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## Cartels: Proof and Procedural Issues

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# Cartels: Proof and Procedural Issues

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## **Abstract**

The above considerations demonstrate, however, the importance of the questions regarding the nature and the scope of admissible cartel evidence, especially in regard to the issues of due process in general and of the obligation to safeguard the rights of the defense against the prosecution in particular. Obviously, the fundamental principle governing these issues is commonly known and universally accepted: no one can be prosecuted or condemned without concrete evidence of the infringement of which the defendant is accused. The legal and procedural requirements concerning cartel evidence are therefore closely related to the powers of investigation entrusted to the EC Commission to enable the Commission to perform its supervisory tasks in antitrust cases. The protection of individual rights of persons and firms involved in anti-cartel procedures as well as the respect of the rights of the defense form part of the community legal order and are safeguarded by the CFI and the Court of Justice.

# ARTICLES

## CARTELS: PROOF AND PROCEDURAL ISSUES\*

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### *INTRODUCTION*

In this new era of free market capitalism, some voices from both sides of the Atlantic Ocean were quick to criticize recent European Economic Community ("EEC") antitrust policy as yet another "statist" interventionism in the free play of market forces. The Commission of the European Communities (the "Commission") has often received bitter comments on its persistence in scrutinizing commercial agreements and structural operations between market operators and undoubtedly will continue to receive similar comments in the future as its policies in some sectors, like merger control or services liberalization, continue to develop. However, even amidst those who would welcome some deregulation in this area, prohibition of cartels seems inevitable. Indeed, to quote Abbott B. Lipsky in a recent article, no economy that claims to be free can exist without effective deterrence of cartels.<sup>1</sup>

Cartels are essentially agreements between independent companies or associations, concluded for a joint purpose, apt to influence, by restraining or eliminating competition, the production or commercialization and in general to alter market conditions regarding certain goods or services. European Community ("EC") competition law provides no definition of the term. According to most analysts of industrial economy, one of the conditions for the successful implementation of a cartel is to keep the number of participants as limited as possible: first, because it is easier to ensure that all members comply with internal rules and respect cartel arrangements; second, in order to limit participation to companies having comparable market power and relatively homogeneous production; and third, to keep the arrangements secret, especially if public

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1. Abbott B. Lipsky, Jr., *Deterring Cartel Behavior: Harmonies and Disharmonies, Problems and Solutions*, 60 *ANTITRUST L.J.* 563 (1992).

authorities do not support or tolerate the cartel and are willing to enforce some kind of antitrust legislation.

Prohibited in the United States,<sup>2</sup> in the European Community,<sup>3</sup> as well as in most industrialized countries,<sup>4</sup> cartels nevertheless continue to flourish and prosper. Interventions of the public authorities, national or international, often appear to reach only the emerged point of an iceberg of anti-competitive practices. These practices ensure, to the detriment of consumers, the prosperity of industrial groups concerned more about their financial safety and the profits they reap from a stable competitive situation than about taking risks and progressing in the market through better and cheaper products. Increasing economic interdependence in the industrialized world makes, however, some sort of harmonization of anti-cartel rules and procedures necessary on global scale.<sup>5</sup> Particularly, import and export cartels are increasingly in the center of a heated discussion on possible solutions for the elimination of trade barriers.<sup>6</sup> Unfortunately the Commission/United States Gov-

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2. See Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988).

3. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 1 (1958), amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [treaty as amended hereinafter referred to as EEC Treaty]. Article 85(1) of the EEC Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which prevent, restrict or distort competition and affect interstate trade. *Id.* art. 85(1).

4. See, e.g., Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, Act No. 54 of 1947, as amended, 1982 (Japanese Antimonopoly Law) arts. 2(6), 3, reprinted in HIROSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS OF JAPAN* 213 (1988). Some strengthening of Japanese antitrust regulations and tougher enforcement procedures are necessary if they are to become internationally acceptable. See Hideki Ogawa, *Strengthening Japan's Anti-monopoly Regulations*, 14 *WORLD COMP. L. & ECON. REV.* 67, 67-73 (1991) (commenting on the U.S.-Japan Structural Impediment Initiative negotiations).

5. See Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What and How*, 60 *ANTITRUST L.J.* 593 (1992) (commenting on global anti-cartel harmonization).

6. See Mitsuo Matsushita, *The Role of Competition Law and Policy in Reducing Trade Barriers in Japan*, 14 *WORLD ECON.* 181, 189 (1991) (arguing that an internationally agreed norm which controls both export and import cartels is necessary to maintain competition in international trade); Yoshio Ohara, *International Application of the Japanese Antimonopoly Act*, 28 *SWISS REV. INT. COMP. L.* 5, 14-20 (1986) (discussing Japanese FTC decisions against international cartels); James F. Rill, *Antitrust in a Global Environment: Conflicts and Resolutions*, 60 *ANTITRUST L.J.* 583, 584-85 (1992) (criticizing the implications of "footnote 159" of the 1988 Enforcement Guidelines on the extra-

ernment Competition Agreement of September 1991,<sup>7</sup> which could serve as a basis for future cooperation in anti-cartel matters, has run into trouble.<sup>8</sup>

Cartels aim essentially at regulating prices and sales conditions, limiting production or reducing production capacities, and sharing markets and spheres of influence. All these practices traditionally are considered most harmful to the establishment of free competition between market operators, which constitutes undoubtedly the only environment likely to ensure optimum allocation of resources and continuous economic progress.

Even if antitrust case law in the European Community demonstrates that competition rules overseas do not retain any so called "per se" prohibitions, as does antitrust law in the United States, most practices of price fixing or market sharing are considered highly restrictive of competition and are virtually prohibited per se, insofar as they are excluded from any possibility of enjoying either an individual or a block exemption from the application of the antitrust provisions of the Treaty Establishing the European Economic Community (the "EEC Treaty"). Supervisory authorities enforcing anti-cartel legislation in the EEC and elsewhere must find the evidence necessary to prove that the cartel exists and that it infringes competition rules. Proving the existence of a cartel constitutes the main difficulty in the vast majority of cases where the antitrust authority is proceeding against a secret cartel. Further, in a more limited number of cases, where the cartel is institutional or publicly known and claims to pursue legitimate goals, the antitrust authority is faced only with the relatively easier task of making the infringement of competition rules evident.

The question of evidence in cartel cases is not only an essential but also an actual one, particularly in view of the most recent developments in the European case law on the matter.

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territorial application of U.S. antitrust law against import cartels operated in a foreign country).

7. Competition Laws Co-operation Agreement 1991 (EEC-USA), Sept. 23, 1991, [1991] 4 C.M.L.R. 823.

8. Both member states and commentators have criticized this agreement. See *France v. Commission*, Case C-327/91, O.J. C 28/4 (1992) (objecting to agreement before the Court of Justice); see also Alan J. Riley, *Nailing the Jellyfish: The Illegality of the EC/US Government Competition Agreement*, 13 *EUR. COMP. L. REV.* 101 (1992) (objecting to legality of this competition agreement).

As regards enforcement of anti-cartel legislation in Europe, the Commission of the European Communities pursues an active and determined policy against price fixing and market sharing cartels by imposing increasingly high fines.<sup>9</sup> In the *Polypropylene*<sup>10</sup> case, the Commission imposed fines on fifteen petrochemical undertakings for a total amount of ECU57,850,000 and ECU9,000,000-ECU11,000,000 for each of the four major producers involved.<sup>11</sup> In the *PVC*<sup>12</sup> case, it imposed fines on fourteen producers of polyvinyl-chloride for a total amount of ECU23,500,000 and ECU2,000,000-ECU4,000,000 for each of the four major producers involved.<sup>13</sup> In the *LdPE*<sup>14</sup> case, it imposed fines on seventeen producers of low-density polyethylene for a total amount of ECU37,000,000 and ECU3,000,000-ECU5,000,000 for each of the four major producers involved.<sup>15</sup>

However, the European Court of Justice (the "Court of Justice") and particularly the Court of First Instance (the "CFI") tend to give to the concept of evidence regarding cartels an increasingly strict and restrictive interpretation. In the *Società Italiano Vetro SpA, Fabbrica Pisana SpA, and PPG Vernante Pennitalia SpA v. Commission* ("*Flat Glass*")<sup>16</sup> judgment, the CFI annulled the main part of the provisions of the Commission's decision<sup>17</sup> relative to a cartel in the flat-glass sector in Italy, considering that the elements of evidence advanced by the Commission were not conclusive.<sup>18</sup> Beyond the characteristics of the specific case, the CFI judgment seems to constitute a

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9. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87. According to Article 15(2) of Regulation 17/62, fines can reach up to 10% of the firm's total turnover in its preceding business year. *Id.* art. 15(2), O.J. Eng. Spec. Ed. 1959-62, at 91.

10. O.J. L 230/1 (1986).

11. *Id.* at 36-37; see *infra* notes 147-48 (citing appealed decisions).

12. O.J. L 74/1 (1989).

13. *Id.* at 18. This decision was annulled by the Court of First Instance on a technicality. *Re* the PVC Cartel: BASF AG v. Commission, Joined Cases T-79, 84-86, 89, 91-92, 94, 96, 98, 102 & 104/89, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 357 (Ct. First Instance) [hereinafter PVC].

14. O.J. L 74/21 (1989).

15. *Id.* at 40.

16. Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_, [1992] 5 C.M.L.R. 302 (Ct. First Instance) [hereinafter Flat Glass].

17. Flat glass, O.J. L 33/44 (1989).

18. *Id.*



change in the approach followed until now by the Court of Justice in horizontal cartel cases.

It must be noted that until the CFI judgment in *Flat Glass*, the Court of Justice, while insisting on the necessity of a high standard in proof, had always examined documentary evidence in the light of the global market behavior of the undertakings concerned, evaluating the elements of evidence as a whole rather than examining each document as such, insulated from every other document. This approach was basically justified, especially if one considers the obvious imbalance existing in the power play of documentary discovery in antitrust cases. On one side, the authors of a secret cartel are in possession of the evidence concerning the infringement of competition rules and deploy all necessary efforts to dissimulate it by using all available means. On the other side, the officials of the antitrust authority who, whatever the extent of their powers to carry out investigations and their determination to implement them, very often are helpless against the sophisticated methods of dissimulation and destruction of evidence employed by those responsible for the organization of the cartel. This strategic advantage enjoyed by cartel members is inherent in all preliminary investigations against secret cartels and hinders detection, legal action against and finally repression of this type of infringement that can be particularly dangerous for the public interest.

The above considerations demonstrate, however, the importance of the questions regarding the nature and the scope of admissible cartel evidence, especially in regard to the issues of due process in general and of the obligation to safeguard the rights of the defense against the prosecution in particular. Obviously, the fundamental principle governing these issues is commonly known and universally accepted: no one can be prosecuted or condemned without concrete evidence of the infringement of which the defendant is accused. The legal and procedural requirements concerning cartel evidence are therefore closely related to the powers of investigation entrusted to the EC Commission to enable the Commission to perform its supervisory tasks in antitrust cases.<sup>19</sup> The protection of indi-

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19. See *infra* text accompanying notes 162-238 (discussing procedural evidence gathering issues).

vidual rights of persons and firms involved in anti-cartel procedures as well as the respect of the rights of the defense form part of the community legal order and are safeguarded by the CFI and the Court of Justice.

### I. CARTELS: DEFINITION AND CLASSIFICATION

The concept of "cartel" does not correspond to any specific legal form. It must be noted that neither the concept of "competition" nor the concepts of "agreement" or "concerted practice" underlying cartel activities are defined in EC anti-trust rules. Consequently, an attempt to define these concepts can depart only from an analysis of the object of the agreements between the companies involved in the cartel or of the effects their agreement or the concerted action might have on the relevant market.

The concept of competition in Community law bears hardly any resemblance to the traditional Adam Smith or David Ricardo theories. It seeks neither the achievement of a purely competitive environment, where prices are fixed in a constant dialogue between offer and demand independent of the action of market operators, nor the establishment of conditions of perfect competition implying the complete and instantaneous access of economic players to market information. Above all, EC competition policy pursues highly pragmatic objectives which consist in creating an internal European market,<sup>20</sup> protecting consumers, and ensuring an optimum allocation of resources and investments. The approach followed by the Commission to achieve these objectives is also a realistic one.

In this respect, legal action against cartels arises less from the construction and implementation of abstract economic theories than from the definition of a coherent policy with regard to concentration of economic power within a group of economic operators. It is not by chance that the French Penal Code of 1810 already provided in Article 419 for the prosecution of "those who . . . by means of concerted action or coali-

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20. EEC Treaty, *supra* note 3, art. 85(1). Cartel agreements or concerted practices restricting the free movement of goods or services, isolating national markets, and affecting interstate trade are contrary not only to Articles 30-36 but also to Article 85(1) of the EEC Treaty. *Id.* arts. 30-36, 85(1).

tion of the main holders of the same good or food product . . . will have caused its price to rise or fall . . . above or below the price level that would have been determined by natural and free trade competition."<sup>21</sup> The idea, taken up later in Anglo-American conspiracy law, clearly makes its first appearance here.

This realistic approach applies also to the concept of workable competition, which demonstrates further that the objectives of EC competition policy are of a practical nature and cannot be easily described in absolute terms. Antitrust action is considered successful when the market is allowed to function spontaneously without artificial obstacles, in other words, without cartels. This implies in fact the ability of a given market to regulate itself more or less freely along the lines of economic theory without being influenced by arbitrary coalitions that, in the name of private, hardly legitimate or outright illegal interests, modify to their profit the natural balance of goods and prices.

Cartels have as a primary target the private regulation of the market through the organization and therefore necessarily the limitation of competition. Of all limitations or distortions of competition, the process of creating a cartel is the one that contradicts most radically all principles of free market economy. It differs from other methods of structural (mergers or joint ventures) or contractual (exclusive dealing, patent licensing, research and development agreements, etc.) limitations of competition, in that cartels between companies situated at the same level of production are generally characterized by their desire to limit or eliminate free competition, while giving the illusion of wanting to comply with its rules to some extent. Experience shows that very often cartels aim at or result in joint price control, limitation or autolimitation of production capacities or technical innovation, or sharing of geographical or product markets.

In theory, cartels give priority to the defense of the collective interests of their members as opposed to the pursuit by each market operator of its individual interests. In practice,

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21. French Penal Code of 1810, C. PÉN. art. 419 (Author trans.); see THE PENAL CODE OF FRANCE art. 419 (Evans trans. 1819) (presenting full translation of Code Pénal).

however, the situation is quite different. Actually, in most cases the "collective" interest is defined by the dominant companies within the cartel. This narrow oligopoly, formed by the few market leaders, obliges dominated companies to take part in a game played by the oligopoly's rules, violation of which exposes the weakest companies to retaliatory measures, sanctions, and finally elimination from the market.

Prohibited cartels are, within the meaning of Article 85(1) of the EEC Treaty, horizontal agreements, arrangements, concerted and anti-competitive practices between undertakings or associations as well as decisions of associations that have as their object of effect the modification of competitive conditions in a degree sufficient to affect interstate trade.<sup>22</sup> It cannot be concluded that in certain circumstances the concept could be applied to particular agreements between undertakings operating at different business levels, i.e., between suppliers and producers or between producers and distributors. But vertical agreements or concerted practices are not, in principle, seen as cartel behavior even if obviously certain horizontal agreements could impose restrictions and obligations on other vertical businesses.<sup>23</sup>

In a common sense, a cartel is a group of competitors who bind themselves to restrict their competitive freedom on the market. However, for Article 85(1) of the EEC Treaty to apply, it is not necessary that the agreements be legally binding for the members of the group or that they provide for penalties in case of cheating. It is sufficient that the competitors reach a consensus that restricts their individual industrial and commercial freedom.

Cartels are often, but not always, conspiracies to restrain free trade. A conspiracy is a coalition of two or more companies in order to accomplish an unlawful end by secret concerted means. If the means are made publicly known, the cartel is not a conspiracy, even if it is a restriction of competition under Article 85(1). Furthermore, national or multinational cartels are often implemented to preserve traditional home

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22. EEC Treaty, *supra* note 3, art. 85(1).

23. See, e.g., Publishers Assoc.—Net Book Agreements, O.J. L 22/12 (1989) (showing that vertical restrictive agreements are permissible), *on appeal*, *Re* the Net Book Agreements: Publishers Assoc. v. Commission, Case T-66/89, [1992] E.C.R. \_\_\_, [1992] 5 C.M.L.R. 120 (Ct. First Instance).

markets against competition from other member states or, collectively, against competition from third countries.

Elaborating on a theoretical cartel definition is not of great interest. It is more useful to analyze, from a competition point of view, the behavior of cartel members and the restrictive practices in which they might engage themselves, as well as to classify cartels according to their form or their object.

#### *A. Classification According to the Form of the Cartel*

The only way to classify cartels according to their form is to distinguish between those that are based on formal publicly known or secret agreements and those that are based on tacit agreements and express themselves only through a concerted practice.

##### **1. Cartels Based on an Agreement Between Two or More Companies**

These cartels are the result of an agreement between a number of companies, the terms of which are clearly defined and have been the object of negotiations between the members. In most cases they consist of a central structure entrusted with the organization and day-to-day management of the cartel as well as with the control of discipline and the exchange of information necessary for the functioning of the cartel.

##### **a. Institutional Cartels**

This category involves essentially publicly known cartels that openly assume both their statute as well as the object of their activities. In fact, these cartels often notify the Commission particularly when they claim to pursue objectives which are not directly anti-competitive. When the object of such a cartel can have a restrictive effect on competition, its operators advance arguments demonstrating pro-competitive effects that compensate or balance negative effects.

Especially when the cartel is publicly known, its central structure takes the form of a professional association for the defense of the interests of a profession, for technical promotion, or for the improvement of services to the consumer. Associations of this kind are primarily entrusted with the repre-

sentation of corporate interests of their members to public authorities, and as such they escape most of the time from the application of Article 85 of the EEC Treaty.

It is certain that decisions of professional associations of this type can lead to the creation of cartels directly infringing competition rules. However, simple recommendations or suggestions of professional organizations cannot be qualified as decisions, even if in practice they can be useful as a starting point in a formal collective agreement or a simple concerted practice (*de facto* cartel). Several associations can also conclude cartel agreements between them. Such cartels, however, fall within the scope of Article 85 of the EEC Treaty.<sup>24</sup>

An institutional cartel of this type was set up in 1963 in the building and construction industry in the Netherlands by the SPO<sup>25</sup> having as its object "to promote and administer orderly competition, to prevent improper conduct in price tendering and to promote the formation of economically justified prices."<sup>26</sup> The SPO, members of which are twenty-seven associations and one foundation regrouping more than 4000 building and construction firms established in the Netherlands, notified the Commission of its "Uniform Price-regulating Rules" ("UPR") and the corresponding "Code of Honour" and requested a negative clearance or an exemption. According to the SPO, the cartel was necessary in order to avoid ruinous price competition in a specific and quite difficult market. In its decision<sup>27</sup> the Commission considered that the SPO rules and decisions were infringing Article 85(1) because they provided for exchanges of information prior to tendering procedures, involved concerted action for the fixing of selling prices and other trading conditions and shared between members the demand side of the market.<sup>28</sup> Consequently members of the SPO were fined and requested to put an end to the cartel immediately.<sup>29</sup>

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24. *Chauffage Central* ("Central Heating"), O.J. L 264/22 (1972).

25. SPO, the "Vereniging van Samenwerkende Prijsregelende Organizationalies in de Bouwnijverheid," is an association of cooperating organizations for the regulation of prices in the construction industry. See *Building and construction industry in the Netherlands*, O.J. L 92/1, at 2 (1992) (commenting on SPO's price agreement).

26. *Id.* at 3 (quoting article three of statutes of the SPO).

27. *Id.*

28. *Id.* at 11-28.

29. *Id.* at 29.

The SPO applied to the CFI to annul the decision. An interim measures request to suspend the decision was also submitted. Ruling on this request, the President of the CFI refused for all practical purposes to suspend the decision of the Commission.<sup>30</sup> He stated that the majority of the restrictive elements identified therein were clearly anti-competitive and ordered the SPO members to put an end to the infringement before October 1992. Nevertheless, he allowed those SPO rules which do not clearly restrict competition to continue to apply ad interim, on the condition that the functioning of the system would be ensured exclusively by the SPO bureau and its president with the exclusion of any contact or concertation between competing undertakings.

An equally elaborate form of organic cartel consists in creating a joint company for market research or marketing purposes that serves as a cover and is entrusted usually with the accomplishment of certain tasks of a commercial nature for the account of its members. There is also the case of joint sales agencies<sup>31</sup> or of cartels which, without going as far as the creation of a joint company, are equipped with management, administrative, or accounting bodies.<sup>32</sup> Participation in such structures is obligatory for the members. Financing is assured through contributions of the member companies. It is not unusual, particularly in market sharing cartels, for the contributions of its members to correspond to the market share allocated to them.

#### b. Secret Cartels

In contrast, secret cartels, even if they are based on formal agreements, do not generally dispose of elaborate organic structures. They are mainly characterized by meetings at the top executive level of the participating companies ("Meetings of Head Delegates," "Meetings of Top Country Representatives," etc.) held discretely in exotic locations without written

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30. *Vereniging van Samenwerkende Prijsregelende Organizaties in de Bouwnijverheid v. Commission*, Case T-29/92R (Ct. First Instance July 16, 1992) (not yet reported).

31. *Central Stikstof Verkoopkantoor BV ("CSV")*, O.J. L 242/15, at 18-22 (1978).

32. *See, e.g., Italian cast glass*, O.J. L 383/19, at 21-23 (1980) (describing role of FIDES in facilitating cartel by maintaining price lists and business statistics).

agendas or minutes. Sometimes such meetings are held parallel to or on the occasion of the official meetings of the professional association to which the members belong. The main defense of such cartels against action by antitrust authorities is precisely the absence of documentary evidence. Following the basic agreement between delegates in a secret meeting, details concerning its application and its practical adaptation to the changing market conditions are mostly taken care of by telephone.

## 2. Cartels Based on Concerted Practices (De Facto Cartels)

A formal agreement, however, is not necessary for the existence of a cartel within the meaning of Article 85. Even in the absence of such an agreement, a cartel exists if a number of companies adapt their commercial strategy or their general behavior to the behavior of each other without having a valid economic reason to do so. Collusion is prohibited in the absence of a plausible economic justification for such behavior. It is not necessary that the companies involved work out an actual plan regulating every aspect of the cartel.<sup>33</sup>

The concept of a cartel based on a concerted practice is an extremely complicated one. It usually involves circumstantial evidence corroborated by economic evidence. The Court of Justice<sup>34</sup> defines the concerted practice as

a form of co-ordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, *knowingly*<sup>35</sup> substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market. Such practical cooperation amounts to a concerted practice, particularly if it enables the persons concerned to consolidate established positions

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33. See, e.g., LdPE, O.J. L 74/21, at 33 (1989); PVC, O.J. L 74/1, at 12 (1989); see RICHARD WHISH, *COMPETITION LAW* 223 (2d ed. 1989) (discussing plausible economic justifications for such collusive plans).

34. Coöperatieve vereniging 'Suiker Unie' UA v. Commission, Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, [1975] E.C.R. 1663, 1916, ¶¶ 26-27, [1976] 1 C.M.L.R. 295, 348 [hereinafter *Suiker Unie*].

35. *Id.* (emphasis added).



to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.<sup>36</sup>

It is certainly a quite complex definition, but its key element is the term "knowingly," employed by the Court of Justice in order to make clear that the companies accused of collusion should at least be conscious of the possible anti-competitive effects of their conduct. Contacts between the companies involved are often a key element in the process of establishing evidence against such cartels.

### B. *Classification According to the Object of the Cartel*

This classification is less useful within the framework of a discussion of problems of evidence. It must be stressed that the basic questions regarding what must be proved and how it must be proved remain practically unchanged from one cartel category to another. Although the following general categories can be observed in dealing with cartels, combinations of two or more categories are common.

#### 1. Commercialization Cartels

Commercialization cartels involve cartels which aim at organizing jointly the conditions for the commercialization of goods or services. These are commonly price fixing cartels,<sup>37</sup> cartels that divide the market between their members either geographically<sup>38</sup> or according to categories of customers,<sup>39</sup>

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36. *Id.* at 1916, [1976] 1 C.M.L.R. at 348.

37. *See, e.g.*, Roofing felt, O.J. L 232/15, at 17-23 (1986) (including price fixing, quotas, and import boycotts), *on appeal*, S.C. Belasco v. Commission, Case 246/86, [1989] E.C.R. 2117, 2186, ¶ 15 [1991] 4 C.M.L.R. 96, 121; Flat glass, O.J. L 33/44 (1989) (including price fixing and production quotas), *on appeal*, Flat Glass, Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_\_, [1992] 5 C.M.L.R. 302 (Ct. First Instance); PVC, O.J. L 74/1 (1989) (including price fixing, production quotas, and information exchange), *on appeal*, PVC, Joined Cases T-79, 84-86, 89, 91-92, 94, 96, 98, 102 & 104/89, [1992] E.C.R. \_\_\_, [1992] 4 C.M.L.R. 357 (Ct. First Instance); LdPE, O.J. L 74/21 (1989) (same); Polypropylene, O.J. L 230/1 (1986) (including price fixing initiatives and market sharing), *on appeal*, *Re the Polypropylene Cartel: SA Hercules NV v. Commission*, Case T-7/89, [1992] E.C.R. \_\_\_, [1992] 4 C.M.L.R. 84 (Ct. First Instance) [hereinafter Hercules].

38. *See, e.g.*, Peroxygen products, O.J. L 35/1, at 4-6 (1985) (discussing market sharing); International Quinine Agreement ("Quinine-I"), O.J. L 192/5 (1969) (including market sharing, quotas, and price fixing), *on appeal*, ACF Chemiefarma NV v. Commission, Case 41/69, [1970] E.C.R. 661, [1967-1970 Transfer Binder] Common

cartels fixing other sales terms and conditions,<sup>40</sup> or cartels regulating advertising,<sup>41</sup> sales promotion,<sup>42</sup> or access to trade fairs,<sup>43</sup> etc. Such cartels may also concern collusive tendering by their members in public or private invitations to tender.<sup>44</sup>

Cartels falling in this category can also take the institutionalized form of joint sales organizations.<sup>45</sup> This usually involves the establishment of an agency having an official business name and taking the shape of a trade association or a joint commercial company.<sup>46</sup> Such agencies regroup and distribute customers' orders in the home market of their members<sup>47</sup> and sometimes themselves carry out commercial operations abroad acting on behalf of the members.<sup>48</sup> Joint purchasing agencies fall also under Article 85(1), because they can restrict sellers'

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Mkt. Rep. (CCH) ¶ 8083; Soda-ash—Solvay, ICI, O.J. L 152/1, at 4-7 (1991) (discussing market sharing arrangements between Solvay and ICI); *see also* J.A. VAN DAMME, *LA POLITIQUE DE LA CONCURRENCE DANS LA CEE* ¶¶ 507-17 (1980).

39. *See* Agreements and concerted practices in the flat-glass sector in the Benelux countries, O.J. L 212/13, at 14-15 (1984); Flat glass, O.J. L 33/44 (1989) (differentiating customers according to types of glass producers, especially automotive glass); *see also* LENNART RITTER, ET AL., *EEC COMPETITION LAW: A PRACTITIONER'S GUIDE* 154-55 nn.214-15 (1991) (citing further cases involving customer categorization).

40. Papiers peints de Belgique ("Belgian Wallpaper"), O.J. L 237/3 (1974), *on appeal*, *Groupement des Fabricants de Papiers Peints de Belgique v. Commission*, Case 73/74, [1975] E.C.R. 1491, [1976] 1 C.M.L.R. 589; *Vimpoltu*, O.J. L 200/44, at 46-48 (1983) (fixing export sale terms).

41. *See* Milchförderungsfonds ("Milk Promotion Fund"), O.J. L 35/35 (1985) (discussing fixed advertising rates for members of milk producers association).

42. *Vimpoltu*, O.J. L 200/44, at 47 (1983).

43. *See* British Dental Trade Association—BDTA, O.J. L 233/15 (1988) (restricting access to British Dental Association trade shows where major sales take place).

44. *See* Building and construction industry in the Netherlands, O.J. L 92/1 (1992) (condemning collusive tendering). *But see* FIEC/CEETB, O.J. C 52/2 (1988) (commission notice allowing standardized tender offers); COMMISSION EIGHTEENTH REPORT ON COMPETITION POLICY ¶ 60 (1989) (commenting that Commission approved FIEC/CEETB agreement).

45. *See, e.g.*, *Floral*, O.J. L 39/51 (1980); *Centraal Stikstof Verkoopkantoor BV ("CSV")*, O.J. L 242/15 (1978); *Nederlandse Cement-Handelsmaatschappij NV ("NCH")*, O.J. L 22/16 (1972); *Cementregeling voor Nederland ("CRN")*, O.J. L 303/7 (1972).

46. *See, e.g.*, *SA Binon & Cie v. SA Agence et Messageries de la Presse*, Case 243/83, [1985] E.C.R. 2015, [1985] 3 C.M.L.R. 800 (forming such common agency to distribute Belgian newspapers); *Société Commerciale des Potasses et de l'Azote (SCPA)—Kali und Salz* (formerly VDK), O.J. L 217/3 (1973); *Wood Pulp*, O.J. L 85/1 (1985).

47. *Centraal Stikstof Verkoopkantoor BV ("CSV")*, O.J. L 242/15 (1978).

48. *Floral*, O.J. L 39/51, at 52 (1980).

access to the market, but are usually exempted under Article 85(3) if they obtain lower prices or better conditions.<sup>49</sup> They must not, however, impose any unnecessary or excessive restrictions or limitations upon their members.<sup>50</sup>

## 2. Output Controlling Cartels

Such cartels are supposed to respond to specific situations of production overcapacity and artificially achieve conditions of market stability.<sup>51</sup> They are designed to safeguard existing business levels under falling demand.<sup>52</sup> Often these agreements are entered into by companies in order to reinforce the implementation of a price fixing agreement. Indeed, as soon as the existence of production overcapacities due to structural problems or to the general economic situation becomes known to the purchasers of the goods or services involved, it gives them a bargaining advantage over suppliers which may enable them to break the price fixing arrangements of the cartel. To keep price levels high, output must be reduced by means of agreements to close down production facilities, by collectively agreed investments, and by producer-to-producer sales or compensations.<sup>53</sup> These cartels often combine quotas, geographical market or customer sharing, price fixing, and information exchange practices.

## 3. Crisis Cartels

Crisis cartels are in fact a variation of the previous category. However, they apply only to clearly established situa-

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49. COMMISSION FIRST REPORT ON COMPETITION POLICY ¶¶ 40-41 (1972) (commenting on joint purchasing agreements); COMMISSION NINTH REPORT ON COMPETITION POLICY ¶ 89 (1980).

50. See *National Sulphuric Acid Assoc.*, O.J. L 260/24 (1980) (granting such an exemption); *National Sulphuric Acid Assoc.*, O.J. L 190/22 (1989) (extending exemption).

51. See *Soda-ash—Solvay, CFK*, O.J. L 152/16 (1991) (agreeing to guarantee minimum production tonnage to competitor to create aura of market stability).

52. ROBERT MERKIN & KAREN WILLIAMS, *COMPETITION LAW: ANTITRUST POLICY IN THE UK AND THE EEC* 80-120 (1984) (discussing justification of restrictive agreements).

53. See, e.g., *Rolled zinc products and zinc alloys*, O.J. L 362/40 (1982), *on appeal*, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission*, Joined Cases 29 & 30/83, [1984] E.C.R. 1679, [1985] 1 C.M.L.R. 688 (describing reciprocal investment strategies and provision of emergency supplies to competitors to restrict competition).

tions of durable and structural production overcapacity, which they try to limit by means of concerted investment and production rationalization plans.<sup>54</sup> Structural overcapacity exists where, over a prolonged period of time, all the undertakings concerned have experienced a significant reduction in their rates of capacity utilization, a drop of output accompanied by substantial operating losses and where the information available does not indicate that any lasting improvement of the situation can be expected in the medium term.<sup>55</sup>

In such cases, companies belonging to the sector concerned are often tempted to conclude between them agreements that restrict competition in order to reduce the existing structural overcapacities collectively. The Commission accepts the possibility to create such crisis cartels under the condition that they are established for a limited and well-defined period of time and that they do not contain any excessive or inappropriate restrictions such as price fixing or geographical market sharing. Further, they should not just limit production while maintaining the existing capacities.<sup>56</sup>

#### 4. Information Exchange Cartels

The exchange of individualized market data or other sensitive commercial information between competitors constitutes a cartel activity falling under Article 85.<sup>57</sup> Thus, in *Vegetable*

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54. See COMMISSION EIGHTH REPORT ON COMPETITION POLICY ¶ 42 (1979) (concerning man-made fibers markets).

55. COMMISSION TWELFTH REPORT ON COMPETITION POLICY ¶¶ 38-41 (1982).

56. *Id.* ¶ 39; see COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY ¶ 58 (1983) (describing zinc industry shutdown agreement providing for voluntary capacity cuts).

57. See Zinc producer group, O.J. L 220/27 (1984) (sharing information on investment plans); Agreements and concerted practices of the flat-glass sector of the Benelux countries, O.J. L 212/13 (1984) (sharing information on output and sales figures of individual firms); Italian cast glass, O.J. L 383/19 (1980) (exchanging confidential information of commercial nature); Bundesverband Deutscher Stahlhandel eV ("BDS"), O.J. L 62/28 (1980) (sharing information on prices); COBELPA/VNP, O.J. L 242/10 (1977) (sharing information on prices and general sales conditions); Agreements between manufacturers of glass containers ("IFTRA"), O.J. L 160/1 (1974) (sharing information on price lists, rebates, general sales conditions, etc.); Société Commerciale des Potasses et de l'Azote (SCPA)—Kali und Salz, O.J. L 217/3 (1973) (exchanging information on stocks, current production, outstanding orders, etc.); Cimbel, O.J. L 303/24 (1972) (providing information on projected increases in industrial capacity).

*parchment*,<sup>58</sup> the Commission considered that the main European producers of this product had, within the framework of an international professional association, the Genuine Vegetable Parchment Association (the "GVPA"), developed a system for the periodic exchange of information concerning price levels and quantities of vegetable parchment exported by each member individually to various markets outside the EEC. In another decision, *Fatty Acids*,<sup>59</sup> the Commission also condemned members of a cartel for the exchange of information concerning individual and normally confidential data of the companies involved.

### 5. Import-Export Cartels

Cartels regulating imports or exports of goods or services within the EEC (from one Member State to another) are normally treated as geographical market sharing cartels and fall under Article 85(1). They are often established as joint sales agencies or associations entrusted with the implementation of marketing agreements concerning the exportation of goods to EEC markets.<sup>60</sup> Although limited initially to the examination of cartels for exports within the Community, later the Commission also started examining the effects on the internal market of commercialization cartels organizing exports to all destinations (EEC and third countries) or even exports to third countries only (indirect effect).<sup>61</sup>

It is clear that even when import/export cartels concern commercial exchanges between the Community and third countries,<sup>62</sup> they are caught by Community antitrust rules. This is particularly true for agreements that regulate imports

58. *Vegetable parchment*, O.J. L 70/54 (1978).

59. *Fatty Acids*, O.J. L 3/17 (1986).

60. See *Floral*, O.J. L 39/51 (1980) (describing such joint sales agency in fertilizer market); *Industrieverband Solnhofener Natursteinplatten Ev*, O.J. L 318/32 (1980) (same).

61. See A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 *ANTI-TRUST L.J.* 571, 577 (1992) (commenting that the jurisdiction predicates of Article 85(1) of effects on Common Market and interstate trade are not met by export cartel). "Pure export cartels" having no effects within the Community, however, would seem indeed outside the scope of Article 85(1). *Id.*

62. Commission's Opinion on self-limitation agreements curtailing imports from Japan, O.J. C 111/13 (1972); COMMISSION SECOND REPORT ON COMPETITION POLICY ¶ 17 (1973) (describing self-limitation importation agreements).

or exports in order to protect national markets.<sup>63</sup> Cartels fixing conditions or prices of imports<sup>64</sup> into the EEC have often been prohibited. Export cartels are prohibited only if they have important anti-competitive repercussions in the internal EEC market.<sup>65</sup> Cartels concerned only with the transportation of exported goods can also fall under consideration of Article 85 of the EEC Treaty, if they eliminate or restrict in practice the freedom of the exporting company as regards the choice of the transporter or if they fix the transport prices or other conditions.<sup>66</sup>

## II. EVIDENCE

The Sherman Antitrust Act in the United States denounces "contracts, combinations or conspiracies" restricting free trade.<sup>67</sup> Does this mean that only explicit agreements to restrain trade are unlawful? Can the enforcing authority demonstrate the existence of a "combination" or a "conspiracy" without reporting evidence of an explicit agreement? In theory, EEC competition rules raise fewer problems insofar as Article 85 aims expressly at both agreements between companies as well as concerted practices.

As it has been stated above, the definition of the cartel does not necessarily involve the existence of a formal agreement. However, in the absence of any written or otherwise formal element making it possible to materialize the existence of an agreement, albeit an implicit one, the supervisory authority is reduced to try to establish purely economic evidence. The conclusive force of such a demonstration remains uncertain.

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63. See Matsushita, *supra* note 6, at 189. Such cartels are often a response to the existence of a corresponding cartel in the third country. In Japan, for instance, import cartels can be exempted under the Transactions Law if an export cartel exists in the country of origin. *Id.*

64. See, e.g., Aluminum Imports from Eastern Europe, O.J. L 92/1 (1985); Wood Pulp, O.J. L 85/1 (1985); Preserved mushrooms, O.J. L 29/26 (1975) (holding that measures restricting Taiwanese mushrooms imports violates Article 85(1)); Franco-Japanese ball bearings agreement, O.J. L 343/19, at 23-24 (1974) (holding that these import restricting measures violate Article 85(1) of the EEC Treaty).

65. CSV, O.J. L 242/15, at 26-34 (1978); European sugar industry, O.J. L 140/17, at 37 (1973), *on appeal*, Suiker Unie, Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295.

66. See COMMISSION NINTH REPORT ON COMPETITION POLICY ¶ 84 (1980) (discussing applicability of article 85(1) in such conditions).

67. Sherman Antitrust Act, 15 U.S.C. § 1 (1988).

In a situation of tight oligopoly, where few producers occupy equivalent market shares, if one of the producers increases its prices, it normally hopes that its competitors will adopt an identical behavior, because it is reasonable to consider that all have a common interest in increasing their prices. Similarly, if one of the producers decides not to increase production despite an increase in demand and observes that competitors act similarly, the producer can reasonably enough consider that this behavior is not due to a formal agreement between the companies involved but solely to the recognition by competitors of a well understood mutual interest. According to some commentators "a conspiracy doubtless entails agreement, and 'contract' in restraint of trade a writing, but a combination can be anything involving two actors, neither the word nor its legislative history demands agreement."<sup>68</sup>

In fact, in Community antitrust law the incrimination is essentially based on written evidence of the voluntary co-ordination of the behavior of the parties to the cartel. It is therefore not of capital importance whether the agreement is concluded in a contractual form or in the form of a simple explicit or tacit commitment leading to the implementation of a concerted practice. The essential element concerns the ability of the supervisory authority to prove the existence of a joint desire to restrict competition, whatever the form of expression of this intention might be.

Evidence regarding the existence of a cartel, both documentary evidence as well as economic evidence, has to be clearly distinguished from the evidence that the cartel is primarily concerned with or has as its main purpose the restriction of competition. Such evidence will be all the more necessary if the acknowledged object of the cartel is more or less harmless from a competition point of view, or at least bears no direct relation to the conditions of competition which have to prevail in a free market. On the contrary, evidence of the anti-competitive intentions behind the cartel will be less essential when the established object of the cartel consists in fixing prices, market shares, or sales conditions.

Regarding the burden of proof in antitrust cases before

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68. RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS* 307 (2d ed. 1981).

the European courts, it is generally admitted that the company seeking the annulment of the Commission's decision (the applicant) must first furnish proof in support of its application. In doing so, it is enough to prove that the Commission's decision is based upon insufficient evidence or that the conclusions of the Commission based upon such evidence are unsound. It belongs then to the Commission (the defendant) to discharge the evidential burden of its allegations in the contested decision.<sup>69</sup>

### A. *Evidence of the Existence of a Cartel*

#### 1. Publicly Known Cartels

Publicly known cartels are in most cases presented as agreements between companies or associations, association decisions, or joint ventures. Their common feature is their official character which leads their members to proceed to a notification under Articles 2 and 4 of Council Regulation No. 17/62 in order to obtain an exemption under Article 85(3) of the EEC Treaty or even a negative clearance.<sup>70</sup> Formal agreements between companies may also be used in specific cases of temporary cartels, such as the crisis cartels. Evidence of the existence of "official" cartels poses no specific problems because of the formal notification of the agreement itself which automatically establishes their existence.

#### 2. Secret Cartels

Secret cartels originate either from an equally secret agreement or from a simple concerted practice.

##### a. Cartels Resulting from an Agreement

An agreement between undertakings or a decision of an association is defined as an act of collective will emanating from the competent administrative bodies of the group and be-

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69. See generally Mark Brealey, *The Burden of Proof Before the European Court*, 10 EUR. L. REV. 250 (1985) (discussing shifting burdens of proof in such cases before European courts).

70. See, e.g., Building and construction industry in the Netherlands, O.J. L 92/1 (1992); Publishers Assoc.—Net Book Agreements, O.J. L 22/12 (1989) (containing such an application for a clearance of restrictive agreement). Council Regulation No. 17/62 allows for such an application for an exemption. Council Regulation No. 17/62, *supra* note 9, O.J. Eng. Spec. Ed. 1959-62, at 87.



ing therefore obligatory for its members. It is not important whether the group or the association has legal personality. Further, it is not essential whether the association disposes of statutes legally binding for its members. In fact, claims from the association or its administration of legal personality or legally binding statutes are mostly aimed at enabling it to obtain from its members compliance with the cartel rules and mechanisms through legal procedures provided for the enforcement of civil obligations.

The agreement can take the shape of a de facto association materialized by various acts—joint memoranda, exchange of correspondence, facsimiles, etc.—reflecting the existence of a common will. In *International Quinine Agreement*,<sup>71</sup> the Commission considered that gentlemen's agreements as well as agreements concluded at joint meetings or by exchanging letters constituted agreements between companies within the meaning of Article 86. In the *Fedetab recommendation* case,<sup>72</sup> the Commission also stated that a simple recommendation emanating from an association of companies constituted an agreement between companies because it had been accepted and actually implemented by the members.

In *Heintz van Landewyck Sàrl v. Commission*,<sup>73</sup> the Court of Justice, on October 29, 1980, stated in its judgment that "a recommendation made by an association of undertakings and constituting a faithful expression of the members' intention to conduct themselves compulsorily on the market in conformity with the terms of the recommendation fulfills the necessary conditions for the application of Article 85(1) of the EEC Treaty,"<sup>74</sup> particularly because the members of the association applied this recommendation accurately for several years. In addition, the Commission considered in its decisions that the internal statutes and regulations of the stock exchanges established in London constituted agreements between companies within the meaning of Article 85(1).<sup>75</sup> Therefore, if the cartel

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71. *International Quinine Agreement* ("Quinine-I"), O.J. L 192/5 (1969).

72. *Fedetab recommendation*, O.J. L 224/29 (1978).

73. *Joined Cases 209-215 & 218/78*, [1980] E.C.R. 3125, [1981] 3 C.M.L.R. 134.

74. *Id.* at 3127, ¶ 9 (quoting introduction in Court of Justice reporter).

75. *London Sugar Futures Mkt. Ltd.*, O.J. L 369/25 (1985); *London Cocoa Terminal Mkt. Assoc.*, O.J. L 369/28 (1985); *Coffee Terminal Mkt. Assoc. of London*

results from an agreement between companies, the Commission must first provide some evidence establishing the existence of this agreement whatever the form might be of the act expressing the collective will of the companies that took part in this agreement.

#### b. Cartels Resulting from a Concerted Practice

In the *Second Report on Competition Policy*, it was already pointed out that the restrictions of competition frequently were taking more and more discreet forms of coordination of the competitive behavior of the undertakings in the relevant markets.<sup>76</sup> This applies to a significant number of secret cartels that do not originate from a specific legal act but only take the form of a "concerted practice" which in most of the cases makes itself visible in the way the parties to this concerted action behave in the market. Most difficulties in establishing evidence of the existence of a cartel given birth under such circumstances originate in reality from the fact that, although a concerted practice can manifest itself in the form of a simple succession of commercial actions or of a certain behavior showing that the economic operator does not determine its industrial or commercial policy in an autonomous manner, this "parallel behavior may not by itself be identified with a concerted practice."<sup>77</sup> However, "it may 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 mar-

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Ltd., O.J. L 369/31 (1985); London Rubber Terminal Mkt. Assoc., O.J. L 369/34 (1985) ("Terminal Markets-I") (containing four decisions regarding the sugar, cocoa, coffee, and rubber markets).

76. COMMISSION SECOND REPORT ON COMPETITION POLICY ¶ 139-61 (1973).

77. Imperial Chem. Indus. v. Commission, Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557 [hereinafter ICI]. Other dye manufacturing companies were involved and had similar decisions applied to them. BASF AG v. Commission, Case 49/69, [1972] E.C.R. 713, [1972] C.M.L.R. 557; Bayer AG v. Commission, Case 51/69, [1972] E.C.R. 745, [1972] C.M.L.R. 557; J.R. Geigy AG v. Commission, Case 52/69, [1972] E.C.R. 787, [1972] C.M.L.R. 557; Sandoz AG v. Commission, Case 53/69, [1972] E.C.R. 845, [1972] C.M.L.R. 557; SA Française des Matières Colorantes (Francolor) v. Commission, Case 54/69, [1972] E.C.R. 851, [1972] C.M.L.R. 557; Cassella Farberwerke Mainkur AG v. Commission, Case 55/69, [1972] E.C.R. 887, [1972] C.M.L.R. 557; Hoechst AG v. Commission, Case 56/69, [1972] E.C.R. 927, [1972] C.M.L.R. 557; Azienda Colori Nazionali—ACNA SpA v. Commission, Case 57/69, [1972] E.C.R. 933, [1972] C.M.L.R. 557. Collectively, these are often referred to as the "Dyestuffs" cases.

ket."<sup>78</sup>

In addition to the parallel behavior of the companies involved in the market, the Commission has to prove the existence of an intentional element behind this behavior, i.e., a collective will to restrict competition that inspires the concerted practice. From the point of view of the evidence that is absolutely necessary before any intervention of the enforcing authority may be considered possible, it must therefore be admitted that, while the demonstration of parallel behavior involves, on a first level only, the simple establishment of a number of facts in the economic context of the case in question, the establishment of evidence regarding the existence of a joint intention of the companies concerned to act in collusion in order to restrict competition raises much more complex problems.

According to section two of the Sherman Antitrust Act, simple adoption of a common stance in the market by several companies which find themselves in a situation of oligopoly constitutes in itself a cartel; it is not necessary to prove the existence of a collective will to restrict competition behind the identical or largely similar commercial attitude of the companies involved. Thus, according to U.S. case law, parallel behavior would constitute a strong indication of collusion or, in other words, of the collective will involved in the concept of "conspiracy."<sup>79</sup> On this particular point European antitrust law is much more restrictive and requires proof of an additional element of intention which manifests itself at least in case of direct or indirect contacts between the companies involved having as their object the incriminated behavior. The Court of Justice states in its *Suiker Unie* judgment that

the criteria of "coordination" and "cooperation" . . . must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market. . . . Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and antici-

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78. *ICI*, [1972] E.C.R. at 620 (quoting introduction to *ICI* in Court of Justice report).

79. See POSNER & EASTERBROOK, *supra* note 68 (discussing formation of conspiracy in such antitrust cases under U.S. case law).

pated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect 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 of conduct which they themselves have decided to adopt or contemplate adopting on the market.<sup>80</sup>

The CFI recently repeated this statement in its *Polypropylene* judgments.<sup>81</sup>

Similarly, on July 14, 1981, the Court of Justice<sup>82</sup> reaffirmed this approach and stated that it was important to consider

whether between the banks conducting themselves in like manner there are contacts or, at least, exchanges of information on the subject of . . . the rate of the charge actually imposed for comparable transfers which have been carried out or are planned for the future and whether, regard being had to the conditions of the market in question, the rate of charge uniformly imposed is no different from that which would have resulted from the free play of competition.<sup>83</sup>

Regulation No. 17/62 of the Council does not contain any indication concerning the problem of evidence.<sup>84</sup> According to the principles relating to evidence in the administrative law in all Member States of the European Community and, further, to the principles of Community law, of which the Court of Justice ensures the respect, the public authority entrusted with bringing forward the accusations against the members of a cartel carries also the burden of the proof. The accused does not have to prove his innocence. On the other hand, it belongs to the companies confronted with the evidence of their culpability to prove that this evidence is either insufficient or the conclusions based upon it are unsound.<sup>85</sup> In other words, evidence

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80. *Suiker Unie*, Joined Cases 40-48, 50, 54-56, 111 & 113-114/73, [1975] E.C.R. 1663, 1942, ¶¶ 173-74, [1976] 1 C.M.L.R. 295, 425.

81. *E.g.*, *Shell Int'l Chem. Co. v. Commission*, Case T-11/89, slip op. ¶ 300 (Ct. First Instance Mar. 10, 1992) (not yet reported).

82. *Züchner v. Bayerische Vereinsbank AG*, Case 172/80, [1981] E.C.R. 2021, [1982] 1 C.M.L.R. 313.

83. *Id.* at 2033, [1982] 1 C.M.L.R. at 326.

84. See generally Julian M. Joshua, *Proof in Contested EEC Competition Cases: A Comparison With the Rules of Evidence in Common Law*, 12 EUR. L. REV. 315 (1987).

85. See Opinion of Advocate General Sir Gordon Slynn, *SA Musique Diffusion*

of infringement of the rules of competition is valid until the contrary is proved.

Although there is no doubt that the burden of the proof is carried by the Commission,<sup>86</sup> it must be noted that rules on the admissibility of evidence in competition cases are more lenient than in penal cases. In *Suiker Unie*,<sup>87</sup> certain applicants claimed that the power to impose fines prevents the Commission, in this matter of a "quasi-criminal" nature, from basing its accusations on presumptive<sup>88</sup> evidence, arguing that the rule "*in dubio pro reo*" should prevail. In his opinion, Advocate General Mayras rejected this argument. He reminded that the procedure before the Commission is administrative, not judicial, and that fines are not criminal law sanctions.<sup>89</sup> The procedure provided for in Regulation No. 17/62 is certainly adversarial but remains nevertheless a purely administrative one. Thus the Commission cannot be considered to be exercising any judicial functions.

Furthermore, evidence of a concerted practice amounting to a secret cartel results generally from circumstantial evidence brought to light during the investigations of the Commission. According to Advocate General Mayras, it is therefore the

combination of these presumptions—provided that they are strong, precise and relevant—which more often than not alone enables the existence of a concerted action corroborated by the actual conduct the undertakings concerned to be proved, and it only remains for the Community judge to determine, finally, whether the material produced as evidence by the Commission is conclusive.<sup>90</sup>

According to Sir Gordon Slynn in *SA Musique Diffusion*

*Française v. Commission*, Joined Cases 100-103/80, [1983] E.C.R. 1825, 1931, [1983] 3 C.M.L.R. 221, 288-89.

86. WHISH, *supra* note 33, at 223.

87. *Suiker Unie*, Joined Cases 40-48, 50, 54-56, 111 & 113-114/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295.

88. JOHN D. HEYDON, *CASES AND MATERIALS ON EVIDENCE* 6 (1975). Circumstantial evidence is defined as any fact relevant to the issue from which the existence of a fact in issue may be inferred. *Id.* Inferences drawn from circumstantial evidence are often stated in presumptive form. *Id.*

89. Opinion of Advocate General Mayras, *Suiker Unie*, [1975] E.C.R. 1663, 2061, [1976] 1 C.M.L.R. 295, 323.

90. *Id.*

*Française v. Commission*<sup>91</sup> it is clearly permissible to rely on presumptions and inferences from the primary facts, and this may be in large measure the crucial part of the assessment as to whether a concerted practice has been adopted. The Advocate General quotes at this point from *Eastern States Retail Lumber Ass'n v. United States*<sup>92</sup> which also accepts circumstantial evidence of a conspiracy in view of the difficulty to prove it by direct testimony.

Further, from the methodology employed by the CFI in its *Flat Glass* judgment<sup>93</sup> in order to analyze and evaluate the findings of fact and the evidence relied on by the Commission in its decision, it results that the applicant who contests the convincing force of a Commission's decision does not have to show that this decision is erroneous; it is enough to demonstrate that "it is not sufficiently proven, expressly or implicitly,"<sup>94</sup> in other words that the alleged infringements are not proved "to the requisite legal standard."<sup>95</sup>

### B. Evidence of the Restriction of Competition

The EEC Treaty prohibits agreements which have as their object or effect the prevention, restriction, or distortion of competition within the common market. This prohibition concerns a variety of commercial behaviors that pursue the same objective: to modify the existing competitive situation. It is clear that any conscious and active behavior of companies attempting to modify in an artificial way the competitive environment in order to reap the benefits of an anti-competitive arrangement and limit the risks of free competition violates the antitrust rules of the EEC Treaty.

Nevertheless, it is not enough to prove the existence of a cartel in order to prohibit it. Evidence that the cartel has as its object of effect the restriction of competition must also be established. The decisional practice of the Commission and the

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91. Joined Cases 100-103/80, [1983] E.C.R. 1825, 1930, [1983] C.M.L.R. 221, 288 (citing Opinion of Advocate General Mayras, *Suiker Unie*, [1975] E.C.R. at 2113-14, [1976] 1 C.M.L.R. at 387-89).

92. 234 U.S. 600 (1914).

93. *Flat Glass*, Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_. [1992] 5 C.M.L.R. 302 (Ct. First Instance).

94. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 223.

95. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 275.

case law of the Court of Justice show that in practice the evidence of the restriction overlaps essentially with the evidence of the existence of the cartel. If the existence of a cartel is successfully proved, therefore, its restrictive object or effect is relatively easy to demonstrate.

### 1. Evidence of Restriction Resulting from the Object of the Cartel

In case of a publicly known or a secret cartel based on an agreement between companies the existence of which is established by direct documentary evidence (text of the agreement, correspondence, minutes of meetings, etc.), evidence of the restriction of competition is sufficiently established because it results from the object of the cartel as it emerges from the available documents. If an "object" to restrain competition is evident, then the agreement itself constitutes a restraint of competition "by its very nature"<sup>96</sup> and evidence concerning the effects of the agreement on the market is not necessary.<sup>97</sup> According to the Court of Justice in *Sandoz Prodotti Farmaceutici SpA v. Commission* ("*Sandoz-II*"),<sup>98</sup> "in such cases the absence in the Commission's decision of any analysis of the effects of the agreement from the point of view of competition does not constitute a defect capable of justifying a declaration that it is void."<sup>99</sup> The Court added that the fact that no steps have been taken to ensure the implementation of a restrictive agreement is not sufficient to remove it from the prohibition of Article 85(1).<sup>100</sup>

The same applies also in the case of a cartel functioning on the basis of a concerted practice having clearly as its object to prevent, restrict, or distort competition, whatever the degree of effective success of such a practice might be. Indeed, the anti-competitive object of an agreement or a concerted practice should be enough to prove that competition was at

96. RITTER, ET AL., *supra* note 39, at 71.

97. S.C. Belasco v. Commission, Case 246/86, [1989] E.C.R. 2117, 2186, ¶ 15, [1991] 4 C.M.L.R. 96, 121; *Sandoz Prodotti Farmaceutici SpA v. Commission*, Case C-277/87, [1990] E.C.R. 45, 46, ¶ 3 [hereinafter *Sandoz-II*]; PVC, O.J. L 74/1, at 13, ¶ 37 (1989); LdPE, O.J. L 74/21, at 34, ¶ 44 (1989); Polypropylene, O.J. L 230/1, at 29, ¶ 90 (1986).

98. *Sandoz-II*, [1990] E.C.R. at 46, ¶ 3.

99. *Id.*

100. *Id.*

least liable to be restricted, even if the agreement or the concerted practice did not have any real effect on the market.<sup>101</sup>

Nevertheless, a view is emerging according to which Article 85(1) should not be considered violated when the means of implementation (pricing arrangements, etc.) of a cartel agreement are "objectively inapt" to restrict competition or modify the competitive situation in a specific market or at a given time.<sup>102</sup> The CFI noted in its *Polypropylene* judgments that even if the means of implementation of an agreement are not always successful, if the agreement is apt to have any effect on competition, it must be considered having an anti-competitive object.<sup>103</sup> Indeed, it belongs to the incriminated companies to prove, necessarily by means of a complex economic analysis, that an agreement was inapt, even potentially, to restrict competition and therefore it could not have an anti-competitive "object." Such an assertion should be extremely difficult to prove in the case of cartel agreements.<sup>104</sup>

On the other hand, the object of the agreement should not be confused with the intention of the parties to restrict competition. It emerges clearly from the clauses of the agreement objectively considered. All that remains to know is whether the specific agreement could be reasonably expected to restrict competition. However, if it is clearly established that an agreement with an anti-competitive object infringes Article 85(1) of the EEC Treaty, even if this agreement is not put into effect or if implementation measures were inadequate to achieve the intended objective, a controversy remains concerning concerted practices when the concertation was not followed by any effect on the market. Admittedly, the appreciation of a concerted practice is somewhat different from that of an agreement. If the concerted practice has already been implemented by the companies involved, then the above consid-

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101. *Vereniging van Cementhandelaren* ("VCH"), O.J. L 13/34 (1972).

102. *See, e.g., Imperial Chem. Indus. Ltd. v. Commission*, Case T-13/89, slip op. ¶¶ 273-88 (Ct. First Instance Mar. 10, 1992) (not yet reported) (analyzing arguments concerning requirements of Article 85(1)).

103. *Id.* ¶ 293.

104. *See* Opinion of Advocate General Vesterdorf, *Hercules*, Case T-7/89, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 84, 164-67, § I.D.5 (Ct. First Instance). The opinion of Advocate General Vesterdorf states these views on Article 85(1) applicability. *Id.*



erations regarding anti-competitive agreements apply to it as well.

On the contrary, the appreciation of a concerted practice having clearly as its object the restriction of competition but not followed by real effects on the market causes some problems. Certain authors deny formally the possibility of treating such a concerted practice in the same way an agreement would be treated.<sup>105</sup> Because the concerted practice is, by definition, only revealed and characterized at the moment of its implementation, it can only be condemned when (and if) it is implemented. Contrary to an agreement having an unlawful object, a concertation (e.g., meetings, exchange of information, etc.) having an unlawful object should, in order to be qualified as a concerted practice infringing Article 85(1), be followed by de facto conduct connected to it by a causality link. Incrimination in such a case should therefore depend upon evidence of restrictions of competition resulting from the measures of implementation of the concerted practice in the market in question.

In his opinion in the *Polypropylene* case<sup>106</sup> Judge Vesterdorf took a similar approach arguing that, for Article 85 to apply, some kind of action must be taken with the knowledge and the awareness that it results from the concertation. If no action is taken at all, perhaps because the company was forced to leave the market, there is no infringement. According to Judge Vesterdorf, the Commission must prove not only the concertation but also subsequent conduct on the market pursued in the knowledge ensuing from the concertation. It is not necessary to prove specifically individual, casually related acts. On the other hand, the undertakings involved should prove that the knowledge obtained from the concertation was not used in the determination of the undertakings policy. The CFI, however, does not seem to follow this interpretation. In its *Shell/Polypropylene* judgment<sup>107</sup> it repeats the definition of the Court

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105. *See id.* at \_\_, [1992] 4 C.M.L.R. at 153-57, § I.D.3(g) (presenting overview of commentators Joliet, J.A. Van Damme, Schapira/Le Tallet/Blaise, Goldman, Piriou, E. Colmant, Van Gerven, Schröter, Koch, Bellamy/Child, Kovar, Druesne, and Deringer on problem).

106. *Id.* at \_\_, [1992] C.M.L.R. at 157-62, § I.D.3(i).

107. *Shell Int'l Chem. Co. v. Commission*, Case T-11/89, slip op. ¶¶ 300-03 (Ct. First Instance Mar. 10, 1992) (not yet reported); *see infra* note 148 and accompanying

of Justice in the *Suiker Unie* case<sup>108</sup> and stresses that, in determining their subsequent policies, parties to a concertation “could not fail to take into account, directly or indirectly,” the information disclosed during the concertation about the course of conduct which other participants had decided to adopt or contemplated adopting on the market. One can reasonably conclude from this judgment that, at least in the case of long-lasting cartels, a concertation with anti-competitive object is presumed to give rise to de facto concerted conduct on the market. It belongs to the incriminated company to prove either the complete absence of conduct or that its actual conduct was totally independent from the knowledge it acquired during the concertation.

Further, it must be noted that reality is often more ambiguous. The dividing line between the agreement and the concerted practice is far from being always easy to draw with precision. This is why the Commission considers that, in the case of certain cartels (particularly complicated and long-running ones with numerous adherents, the existence of which is established on the basis of circumstantial evidence relating to minutes of meetings, exchange of correspondence, or internal notes, etc.), collusion presents some of the elements of both forms of prohibited cooperation.<sup>109</sup> In such cases the Commission is entitled to find that the behavior of the incriminated companies constitutes a single infringement qualified as agreement or at least concerted practice without it being necessary to prove each type of infringement separately.<sup>110</sup> Finally, it must be stressed that in the case of a concerted practice, the anti-competitive intention of the participants has to be inferred clearly from their action on the market and from the background against which the incriminated conduct took place.

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text (discussing Court of First instance's partial acceptance of application for annulments of decision).

108. *Suiker Unie*, Joined Cases 40-48, 50, 54-56, 111 & 113-114/73, [1975] E.C.R. 1663, 1942, ¶¶ 173-74, [1976] 1 C.M.L.R. 295, 425; *see supra* text accompanying note 80 (quoting this definition).

109. *E.g.*, PVC, O.J. L 74/1 (1989); LdPE, O.J. L 74/21 (1989); Flat glass, O.J. L 33/44 (1989); Polypropylene, O.J. L 230/1 (1986).

110. *See* Opinion of Advocate General Vesterdorf, *Hercules*, Cases T-7/89, [1992] E.C.R. \_\_\_, [1992] 4 C.M.L.R. at 167, § I.D.6 (Ct. First Instance); *Shell Int'l Chem. Co. v. Commission*, Case T-11/89, slip op. ¶¶ 304-05 (Ct. First Instance Mar. 10, 1992).

## 2. Evidence Resulting from the Effects of the Cartel

When it is demonstrated that several companies had deliberately implemented a concerted practice of an industrial, commercial, or economic nature without explicitly stating an anti-competitive objective, the evidence of its restrictive effects on competition should be established by the precise analysis of the circumstances and the impact of the behavior on the market. These effects may be currently observed or they may be potential or future effects, if the practice in question is still only in the initial phases of its implementation.

The Court of Justice stated in its judgment of June 30, 1966 in *Société Technique Minière v. Maschinenbau Ulm GmbH*<sup>111</sup> that it may be necessary, in case of doubt about the interpretation of the object of an agreement, to examine whether competition was in fact prevented, restricted, or distorted in an appreciable measure.<sup>112</sup> To simplify the approach of the Commission, it can be said that in the absence of direct documentary evidence against a cartel having an anti-competitive object, priority will be given to the demonstration of its restrictive effects on the market. In other words, this involves determining whether or not, taking into consideration the characteristics of the market and the diverging interests of each individual firm involved, the behavior of companies active in this market corresponds to what it is considered reasonable by the economic theory, presuming that each company takes its decisions and determines its policies independently from the others.

Nevertheless, if the effects of a concerted practice or of parallel behavior are clearly anti-competitive, evidence of a causality link between suspect behavior and the restriction of competition in the market must be established, even if such a link can be demonstrated by logical deduction. Thus, a uniform price level or simultaneous price increases by several firms can be the logical result of undistorted competition or, on the contrary, they can be the consequence of cooperation without which prices and price increases would have been different. In fact, establishing the evidence of a restriction of competition through the effects of a specific agreement or con-

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111. Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357.

112. *Id.* at 249, [1966] C.M.L.R. at 375.

certed practice on the market presupposes that economic evidence has already been successfully established. This can only be achieved by means of a detailed analysis of the market in question and particularly of its most significant aspects from the point of view of competition: degree of concentration of the sector, price levels in the long term, upward/downward movements of prices, accessory sales conditions (transport costs, collective rebate schemes, "basic point" systems, etc.), limitation of production capacities and investments, lists of approved customers, etc.

### *C. Types of Evidence Used*

The nature of evidence that is necessary and sufficient to prove charges against a secret cartel constitutes a central issue in the procedure for the incrimination of companies involved in such restrictive practices. Evidence likely to be used by the Commission can be divided in the following categories: direct documentary evidence, circumstantial evidence, and economic evidence. Use of testimony evidence is limited in the EEC anti-trust procedures.

#### 1. Direct Documentary Evidence

Cartels involving a large number of companies and establishing complex price fixing and market sharing mechanisms, lead in most cases to the development of equally complex organization and control structures. In such cases it appears necessary for the cartel members to determine rules of conduct in detailed documents, keep minutes of meetings and reports or working papers on the implementation of these rules both regarding the operation of the cartel on a daily basis as well as the long term compliance of individual members with the rules. Discovering, by means of appropriate investigations, letters, telexes, internal notes, and reports establishing in a direct way the evidence of cooperation seems therefore easier than in the case of a cartel with few members and loose organization.

A document constitutes direct evidence in itself when it allows the Commission to establish that precisely designated companies (or persons in charge of these companies) concluded an agreement with the intention to restrict competition. This is the case, for example, with a memorandum on an

agreement entered into by the participants, an exchange of letters between members of the cartel relative to restrictive practices, minutes of meetings concerning these practices and authenticated by the companies present to the meeting, etc. Documents concerning third parties directly or indirectly incriminating them as participants in the cartel can either constitute direct evidence against such parties, if they are sufficiently clear and consistent, or corroborate and explain other direct evidence supporting the incrimination in first place. Such documents must, nevertheless, be treated with care.<sup>113</sup>

Direct documentary evidence is increasingly rare and difficult to discover insofar as the decisional practice of the Commission becomes stricter as regards secret horizontal cartels. Certainly surprise inspections on the basis of Article 14(3) of Regulation No. 17/62, performed simultaneously in the head offices of several companies, have still shown their efficiency in a recent past<sup>114</sup> and certain current procedures prove that one must never despair to discover by such means direct evidence of the infringement or, as some commentators call it in the United States, the "smoking gun." Nevertheless, no legal text or regulation specifies which kind of direct evidence has to be considered sufficient in order to establish the existence of a cartel. This makes it, therefore, essential to approach and evaluate all available evidence in a pragmatic way.

In the *Wood Pulp* case<sup>115</sup> the Commission relied on a large number of direct evidence (internal notes, exchanges of letters, and telexes) from which it resulted clearly that certain companies were involved in the organization of various meetings between 1973 and 1977 having as their object to fix prices but also to determine disciplinary rules and retaliatory actions, in order to compel companies not adhering to these prices to justify or adapt their behavior. From the moment a document is qualified by the Commission and accepted by the Court of Justice as direct evidence of anti-competitive practices, companies incriminated in the Commission's decision against the secret cartel can not contest it and try to "destroy" its validity in

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113. C.S. KERSE, *EEC ANTITRUST PROCEDURE* 103 (2d ed. 1988) (stating that inspectors must keep records and inventories of materials taken).

114. PVC, O.J. L 74/1 (1989); LdPE, O.J. L 74/21 (1989); Polypropylene, O.J. L 230/1 (1986).

115. *Wood Pulp*, O.J. L 85/1 (1985).

court other than by proving before the Court of First Instance that it is false or "made up" with the intention to mislead the authorities and harm the company concerned or that it simply reflects an erroneous point of view of its author. This is mostly the case of certain minutes kept by someone present in a meeting but contested later by the other participants in the same meeting.

On the other hand, the absence of any written trace, report, or internal note in the files of a company, which, according to evidence found elsewhere, took part in one or more meetings with competitors, can constitute a strong presumption of the incriminating character of these meetings. Absence of documentation in all companies having participated in a meeting that undoubtedly took place can further be considered by the Commission as subsidiary evidence of the incriminating character of this meeting and be used to corroborate other direct documentary evidence.<sup>116</sup>

## 2. Circumstantial (Presumptive) Evidence

It is clear that while the best demonstration of the existence of a cartel is normally based on direct evidence regarding its creation and implementation, accepting the idea that only direct evidence should be admitted in such cases would allow the majority of these cartels to remain active with total impunity. In Europe, as well as in the United States, the concept of evidence admissible against cartels had to be extended in order to incorporate circumstantial evidence from which the presumption (disputable in court) of the existence of a cartel can be inferred.

Indeed, direct evidence available in cartel cases concerns frequently only certain findings of fact such as the precise rates of price increases implemented by the companies involved as well as the identity of these companies. But the fact of aligning one's sales conditions based on the conditions practiced by a competitor, often the price leader in the specific market, does not constitute in itself evidence of concertation. It will be necessary, therefore, to uncover other elements of proof or indications from which the existence of collusion may be inferred. The implementation by several producers simultaneously of

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116. Joshua, *supra* note 84, at 319.

identical price increases covering an important number of different products makes it reasonable to presume that there exists an agreement behind these increases insofar as it appears highly improbable that almost all competitors in the same market act in an identical way at the same time.

The Court of Justice had the opportunity to fix the conditions of admissibility of circumstantial evidence<sup>117</sup> in the July 14, 1972 *Dyestuffs* decisions, and in particular in the paragraphs 66-67 and 68.<sup>118</sup> Paragraph 66 states first of all that

[a]lthough parallel behaviour 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, having regard to the nature of the products, the size and the number of the undertakings, and the volume of the said market.<sup>119</sup>

These abnormal market conditions are observed, according to paragraph 67, when

parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the Common Market and of the freedom of consumers to choose their suppliers.<sup>120</sup>

The above considerations of the Court of Justice lead to the following conclusions: parallelism of behavior is only an indication (albeit a serious one), but does not in itself constitute evidence of cooperation. Furthermore, this indication can only be appreciated in the light of the anti-competitive objective that the parallel behavior is supposed to have sought. In addition, the Court of Justice draws also in its paragraph 68 a procedural conclusion of extreme importance for the anti-cartel policy of the Community: indications should not be appreciated separately but in combination with each other. According to the Court of Justice, "the question whether there was a

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117. "Indizienbeweis" in German law, "*preuve par presumption*" in French law.

118. *ICI*, Case 48/69, [1972] E.C.R. 619, 655, [1972] C.M.L.R. 557, 622-23; see *supra* note 77 (listing other cases constituting "Dyestuffs" decision).

119. *ICI*, [1972] E.C.R. at 655, [1972] C.M.L.R. at 622-23.

120. *Id.* at 655, [1972] C.M.L.R. at 623.

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, account being taken of the specific features of the market in the products in question."<sup>121</sup>

This relation between circumstantial and economic evidence as well as the fact that the conduct of each company must be evaluated in comparison both with the conduct of the other competitors and with the market situation is evident in a number of subsequent decisions of the Commission. Formulating this principle in its decision in the *Pioneer Hi-Fi Equipment* case,<sup>122</sup> the Commission concluded that the conduct of the undertakings involved could not "be explained in a reasonable way as being the consequence of normal business considerations of contractual necessities" nor could "the conduct of each of the undertakings be considered as isolated facts."<sup>123</sup> On the contrary, the conduct of each company involved in the cartel constitutes an essential element and forms together with the others a concerted practice. The Court of Justice essentially confirmed this approach in its judgment on this case.<sup>124</sup>

This approach was further validated by the Court of Justice in the March 28, 1984 decision *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission*<sup>125</sup> which nevertheless imposed an important limitation on the value of circumstantial evidence considering that it cannot be conclusive by itself, if a plausible alternative explanation of the parallel behavior could be found.<sup>126</sup> This explanation is mostly furnished by means of an economic analysis of the relevant market that tends to demonstrate that a number of alternative developments could be considered "normal" in view of a given market situation. Of course the old controversy surrounding the analysis of what market conditions should be considered as "normal" can not be quashed by a Court of Justice decision. It

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121. *Id.*

122. *Pioneer Hi-Fi Equipment*, O.J. L 60/21, at 34, ¶ 73 (1980).

123. *Id.*

124. *SA Musique Diffusion Française v. Commission*, Joined Cases 100-103/80, [1983] E.C.R. 1825, [1983] 3 C.M.L.R. 221.

125. Joined Cases 29, 30/83, [1984] E.C.R. 1679, [1985] 1 C.M.L.R. 688.

126. *Id.* at 1702, ¶ 16, [1985] 1 C.M.L.R. at 711 (allowing applicants to give reasons for their behavior other than concerted action).



is obvious that such an approach involves a share of subjective analysis based on a number of hypothetical constructions qualified by some commentators as arbitrary to a certain extent. It is in fact the responsibility of the administration at a political level that is at stake in this case and the Court of Justice has rarely taken the risk to challenge it. In other words, if market conditions which command or result from the parallel behavior are judged "normal," there will be no presumption of a restriction of competition. On the contrary, if market conditions are judged "abnormal," parallel behavior will not be regarded as spontaneous, but will necessarily result from preliminary concerted action.

However, as Judge René Joliet<sup>127</sup> stresses, it is by hypothesis impossible to determine what the "normal" terms of competition would be in the absence of the incriminated behavior. Undoubtedly, this is the reason why the Court of Justice attached in the *ICI* judgment more importance to the analysis of the behavior of the companies involved than to that of the price level. It is reasonable enough to conclude that what really mattered in this case was rather the indications of cooperation between the incriminated companies reviewed as a whole in the light of the specific characteristics of the market in question, than the theoretical analysis of the normal market conditions regarding price formation. It should nevertheless be noted that, although both the Commission and the Court of Justice examined principally all circumstantial evidence on the parallel behavior of the dyestuffs producers, they did not attach the same importance to the same elements of proof.

In its *Matières Colorantes* ("Dyestuffs") decision of July 24, 1969,<sup>128</sup> the Commission put the accent on findings of "documentary" nature during its investigations: correspondence regarding instructions of price increases addressed to the distribution subsidiaries which contained phrasing similarities, documents concerning meetings between producers, telexes, etc. The Court of Justice gave its preference to factual elements of economic nature—identity of the price increase rates, of the products concerned, of the national markets where the price

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127. René Joliet, *La Notion de Pratique Concertée et L'arrêt I.C.I. Dans Une Perspective Comparative*, 15 C.D. EUR. 251, 275 (1974).

128. J.O. L 195/11, at 12-14 (1969).

increases were implemented—and concluded that it did not appear “plausible” that increases introduced on national markets that have few common elements between them, i.e., Italy and the countries of Northern Europe, as regards both price levels and conditions of competition, could be carried out in such a short period of time, i.e., within two to three days, without some kind of preliminary coordination.<sup>129</sup> Furthermore, in this judgment the Court of Justice seems to attach more importance to taking into account the logic of the market in question than to the material indications of collusion between producers.

However, in its *Suiker Unie* judgment of December 16, 1975,<sup>130</sup> the Court of Justice clearly applied again the principle of circumstantial evidence regarding collusion and determined the conditions that should be satisfied in order that the various elements constituting the body of proof may be qualified as evidence of the alleged cooperation of the incriminated companies. In this case, the Commission had based its decision<sup>131</sup> on the fact that cross-border deliveries between the Member States were made almost exclusively from producer to producer. This fact, which allowed the producers of importing countries to preserve their acquired positions, could not be explained according to the Commission other than by the willingness of all interested parties not to compete with each other. The Commission inferred the evidence of cooperation not only from a precise analysis of the statistical information available on “controlled” deliveries between producers but also from a multitude of documents (telexes, letters, reports, internal notes, and minutes of meetings) revealing the existence of a concerted action between producers having as its object to prohibit all “movements of goods from one country to another other than those coordinated by the producers themselves.”<sup>132</sup>

The Court of Justice stated in particular in paragraph 164 that “there is no reason why the Commission and the Court

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129. ICI, Case 48/69, [1972] E.C.R. 619, 659, ¶¶ 107-10, [1972] C.M.L.R. 557, 626.

130. *Suiker Unie*, Joined Cases 40-48, 50, 54-56, 111 & 113-114/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295.

131. European sugar industry (“Sugar”), O.J. L 140/17 (1973).

132. *Id.* at 23 (Author trans.).

should not accept as evidence of an undertaking's conduct correspondence exchanged between third parties, provided that the content thereof is credible to the extent to which it refers to the said conduct" and required in paragraph 165, that "in particular the statements in the documents in dispute tally with the actual way the parties concerned have behaved on . . . [the] market."<sup>133</sup> As far as evidence against cartels is concerned the above considerations of the Court of Justice are very important. Paragraph 164, which retains as evidence against a company correspondence between third parties, allows the field of incriminating documents to be enlarged beyond the sphere of direct evidence emanating from the party suspected of infringement.<sup>134</sup>

Further, in view of the Court's assessment in paragraph 165<sup>135</sup> it must be concluded that the content of this indirect evidence should be evaluated not only in the light of possible dispute by the incriminated companies but also against their effective behavior on the market. Thus, it is obvious that final evidence against cartels results not only from each element of proof taken separately but from the combination of these elements with each other particularly when their contents reflect with precision the economic or commercial realities of the market in question. Paragraph 166<sup>136</sup> summarizes clearly this approach in concluding that "having regard to all these circumstances it must be held that these documents form a body of consistent evidence and that their contents correspond, *at least for the most part, to the facts.*"<sup>137</sup>

It must be noted that the Court's requirement that evidence corresponds "for the most part" to the factual situation is all the more important, if one considers that the Court of Justice explicitly recognizes here that it would be unreasonable to demand that the evidence reported by the Commission in order to describe and characterize the incriminating conduct of the parties concerned should be totally exempted from any doubt or uncertainty. In fact, neither the economic and relational life of companies nor their documentation and mailing

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133. *Suiker Unie*, [1975] E.C.R. at 1940, [1976] 1 C.M.L.R. at 423-24.

134. *Id.* at 1940, [1976] 1 C.M.L.R. at 423.

135. *Id.*

136. *Id.* at 1941, [1976] 1 C.M.L.R. at 424.

137. *Id.* (emphasis added).

practice is organized solely with the purpose of establishing clear and indisputable evidence of infringement of the rules of competition in order to satisfy and facilitate the task of the enforcing authority.

In requiring only a certain amount of consistency between the documentary evidence advanced by the Commission and the reality of the alleged conduct violating competition rules, the Court of Justice demonstrates a certain pragmatism, which seems, unfortunately, somewhat forgotten by the Court of First Instance in its *Flat Glass*<sup>138</sup> and *Polypropylene*<sup>139</sup> judgments of March 10, 1992. Indeed, in *Suiker Unie*, the Court of Justice retained first of all evidence proving the multiple contacts between the accused firms as well as indirect evidence of collusion between them, whereas in the *Dyestuffs* case, it gave more importance to the presumptions resulting from market analysis.<sup>140</sup>

In its *Flat Glass* judgment, the CFI goes further in stating that "the appropriate definition of the market in question is a necessary precondition of any judgment concerning allegedly anti-competitive behaviour."<sup>141</sup> Regarding the similarities in the pricing policy of the companies involved, which were evidenced in the Commission's decision through the notification to customers of identical price increases at close dates or sometimes on the same day, the CFI merely retains as indications of cooperation only elements of "actual coincidence" of both the date and the amount of increase between the producers' pricing announcements.<sup>142</sup>

This requirement concerning acceptable evidence, in other words the complete "coincidence" in the date and the amount of the price increase, exceeds considerably the conditions imposed by Court of Justice in the *Dyestuffs* case as regards the admissibility of evidence against cartels. More alarming yet is the attitude of the CFI that tends to appreciate findings of fact and pieces of evidence individually, examining

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138. *Flat Glass*, Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_, [1992] 5 C.M.L.R. 302 (Ct. First Instance).

139. See *infra* notes 147-48 (describing *Polypropylene* decisions).

140. *Suiker Unie*, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295; ICI, Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557.

141. *Flat Glass*, [1992] E.C.R. at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 159.

142. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 193.

if each of them alone is sufficient to prove the alleged cooperation, contrary to the consistent case law of the Court of Justice which evaluates the various elements of evidence in relation to each other as well as to the behavior of the companies. In this respect paragraph 200 of the CFI judgment explicitly stated that "the fact that the discounts granted to some wholesalers by the three producers coincide is not sufficient, in itself, to prove systematic concerted action among the three producers in relation to the discounts granted to wholesalers in general."<sup>143</sup> For the CFI, it is more important that the producers "did not all grant their discounts with the same system and criteria"<sup>144</sup> according to the tables produced.

The same attitude is manifest in the treatment of the *Polypropylene* cases.<sup>145</sup> Most of the companies involved in the cartel applied for the annulment of the Commission's decision.<sup>146</sup> In a series of judgments the CFI rejected eight<sup>147</sup> of the applications and partially accepted the remaining six<sup>148</sup> of them estimating that, as regards certain periods of time, the Commission had not conclusively proved the participation of

143. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 200.

144. *Id.*

145. O.J. L 230/1 (1986).

146. *See infra* notes 147-48 (citing decisions of Court of First Instance on these applications).

147. *Hercules*, Case T-7/89 (Ct. First Instance Dec. 17, 1991) (not yet reported); *DSM NV v. Commission*, Case T-8/89 (Ct. First Instance Dec. 17, 1991) (not yet reported); *Rhône-Poulenc v. Commission*, Case T-1/89 (Ct. First Instance Oct. 24, 1991) (not yet reported); *Atochem SA v. Commission*, Case T-3/89 (Ct. First Instance Oct. 24, 1991) (not yet reported); *Hoechst AG v. Commission*, Case T-10/89 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Solvay SA v. Commission*, Case T-12/89 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Montedipe SpA v. Commission*, Case T-14/89 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Chemie Linz AG v. Commission*, Case T-15/89 (Ct. First Instance Mar. 10, 1992) (not yet reported).

148. *See Petrofina SA v. Commission*, Case T-2/89 (Ct. First Instance Oct. 24, 1991) (not yet reported) (reducing fine from ECU600,000 to ECU300,000); *BASF AG v. Commission*, Case T-4/89 (Ct. First Instance Dec. 17, 1991) (not yet reported) (reducing fine from ECU2,500,000 to ECU2,125,000); *Enichem Anic SpA v. Commission*, Case T-6/89 (Ct. First Instance Dec. 17, 1991) (not yet reported) (reducing fine from ECU750,000 to ECU450,000); *Hüls v. Commission*, Case T-9/89 (Ct. First Instance Mar. 10, 1992) (not yet reported) (reducing fine from ECU2,750,000 to ECU2,330,000); *Shell Int'l Chem. Co. v. Commission*, Case T-11/89 (Ct. First Instance Mar. 10, 1992) (not yet reported) (reducing fine from ECU9,000,000 to ECU8,100,000); *Imperial Chem. Indus. Ltd. v. Commission*, Case T-13/89 (Ct. First Instance Mar. 10, 1992) (not yet reported) (reducing fine from ECU10,000,000 to ECU9,000,000).

the companies in the cartel, and reduced the fines accordingly. In its judgments the CFI examines each incriminating act (price initiatives, participation in meetings, etc.) individually and evaluates the evidence of the firm's participation in this act separately from its global conduct over a long period. This leads to the somewhat peculiar result that, to give an example, a company which is found guilty of participating in a cartel agreement from mid-1977 to September 1983, is acquitted of participating in a January-May 1981 price initiative.<sup>149</sup>

It should be noted in this occasion that, according to the reporting Judge Vesterdorf, the overall view of the evidence was a very important factor in these cases. Judge Vesterdorf stated that

even where it is possible to give a reasonable alternative explanation of a specific document, which may be isolated from a number of documents, the explanation in question might not withstand closer examination in the context of an overall evaluation of a whole body of evidence. It must accordingly be permissible to apply, as the Commission does, conclusions drawn from periods where the evidence is fairly solid to other periods where the gap between the various pieces of evidence is perhaps larger.<sup>150</sup>

This quite pertinent piece of advice should not be lost in the future developments of CFI case law concerning proof standards. However, as things stand, one is tempted to conclude that to avoid being fined, it is enough for cartel members to vary the external appearance and the timing of their concerted actions or simply to "cheat" from time to time by not following the cartel instructions. It might even come to the point where, as Judge Vesterdorf seems to suggest,<sup>151</sup> in cases of varying implementation actions the Commission might be requested to establish the existence of a mutual understanding of the cartel members that, for instance, if "A is to do *a*, B is to do *b*, C is to do *c* and so on,"<sup>152</sup> which, as the Judge himself admits, should be extraordinarily difficult to prove other than by direct documentary evidence.

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149. *Shell*, slip op. ¶ 190.

150. Opinion of Advocate General Vesterdorf, Hercules, Case T-7/89, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 84, 173, § I.E.2 (Ct. First Instance).

151. *Id.* at \_\_, [1992] 4 C.M.L.R. at 157-58, § I.D.3(i).

152. *Id.* at \_\_, [1992] 4 C.M.L.R. at 162, § I.D.3(j).

Apart from the specific assessments of the evidentiary value of documents or other pieces of evidence supporting the Commission's presumptions in these cases, probably more significant is the overall approach of the CFI in its *Flat Glass* and *Polypropylene* judgments. It is clear that the Court of First Instance insists on examining the documentary evidence separately from the global context of the producers' effective behavior on the market, so that only documents or document parts containing direct evidence of participation in the cartel are retained. This could seriously reduce the scope of circumstantial evidence admissible in cartel cases and, consequently, the efficiency of the antitrust action of the Commission. Nevertheless, one should not jump to the conclusion that the case law concerning the concept of cartel as it applies to concerted practices has definitely taken a more restrictive direction regarding admissible evidence, at least not before the CFI has had the occasion to examine more cases of this kind.

### 3. Economic Evidence—Analysis of the Structure of the Market

The concept of economic evidence, as opposed to that of legal or documentary evidence, does not have any real existence outside and independent of the concept of concerted practice. Indeed, evidence of the latter is precisely based on the presumption that the incriminated companies intentionally adopt a parallel behavior inexplicable by economic analysis, while in the case of cartels based on anti-competitive agreements, market effects are secondary.<sup>153</sup> Certainly, an element of legal relation (e.g., a signed agreement) between the participants is not indispensable, but parallel or even identical conduct of several market operators is not sufficient to prove a cartel in the absence of any element of agreement between them, even if the companies concerned are conscious about the parallelism of their commercial behavior.

In other words, identical conduct constitutes nothing more than a first indication of cooperation. The fact that the

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153. Wernhard Möschel, *Use of Economic Evidence in Antitrust Litigation in the FRG*, 32 *ANTITRUST BULL.* 523 (1987). Professor Möschel correctly points out that, regarding the use of economic criteria in the application of German antitrust law against horizontal restraints, the key factual element itself, restraint of trade, is managed without reference to economic analysis. *Id.* at 529.

companies involved are aware that they are acting in an identical manner constitutes a second indication of cooperation which reinforces the first. The question that remains to be answered is whether these indications together with other fragmentary evidence constitute circumstantial evidence sufficient to support a presumption of infringement and to incriminate the companies concerned for violation of antitrust law.

U.S. case law qualifies conscious parallelism of behavior as an indication of concerted practice. The 1956 judgment of *Morton Salt Co. v. United States*<sup>154</sup> retains that a consciously parallel behavior is likely to weigh heavily in the appreciation of the case in question. In fact, both in U.S. and in European case law, conscious parallel behavior, once it is admitted as an indication of cartel activity, gives rise to a thorough examination of the conditions under which a cartel agreement can be presumed. Both legal systems admit that, if such an agreement cannot be proved by other means (direct documentary evidence, testimony, etc.), its existence can nevertheless be inferred from the effective conduct of the companies on the market in question. Under U.S. law, parallelism of behavior cannot be qualified as a *per se* violation of the Sherman Act, but leads to an analysis of this behavior in order to determine if, on the basis of the situation in the relevant market, it would be inconceivable that the obvious uniformity of behavior was achieved without prior agreement. This leads to the conclusion that the existence of an agreement in such cases is not proved but deduced or, to be exact, presumed by deduction.

Paragraph 66 of the *ICI* judgment<sup>155</sup> defines an equivalent principle in somewhat different terms, stating 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, having regard to the nature of the products, the size and the number of the undertakings, and the volume of the said market.<sup>156</sup>

For all that, are we entitled to speak about economic evidence?

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154. 235 F.2d 573 (10th Cir. 1956).

155. *ICI*, Case 48/69, [1972] E.C.R. 619, 655, [1972] C.M.L.R. 557, 622-23.

156. *Id.*



Unfortunately, economic analysis by itself cannot demonstrate in a scientific manner the exact significance of a commercial or industrial behavior in a specific market. Certainly, it is admitted that careful analysis of the market structure can provide a plausible explanation of certain behavioral patterns such as those resulting from price leadership or from oligopoly. But such a pattern does not always imply collusion.

Summarizing this principle, Melchior Wathelet<sup>157</sup> observes that an economic analysis is necessary to determine to what extent the structure of the market imposes, explains, or makes impossible parallel behavior. Having completed this analysis, a conclusion can be reached about the probability or improbability that the observed parallel behavior is in fact coordinated. If parallel behavior is or could reasonably be thought to be imposed by the structure of the market, economic evidence cannot be used under any circumstances as an indication of cooperation. If, on the other hand, the structure of the market is unable to provide any plausible explanation of the observed parallelism of behavior, cooperation between market operators could be presumed. The difficulty comes from the fact that between these two relatively clear cut but mostly theoretical situations numerous cases can be observed where the market structure, without really imposing a parallel behavior, can nevertheless be quite useful in providing a plausible explanation or even a justification of otherwise disconcerting similarities in the commercial behavior of companies competing with each other. In the *Dyestuffs* case, companies invoked the economic laws that apply to oligopolistic markets in order to demonstrate that no conclusive evidence of cooperation could be drawn from the observation of simultaneous and similar price increases. Indeed, they claimed that in an oligopolistic market, each company has to adapt its behavior to that of the company first implementing the price increase. According to this theory, markets composed of producers of equivalent size or competitive strength involve to some extent a system of random price leadership. On the other hand, in the traditional system of the dominant price leader, one pro-

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157. Melchior Wathelet, *Pratiques Concertées et Comportements Parallèles en Oligopole: Le Cas des Matières Colorants*, 11 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 663 (1975).

ducer holding a stronger competitive position systematically initiates the price increase.

In an oligopolistic market of this nature all producers are well aware of each other and have thorough knowledge not only of the prices charged by the others for the various products but also, especially if the products are homogeneous, the price structure of each competitor. Under the constant pressure of purchasers, the prices undergo a continuous erosion until a critical point is reached and one of the competitors or the dominant producer is forced to react by implementing a reasonable price increase while being more or less certain that the other producers will react in identical terms without a prior agreement or concerted action. Despite the fact that neither the Commission nor the Court of Justice accepted this argument in the *Dyestuffs* case, the validity of the reasoning itself was not contested in principle.

In order to solve the problem, the Court of Justice proceeded to a comparison of the market situation resulting from the alleged concerted practice with the competitive situation that would correspond to the normal conditions of the specific market, taking into consideration the nature of the products, the volume of the market as well as the importance and the number of the competitors involved. If parallel behavior, although not restrictive of competition in itself, is likely to afford the interested parties the possibility to reach a price equilibrium on a level different from that which would have resulted from competition, and to consolidate acquired market positions to the detriment both of the effective freedom of movement of the products in the common market as well as of the freedom of consumers to choose their suppliers, then such behavior constitutes an indication of concerted practice which could be qualified as serious.

Maintenance of acquired market positions, e.g., market shares, over a long period constitutes a phenomenon which, without being in itself abnormal, deserves a specific examination. Indeed, if consolidation of a market position in the long term cannot be explained rationally without some sort of concerted action of the operators involved in the market, then the existence of an agreement, or at least a concerted practice, will have to be presumed. In this context, individual commercial behavior can reveal the existence of collective agreements hav-

ing as their object precisely the respect of acquired positions. This could be the case with refusals to sell unjustified from an economic standpoint or in view of the stocks available. Such refusals to supply customers could also be regarded as an additional indication of concertation. In the *Sugar* case, for example, refusals to supply were considered as a concerted practice aiming at protecting and maintaining the agreed bulkheading of the national market of each competitor.

Finally, it should be noted that economic analysis is used only to corroborate or explain other evidence. It can never be used directly as the basis of a legal assessment. That means on one hand that the Commission cannot accuse oligopolists of cartel activity only because market analysis demonstrates that, for example, the price level cannot be explained otherwise than by a cartel agreement. On the other hand, even if an incriminated company could prove that the market continues to behave in a normal competitive manner, this does not mean that no cartel agreement or concerted practice has taken place, if the existence of it is proved by documentary or other direct evidence.

#### 4. Testimony Evidence

Being for all practical purposes an administration, even if it is often portrayed as a "quasi-penal" one, particularly when it applies Articles 85-86 of the EEC Treaty and imposes fines, the Commission, nevertheless, does not have the powers vested in a penal jurisdiction particularly as far as the procedure for the establishment of truth is concerned. As already mentioned above, the procedure is primarily based on documentary evidence concerning the incriminating facts or circumstances. The Community procedure leaves only limited space for evidence by testimony. The Commission does not retain testimony as evidence of an infringement because the applicable procedures do not provide for the possibility to give evidence under oath.

However, on one hand, companies are free to produce all elements they consider useful for their defense. On the other hand, the Commission can also make use of evidence in the form of written declarations of the persons in charge of the companies involved in the procedure, or of third parties, in or-

der to explain, make comprehensible, or get an insight into a piece of documentary evidence not sufficiently explicit in itself. Thus, certain documents that are likely to constitute a direct evidence of cartel agreements, such as minutes of meetings or internal company notes, are often written with the sole purpose of keeping a trace of the commitments entered into by the parties to an agreement or just to inform interested third parties. The drafting of such documents, intended for use by initiates exclusively, often gives rise to confusion insofar as they contain exotic abbreviations, codes, or initials that render reading and interpretation by third non-initiated persons, in particular by the agents of the Commission, extremely difficult.

In such circumstances, the Commission can always ask the participants in the reported meeting or agreement to provide some oral explanations in order to clarify the specific significance of the terms, abbreviations, or codes used in the document. Such testimony cannot be qualified in itself as evidence but contributes undoubtedly to the establishment of evidence, especially if it comes from a relevant person or from a company directly involved in the procedure either as a member or as a victim of the cartel. Certainly, the value of this type of testimony evidence remains relative and it can be contradicted by other testimonies, if they are supported by elements of proof sufficient to ensure their credibility.

Using the powers of investigation provided in Council Regulation No. 17/62, the Commission can oblige a company, by imposing fines or periodic penalty payments if necessary, to supply all relevant information concerning an alleged infringement, even if this information establishes the evidence or strengthens the presumption of an infringement against that company. From this point of view, it can be stated that the privilege of non-incrimination against oneself does not exist in EC competition law.<sup>158</sup> That does not mean that a company could be forced to testify against itself. The administrative procedure provided for the enforcement of competition rules by the Commission does not include testimony under oath. According to the Court of Justice, companies are obliged to collaborate with the Commission and to supply exact and complete information in response to a written request on the basis

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158. See generally Joshua, *supra* note 84, at 336-40.

of Article 11 of Regulation No. 17/62, or to communicate the complete documentation asked for during investigations carried out on the basis of Article 14(2) or 14(3) of the same regulation.<sup>159</sup>

Thus, an incriminating statement made by a company in response to a written request for information could give the Commission the possibility to bring charges not only against its author, but also against third parties expressly mentioned in the statement. Such declarations are to some extent authenticated by the legal obligation of their exactitude imposed by Regulation No. 17/62. For all practical purposes, they could therefore be compared with testimony under oath pronounced before a tribunal and constituting direct evidence. Their value is, however, far from being equivalent to that of testimony under oath.

According to Article 3(3) of Commission Regulation No. 99/63 of July 25, 1963<sup>160</sup> regarding the hearings of companies receiving a Statement of Objections, these can propose that the Commission hears persons who may corroborate the facts set out in their written response to the objections. Testimony in this case allows the companies suspected of infringement to invite third-party witnesses to explain, describe, and confirm the facts relevant to their defense. This opportunity to make use of witnesses does not, however, impose any legal obligation on the third party concerned. On its side, the Commission is free to satisfy this request or to reject it.

Reciprocally, under Article 7(2) of the same regulation, the Commission may also invite certain witnesses to express orally their point of view on the entire case or on specific aspects of the current procedure.<sup>161</sup> These testimonies do not have any absolute probative force, but aim rather at enabling the Commission to appreciate better the events under scrutiny in their real economic or legal context.

### III. PROCEDURAL ISSUES

An effective competition policy constitutes one of the essential conditions for the achievement of a single market and

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159. See *infra* text accompanying notes 162-238 (discussing procedural issues).

160. J.O. L 127/2268 (1963), O.J. Eng. Spec. Ed. 1963-64, at 47.

161. *Id.* art. 7(2), O.J. Eng. Spec. Ed. 1963-64, at 48.

the harmonious development of companies through the optimum allocation of resources. Among the tasks an antitrust authority is entrusted with, prohibition and repression of cartels hold a prominent position. In fact, horizontal agreements between competitors often constitute the most harmful form of collective restriction of competition, the most contrary to interests of consumers and third parties.

Like most public authorities enforcing antitrust legislation, the Commission of the European Communities disposes of important powers of investigation set out principally in Council Regulation No. 17/62.<sup>162</sup> This regulation enables the Commission to take all necessary steps to detect cartels and put an end to their activity, or on the contrary to authorize them under certain conditions. Antitrust investigation is an act of public authority. As such, it is limited by the obligation to respect the civil rights of physical persons and companies according to the principles of legal order recognized in all the Member States and protected by the Court of Justice of the European Communities.

In adopting Regulation No. 17/62, the Council of Ministers entrusted the Commission with monitoring the compliance of market operators with the rules of competition both for reasons of neutrality and of uniformity of implementation of these rules in the various Member States, but also for reasons of efficiency since in cartel cases necessary information concerning infringements of antitrust legislation has often to be sought beyond the borders of a single state. While on the basis of the "effects doctrine"<sup>163</sup> EEC antitrust rules apply to agreements between companies situated outside the Community, the question of the extraterritorial application of the Commission's powers of investigation is more delicate.<sup>164</sup> In

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162. Council Regulation No. 17/62, *supra* note 9, O.J. Eng. Spec. Ed. 1959-62, at 87, 90.

163. See Commission Press Release, IP (88) 573 (1988) (commenting on European Court of Justice's recent decision in *A. Åhlström Osakeyhtiö v. Commission*, Joined Cases 89, 104, 114, 116, 117, 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901. But see J.R. Atwood & C. Lister, *International Antitrust Enforcement in the George Bush Administration: the Enforcement Guidelines and Beyond*, 23 J. WORLD TRADE L. 97, 103 (1989) (describing this interpretation of *Wood Pulp* by Commission and 1988 Antitrust Enforcement Guidelines for International Operations of U.S. Department of Justice).

164. KERSE, *supra* note 113, at 87-88; M. Slater, *L'application Extraterritoriale du*

practice, the Commission never carries out inspections in third countries. Such inspections could only take place with the authorization of the state concerned.<sup>165</sup> On the contrary, informal requests for information are sent to companies outside the EEC.<sup>166</sup> In any case, if the company has a subsidiary within the EEC, a formal Article 11 request preferably is served to the subsidiary. However, the wide-ranging powers of the Commission also gave rise to numerous criticisms and misunderstandings. For instance, it is submitted that concentrating in the hands of a single institution the power to take decisions prohibiting or exempting agreements, to deliver negative clearances, to adopt block exemption regulations, to initiate investigations, to address written requests for information to individual companies or to carry out investigations under warrant (non-compulsory) or order (compulsory) at the offices of suspected firms, to impose fines or periodical penalty payments for non-respect of competition rules, in other words to combine at the same time the functions of police, public prosecutor, and judge, could result in a situation unfair for the companies involved. Procedural issues focusing on the real scope and the limitations of the fact finding powers of the Commission are probably in the center of the debate concerning its activities in the field of prosecution and repression of secret cartels.

#### A. Powers of Investigation

The Commission's powers of investigation are stated in Council Regulation No. 17/62: discovery powers involving written requests or orders to produce information on the basis of Article 11, the power to carry out sector inquiries on the basis of Article 12, the power to carry out on-the-spot investigations under warrant or order on the basis of Article 14, and

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*Droit Communautaire*, C.D. EUR. 309, 316 (1986); see generally Joachim Schmidt-Hermesdorf, *Internationale Rechtshilfe in Kartellsachen*, 32 RECHT DER INTERNATIONALEN WIRTSCHAFT 180 (1986); *Atwood & Lister*, *supra* note 163, at 103-11 (explaining extraterritorial application in U.S. law); David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986) (same).

165. WHISH, *supra* note 33, at 391.

166. Council Regulation No. 17/62, *supra* note 9, O.J. Eng. Spec. Ed. 1959-62, at 87, 90. This is based on Article 11 but contains no mention of Article 15 consequences for refusal to submit or incomplete submission. *Id.*

the possibility to request the competent authorities of Member States to carry out investigations on the Commission's behalf on the basis of Article 13.

Sector inquiries and investigations carried out by the Member States on behalf of the Commission seldomly are employed and in the final analysis are badly suited to the repression of multinational cartels. The Article 12 procedure is only implemented when the Commission has reasons to suspect that competition is distorted across a whole industry.<sup>167</sup> Although there is no need for strong evidence of infringements, a formal decision of the Commission after consultation with the Advisory Committee is necessary in order to launch the inquiry. A sector inquiry involves investigations in the firms concerned and can be combined with requests for information on the basis of Article 11 and inspections on the basis of Article 14. The Article 13 procedure is also rarely used by the Commission to delegate to the Member States the power to carry out investigations under the EEC rules of competition. The possibility exists that it may be used more frequently in the future as an application of the principle of subsidiarity enshrined in the Treaty of the European Union.

In practice, written requests for information and on-the-spot inspections constitute by far the Commissions' most privileged methods of investigation. Both must respect two basic principles: the principle of necessity and the principle of proportionality. The principle of necessity arises explicitly from the phrasing of Articles 11, 12 and 14 of Regulation No. 17/62 which authorize only requests of "necessary" information and "necessary" inspections. It belongs to the Commission to appreciate the necessary character of its investigations.<sup>168</sup>

The principle of proportionality means that the Commission should take particular care not to use inadequate or disproportional enforcement measures when investigating a car-

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167. See COMMISSION FIRST REPORT ON COMPETITION POLICY ¶ 124 (1972) (discussing that article 12 has been used only two times to investigate margarine industry and tying of bars to breweries); COMMISSION THIRD REPORT ON COMPETITION POLICY ¶¶ 14-15 (1974) (regarding similar situation in oil sector).

168. AM & S Europe Ltd. v. Commission, Case 155/79, [1982] E.C.R. 1575, 1610, ¶ 17, [1982] 2 C.M.L.R. 264, 322; Solvay & Cie v. Commission, Case 27/88, [1989] E.C.R. 3355, [1991] 4 C.M.L.R. 502. *Solvay* was decided on grounds similar as *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283, [1991] 4 C.M.L.R. 502.



tel case. In order to evaluate the proportionality of its fact-finding measures, the Commission considers the seriousness of the suspected infringements and the fact that the information it seeks is mostly kept secret.

### 1. Requests for Information on the Basis of Article 11

Article 11 empowers the Commission to obtain from Member State governments and competent antitrust authorities, as well as from undertakings and associations of undertakings, all information necessary for the enforcement of competition rules. The Commission must first address a simple request for information under Article 11(1) and, if the company does not respond by supplying the requested information within the fixed time limit, or responds by supplying incomplete information, the Commission can at a second stage adopt a formal decision within the meaning of Article 11(5) ordering the company to do so.<sup>169</sup>

#### a. Simple Requests—Article 11(1)

The request for information is subject to certain rules regarding its form and its contents. It must be addressed to the company concerned by means of a registered letter with acknowledgment of receipt. The letter must specify the legal basis and the purpose of the request and remind its recipient of the penalties provided for in Article 15(1)(b) for supplying inaccurate information. A copy of the request is forwarded to the antitrust authority of the Member State in whose territory the seat of the firm or association is situated. Further, the Commission must indicate, at least in brief, the nature of the suspected infringement of Articles 85 or 86 of the EEC Treaty as well as a deadline for response.

#### b. Orders—Article 11(5) and Penalties for Noncompliance

This decision, which orders the company to submit the necessary information, must specify what information is required, fix an appropriate time limit for compliance with the order, indicate the penalties provided for in Articles 15(1)(b) and 16(1)(c) and inform the company of its right to have the

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169. *National Panasonic (UK) Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, 2053-54, ¶ 10, [1980] 3 C.M.L.R. 169, 184.

decision reviewed by the Court of Justice. Article 15(1)(b) empowers the Commission to impose fines from ECU100 to ECU5000 if the company provides inaccurate information or persists in its refusal to answer within the fixed time limit. According to Article 16(1)(c), the Commission can impose periodic penalty payments of ECU50 to ECU1000 per day in order to compel the company to supply complete and correct information requested by the Commission by means of the Article 11(5) order.

### c. Defense to Article 11 Requests or Orders

Two judgments delivered by the Court of Justice on October 18, 1989, *Solvay & Cie v. Commission* and *Orkem v. Commission* specify the extent of the Commission's powers as regards requests for information.<sup>170</sup> The Court stated in particular that a request for information referring explicitly to suspected agreements violating Article 85(1) does not correspond to a statement of objections but constitutes simply the justification for the engagement of an investigation. The Court specified further that the Commission can collect under Article 11 documents accessible also under Article 14. As far as the privilege against self-incrimination is concerned, the Court of Justice pointed out in the *Solvay* and *Orkem* judgments that it does not apply to a discovery ordered by a statutory authority such as the Commission. Such a principle could never serve for the defense of legal entities being requested to provide information by means of a non-criminal procedure.<sup>171</sup> However, the Court of Justice fixed a clear limit to the discovery powers of the Commission in cases where the request for information is likely to violate the rights of defense by compelling the company to provide answers which would cause it to admit the existence of an infringement or acknowledge its participation in agreements restricting competition. While the Commis-

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170. *Solvay & Cie*, [1989] E.C.R. 3355, [1991] 4 C.M.L.R. 502; *Orkem*, [1989] E.C.R. 3283, [1991] 4 C.M.L.R. 502.

171. *Orkem*, [1989] E.C.R. at 3350-51, ¶¶ 27-31, [1991] 4 C.M.L.R. at 555-56. But see Thomas Kühlhorn, *Ermittlungen der EG-Kommission nach Art. 11 und 14 der VO 17/62*, 36 WIRTSCHAFT UND WETTBEWERB 7, 9-17 (1986) (contesting arguments from Article 15(4) of Regulation No. 17/62 and fact that firms are legal and not natural persons as formalistic with examples from British and German legislation and case law).

sion's discretion about what information is necessary is largely recognized by the Court,<sup>172</sup> it cannot formulate its questions about the firm's participation in a cartel in such a way that to answer them would oblige the company to confess an infringement of competition rules.<sup>173</sup>

The Court of Justice pointed out in this respect that a written question about precise actions or concerted measures likely to have been envisaged or adopted to support price initiatives within the framework of the cartel, is liable to compel the companies to acknowledge their participation in an agreement restricting competition or to state that they intended to achieve this objective.<sup>174</sup> The Court treated in the same way other requests for information concerning quotas, sales targets, or market sharing between producers. It concluded that the Commission, by compelling the company to acknowledge an infringement of Article 85 of the EEC Treaty, violated the rights of defense of companies receiving an order to supply information on the basis of Article 11(5) and thus fixed, for the first time, strict limits to the use of this provision of Regulation No. 17/62.

A number of other arguments against discovery requests or orders has been examined by the Commission and the Court of Justice. Among them were several unsuccessful arguments: on grounds that the phrasing of Article 11 refers to "information" and not to "documents;"<sup>175</sup> on grounds that this might expose the firm or its employees to criminal sanctions in the Member States or in a non-EC country, for example, Switzerland;<sup>176</sup> on grounds that disclosure might breach fiduciary duty<sup>177</sup> or violate the rules of a trade association regarding confidentiality of meetings and authorizations;<sup>178</sup> or on the basis of arguments on the merits of the case.<sup>179</sup>

172. *Orkem*, [1989] E.C.R. at 3347-48, ¶¶ 15-16, [1991] 4 C.M.L.R. at 553.

173. *Id.* at 3351-53, ¶¶ 32-41, [1991] 4 C.M.L.R. at 556-57.

174. *Id.* at 3352, ¶¶ 38, [1991] 4 C.M.L.R. at 557.

175. *Id.* at 3347, ¶¶ 13-14, [1991] 4 C.M.L.R. at 552-53.

176. *Central Stikstof Verkoopkantoor BV ("CSV")*, O.J. L 242/15 (1978).

177. *Fides, Milan*, O.J. L 57/33 (1979) (asserting that it could not supply information requested by Commission unless authorized by principles involved).

178. *Fédération Nationale de l'Industrie de la Chaussure de France ("FNICF")*, O.J. L 319/12, at 13 (1982).

179. See RITTER, ET AL., *supra* note 39, at 628 n.196 (containing more objections to these discovery procedures).

## 2. Inspections on the Basis of Article 14

Requesting information and inspecting a firm's seat are not part of a two-stage procedure. The Commission carries out inspections into companies that are members of a cartel whenever it considers it necessary. A prior written request for information is not necessary.

In its *National Panasonic (UK) Ltd. v. Commission*<sup>180</sup> judgment, the Court of Justice pointed out that Regulation No. 17/62 "provides for separate procedures, which shows that the exercise of the powers given to the Commission with regard to information and investigations is not subject to the same conditions."<sup>181</sup> Further, the argument of the firm seeking to annul the Commission's decision on grounds that Article 14 provides for a two stage procedure obliging the Commission to issue first an investigation warrant based on Article 14(2) and then an order based on Article 14(3) was rejected by the Court.<sup>182</sup> Taking into consideration the necessity of an investigation in view of the circumstances of the case, the Commission disposes, according to the Court of Justice, of a broad discretionary margin concerning the means of carrying out such investigations.

When there is a specific risk of disappearance of crucial evidence or when it is necessary to carry out simultaneous inspections (so-called "dawn raids") in several companies suspected of being members of a cartel, the Commission opts for surprise inspections under order on the basis of article 14(3). In other cases, it is satisfied with announced inspections under warrant ("simple" inspections) on the basis of Article 14(2).

### a. Non-Compulsory "Authorizations to Investigate" Under Warrant—Article 14(2)

"Simple" inspections are announced to the concerned firm beforehand and are carried out by officials of the Commission on the basis of an "authorization to investigate" signed by the Director-General of DG-IV on the authority of the member of the Commission responsible for competition. This authorization is a warrant stating the names of the Commission's in-

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180. Case 136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169.

181. *Id.* at 2053-56, ¶¶ 8-16, [1980] 3 C.M.L.R. at 183-86.

182. *Id.*

spectors authorized to conduct the investigation and specifying the subject matter and purpose of the investigation and the penalties provided for in Article 15(1)(c) in cases where production of the required books or other documents and business records is incomplete. The competent authorities of the Member State in whose territory the investigation will take place are informed beforehand both of the investigation's mission and of the identity of the authorized officials. In some Member States an official from the national antitrust authority accompanies and assists the Commission's officials. Assistance can be requested either by the Member State or by the Commission.

The object of the inspection covers all information liable to establish factual evidence of an infringement of competition rules and the exact circumstances of the firm's participation in the suspected restrictive agreement or cartel. Documents found during the inspection must allow the Commission to situate the alleged infringement in its precise legal and economic context. After having produced their warrant and an explanatory note setting out the rights and duties of the company in relation to the inspection, the agents of the Commission ask the company whether it intends to accept the inspection. The company has the right to refuse; the agents take note of this refusal in an official report. If the company agrees to submit itself to the inspection, it must do so without reservation in other words, it must enable the agent of the Commission to exercise all the powers set out in Article 14(1) of the Regulation No. 17/62.

Submission to the inspection has to be total. The company cannot accept an inspection "à la carte," enabling it to submit to certain parts of the checking and to refuse to communicate other specific information.<sup>183</sup> Refusal to communicate certain documents during the inspection can be considered as incomplete production of required books or business records liable to sanctions under Article 15(1)(c) of Regulation No. 17/62. The company can ask to be assisted by a lawyer and it is admitted that the Commission's officials can delay the

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183. Fédération Nationale de l'Industrie de la Chaussure de France ("FNICF"), O.J. L 319/12, at 13-14 (1982) (criticizing FNICF for submitting incomplete documentation).

beginning of the inspection for a reasonable period of time in order to allow this lawyer to arrive.<sup>184</sup>

b. Compulsory Inspections Under Order—Article 14(3)

The Commission resorts to compulsory inspections, ordered by means of a formal decision, when it considers that there is a risk of disappearance of the evidence or that there are reasons to believe that the company will refuse to submit to a “simple” inspection. Inspection orders are normally signed by the competent member of the Commission personally.<sup>185</sup> The Commission’s decision ordering a surprise inspection specifies the subject matter and purpose of the investigation and indicates the penalties provided for in Article 15(1)(c) and 16(1)(d) and the right to have the decision reviewed by the Court of Justice.

There is no need for the Commission to disclose in the decision ordering an inspection the complete list of indications or pieces of evidence supporting its presumptions of infringement. In its *Hoechst AG v. Commission* judgment of September 21, 1989,<sup>186</sup> the Court of Justice pointed out that the requirements and conditions provided for in Article 14(3) constitute a fundamental guarantee of the rights of the defense and that the Commission has to indicate clearly the presumptions of infringement that it intends to investigate. Nevertheless, “the Commission is not required to communicate to the addressee of a decision ordering an investigation all the information at its disposal concerning the presumed infringements.”<sup>187</sup> In the specific case the Court observed that the decision, although “drawn up in very general terms which might well have been made more precise” contained “none the less . . . the essential

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184. Julian M. Joshua, *The Investigative Powers of the EEC Commission in Competition Cases*, G.P., Nos. 158-59, 7-8 Juin, 1991, at 23, 25 (Fr.) (commenting that such delay is allowed on condition that the premises be secured).

185. IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, *COMPETITION LAW OF THE EEC* ¶ 1109 n.34 (2d ed. 1990) (describing “habilitation”); RITTER, ET AL., *supra* note 39, at 634 n.244 (same).

186. *Hoechst AG v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859, [1991] 4 C.M.L.R. 410; *Dow Chem. Ibérica SA v. Commission*, Joined Cases 97-99/87, [1989] E.C.R. 3165, [1991] 4 C.M.L.R. 410; *Dow Benelux NV v. Commission*, Case 85/87, [1989] E.C.R. 3137, [1991] 4 C.M.L.R. 410.

187. *Hoechst*, [1989] E.C.R. at 2929-30, ¶ 41, [1991] 4 C.M.L.R. at 469-70.

indications prescribed by Article 14(3)"<sup>188</sup> and rejected Hoechst's recourse.

An Article 14(3) decision has the following legal consequences: the company concerned is required to submit to the inspection. In case of refusal it faces fines from ECU100 to ECU5000 and periodic penalty payments from ECU50 to ECU1000 per day of persistence in the refusal. Furthermore, the interested Member State has to afford the Commission's officials the assistance necessary to carry out their specific mission. It must be noted that the Commission's inspectors do not dispose of any power to compel the company to submit to the investigation. Assistance from the national authority covers the entire range of the powers of investigation provided for in Article 14(1).<sup>189</sup> For instance, the national authority cannot limit its assistance to the access to the buildings and refuse it as regards the access to company books and business records. Such a limitation would indeed deprive the inspection of its useful effect. According to the *Hoechst* judgment of the Court of Justice, when the Commission runs up against the opposition of a company to an inspection, its officials can, even without any collaboration from the company, seek on the basis of Article 14(6), all the elements of information necessary, with the assistance of the national authorities. According to paragraph thirty-three of this judgment, Member States are required to ensure that the Commission's action is effective.<sup>190</sup> Nevertheless, the same judgment specifies that when the Commission is forced to carry out an inspection without the collaboration of the company involved and therefore it needs the assistance of the national authorities within the meaning of Article 14(6), the Commission's officials are required to comply with the specific procedural guarantees provided for in such a case by national law.<sup>191</sup>

As regards, further, the national legal framework allowing antitrust authorities in the Member States to assist effectively the Commission during an inspection, Member States have a

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188. *Id.* at 2930, ¶ 42, [1991] 4 C.M.L.R. at 470.

189. *See infra* text accompanying notes 209-21 (discussing powers of Community's inspectors under Article 14(1)).

190. *Hoechst*, [1989] E.C.R. at 2928, ¶ 33, [1991] 4 C.M.L.R. at 468.

191. *See infra* notes 192-208 and accompanying text (discussing how discovery procedures protect fundamental rights).

specific obligation insofar as Article 14(6) of Regulation No. 17/62 stipulates that they must adopt all necessary measures to organize and facilitate the implementation of this procedure in practice.

### c. Protection of Fundamental Rights

Enforcement of an inspection order is similar in many respects to a genuine search of premises and as such it supposes that all precautions are taken to safeguard the fundamental rights of the companies and persons involved. As regards searching professional premises in the economic or fiscal field, certain Member States recognize in their national legal order the principle of preliminary judicial control. Community law also recognizes that the fundamental rights of individuals faced with administrative measures taken by a Community institution must be protected. According to the Court of Justice in *National Panasonic*,<sup>192</sup> "fundamental rights form an integral part of the general principles of law, the observance of which the Court of Justice ensures, in accordance with constitutional traditions common to the Member States and with international treaties on which the Member States have collaborated or of which they are signatories."<sup>193</sup>

Unfortunately, constitutional rules and traditions of Member States concerning search of business premises<sup>194</sup> and protection of the principle of inviolability of such premises vary considerably. Nevertheless, they all contain the following two common features: search of premises must be authorized by law in force at the moment of the search and fixing the conditions of it; possibility of judicial control of the search *a priori* or *a posteriori*. Because an explicit catalogue of protected fundamental rights is absent from the Community constitution, applicants against 14(3) decisions of the Commission often base their arguments on fundamental rights protected in their na-

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192. *National Panasonic (UK) Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, 2057, ¶ 18, [1980] 3 C.M.L.R. 169, 186; *J. Nold, Kohlen-und Baustoffgroßhandlung v. Commission*, Case 4/73, [1974] E.C.R. 491, 507, [1974] 2 C.M.L.R. 338, 354.

193. *National Panasonic*, [1980] E.C.R. at 2057, ¶ 18, [1980] 3 C.M.L.R. at 186.

194. Council Regulation No. 17/62, *supra* note 9, O.J. Eng. Spec. Ed. 1959-62, at 91. Article 14 does not authorize the Commission to carry out investigations in people's private residence. *Id.*



tional constitutions or in the European human rights conventions. If it is undoubtedly true that in an abstract sense both form part of the general principles of law applied by the European Courts, in *National Panasonic* the Court of Justice stated that, "Regulation No. 17, by giving the Commission the powers to carry out investigations without previous notification" does not infringe "Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 whereby 'everyone has the right to respect for his private and family life, his home and his correspondence.'"<sup>195</sup>

The Court of Justice points out that Article 8(2) of the European Convention, insofar as it applies to legal persons, acknowledges that such interference is permissible to the extent to which it is in accordance with the law and is necessary in a democratic society for the defense of the public interest or the economic well-being.<sup>196</sup> The powers entrusted upon the Commission by the Regulation No. 17/62 correspond precisely to these two conditions.<sup>197</sup>

In the *Hoechst* judgment, the Court of Justice confirmed the necessity to respect the rights of defense and the inviolability of residence. It stated that

in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law.<sup>198</sup>

Essentially, however, the Court of Justice confirmed that the Commission has broad inspection powers that must be carried out

195. *National Panasonic*, [1980] E.C.R. at 2056-57, ¶¶ 17, 20, [1980] 3 C.M.L.R. at 186-87.

196. *Id.* at 2057, ¶ 19, [1980] 3 C.M.L.R. at 186.

197. See, however, Michel Waelbroeck, *Les Droits de la Défense des Entreprises en Matière D'ententes*, 45 *ANNALES DE DROIT DE LOUVAIN* 67, 70 (1985), doubting that Council regulation could be qualified as "the law."

198. *Hoechst AG v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859, 2924, ¶ 19, [1991] 4 C.M.L.R. 410, 466.

with the cooperation of the undertakings concerned, either voluntarily, where there is a written authorization, or by virtue of an obligation arising under a decision ordering an investigation. In the latter case, . . . the Commission's officials have, *inter alia*, the power to have shown to them the documents they request, to enter such premises as they choose, and to have shown to them the contents of any piece of furniture which they indicate. On the other hand, they may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking.<sup>199</sup>

If a company opposes the Commission's investigation, the situation is completely different. According to the Court of Justice, in such case,

the Commission's officials may, on the basis of Article 14(6) and without the cooperation of the undertakings, search for any information necessary for the investigation with the assistance of the national authorities, which are required to afford them the assistance necessary for the performance of their duties. Although such assistance is required only if the undertaking expresses its opposition, it may also be requested as a precautionary measure, in order to overcome any opposition on the part of the undertaking.<sup>200</sup>

Thus, Member States are required to ensure that the Commission's action is effective. According to the Court, within the limits imposed by the necessity of efficiency, the appropriate procedural rules designed to ensure respect for undertakings' rights are those laid down by national law.<sup>201</sup>

It is clear that in those Member States where prior judicial authorization is needed to effectuate a search of business premises, the national legal order must be respected. Insofar, the criticism<sup>202</sup> that the *Hoechst* judgment sets a lower level of fundamental rights protection than the one safeguarded in some Member States is unfounded.<sup>203</sup> The competent authority entrusted with the judicial control under the terms of na-

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199. *Id.* at 2927, ¶ 31, [1991] 4 C.M.L.R. at 468.

200. *Id.* at 2927-28, ¶ 32, [1991] 4 C.M.L.R. at 468.

201. *Id.* at 2928, ¶ 33, [1991] 4 C.M.L.R. at 468.

202. See, e.g., Rupert Scholz, *Grundrechtsprobleme im Europäischen Kartellrecht: zur Hoechst-Entscheidung des EuGH*, 40 WIRTSCHAFT UND WETTBEWERB 99, 101 (1990).

203. See Bernhard Jansen, *Les Pouvoirs D'investigation de la Commission des Com-*

tional law has to dispose of all the elements necessary to allow it to exercise its own supervisory powers, but it cannot substitute its own assessment of the need for the investigations ordered for that of the Commission, whose assessments of fact and law are subject only to review by the Court of Justice.<sup>204</sup> On the other hand, it is within the powers of the national authorities, possibly tribunals or judges, to examine the authenticity of the inspection order, as well as to consider whether the measures of constraint are arbitrary or excessive having regard to the subject matter of the investigation and to ensure that the rules of national law are complied with in the application of those measures.<sup>205</sup>

While it is clear that the national judge controls the authenticity and due form of the Article 14(3) order,<sup>206</sup> the scope of his scrutiny of the proportionality of the Commission's decision having regard to the subject matter of the investigation is still uncertain.<sup>207</sup> Some commentators suggest that the national judge must be able to examine whether the presumptions of the Commission are sufficient in order to decide if a search is disproportionate.<sup>208</sup> This interpretation of *Hoechst* appears too broad. It would substitute the judgment of the Commission for that of the national controlling authority and would inevitably result in the questioning of the necessity of an inspection. The national judge cannot scrutinize the foundation of the Commission's allegations. He decides only if, in view of the particular circumstances of the search in question and the subject-matter mentioned in the inspection order, such a measure appears justified or not. The latter could be the case if, for instance, the Commission ordered an inspection to elucidate cartel activities of company *A* in the sector *Y* and requested an authorization to search the premises of a subsidiary *B* undoubtedly active only in the sector *Z*.

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*munautés Européennes en Matière de Concurrence*, 342 REVUE DU MARCHÉ COMMUN 696, 697-98 (1990).

204. *Hoechst*, [1989] E.C.R. at 2928, ¶ 35, [1991] 4 C.M.L.R. at 468-69.

205. *Id.* at 2928, ¶ 35, [1991] 4 C.M.L.R. at 468-69.

206. RITTER, ET AL., *supra* note 39, at 636.

207. VAN BAEL & BELLIS, *supra* note 185, at 482-83.

208. Marie-Chantal Boutard & Louis Vogel, *Limites des Pouvoirs de la Commission des Communautés Européennes en Matière de Vérification Auprès D'entreprises*, No. 20, SEMAINE JURIDIQUE—CAHIERS DE DROIT DE L'ENTREPRISE 341-42 (17 Mai 1990).

d. Powers of the Commission's Inspectors Under Article 14(1)

Inspectors authorized by the Commission to investigate are empowered under Article 14(1) to enter any premises, land, and means of transport of the company; examine books and business records; take copies of extracts from such books and business records; and ask for oral evaluations from employees of such evidence.

1. Enter Any Premises, Land, and Means of Transport of the Company

The power to enter premises covers all company offices or plants, including accounting, technical services, executive offices, and archives. Inspectors must be given access to offices, filing cabinets, desks, briefcases, etc. Even the trunk of the firm's general manager's car can be opened and its contents inspected. Premises of third parties, in which books or business records have been temporarily or permanently deposited, can also be inspected.<sup>209</sup>

2. Examine the Books and Other Business Records

Access to premises is only meaningful if it allows access to the documents which make it possible to establish the factual situation and eventually report the evidence of infringement. The terms "books" and "business records" cover any form of documentation of professional utility or significance including paper documents, photos or transparencies, magnetic video or audio tapes, microfilms, computer software, and files.<sup>210</sup> They involve in general any recorded information of the business activities of the company or its employees regardless of the medium used to store this information. Access to business

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209. See Commission Decision No. 379/84, O.J. L 46/23, art. 1(1)(a) (1984) (establishing powers of Commission agents under treaty establishing European Steel and Coal Community (ESCS)); RITTER, ET AL., *supra* note 39, at 639 n.279.

210. Commission Decision No. 379/84, O.J. L 46/23, art. 1(1)(a) (1984). Article 1(a) and (b) of Decision 379/84 on inspection powers of the Commission in anti-trust cases in the field of steel and coal makes it clear that business records include "records [data] held in automated systems of any kind." *Id.* But see Bernard Amory & Yves Pouillet, *Le droit de la preuve face à l'informatique et la télématique*, 37 R.I.D.C. 331 (Avril-Juin 1985) (discussing problems and limitations on the use of computerized data as evidence).

records covers not only official documents kept because companies are required to do so by law (invoices, accountancy, fiscal declarations, etc.), but also all other documents, correspondence, internal notes, minutes of meetings, manuscript memos, appointments diaries, travel expense accounts, etc. All documents found on the company's premises are not necessarily professional. It must be noted, nevertheless, that documents located in the premises of a company are by presumption of professional character.

Brief consultation of any document by the inspector enables him to qualify it as professional or private, relevant to the object of the investigation or irrelevant. Private documents as well as irrelevant business documents are discarded. The company can also, within the framework of its defense, produce on its own initiative documents which are favorable to it. The inspection warrant or order issued pursuant to Article 14 limits the scope of investigation to documents only which concern products or services related to the alleged restrictions of competition. It is not necessary, however, for the Commission to provide a detailed list of the documents it wishes to inspect.<sup>211</sup>

The company undergoing the inspection has an obligation to cooperate actively during the investigation. This involves opening safes and locked filing cabinets, providing on-the-spot oral explanations in order to identify the author of a document, explaining the filing system of the company's computer, and the like. Voluntary or negligent omissions or misleading explanations, which might cause the inspectors to overlook relevant documents, are qualified as incomplete production of the required books or records and can be fined on the basis of Article 15(1)(c).

The exact scope of the obligation of active cooperation on behalf of the company undergoing an inspection has been specified by the Commission in *Fabbrica Pisana*.<sup>212</sup> During a "simple" inspection carried out in this company within the framework of a survey concerning a cartel in the flat-glass sec-

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211. *Hoechst AG v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859, 2926, ¶ 27, [1991] 4 C.M.L.R. 410, 467 (allowing search for documents unknown at beginning of search); *Dow Benelux NV v. Commission*, Case 85/87, [1989] E.C.R. 3137, 3159, ¶ 38, [1991] 4 C.M.L.R. 410, 477 (same).

212. O.J. L 75/30 (1980); *Fabbrica Lastre di Vetro Pietro Sciarra*, O.J. L 75/35 (1980).

tor in Italy, the company limited its collaboration to putting all premises and company records at the inspector's disposal, but it refused to fetch precisely required documents. The Commission imposed on Fabbrica Pisana a fine of ECU5000 pursuant to Article 15(1)(c) of Regulation No. 17/62.<sup>213</sup> The Commission stated that "the obligation on undertakings to supply all documents required by Commission inspectors must be understood to mean not merely giving access to all files but actually producing the specific documents required."<sup>214</sup>

### 3. Take Copies of or Extracts from the Books and Business Records

Inspectors can take copies of the books and records of which they require the presentation. They do not have the power to seize the originals. They may ask to use the firm's photocopying facilities and should pay for the copies.<sup>215</sup>

### 4. Ask for Oral Explanations on the Spot

A good deal of controversy surrounds this possibility. As the Commission stated in *Fabbrica Pisana*,<sup>216</sup> the company has a duty to allow employees with thorough knowledge of the object of the inspection to provide oral explanations. It is not certain that the Commission has the power to interview particular employees.<sup>217</sup> Some commentators limit this power only to the possibility of asking for explanations concerning the books or professional records being examined.<sup>218</sup> Others extend it to the conduct under investigation provided that questions arise out of the examination of the books or records.<sup>219</sup> If it is clear that a possibly inaccurate response to a request for oral explanation during the inspection cannot be fined under Article 15(1)(b), which sanctions only inaccurate information submitted to the Commission following a request on the basis

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213. *Fabbrica Pisana*, O.J. L 75/30, at 34 (1980).

214. *Id.* at 33, ¶ 10.

215. See RITTER, ET AL., *supra* note 39, 925-27, app. 22, ¶ 8 (containing explanatory note to authorization to investigate under Article 14 of Regulation No. 17/62).

216. *Fabbrica Pisana*, O.J. L 75/30, at 32-33, ¶ 10 (1980).

217. RITTER, ET AL., *supra* note 39, at 639 n.284. *But see* Kühlhorn, *supra* note 171, at 22-23 (containing further references to these powers).

218. VAN BAEL & BELLIS, *supra* note 185, at 483, ¶ 1109.

219. KERSE, *supra* note 113, at 105.

of Article 11, it must nevertheless be considered that the characterized refusal to comply with oral requests for explanation during the inspection must be regarded as an obstacle to the exercise of the powers of investigation provided for in Article 14 and can consequently be qualified as a refusal to submit to an inspection. This may result in the interruption of the inspection and, eventually, the implementation of the sanctions planned for in case of a refusal to submit to an inspection ordered by a Commission's decision.

In its *National Panasonic* judgment,<sup>220</sup> the Court of Justice confirmed that

[t]he fact that the officials authorized by the Commission, in carrying out an investigation, have the power to request during that investigation information on specific questions arising from the books and business records which they examine is not sufficient to conclude that an investigation is identical to a procedure intended only to obtain information within the meaning of Article 11 of the regulation.<sup>221</sup>

If officials of the Commission cannot materially obtain an explanation or an answer to their questions on the spot during the inspection for some reasons that are not due to a refusal of the company or a deliberate strategy to put obstacles to the progress of the investigation, they can resort to obtaining this answer at a later date, by using to this end the procedure provided for in Article 11 (written request for information). In case of cartel investigations, written requests for information are mostly used precisely to complete information gathered during an inspection or to ask additional questions based on the evidence found.

In any event, a company cannot, during the inspection, be faced with the alternative either to have to incriminate itself by recognizing its participation in a prohibited cartel, or to run the risk of being sanctioned for inaccurate or incomplete information. As already mentioned above, the same limitation applies to written requests for information under Article 11. Moreover, the privilege against self-incrimination is not really relevant within the framework of a procedure which, unlike an-

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220. *National Panasonic (UK) Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169.

221. *Id.* at 2056, ¶ 15, [1980] 3 C.M.L.R. at 186.

titrust procedures in certain national legal systems, is not governed by criminal law but is based essentially on the principle of documentary evidence as opposed to that of evidence by testimony.

e. Defense to Article 14 Warrants or Orders

As already mentioned above, companies have the right to refuse an inspection warrant. This is based on the principle that inspections under EEC legislation can only be carried out with the collaboration of the company. Otherwise recourse to national enforcement rules (searches etc.) is necessary. However, refusal to submit to an inspection has nothing to do with the privilege against self-incrimination. As far as inspections are concerned, this principle has the same scope as in cases of requests for information.<sup>222</sup> Further, firms are entitled to have the inspection order reviewed by the CFI. A reminder of this possibility is contained in the order according to Article 14(3) of Regulation No. 17/62.

Application to the CFI does not suspend the inspection which can continue. All effects of the judicial review are retrospective. A successful appeal would prohibit the Commission from using the materials gathered during the inspection, otherwise the decision on the infringement might be annulled insofar as it was based on such evidence.<sup>223</sup> Nevertheless, the company can also apply for interim measures requesting the CFI to suspend the execution of the inspection order. The applicant has to prove that the inspection would cause him some serious and irreparable injury. It must be noted that this argument has so far been dismissed by the Court of Justice in the case of inspections.<sup>224</sup> In any case, in view of the fact that most Article 14(3) inspections are unannounced, it seems rather difficult, even with modern communications methods, to obtain

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222. See *supra* text accompanying notes 170-79 (describing defenses to Article 11 requests or orders).

223. *Hoechst AG v. Commission*, Case 46/87R, [1987] E.C.R. 1549, 1558, ¶ 34, [1988] 4 C.M.L.R. 430, 437-38; *Dow Chem. Nederland v. Commission*, Case 85/87R, [1987] E.C.R. 4367, 4372, ¶ 17, [1988] 4 C.M.L.R. 439, 443; *Acciaieria e Tubificio di Brescia v. High Authority*, Case 31/59, [1960] E.C.R. 98, 99-100.

224. *Dow Chem. Nederland*, [1987] E.C.R. at 4372, ¶ 16, [1988] 4 C.M.L.R. at 443; *Hoechst*, [1987] E.C.R. at 1558, ¶ 32, [1988] 4 C.M.L.R. at 437.



the suspension of an ongoing inspection by means of an interim measures request.

### B. *Procedural Guarantees During Cartel Investigations*

#### 1. Protection of Correspondence Between the Company and Its Lawyer

Both the Commission<sup>225</sup> as well as the Court of Justice<sup>226</sup> had the occasion to specify the extent of immunity granted in Community law, as in any national legal order, to correspondence exchanged between the accused company and its legal counsellors. The Court recognized such immunity under the following two conditions. First, the protected correspondence has to have been exchanged within the framework of and in order to ensure the customer's defense. Protection does not extend therefore to letters, notes, or opinions sent to a company by a lawyer with the purpose of organizing an infringement of the rules of competition. Second, it has to be correspondence exchanged with an external lawyer, independent from the company concerned, and entitled to exercise its functions at least in one Member State of the Community.

The Court stated in *AM & S Europe Ltd. v. Commission* that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose. Such a conception reflects the legal traditions common to the Member States and is also to be found in

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225. See Answer to the parliamentary question No. 63/78, O.J. C 188/30, at 31 (1978) (stating that Article 14 empowers the commission to check all correspondence prepared by law firms and legal consultants); *AM & S Europe Ltd.*, O.J. L 199/31, at 32 (1979) (stating that Commission can determine what documents it needs from viewing them, and will not trust company's legal advisers to screen any such material).

226. *AM & S Europe Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264.

the legal order of the Community, as is demonstrated by Article 17 of the Protocols on the Statutes of the Court of Justice of the EEC and the EAEC, and also by Article 20 of the Protocol on the Statute of the Court of Justice of the ECSC.<sup>227</sup>

The same judgment defines an "independent lawyer," as one "not bound to the client by a relationship of employment."<sup>228</sup> This point was sometimes disputed since it excludes de facto all internal lawyers of the company. Indeed, in certain Member States, these internal lawyers can be registered to the bar and also be subject to a code of professional deontology. However, in other Member States, internal lawyers are not allowed to represent in court the company which employs them. For its part, the Commission did not fail to note, that

any extension of the principle of confidentiality would require an amendment of the law as it now stands and would place the Commission in breach of the Treaty were it spontaneously to renounce exercise of a power of investigation conferred on it in the public interest by the Council and upheld by the Court of Justice. Moreover, extension of legal privilege to in-house lawyers in certain Member States, in accordance with the various rules of professional ethics in force, would create differences in the legal systems within the Community and would also be manifestly incompatible with the ratio of the Court's decision.<sup>229</sup>

This is why the Commission will not change its current approach which conforms to the *AM & S* case law. Further, regarding the problem<sup>230</sup> of "foreign independent lawyers,"<sup>231</sup> for example, lawyers not being members of a Community bar, law society, or equivalent bodies and therefore not entitled fully to practice their profession in at least one of the Member States, the Commission submitted in 1984 to the Council a recommendation seeking a mandate to negotiate agreements "be-

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227. *Id.* at 1611-12, ¶ 24, [1982] 2 C.M.L.R. at 324.

228. *Id.* at 1611, ¶ 21, [1982] 2 C.M.L.R. at 323.

229. *Confidentiality of Legal Documents: Application of the Competition Rules*, 16 E.C. BULL., No. 6, at 43, ¶ 2.1.60 (1983).

230. See Waelbroeck, *supra* note 197, at 72 (considering exclusion justified in view of the number and diversity of lawyer's rules of ethics in third countries).

231. See Jonathan Faull, *Legal Professional Privilege (AM & S): The Commission Proposes International Negotiations*, 10 EUR. L. REV. 119 (1985) (discussing approaches to solving problems of foreign independent lawyers).

tween the EEC and certain third countries concerning the protection of legal papers in connection with the application of the rules of competition."<sup>232</sup> Such agreements would confirm and safeguard the position of third country lawyers and protect communications between them and companies involved in EC antitrust procedures, on the basis of reciprocity and equal treatment. Unfortunately, the proposal was never followed up by the Council.

The burden of proving the privileged character of a document belongs to the company which intends to make use of this immunity during an inspection. If evidence forwarded by the company is judged insufficient, the Commission can, on the basis of Article 11(5), adopt a decision ordering the production of the contested documents. The company can appeal to the Court of Justice in order to suspend the implementation of this decision.

## 2. Professional Secrecy

Article 20(1) of Regulation No. 17/62 specifies that the information acquired as a result of the application of Articles 11, 12, 13 and 14 can be used only for the purpose of the relevant request or investigation. It follows from this provision that the information collected during an inspection can only be used by the Commission for the current antitrust procedure. The national authorities assisting the Commission in the investigation cannot use it to initiate national procedures of any nature whatsoever (economic or fiscal, antitrust, customs, etc.). According to Article 20(2), neither the Commission, nor the competent authorities of the Member States, their officials and other servants may disclose information acquired by them as a result of the application of Regulation No. 17/62, if it is of the kind covered by the obligation of professional secrecy, for example, if it contains business secrets or other sensitive commercial information.<sup>233</sup> One of the consequences of this provi-

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232. Recommendation for a Council Decision to Authorize the Commission to Open Negotiations with a View to the Conclusion of Agreements Between the European Economic Community and Certain Third Countries Concerning the Protection of Legal Paper in Connection with the Application of the Rules on Competition, COM (84) 548, (October 9, 1984).

233. See Chantal Lavoie, *The Investigative Powers of the Commission with Respect to Business Secrets under Community Competition Rules*, 17 *EUR. L. REV.* 20 (1992).

sion is that the Commission, when publishing in the *Official Journal of the European Communities* the decisions implementing Articles 85 or 86 of the EEC Treaty, occults information concerning business secrets, except in cases where the specific information constituting the business secret is itself the constituent component of the infringement (for example, the invoiced price, if the detected infringement is a price fixing agreement).

Another consequence is that it obliges the Commission to take care to avoid any unnecessary disclosure of business secrets, when it gives to the companies receiving a Statement of Objections access to its files in order to enable them to prepare their defense. Companies are allowed during access to files to examine and take copies only of documents which are accessible or partially accessible to them. However, documentary evidence of a cartel cannot be withheld from other incriminated companies on grounds that it contains business secrets of a cartel member.<sup>234</sup> This would violate the principle according to which the accused firm must be given the possibility to see and comment on the evidence brought against it.

Parties to the procedure are also entitled to take copies of documents obtained by means of an Article 14 inspection and constituting evidence of an infringement. The Commission must, however, thoroughly motivate its decision to disclose such information and, in any case, afford the party concerned by the disclosure of information it considers sensitive the possibility to bring action before the Court of Justice.<sup>235</sup>

### 3. Access to the File

Before taking an unfavorable decision, the Commission gives companies concerned the opportunity of being heard on the matters to which the Commission has taken objection. In practice a statement of objections is addressed to the company, which responds to these objections in writing and, if necessary, orally during a hearing. According to consistent case law of the Court of Justice,<sup>236</sup> recalled by the Commission in its *Elev-*

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234. See Julian M. Joshua, *Information in EEC Competition Law Procedures*, 11 EUR. L. REV. 409, 423 (1986) (discussing lawyer-client confidentiality).

235. AKZO Chemie BV v. Commission, Case 53/85, [1986] E.C.R. 1965, 1991-92, ¶¶ 26-30, [1987] 1 C.M.L.R. 231, 258-60.

236. E.g., *Établissements Consten Sàrl and Grundig-Verkaufs-GmbH v. Commission*, Cases 56 & 58/64, [1966] E.C.R. 249, [1966] C.M.L.R. 418; ACF

enth Report on Competition Policy,<sup>237</sup> in its statement of objections the Commission can state only the essential facts on which its objections are based.

Nevertheless in its *Eleventh, Twelfth, and Thirteenth Reports*, the Commission went beyond the requirements formulated by the Court in giving to the suspected companies the opportunity to take knowledge of the file concerning the case in question.<sup>238</sup> Thus, companies involved in a procedure are invited to come and consult the documents which are accessible to them on the Commission's premises. Principally accessible are documents used as evidence by the Commission against the company receiving the statement of objections. Further, reports drawn up after an inspection and containing a purely factual account thereof are accessible to the firm which was subject to the investigation. Statements made by employees or other staff of the company will normally be made available to all parties concerned to the extent that they constitute evidence of an infringement and figure in the statement of objections.

On the other hand, the final evaluation reports of the Commission's officials, possibly established after one or more inspections, are considered internal documents of the Commission and as such they are not accessible. In addition, the Commission regards as confidential, and therefore inaccessible to the companies involved in the procedure, documents or parts thereof containing other undertakings' business secrets, internal Commission documents, such as notes, drafts, or other working papers, as well as any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality. However, documents containing business secrets or

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Chemiefarma NV v. Commission, Joined Cases 41, 44-45/69, [1970] E.C.R. 661; ICI, Case 48/69, [1972] E.C.R. 619, [1972] C.M.L.R. 557; Hoffmann-La Roche v. Commission, Case 85/76, [1979] E.C.R. 461, [1979] 2 C.M.L.R. 211; Heintz van Landewyck Sàrl v. Commission, Cases 209-215 & 218/78, [1980] E.C.R. 3125, [1981] 3 C.M.L.R. 134.

237. See COMMISSION ELEVENTH REPORT ON COMPETITION POLICY ¶¶ 22-25 (1981) (discussing access to Commission files).

238. COMMISSION ELEVENTH REPORT ON COMPETITION POLICY (1981); COMMISSION TWELFTH REPORT ON COMPETITION POLICY (1982); COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY (1983).

qualified as confidential by the company communicating them, that contain information used in the statement of objections as evidence proving an infringement of competition rules, are excluded from the confidentiality protection and are normally communicated to all members of a cartel.

### CONCLUSION

It was always clear from the standing jurisprudence of the Court of Justice that the evidential standards of the Commission had to be very high. However, they were still those of an administrative and not of a criminal procedure. As regards in particular first instance jurisprudence in the recent cartel cases, the CFI is obviously not ready to accept evidence which is not established "to the requisite legal standard." It remains to be seen whether this legal standard should be interpreted as "proof beyond reasonable doubt" that certain firms were operating a restrictive cartel over a period of time as evidenced by a convincing body of documentary, economic, and other circumstantial evidence, as the Court of Justice has always interpreted it, or whether it is even stricter, requiring the Commission to provide direct evidence that each member of the cartel participated in each individual infringing act during the totality of the duration of the cartel and prove also the causality link between such participation and the restrictive effects of the specific infringement on competition. It is to be hoped that the CFI will find the occasion to clarify its position on "the requisite legal standard" regarding evidence in cartel cases.