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Definitional and Evidential Aspects of Concerted Practices under Article 85 EEC

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In setting up provision for the creation of a common market the EEC Treaty makers had to acknowledge the fact that the removal of customs duties and the elimination of quantitative restrictions on trade would be futile if national markets could be maintained by other artificial obstacles to trade put up by undertakings and the authorities of the various member states. The Commission made quite clear its view that

"competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all,"(1)

and on this foundation that competition is a way to ensure that the envisaged common market functions as a *genuine market*, Article 3(f) of the Treaty of Rome makes provision for the "institution of a system ensuring that competition in the common market is not distorted."

The system is to be found in Articles 85 to 94 of the Treaty. The concern of this thesis is with Article 85 which caters for the restrictive trade practices of undertakings. Although the thesis intends to deal specifically only with the concept of a concerted practice under that provision, for the sake of clarity and completeness,

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(1) First Report on Competition Policy

the provisions of Article 85 are set out below:

Article 85

"(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of paragraph (1) may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contibutes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

The issues to be dealt with in this thesis all relate to questions of definition and evidence and have as their foundation the Court's judgement in Dyestuffs[2] as to the "concept of a conerted practice":

"Article 85 draws a distinction between the concept of "concerted practices" and that of "agreement between undertakings" or "decisions by associations of undertakings"; the object is to bring within the prohibition of that article a form of coordination between undertakings

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(2) Cases 48/69 Imperial Chemical Industries Ltd. v EC Commission [1972] ECR 619

which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. By its very nature then, a concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants.

Although 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 number of the undertakings, and the volume of the said market.

This is especially the case if the 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.

Therefore the question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question."

In some respects a clearer definition of the concept and of the way in which it is proved could not be wished for. However, it will be noted that the Court chose partly to define the concept in terms of the evidence by which it was proved[2] It is submitted that it is this aspect - not so much of the Court's definition but of the nature of that type of collusion which does not amount to an agreement which necessitates such a definition - which gives rise to doubt about about what sort of behaviour will constitute the required collusion actually in practice. Furthermore, the Court's remarks about the evidential quality of parallel behaviour and more particularly its actual treatment of it within the case also cause some concern about the true meaning of the definition, and more particularly, the true role of market evidence in the proof of a concerted practice, even in the abstract.

This boils down to two essential questions:

What is the minimum amount of collusion required to make the conduct of enterprises operating within the Common Market an infringement of Article 85?

What is the minimum evidence which must be adduced to prove it?

At this stage no claims are made that definitive answers to these questions will be found. It is to be hoped however, that an analysis of the case law of the Commission and Court reviewing various sub-issues of the basic issues of definition and evidence will bring to light some of the problems and controversies, or simply the interesting points which concerted practices law in theory and in practice raises, and that at the very least it will provoke a critical assessment of what these requirements might or should be.

conduct[4]. However, there are commentators such as F.A. Mann (whoconsiders Article 85(1) to impose sanctions of a criminal nature[5]) and Pfeifer who holds the opinion that a concerted practice is defined too widely, or proved inadequately (so as to become a strict liability offence)[6]. It is submitted that if these arguments are accepted, any failure on the part of the Commission to fully investigate (and therefore, to wholly prove) an agreement because it can establish collusion by relying on the arguably lower standards of proof for a concerted practice[7] will result in an increase in the number of charges of anti-competitive behaviour based on unacceptable levels of proof. While the greater capacity to avoid detection these days may render a lower standard of proof necessary if anti-competitive behaviour is to be avoided, in some circumstances, the acceptability of this standard is questionable[8] and it should be reverted to only as a last resort after thorough investigations for signs of an agreement have proved fruitless. It should not be used as an expedient by which the Commission is relieved of the task of satisfactorily proving the existence of anti-competitive behaviour.

3. Exclusion of Article 85(3) exemption for concerted practices

Common sense suggests that a concerted practice cannot be notified under

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(4) e.g. in Flat Glass O.J. 1984 L212/13, the fact the firms acted deliberatley to restrict competition warranted the imposition of higher fines
(5) Mann, 'The Dyestuffs Case in the European Communities', 1973 ICLQ 35
(6) Pfeifer, 'Uniform pricing in concentrated markets: is conscious parallelism prohibited by Article 85?', 1974 *Cornell International Law Journal* 113
(7) see p23 for fuller treatment of this point
(8) Chapter Two explains this more fully

the provision in Article 85(3). This subsection offers exemption from the general prohibition in Article 85(1) for anti-competitive conduct which satifies certain conditions which on the whole require that the anti-competitive effects of the conduct are outweighed by consequences which benefit the Community. Since a concerted practice is something which arises only at the moment when the parties adopt a certain course of mutual or reciprocal behaviour on the basis of an unspoken and unacknowledged invitation to do so[9], it would be impossible for the participants to inform the Commision of their intentions. On the other hand, common sense also indicates that once anti-competitive behaviour is under way the parties operating it would be in a position to agree among themselves to notify the Commission of it under Article 85(3), and if their application were successful they would be allowed to maintain their business cooperation from that moment on. Thus, the "spontaneous" nature is really no obstacle to the award of Article 85(3) exempion. In practice however, once the participants are in a position to agree on notification their behaviour must obviously have developed into cooperation resembling the organisation and certainty of an agreement; and more crucially the members to a concerted practice would not wish to notify their behaviour: otherwise, they would have done so earlier instead of maintaining the clandestine nature of their cooperation.

Presumably concerted practices legislation was created to seal the gap which a provision catering only for the prohibition of agreements

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(9) see pp19, 24 for the arguments from which this conclusion is drawn

- however widely they may have been defined - would have left. The provision was necessitated by those businessmen who would avoid prohibition by cooperating via means other than an agreement - and who could even attempt to conceal that behaviour from the Commission because of its close simularity with acceptable business practices. By adopting a less cohesive form of behaviour such economic actors clearly do not want to notify an arrangement to the Commission. It is for this reason that we can say that by its very definition a concerted practice cannot be notified: it was created for - and its constitution devised by - a form of behaviour which never would be notified.

If this explanation of the motivation for concerted practice legislation is valid then the distinction between an agreement and concerted practice on the 'Article 85(3) ground' makes no difference. If the Commission labels what is really an agreement a 'concerted practice' no harm is done by depriving its members of the right to notify because they obviously did not choose to do so anyway. However, this reasoning does lead to an altered definition of a concerted practice. While an agreement can have some beneficial effects and be exempted, a concerted practice is a form of anti-competitive behaviour which is 'bad' *per se*. This conclusion is derived from the evidential aspect of the definition of a concerted practice. Ironically, an agreement which may be exempted will be deliberately devised with anti-competitive intent; a concerted practice which is 'bad' *per se* and which may never be exempted may arise with little conniving and preparation, almost unconsciously. And if conscious parallelism is mistaken for a concerted

practice[10], it does arise unconsciously.

Additional situations in which the distinction between agreements and concerted practices becomes important may incidentally be brought to light as the discussion which follows reveals the differences and simularities of the two terms as they exist in established definitions.

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(10) see Chapter Three for an account of how this may occur

"Agreements" under Article 85(1)

In order to analyse the Commission's consistency in its application of the terms "agreement" and "concerted practice" to cases which have come before it, it is necessary to set down as far as is possible authoritative definitions of the two terms. Since Article 85 itself offers no explanation of how each of the three forms of behaviour it prohibits should be constituted this will involve a consideration of some of the more definitive statements of the Commission and Court, as well as reasoning and presumptions based on a recognition of the aims of the EEC Treaty in the area of competition. Reference to the equivalent provisions in national counterparts of Article 85(1) may also help to shed some light on the matter.

The mere fact that an extra concept has been included in legislation shows that a "concerted practice" must have been devised to complement the term "agreement". Obviously, the Treaty makers must have envisaged a collusive situation which in their view an "agreement" could not cover, and so an initial inference is that the two concepts are, at least notionally mutually exclusive.

Clearly, if an agreement does not include the lesser forms of collusion which constitute a concerted practice it must incorporate behaviour of the other extreme, like the most tightly-knit type of anti-competitive cartel. But there are many degrees of collusion between these poles, and those which lie in the middle might conceivably fit into

either category. This of course depends on the precise formulation of the two terms.

Before the Court considered the nature of a concerted practice in Dyestuffs[11] it was pointed out that the German GWB distinguishes between contracts for a common purpose and other contracts[12]. The omission of this distinction in Article 85(1) means that an agreement includes not only cartels but all other anti-competitive contracts with legally binding effects on the parties. While it is to state the obvious that numerous sorts of anti-competitive contract come within the agreement provision, the assertion that agreements are the same as German civil law contracts is wrong. This would require that all agreements would have to have a legally binding effect on the parties before they could qualify for consideration with a view to prohibition as an "agreement". The reasoning of Gleiss and commentators with similar views,[13] implies that collusion which constitutes an agreement in the ordinary sense but which does not satisfy the contractual requirement of legal obligations, will come under the scope of the concerted practices category. For example, Graupner specifically stated that "concerted practices are so-called 'gentlemen's agreements', i.e., understandings intended to be acted upon without being legally binding" [14]. This would be plausible but it might also be a very dangerous assumption: if the first role ascribed to a concerted practice is to cover the likes of gentlemen's agreement it is possible that its ambit would be limited

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(11) Case 48/69 Imperial Chemical Industries Ltd. v EC Commission [1972] ECR 619
(12) Oberdorfer, Gleiss, Hirsch, *Common Market Cartel Law*, 2nd ed. 1971
(13) e.g., Megret, Waelbroeck, 'Le droit de la Communaute economique europeene', vol.4, Concurrence (1972) p98
(14) Graupner, *The Rules of Competition in the European Economic Community* (1965) p12

to behaviour which clearly constitutes an agreement in the ordinary sense - if a concerted practice means an "agreement" without legal relations, how can it mean something which does not comprise an agreement at all? If the Treaty makers had intended that the scope of agreements and concerted practices should be so restricted, it could have renamed the concepts, "contract" and "gentlemen's agreement" respectively. One simple definition of a contract is that it is "an agreement giving rise to obligations which are enforced or recognised by law"(15). Thus if the Commission had meant to restrict the term "agreement" to mean a "contract" it would have used that very term instead of one of which a contract may be comprised. Having made this comment about the position of gentleman's agreements, it would appear that Graupner perceived the validity of this reasoning and had the foresight to include "other consciously affected cooperation"(16), and before the Dyestuffs judgement noted that they "do not include mere 'price leaderships' or the so-called 'parallel actions'(17).

On both the subjects of agreements and concerted practices, cases decided after some of the above academic views were formulated reinforce criticism of the narrow interpretation of "agreement". The status of a gentlemen's agreement has been clarified and the requirement that an "agreement" must involve legal relations has been considered in great depth. In 1970, the Court in the Quinine Cartel Case(18) saw fit to find a gentlemen's agreement to amount to an agreement and not to a

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(15) Treitel, *The Law of Contract*, 1983 (6th ed.) p1
(16) *Op.cit.* n.14, p13
(17) *Ibid.*
(18) Case 7/72 Boeringer Mannheim v EC Commission [1972] ECR 1281

concerted practice. A Cartel was evidenced by unsigned documents referred to as "gentlemen's agreements", together with a number of implementing arrangements made in the course of meetings and by correspondence. The object of these was to protect each national market in favour of the national producer. In holding these documents to be an "agreement", the Court explained that the "gentlemen's agreements" reflected the parties' common intention with respect to their behaviour in the Common Market. However, it must be stressed that the gentlemen's agreements in this case were enforceable by arbitration and that the Commission did add that if the agreements were to lose their legally binding character, together they would still be eligible for prohibition as a concerted practice. Thus, the concept of an agreement, while not requiring judicially enforceable obligations, may indeed require that they be enforceable through arbitration - which normally means that there must be legal relations between the parties.

Inferences from the Commission's treatment of the Japanese Ballbearings Agreement[19] however suggest that legal relations are not a requisite factor of a gentlemen's agreement prohibitable under the term "agreement". The Commission stated that for an agreement to exist "it is sufficient that one of the parties voluntariiy undertakes to limit its freedom of action with regard to the other"[20]. Thus, an exchange of letters between French and Japanese trade bodies, in which Japanese trade bodies undertook to raise their prices, was held to be an agreement.

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(19) Japanese Ballbearings O.J. 1974, L343/13
(20) *Ibid*, p24

This statement implies *a fortiori*, that those requirements of "form" which are only essential to the "existence" of a legally binding contract when specifically provided for in statute, are certainly not a necessary character of an agreement for Article 85(1) purposes. Thus the implementing agreements in Quinine amounted to "agreements" for the Court, notwithstanding that some of these were only verbal. And like a contract, an agreement does not lose its essential character if it is not put into effect. A declaration of the Commission's policy in this area was made in WEA Filipacchi(21) in which an infringement was found even though the agreement was not implemented.

This remark illustrates just how important it can be to have an accurate dividing line between agreements and concerted practices and for the Commission to confidently and consistently apply it. An anti-competitive arrangement, if it satisfies the requisite conditions to constitute an agreement (and if there is some evidence of this) would be terminated by the Commission and the firms perhaps fined, even though it is not implemented: its potential anti-competitive effect is as important as its actual effects for the requirements of Article 85(22) But if the collusion - the "coming together" - lacks all the elements of an agreement, or if those elements do exist but do not manifest themselves in documentary or other evidence, and the "arrangement" is not implemented on the market, it is exempt from the prohibition altogetherdespite the fact that the "coming together" has potential anti-competitive effects; it could not constitute a concerted practice because

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(21) WEA Filipacchi, SA J.O. 1972, L303/52
(22) Article 85(1) prohibits arrangements whose object or effect is to restrict competition

one view of a "concerted practice" is that it is a concept which demands that restrictive behaviour should actually be taking place. The requirement of implementation in the proof of a concerted practice stems from the fact that the "coordination" which constitutes the prohibited behaviour, since it cannot be evidenced in a contract, written or oral, "becomes apparent from the behaviour of the participants"(23). Evidence of its taking place is the major evidence of its existence - in some cases it may be the only evidence. Although evidence of a more direct nature may be available to substantiate market evidence, this on its own (usually opportunities during which information with potentially anti-competitive consequences, or the desirability of cooperation may have been discussed) will be inadequate proof. A concerted practice is really an alternative to an agreement as a way of avoiding detection, and if it can be detected before implementation then arguably it will satisfy the requirements of at least a gentlemen's agreement. Consequently, as the Advocate-General remarked in Dyestuffs, basic to the concept of a concerted practice is that the parties involved must in fact have taken action - it is inseparable from the anti-competitive effects it has on the Common Market(24). Thus, the precise location of the dividing line between "agreement" and "concerted practice" may mean the difference between prohibition and escape for a given instance of collusion.

Korah says that the distinction is unimportant because a concerted practice catches less formal agreements "once they have been implemented"(25). The addition of these words shows how

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(23) Case 48/69 Imperial Chemical Industries Ltd v EC Commission [1972] ECR 619
(24) *Ibid*, p671
(25) Korah, *EEC Competition Law and Practice*, 1986 (3rd ed.) p18

important it is that the distinction is made accurately and consistently in the cases where implementation does not occur.

The importance of the correct application of the distinction arguably manifests itself in a very recent Commission decision, Polypropylene[26]. The European polypropylene market was suffering from considerable excess capacity and fast falling prices, and when the Commission observed, *inter alia* a "follow the leader" pricing pattern it suspected an anti-competitive infringement of Article 85(1) to organise minimum market shares and prices. The facts of the alleged collusion are particularly complex, and the Commission viewed all the possible incidents in combination as a "continuing agreement". Some of the components of this agreement however clearly did not constitute an agreement - for instance, mere proposals on quotas. The Commission accepted this fact, yet on the other hand held measures such as the exchange of information to constitute an implied agreement to maintain market shares previously attained by their collusion.

If it is established that any or all of these measures were in fact implemented - or in the case of exchanges of information, acted upon, then there is no difficulty in charging the members to the "cartel" with anti-competitive behaviour contrary to Article 85(1). However, the facts of the polypropylene market were such that the parallel actions the Commission observed with respect to price changes are only contraversially the result of collusion - in which case the prohibition

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(26) Polypropylene 89/396/EEC

could apply only to the unimplemented "arrangement" . The Commission maintains that if the observed collusionary behaviour did not constitute an agreement, it certainly was a concerted practice. While an unimplemented agreement can be prohibited if the Commission is satisfied that its object is to restrict competition, a concerted practice is unable to exist simply on the basis of an intention which was not followed in practice. The key argument, it is submitted is that the signs of collusion in a concerted practice are so weak - deliberately so because the parties do not wish to be detected and therefore make their "decisions" spontaneously on the market - that the only real evidence of its existence lies in the market. Therefore if there was no actual anti-competitive behaviour then not only was the concerted practice not implemented but there was also no "plan". Alternatively, if we are to say a concerted practice is a cover for behaviour which is planned but which does not satisfy the requirements of an agreement, then a line of argument might be that a failure to "implement" denotes a change of policy. Had the intended cooperation been via an "agreement" it would have been terminated before being put into practice, and the Commission would have had no cause or desire to prohibit it. It would be illogical and grossly injust to penalise undertakings which have abandoned all intent to restrict competition but who cannot make a declaration to this effect owing to the informal nature of their intent.

However, when Article 85(1) states that it prohibits behaviour whose "*object* or effect" is to restrict competition it makes no distinction between agreements and concerted practices. It can be argued that while in most cases "non-agreed" collusive behaviour will only be

noted if it is put into effect - any collusion which *is* clearly seen and for which a definite anti-competitive intent has been established, is nonetheless an arrangement with potential effects. Arguably this may be illustrated by concerted practices concerning the exchange of information. In cases such as COBELPA(27) it is the actual exchange of information which is alleged to be the concerted practice(28). It cannot be said that the mutual transfer of sensitive information is an anti-competitive result until it is "acted upon", but it can be said with confidence that there is no requirement for "implementation" for the exchange of information to "distort competition". Thus in COBELPA the "concerted practices...resulted in the establishment of a system of solidarity and mutual influence designed to coordinate business activities"(29).

So in conclusion, even if the distinction between concerted practices and agreements does lie in the implementation, and even if it is applied accurately, in practice it may be of little effect to the outcome of the case where the collusion is itself an actual distortion(30) of market conditions. In effect the "concerted practice" to exchange information exists by virtue of its operation or impementation on the market.

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(27) COBELPA/VNP O.J. 1977, L242/10
(28) But see p39 *et sec.* for a discussion as to whether the information exchange did in fact constitute a concerted practice
(29) *Supra*, n.27, para.27
(30) Article 3(f) EEC professes the aim that competition should not be "distorted"

The *ratio* in WEA Filipacchi[31] and the concept of a concerted practice as "collusion in action" also have implications for the significance of the concern expressed at the begining of the chapter about potential abuse of the lower standard of proof required in the establishment of a concerted practice. The argumentsit raises (expressed above) illustrate that in some circumstances proof of an agreement will be far more straightforward. Documentary evidence of an agreement is adequate for the Commission's purposes (although obviously if it has anti-competitive effects the evidence is more compelling and the Commission may impose a heavier fine); if there is no such evidence the Commission must consider the possible existence of a concerted practice and satisfy itself that whatever market indications of collusion there are, these are in no way attributable to natural economic phenomena. This involves the additional investigation of economic analysis.

Of course an agreement too may be proved purely on the basis of evidence of its implementation if that is the only concrete proof of its existence. Normally, an active anti-competitiveness with no other evidence will lead to the conclusion that a concerted practice is being operated, but where it augments prior evidence of an agreement (but which alone was inadequate to prove an agreement), then it is an agreement which will be presumed. In BP Kemi[32] a written but unsigned agreement was incomplete proof of a meeting of minds because being unsigned, the agreement might not have been finally agreed to by all the parties.

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(31) *Supra*, n.21
(32) BP Kemi/DDSF O.J. 1979, L286/32

grounds that actual implementation of it proved a genuine and actual agreement to collude. Naturally there would be no necessity of implementation for a verbal cooperation to constitute a proven agreement because the nature and content of the communication itself would provide sufficient proof of agreement. Unlike in the case of a written agreement which is lacking an essential element without signatures, it is complete and final already.

A final brief indication of how far the term agreement really can stretch might best be gained from the following case illustrations: in Papiers de Peints Belguique[33] it was held that there would be an agreement between undertakings whenever a customer accepted standard conditions of sale (approved by all the parties to the agreement) as governing his purchase, on the grounds that they are terms of sale agreements; and in WEA Filipacchi[34], the Commission decided that an agreement could arise when one party sent a receipt of a circular by retaining a copy for itself.

"Concerted practices" under Article 85(1)

The controversies surrounding the definition of concerted practices and the manner in which "collusion" may be proved will be extensively dealt with in Chapter Two, but for the purpose of providing a background to an

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(33) Case 73/74 Groupement des fabricants de papiers peints de Belgique v EC Commission [1975] ECR 1491
(34) *Supra*. n.21

analysis of the Commission's consistency it is sufficient to set down some utterances of the Commission or Court on the matter.

Unlike with the term "agreement", the analyst has an authoritative definition from the Court from which to consider how the Commission has treated the term "concerted practice" in its practical application; to enable him to assess how its ambit may have developed. The first crucial case in which the Court considered the precise distinction between agreements and concerted practices was Dyestuffs [35]. The Advocate-General, reviewed the question previously raised by Advocate-General Gand in Quinine[36], as to whether an unsigned document headed "gentlemen's agreement" ought to be seen as evidence of a concerted practice. In that case Advocate-General Gand concluded that this was not viable, but that was only because this particular gentlemen's agreement was modelled so closely on the proper agreement that the two could not be disconnected. This illustrates just how difficult it is to determine the exact dividing line between an agreement and a concerted practice. The Court declared that because Article 85 makes a distinction between agreements, decisions and concerted practices, a concerted practice obviously must bring within Article 85(1)'s purview "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitues practical cooperation between them for the risks of competition"[37]. The judgement of the Court tended to explain a concerted practice in terms of "agreement" pointing

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(35) *Supra*, n.23,
(36) *Supra*, n.18,
(37) *Supra*, n.23, para.64

differences between them, but in doing so implying that the two forms of conduct rest on the same plane: a concerted practice is a form of "coordination" which is not quite "an agreement properly so called", and it does not have "*all* the elements of a contract"(38), but this implies that it must have some of those elements and logically, since the obvious differences relate to form, the similarities ought to relate to " intention".

The Sugar cases in 1973, reiterating the judgement in Dyestuffs, clarified the point that a "plan" of any sorts is not an essential element for the existence of a concerted practice, but at the same time repeated that this did not alter the legality of the situation in which a small number of competitors on a concentrated market adopt a policy taking "into account...the present or foreseeable conduct of [their] competitors"(39). All that is required by way of arrangement is "any direct or indirect contact between...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."(40). With such limited contact required, a concerted practice does not require the removal of *all* doubt about the intended future conduct of competitors. If it did, its definition would be senselessly close to the type of gentlemen's agreement found in

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(38) *Supra*, n.23, paras.64, 65
(39) *Supra*, n.23, para.118
(40) Cases 40-48, 50, 54-56, 111, 113-14/73 Suiker Unie (Cooperative Verenigning) VA et al v EC Commission [1975] ECR 1663, para.174

Quinine, and even to those gentlemen's agreements made without a provision for arbitration.

While it is to be hoped that the above has shown that an agreement and a concerted practice are theoretically distinct, when applied to facts, their respective definitions may be inadequately formulated to cater for every subtelty of behaviour potentially present on the market place. There may be a range of behaviour in between the vaguest gentlemen's agreement and the tightest concerted practice as defined by the Commission. For instance, how would the Commission regard cooperative conduct which did not originally arise from an agreement, but which has continued for so long in exactly the same pattern, so that there is as much certainty as to each other's future acts as if there had been an agreement? This question becomes even more pertinent if the parties subsequently acknowledge their cooperation. Perhaps the equivalent provisions of the Competition Law of the UK may serve to fill some of the gaps which the indeterminite definitions of agreement and concerted practice leave.

The Situation in the UK

Section 1 of the 1957 Restrictive Trade Practices Act 1957, as amended in 1972 makes provision only against "agreements". Unlike its EEC counterpart, the Act contains a definition section in which an agreement is said to include "any agreement or arrangement, whether or not it is intended to be enforceable by legal proceedings." Thus the inference

from section 43 clearly is that gentlemen's agreements are within the Act's scope, and the expression "any arrangement" implies that within the spectrum oral undertakings, binding decisions of trade associations, and recommendations made in circulars and memoranda must be catered for. While section 43 expresses the scope of section 1 in broad terms, in the absence of a provision against concerted practices or other collusive behaviour, its thrust, *as stated by the Act*, against anti-competitive practices is weaker than that of Article 85(1). In the application of the provision to facts however, the term "arrangement" has been given a liberal meaning.

The first case in which the Restrictive Practices Court truly had to consider the possibility of an extended meaning to "arrangement" was Austin Motor Vehicle Distribution Scheme[41]. Austin set up identical bi-partite agreements between itself and all its dealers individually in which distribution channels were specified. While these were clear of the Act's clutches because paragraph 2 of Schedule 3 exempts individual vertical agreements, their effect was anti-competitive, in effect, creating territorial protection for the individual distributors. Moreover, it was quite apparent that the agreements were interdependent in that none of the dealers would have bound themselves to it unless they were confident that the others would do the same. Therefore it was argued before the Court that in reality there was an "arrangement", albeit tacit, between the dealers *inter se*. In this case, Upjohn J defined "arrangement" as the acceptance of "mutual rights and

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(41) Austin Motor-Car Co.'s Ltd.'s Agreement L.R. 1 R.P. 6

obligations"[42], which is really no more than the gentlemen's agreement strain of Article 85(1) agreements.

The term was reconsidered in British Basic Slag[43], a case whose salient facts raised the same question: could an "arrangement" be found among parties who had entered into individual yet identical vertical agreements with the same entity? The Court of Appeal held unanimously that a horizontal agreement could and did exist between the manufacturers. This judgement meant that the terms "agreement" and "arrangement" no longer required the creation of mutual rights and obligations, but depended on inferences raised from intercommunication and observed conduct:

"It is sufficient to constitue an arrangement between A and B if

(i) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way;

(ii) such representation is communicated to B, who has knowledge that A so expected and intended, and;

(iii) such representation, or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way.[44]

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(42) *Ibid*, p19
(43) Re British Basic Slag Ltd.'s Application (1963) L.R. 4 R.P. 116
(44) *Ibid*, pp154-55, *per* Diplock, LJ

The new notion of an agreement was reinforced in Tyre Mileage[45] in which the Court took the view that the apparently independent decisions of each member was explicable only by recognition that all the members were acting in the same manner.

The *ratio* is practically identical to the justifications for a finding of a concerted practice in some EEC decisions - that where parallel conduct is unaccoutable by prevailing economic conditions, it can only be explained by concertation. The difference lies in the fact that in the UK the Court seems to have to justify finding an implied or constructive arrangement from the facts, whereas intercommunication as a concept on its own is sufficient for EEC purposes if it leads to anti-competitive results; perhaps more crucially, the "arrangement" in all these UK cases has been construed from an existing vertical agreement common to all the parties. Therefore, it is only in these limited circumstances that an arrangement of the style of a concerted practice will be found by the Restrictive Practices Court. In the EEC the reverse tends to be the case; a concerted practice is usually inferred from initial evidence of parallel behaviour after which the Commission may subsequently investigate for evidence of contact (but not of an agreement) to substantiate its presumptions. The most recent English case on the matter, Fisher[46] in which the Court seemed to revert to a more formal notion of "agreement" illustrates this. Although the very wide definition of arrangement was approved in this case, it was limited to the particular facts of British Basic Slag and similar cases, the

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(45) Re Tyre Manufacturers' Conference's Agreement L.R. 6 R.P. 49
(46) Fisher v National Greyhound Racing Cluo [1982] ICR 71

Court maintaining that the decision in Austin had never been doubted on its facts. It was held that in absence of evidence of direct dealing between the parties (in British Basic Slag, for example, the members to the inferred horizontal arrangement had actually established the institution with which the vertical agreements were made) an agreement could not be inferred. Thus, while not casting doubt on the role which inferences may play in the creation of a presumption of agreement, the Court severely limited the situations from which an agreement may be inferred.

The conclusion is that an "agreement" for the purposes of the RTPA may, for certain circumstances as stated above, be defined in the same way as a concerted practice in EEC law, ie., it covers cooperation without the necessity for an agreement properly so-called. If the reasoning for this wide definition of a "UK agreement" is deemed valid, is there any reason why the same definition should not apply to an "agreement" for Article 85(1) purposes? With the limitation imposed on this wide interpretation of arrangement, this interpretation would not make concerted practices as a concept redundant. They would still fill the lacuna which sole use of the concept "agreement" would create by including in their ambit anti-competitive cooperation which was not based on an arrangement prior to the actual market activity. While it is feasible and perhaps more realistic to allow behaviour which in non-legal terms is "agreed upon" to constitute an "agreement" for Article 85(1) purposes, it is submitted that equating "agreement" with "arrangement" under the RTPA would not solve the major problem alluded to in this discussion, i.e., that a very vague arrangement which did not satisfy the

formal requirments of agreement and which was not implemented will escape prohibition as there is no indication in the judgements or even in Lord Diplock's generous *dictum* that the "arrangement" would be proven if not put into practice.

The cases which follow are discussed with specific reference to the distinction between agreements and concerted practices, and will seek to discover if the cumulative definitions in Dyestuffs[47] and Sugar[48] of a concerted practice have been applied consistently by the Commission and whether the "coordinated course of action" in Dyestuffs in practice is broader than collusion as the phrase itself suggests.

Flat Glass[49]

The anti-competitive evidence in this case was constituted by identical published and unpublished prices, identical or very similar customer ratings, market sharing, and exchanges of sales figures - all of which took place in the Benelux glass market. The Commission dismissed as inadequate defences that the cooperation had been either unnecessary owing to extraneous factors which brought about the same market consequences anyway, or that the price lists had not been observed, and found against the manufacturers for applying agreements and concerted practices. In its ultimate decision, the Commission does not specify which of these practices constitutes agreements and which are concerted practices; nor is any such distinction made within the rest of the report. It discusses the evidence which indicates the existence of collusion, but it does not specify strongly enough what form the concertation takes for each of the types and incidents of anti-

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(47) *Supra*, n.23
(48) *Supra*, n.40
(49) Flat Glass O.J. 1984 , L212/13

competitive conduct. Admittedly, it refers on occasion to the parties having "agreed" or that they had "agreed or at least colluded"(50), or simply that they "concerted their policies"(51). But what do these expressions when used together to describe a set of practices really mean? An initial impression might be that the Commission is unsure of what it is dealing with and unprepared to commit itself to finding one or the other of an agreement or concerted practice for any of the items of conduct. However, a closer reading of the case in its entirity suggests that this is not necessarily so.

Each of the different "types" of anti-competitive behaviour - price identity, market sharing, and information exchange - are treated individually. With respect to the identical published price lists the Commission cites them as blatent documentary - although indirect - evidence of collusion. There is no hint of there having been a contract, a gentlemen's agreement nor even a meeting of minds in this evidence or in the Commission's minimal account of it. Thus, cooperation is only an inference or presumption - and given the role of inferences and presumptions in the key concerted practices cases, and the predominance of clear direct evidence in cases where an agreement has been found, the likelihood is that the evidence can show only a concerted practice.

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(50) *Ibid*, para.17
(51) *Supra*, n.49, para.41

Evidence of a more direct nature however is available regarding the identity of confidential unpublished price lists. Obviously the Commission was able to point to the lists in the companies' individual files illustrating the identity, but it also had at its disposal a document of 22 November 1979 referring to a joint-meeting between Glaverbel and Glaciers de Saint-Roch, (two of the producers), at which customer ratings and prices for the Belgian market were discussed; and a document of 20 September 1979 concerning a meeting about prices and classification of customers by importance in The Netherlands. The Commission does not say whether these prove or indicate an agreement or a concerted practice, but the evidence does not suggest that an agreement was actually made between the firms. On the contrary, these meetings would constitute model evidence of merely the opportunity for concertation in which case a concerted practice is more likely to be inferred.

Yet the Commission says that the same document of 22 Novemeber 1979 "proves that the customer ratings lists were drawn up together and also indicates that the prices and customer lists were considered part of the same problem which had to be dealt with simultaneously"(52). If identical lists are "drawn up *together*" does this mean that there was an agreement to employ the same ratings? If so, the fact that prices were treated in the same overall topic suggests that identical published and confidential price lists too were the consequence of an agreement. Or could the lists have been made at the same time but independently, and therefore is there only an *inference* of collusion? If this is the case,

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(52) *Supra*, n.49, para.9

then on the criterion as above (that where there is only an inference of collusion the only kind that may legitimately be inferred is a concerted practice) the conclusion must be that there was a concerted practice to apply uniform customer ratings.

It is concerning "prices and other terms" that the strongest suggestion of the Commission's finding an actual "agreement" presents itself. The Commission mentions "a coordination meeting [between the parties]...to agree to prices"(53) in the Benelux countries, and a Saint Roch internal memorandum accounting a telephone call between Saint Roch and Glaverbel which "summarised what had been agreed on prices and discounts for window glass"(54). Admittedly reference is also made to incidents which suggest only a very vague sort of cooperation, for example, that there were meetings to merely discuss the relevant topics. Yet the fact that the Commission mentions on more than one occasion that there was proof that the parties concerned actually "agreed" on certain aspects of their pricing policy indicates that these areas might constitute the "agreements" quoted in the Commission's decision at the end of the report.

The same might be said to apply to the collusion over market sharing, the Commission citing, *inter alia* a Saint-Roch document of 19 March 1980 in which it was said that "the two companies have agreed...to maintain the status quo..."(55). Yet still the Commission does not

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(53) *Supra*, n.49, para.11
(54) *Supra*, n.49, para.12
(55) *Supra*, n.49, para.29

definitely say there was an "agreement" to do so and it is only in the final decision that we are aware that the Commission perceives "agreements" to exist. It is up to the reader to decide what are the agreements and concerted practices on the basis of a thorough examination of the case, and the conclusion is that judging by the way in which the Commission referred to the various items of evidence (for instance, saying that the parties had "agreed" on certain policies), the identity of customer ratings and market sharing and possibly some "prices and other terms" may be the results of agreements; but the published and confidential price lists and exchanges of information can only be concerted practices. On this interpretation of the Commission's treatment of the facts the Commission is justified in declaring both agreements and concerted practices to be prohibited; but it is not excused for failing to make clear what elements of the parties' behaviour constituted which particular forms of behaviour, and why. However, the analysis does at least clear the Commission of the charge of inconsistency within the case which may at first sight be apparent owing to its own omissions.

Of course these interpretations of the Commission's analysis may be incorrect; perhaps the Commission had a reason for not labelling in detail the behaviour under its scrutiny. While there may be evidence that the parties have "agreed" on a proposal, this might not constitute the same thing as an "agreement". For instance, in Dyestuffs[56], the parties knew what their common purpose was and accepted each other's "individual" pricing policies and so one might say that they had a

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(56) *Supra*, n.23

meeting of minds and that they agreed to follow a particular policy at one of their meetings. But because there was no document or other evidence specifying this, the Court considered that the Commission was entitled to infer a concerted practice at the very most. In Flat Glass, the Commission presents no evidence of even a gentlemen's agreement and perhaps while it strongly suspects an agreed programme, it cannot prove it. Perhaps this then provides an extension to the definition of a concerted practice - not only does it cover the situation in which an agreement has not been included, it may operate where an agreement has been reached but cannot be proved. This might account for the Commission's caution in pin-pointing any particular practice as an agreement, and at the same time, its reluctance to rely solely on a concerted practice charge. This view that an agreement could not be proved is reinforced by the fact that the situations in which the Commission was verging on labelling an agreement were only small incidents which as a group make up the general concertation on prices. One or two instances of agreement in a network of collusion ought not sensibly to govern the nature of collusion with respect to the whole area of prices.

Either of these conclusions, it is submitted, is a plausible explanation for the Commission's decision to label the behaviour as both agreements and concerted practices: both of them square with interpretations of traditional definitions and Commission practice; and either way the outcome of the case does not effect the adequate enforcement of competition law - all the cooperation was practically implemented on the market and there were no problems connected with the

Article 85(3) entitlements of parties to a concerted practice because there was no attempt to notify any of the behaviour. But neither explanation detracts from the conclusion that the Commission's decision is unclear in respect of what is an agreement and what is a a concerted practice, and that no attempt is made to explain the labelling that is offered.

COBELPA/VNP[57]

This is another case in which the number of separate anti-competitive practices involved, and the Commission's failure to categorically separate themcreate confusion over what form of anti-competitive conduct they constitute, or rather over what the Commission considers them to be - confusion which seems far greater than it in reality is, or certainly than it need be.

The particular items of behaviour with which this analysis is concerned are exchanges of information between Dutch and Belgian manufacturers of printing paper and stationery, the subject matter of which made the practice an anti-competitive act. Confusion regarding the Commission's treatment of the exchanges arises partly because the Commission saw them as two acts :

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(57) COBELPA/VNP O.J. 1977 L242/10

(i) a practice of information exchange which was notified to the Commission by COBELPA and VNP (respectively the Belgian and Dutch paper manufacturing federations), and

(ii) unnotified "specific cooperation which lasted for some time"[58], which the parties insisted were part and parcel of the practices notified.

Taking the exchanges of information relating to statistics and general data first, the mutual notification of prices and of general terms of sale was notified to the Commission actually as a concerted practice. When discussing the anti-competitive nature of these exchanges, the Commission at first referred to them merely as "practices"[59], and only as "concerted practices"[60] when quoting from the applicants own notification; later it states that "the organisation of an exchange of information on prices constituted an agreement having as its object the restriction and distribution of competition."[61]

Similarly parties were said to have "agreed"[62] to exchange certain monthly figures. These were the unnotified practices. Yet, in the same paragraph, when remarking that the nature of the data concerned pushed the exchange of it over the threshold of legal activity, the Commission refers to the practices as "concerted practices". This term is more in keeping with the words "specific cooperation" and "understanding" of paragraph 9, and with the nature of the practice when

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(58) *Ibid*, para.9
(59) *Supra*, n.57 para.6
(60) *Supra*, n.57 p11
(61) *Supra*, n.57 para.30
(62) *Supra*, n.57 para.27

viewed in the light of other concerted practice and agreement decisions. When stating that the parties "agreed" to exchange certain monthly figures, the Commission may simply have meant that in the ordinary sense of the word they reached a consensus. While previous case law has shown that a formal contract is not required for an "agreement" to exist, there is no evidence of anything less concrete than a gentlemen's agreement being the subject of the charge. If this is the lower limit to which an "agreement" can drop, there is no indication in the evidence as presented by the Commission that the requisite elements of an agreement were present and thus the first inference would be that the exchanges of information constituted a concerted practice. Perhaps it is inappropriate that every single word the Commission utters should be scrutinised and analysed for its ordinary or legal meaning. There is no "precedent" as such in Commission decisions (although of course it must conform to the judgements of the Court) and therefore any irregularity in its decision-making process is not irreversible. Moreover, it is not the Commission's function as it is of the Court, to explain in its Official Report in *minute* detail why and how a practice is prohibited. Its job is simply to decide the case according to the requirements of EEC Competition Law. For this reason what should count is its final decision. Thus a surface reading of the case suggests that the Commission draws a clear dividing line between the notified and unnotified practices, the former being an agreement and the latter constituting a concerted practice. But how can these exchanges of information constitute concerted practices when the notified practices (which do not appear to be radically different to the unnotified ones) were, so it seems, finally held to be "agreements"? The parties

themselves think it is identical behaviour, contesting that these exchanges came within the notification. Moreover, the Commission cites no evidence of the process by which the information exchange came about; whether for example it was the subject of formal contact and agreement or simply of a couple of incidents of indirect contact. Without evidence to show an agreement, any normal inference of anti-competitive behaviour would be that there is a concerted practice. Therefore to justify assuming an agreement, the Commission perhaps relies on the mere fact that the exchanges of information were notified which would give them the consistency of meeting of minds, a coherency and definiteness which might be absent in a concerted practice. If this is the criterion by which the Commission distinguishes between the two exchanges of information, and indeed by which it decides the existence of an agreement, it would seem to extend the definition of agreement beyond the gentlemen's agreement to the realms of an (unacknowledged) meeting of minds brought about by the simple exchange of information.

This may be welcomed as a move towards a more common sense definition of "agreement". But at the same time, the criticism which applied to the Commission's approach in Flat Glass[63] applies here: if it is going to categorise behaviour at all, the Commission should clearly state what elements of the observed conduct constitute the particular brands of labelling it adopts, and offer a full explanation of the criteria by which it has reached its decision. Thus, if a new definition of one of the terms thereby develops, this will be clear. It

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(63) *Supra*, n.49

must be conceded once more, however that in this case, neither the location of the dividing line between the two forms of behaviour, nor the explanation of it makes much practical significance to the outcome.

White Lead[64]

Unlike in the previous two cases, there is no confusion, real or imagined (brought about by the Commission's failure to fully explain its reasoning) in the Commission's decision; and while some alternative interpretation of the collusion which took place will be offered, it is not sought here to criticise the Commission's labelling. Rather, it is intended that this analysis will illustrate the type of case for which accurate labelliing is unimportant.

In its sub-heading under Section II, "The Applicability of Article 85(1)", the Commission refers to an agreement and concerted practices, the latter being a consequence of the terminated agreement. However, it was manifestly clear what the parties were aiming at by their original agreement. The white lead industry in Europe had been suffering from falling prices and it was the object of the agreements to avoid the exacerbation of this. Just because the final written agreement excludes Europe from its ambit, it does not mean that if in its practical operation the member states are not excluded, this practice must exclusively be the subject of a concerted practice. After all, the parties had once agreed to act in Europe in a certain manner to

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(64) White Lead O.J. 1979, L21/16

their common benefit, and a piece of paper repudiating this practice so as to avoid prohibition after the entry of the three new member states can hardly contradict what may have been an oral agreement or a consensus to a policy which in practice never really changed. I would suggest that the requisite commitment for an agreement is further evidenced in the Commission's allusion to the fact that the "parties themselves had earlier recognised and admitted that a notification system which did not cover deliveries within the common market would be useless"(65). The fact that the system was carried out to the letter illustrates that it was the subject of the old agreement. The Commission points out that the terminated agreement was operating in practice and that the likelihood of the same effects occurring spontaneously is nil. Thus there are grounds for inferring "at the very least a concerted practice"(66). However, in view of what has been said above, it is submitted that this is not so much evidence of the terminated agreement operating in practice as it is of the old agreement in reality never having been terminated in effect at all - only in form. Thus, it is submitted that the words "in practice" are superfluous and the proof of a written agreement in application is as concrete in this case as in any other decision in which the Commission has found an agreement. The question then arises, would it have been consistent with established definitions for the Commission to name the information exchange an agreement?

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(65) *Supra*, para.22
(66) *Supra*, n.64 para.21

In BP Kemi[67] an unsigned agreement was held nonetheless to be an agreement because it had been implemented and therefore proved in action. In White Lead we have the situation in reverse. The old agreement, clearly anti-competitive with respect to EEC countries was terminated and ostensibly replaced by a new one expressly excluding the member states from its ambit. Since in principal both actions have negative effects on the agreement, can the termination of an agreement be equated with the absence of signatures? Arguing by analagy the Commission would be entitled to say that actual impiementation is proof of the existence of the agreement. However, while this reasoning may seem plausible, there is no precedent (as far as a Commission decision can ever provide a precedent) for this specific situation and so the Commission was probably justified in exercising caution. If termination in form must be taken as termination in substance, then the exchange of European sales figures must be taken to be a phenomenon which arose on the basis of a mere mutual recognition that not to do so would be detrimental to them all. Thus the usual notion of a concerted practice as cooperation without the need for agreement is satisfied here, and so it is more applicable and less contraversial that the behaviour be called, if anything a concerted practice.

However, from the practical point of view of the satisfactory application of Article 85(1) an analysis would conclude that it is not necessary to label the behaviour as anything other than that which it patently and really was, ie., the old agreement continuing "to operate in

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(67) BP Kemi/DDSF O.J. 1979, L286/32

practice after its formal termination"[68] - which is in fact what the Commission did in Article I of its final decision. In the final analysis, rather than avoiding the complex issues of definition in the case, the Commission has perhaps reached the most apt solution. Thus, any controversy or criticism is avoided and the Commission has fulfilled its task of reviewing and controlling anti-competitive behaviour in this way just as effectively, and possibly more efficiently than if it had taken the trouble to solve all the potential problems of legal definition. Because the facts of the case remain exactly the same and have exactly the same result whichever interpretation is favoured the outcome remains unaltered.

Hasselblad[69]

The evidence on which the Commission established a concerted practice was comprised of market indications and several contacts between the parties in which the anti-competitive behaviour to be put into practice was discussed. Victor Hasselblad, the manufacturer of Hasselblad cameras and equipment, and a number of his sole-distributors in the member states were concerned about the increasing problem of parallel imports and there was a spate of correspondence among them all in which those suffering from the effects of parallel imports expressd their distress, requiring that all steps should be taken to stop the practice, and in which the

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(68) *Supra*, n.64, p23
(69) Hasselblad O.J. 1982, L161/18

recipients, on the whole pledged to do their best. At about the same time, the incidence of parallel importing waned, strongly suggesting that the distributors had indeed acted in concert in response to the above-mentioned approaches.

Hasselblad illustrates two points in the Commission's favour. Firstly, that it is quite capable of dealing consistently with behaviour as it sets down the facts and analysis within the decision (there is never any suggestion in the report that the collusion is anything other than a concerted practice); and secondly, that it can apply the same criteria by which it labels anti-competitive conduct from case to case. It is not necessary to refer to the Dyestuffs judgement to know that the function of a concerted practice is to cater for the situation in which there is no agreement. The case does however clarify that the normal situation which it will serve is that where parallel conduct which cannot be explained by spontaneous economic factors is observed on the market place, and either an agreement has not been concluded or there is no evidence of one, but there is evidence of contact between the parties at which concertation might have taken place. The two types of evidence complement and reinforce one another and entitle the Commission to assume the existence of collusion. Since an agreement cannot be proven, but collusion of some sort can be, the label which is attributed to the behaviour is a concerted practice. This pattern is accurately reflected in Hasselblad.

Having explained the similarity of the pattern of behaviour in Hasselblad with Dyestuffs, viewed from another angle the actual "content"

of behaviour - the contacts - may lead to some doubt about the correctness of the Commission's choice. While it is true that no actual "agreement" is witnessed, the Commission labelled the conduct merely a "concerted practice", despite the fact that it points out that Victor Hasselblad "made clear"(70) to its sole distributors its policy of protection for them against parallel imports, and that he "expressly prohibited"(71) Ilford from exporting. More strikingly, Ilford gave Victor Hasselblad "oral and written commitment that it would comply with the ban"(72) If the purpose of concerted practice legislation is to seal the gap between an agreement and other cooperation where this sort of "commitment" is clearly absent, then should not cooperation described in such strong terms as this amount to an agreement, in spite of the absence of the formality or acknowledgement usually associated with an agreement or gentlemen's agreement?

This argument may find some support in a brief consideration of UK law. It was explained earlier that widely though section 43 defines the "agreement" of section 1 of the RTPA, the term still does not cover the situations conceived by a concerted practice. Thus, anything which constitutes an agreement for the purposes of the RTPA stands a good chance of being an agreement in the application of Article 85(1). In effect, the parties in Hasselblad were found to have colluded because they had been in touch with one another and with their maunfacturer (who in fact issued the complaints on the instigation of one of his distributors) about the subject of parallel imports. Because the sole

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(70) *Ibid*, para.43
(71) *Ibid*
(72) *Supra*, n.69, para.44

distributors had individually conceded to Victor Hasselblad's requests, a horizontal arrangement was found among the parties who in fact had separate vertical arrangements with Victor Hasselblad. This is almost identical to the situation in British Basic Slag[73] and Tyre Mileage [74] in which an "arrangement" ("agreement") among the firms was implied between them on the basis that they had been in contact with one another through the medium of the entity with whom they all had vertical agreements. An "arrangement" for RTPA purposes means "agreement" and so there should be no reason why the same interpretation could not apply in EEC law, particularly in the Hasselblad case where the evidence of actual agreement (horizontal consensus based on actual communication between the parties themselves, as well as with Victor Hasselblad) rather than of an implied one (which was the case in British Basic Slag and Tyre Mileage) is so much stronger.

Thus, while the Commission stood by criteria which have been applied in the past by which a concerted practice exists and by which an agreement does not , it is submitted that the distinction currently drawn between the two concepts which seems to lie in the requirement of some formality, in the sense of an *acknowledgement* of the existence of an "agreement" is an artificial one; that an agreement which the parties attempt to conceal by omitting the "formal" element is just as much an agreement. In saying that it is unnecessary to determine whether the export ban in fact "amounts to an agreement" because it is sufficiently decisive that the parties "combined to apply a policy of market

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(73) *Supra*, n.43
(74) *Supra*, n.45

compartmentalisation"(75), the Commission is aware of this arbitrariness and of the fact that it might be condemning what is really an agreement as a concerted practice. What this statement shows, however, is that by admitting its inattention to the question of distinction, the Commission is unpeturbed by it and clearly does not think the issue is at all relevant to the outcome of the case.

In addition to the overt attempt to stop parallel imports, the Commission condemned as anti-competitive a series of exchanges of information on price lists and terms of business between Victor Hasselblad and his sole-distributors. Briefly, these took place over several years, not as part of an agreement (or more accurately, not an overt one which provided a regular basis for the information exchange) but on the occasions when Victor Hasselblad asked individual sole distributors for information which he subsequently circulated among his other sole distributors, or when the sole distributors themselves wrote directly to one another for information.

Although by positively responding to requests, the distributors of Hasselblad cameras clearly "agreed" to exchange information, indications from previous cases discussed suggest that they did not actually have "agreements" for Article 85(1) purposes. The exchanges of information took place on an individual and *ad hoc* basis. Perhaps because they were not part of a specified overall structure to eliminate competition they could not constitute an agreement as such. Certainly, the Commission does not refer to any agreements, but nor does it mention a concerted practice, except in its final decision when it condemns "the

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(75) *Supra*, n.69 para.46

concerted practice...to prevent, limit or discourage exports."[76] No specific reference is made to the exchanges of information, but perhaps because the Commission saw them as being designed precisely to remove any incentive for "pirate exports" they are included with the more directly anti-competitive behaviour in one large concerted practice for this overall purpose.

A more probable account of the Commission's view may be seen in the plain statement that they are an "ancillary device to ensure market partitioning"[77]. Perhaps this might be read to mean that the exchanges of information did not constitute a concerted practice, but that they were merely the means by which an effective concerted practice - the actual market partitioning - could take place. This would shed some light on the nature of the role of information exchange as an anti-competitive concept; and also of concerted practices in general - that a concerted practice exists only in the actual or attempted anti-competitive conduct and not in the preliminaries. But this would mean that collusion alone is not a concerted practice. This is clearly incorrect because Article 85(1) behaviour need only have potential anti-competitive effects to be prohibited[78], unless of course we accept the proposition at the start of this chapter that a concerted practice can only exist in the performance of it, and that the potential anti-competitive effects refers to those which exist after this point. Whatever wider consequences the Commission's statement is interpreted to have, one thing is uncontradictable: however this or any other incident

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(76) *Supra*, n.69 para.33
(77) *Supra*, n.69 para.49
(78) n.22, *supra*

of information exchange it is labelled, is its contribution towards the fulfilment or attempted fulfilment of a restrictive practice and not its particular form that makes it an offence to EEC Competition Law. This factor means it can be justifiably and legally prohibited under Article 85(1), however it is labelled.

Vegetable Parchment[79]

While in this case the Commission referred to the anti-competitive conduct as a concerted practice in its discussion of the facts, the legal analysis, and in the final authoratitive decision it is worthwhile stating that the Commission remarks that the parties "agreed"[80] to do the prohibited thing - that was to supply Wiggins Teape, a UK producer, with vegetable parchment to the exclusion of all other producers in the UK so as to enable Wiggins Teape to reserve the entire British and Irish markets for itself. The evidence on which the Commission relies to prove collusion is a letter which Wiggins Teape sent to its customers ensuring that orders would be fulfilled by virtue of Continental suppliers having agreed to fully meet British demand. In addition, a noticeable absence of European vegetable parchment from elsewhere on the British market was seen to "confirm"[81] that from May 1971 until December 1974 there was a concerted practice between Wiggins Teape and Continental members of GVPA. In having at its disposal only market evidence and indirect written evidence of contact between the parties,

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(79) Vegetable Parchment O.J. 1978, L70/54
(80) *Ibid*, para.56
(81) *Supra*, n.80 para.59

the Commission used traditional methods to prove a concerted practice and there is no possible argument (as in the two previous cases) that there is any proof of an agreement. The Commission might be accused of inconsistency by using the word "agreed" to describe a situation which for legal purposes was not an agreement. On the other hand, the occurence of this "mistake" which is present in the cases dicussed earlier at least indicates a clear policy to the effect that something "agreed" does not mean the same thing as "an agreement".

BPCL/ICI[82]

The facts of BPCL/ICI and the discussion which they provoke are almost identical to those in White Lead. Again, the Commission's arguments are consistent within the case itself, and the way in which it labels the conduct concerned does not contradict traditional definitions or its own previous practice (although it is true that the Commission does not take pains to explain why particular aspects of the behaviour constitute the particular forms of anti-competitive conduct branded on them). However, although in conformity with previous decisions there are reasons why the behaviour might qualify for different labelling, and as with White Lead, these find credence in the fact that the alleged concerted practices have their roots in an agreement - a phenomenon that is not rare in concerted practices cases.

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(82) BPCL/ICI O.J. 1984, L212/1

In 1983 several agreements between BPCL/ICI for the rationalization of the petrochemical industry with respect to low density polyethylene and polyvinyl chloride (hereinafter referred to as LDPE and PVC respectively) were notified to the Commission. In view of the decline in the petrochemical industry, and the nature of the rationalization process, the Commission found the agreements eligible for Article 85(3) exemption, a fact which like the tag "agreement" is not contested by this discussion. Of more concern are the "concerted practices" to transfer and close down plants which were not provided for in the agreement, but which served the same purpose as the projects in the agreements, namely the specialization of LDPE and PVC production. On first reading it seems that the Commission's only option would be to attribute these plant exchanges to a concerted practice, since there was no sign of even an acknowledged agreement of the gentlemen's type as in other cases where agreements have been, or might have been found - nor even evidence of verbal or written communication in which the subsequent actions would be referred to, as was the case in White Lead. The Commission merely had evidence of what actually happened on the market, and since it rejected arguments that the closures were the inevitable consequence of the industry-wide excess capacity and the firms' individual long-term strategies to overcome the problem as inadequate, it could only infer that collusion of the nature of a concerted practice was the cause. However, although Dyestuffs shows us that market evidence alone may be sufficient evidence of a concerted practice, where there is no alternative explanation for the behaviour, the Commission substantiates its inference with direct evidence of communication between the firms, the only available evidence of this sort in BPCL being the

original agreements. But if this can reinforce the evidence of a concerted practice, being an agreement itself it also ought to be sufficient to prove that the additional closures were part of an agreement - that very agreement. The Commission itself acknowledges that the closures were an "extension" to the written agreements, having the effect of continuing and complementing the work of the agreement, that is, an immediate specialization of production of PVC and LDPE in the UK. Moreover, if the Commission can say that the official agreements had an attached "implied obligation not to compete"(83), it would also be legitimate to assume that there was also an implied obligation to continue the specialization process by further plant closures - which in effect, amounts to fulfilling the obligation not to compete. Thus, it may be said that the additional closures were the result of an indisputable consensus and the implied terms of an agreement, and as such, were part of that original agreement as opposed to the result of a new concerted practice. And as the Commission itself pointed out, the agreements and associated closures should be seen as a whole, the final result of which is equivalent to both a production and specialization agreement.

Perhaps once more the Commission has perceived the essentials of the behaviour: that the crucial nature of the behaviour, both in the execution of the agreement and the concerted practices, is not its form but its effect. This is said with particular reference to the proposition that the location of the distinction between agreements and concerted practices has consequences for the possibility of exemption for

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(83) *Ibid*, para.26.4

anti-competitive behaviour with beneficial effects. Rationalization processes which were at first referred to as "concerted practices" and subsequently as "agreements" were exempted from prohibition under Article 85(3) notwithstanding the fact that they were not notified. It would be too contentious however to infer that in any case in which a concerted practice (which by its constitution is incapable of being the subject of notification) has sufficient merit, the Commission would waive the procedural requirment to grant an exemption, but nonetheless this case does seem to cotradict the proposition that a concerted practice cannot be notified and that any anti-competitive act, whatever its form, should be notified to gain the benefits of exemption.

Summary

The preceding case analyses was motivated by an *initial* impression from decisions of the Commission that the Commission either has no consistent criteria by which it defines agreements and concerted practices when it has to apply these terms to facts, or at the very least, that if it does possess criteria for this purpose it fails to utilise them with any great regularity. However, the investigation in the earlier part of this work into the origins of the two terms and the subsequent analysis has shown that definitive criteria do exist and that in the main, particularly when it has been faced with behaviour which either clearly constitutes an agreement or alternatively a concerted practice (ie., where conduct does not verge on the border), the Commission has identified the behaviour accurately and developed the respective definitions in accordance with the root definitions as new facts arise (for example when it held that an unsigned written agreement was nonetheless an 'agreement' if implemented in BP Kemi(84)). Moreover, a thorough examination reveals that where anti-competitive behaviour lies around the border between agreements and concerted practices Commission decision making in the labelling of that conduct is on the whole consistent. What this analysis has illustrated to the criticism of the Commission is that in many situations where it reaches a conclusion which is fully consistent with established criteria, it does not label its behaviour consistently throughout the case and the

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(84) *Supra*, n.68

reader is only truly sure of the Commission's perception of the nature of the behaviour at the very end of the report when it issues its final decision. This applies particulary in cases where there are several elements to the anti-competitive behaviour and where those elements are a combination of concerted practices and agreements. Moreover, in these cases, it does not take the trouble to explain fully the means by which it reached its decision - why one particular item of conduct constitutes an agreement and why another does not quite come up to that standard.

It is these factors in the Commission's decision-making which give rise to confusion and allegations of inconsistency. A careful reading of its decisions however, indicates that on the whole the Commission is a rational and consistent assessor of fact. Furthermore, decisions such as White Lead(85) and Hasselblad(86) illustrate that rather than creating unnecessary confusion by not consistently labelling a particular item of conduct as one or other of the two forms of anti-competitive acts throughout the case, but referring to it instead in ordinary non-legal terms, the Commission avoids ambiguity in contentious cases by deliberately refraining from the steadfast use of precise labels.

Criticism, it is submitted, is however deserved in that where the Commission does adopt this approach of using ordinary terms rather than legal ones, it should make this clear. Similarly, where the conduct concerened is inextricably linked with a previous agreement and the

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(85) *Supra*, n.64
(86) *Supra*, n.69

various items of behaviour in the charge simply overlap the Commission should point out the difficulty of its task of separating the various elements and provide as full an explanation as possible as to which parts constitute what practices and as to the criteria on which it reached its decision.

The Polypropylene case(87) shows that the correct application of the distinction between the two terms can mean the difference between prohibition and dismissal of a case in practice as well as in theory. But it is argued here that if the distinction in theory lies in the requirement of implementation for a concerted practice, then if the Commission is able to observe acts of collusion which are not implemented it is entitled to infer that it is a gentlemen's agreement and therefore take action against it because of its anti-competitive intent. Alternatively, it may fail to apply the theoretical distinction and charge the "arrangement" as an unimplemented anti-competitive concerted practice. It is submitted that one or the other of these courses is taken in information exchange cases, and that were the Commission unable to adopt one of these routes the objectives of EEC policy by which "competition in the commom market is not distorted"(88) so as to facilitate the establishment of a common market would stand to be defeated. In the case of agreements the Commission is not obliged to wait until the stage where the only steps which can be taken are remedial, and it is only logical that it should be allowed to prevent

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(87) Polypropylene 86/398/EEC
(88)Article 3(f) EEC

anti-competitive collusion of other sorts before it can inflict harm on the common market. Fortunately the Commission has not met with this situation often because any collusion which can be identified before implementation is likely to statisfy the requirements of an agreement.

However, this case does not defeat the conclusion of the analysis that on the whole, any inconsistency within the Commission's application of the two terms to facts is rarely of any practical significance to the outcome of the case. Equally, however, the proposition that for the sake of legal certainty and avoidance of abuse the distinction between concerted practices and agreements should be made clear also remains true.

CHAPTER TWO

THE REQUIREMENT OF A *MENS REA* IN THE OPERATION OF A CONCERTED PRACTICE

Chapter Two

The Requirement of a *mens rea* in the Operation of a Concerted Practice

Chapter One has already dealt with the nature of a concerted practice in so far as it compares with that of an agreement. The analysis also considered the respective evidential chracteristics of the two concepts. The purpose of this chapter is to provide a more critical assessment of the definition ascribed by the Court to a concerted practice and while this necessarily involves some duplication of the discussion in the previous chapter, it aims more specifically to contemplate the real implications of the Court's decision for the requirement of a motive in the proof of a concerted practice.

The first case in which the Court gave a detailed consideration of the concept of a concerted practice - both in terms of definition and the behaviour this definition covered in practice, and of the evidential requirements to prove it was Dyestuffs[1]. On the basis of information given to it by various trade bodies in several member states, the Commission began investigations into the dyestuffs industry and dicovered that between 7-20 January 1964, there had been a 15% price increase on most aniline dyes in Belgium, Luxembourg, Italy and the Netherlands. On 1st January 1965 this increase was extended to Germany, and subsequently nearly all the manufacturers made a uniform 10% increase in their prices.

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(1) Case 48/69 Imperial Chemical Industries v EC Commission [1972] ECR 619

The next stage was on 16th October 1967 when prices rose uniformly by 8% in most dyestuffs industries in Belgium, Germany, Luxembourg and Holland, while in France the increase was 12%. In Italy the manufacturers made no alteration to their prices.

On these facts, the Commission imposed fines on eleven manufacturers, charging them with having carried out concerted practices to cause uniform and simultaneous price increases throughout the Common Market. In the Court of Justice where an appeal was heard, some significant comments were made on the scope of a "concerted practice". In response to the applicants' claims, the Commission argued that a concerted practice did not necessarily involve the drawing up of a common plan with a view to adopting a certain mode of behaviour, but that it was sufficient that the parties to it should have informed one another of their intentions so as to enable them all to pursue their respective policies in reliance that their competitors would act in a way not incompatible with and detrimental to it(2).

The Court implicitly supported the Commission's interpretation as it gave a detailed statement as to what a concerted practice consisted of. It is "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition"(3). Turning to the question of the evidence,

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(2) *Ibid*, p643
(3) *Supra*, n.1 para.64

it explained how the nature of the concept determined the way in which it manifests itself. The prohibited behaviour, since it cannot be evidenced in a contract, written or oral, "becomes apparent from the behaviour of the participants"[4].

The motivation of this definition would seem to be that the behaviour of the parties creates a "safe" background for them in which to act by virtue of the fact that doubt about each others' intended behaviour is removed; but more essential perhaps, is the fact that they are each aware of what they are doing and of the object of their actions. The offence of taking part in a concerted practice requires some sort of *mens rea*. It is submitted that this can be deduced partly from the fact that the judgement of the Court tended to explain a concerted practice in terms of "agreement" and "contract"[5], the only possible common denominator between the forms of behaviour being the requirement of some degree of consensus.

It is interesting to note the Advocate-General's reference to United States law as a guide to delineating the concept of a concerted practice. He sees the origin of a concerted practice as lying in the US "concerted action" which involve several undertakings "all working for a common purpose"[6].

This notion of common objective also exists in the Court's definition, that objective being to replace the risks of competition with

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(4) *Supra*, n.1 para.65
(5) *Supra*, n.1 paras.64, 65
(6) US v Hamilton Watch Co., and US v Elgin National Watch Co. (DC NY 1942) 47F, Supp.524

cooperation. However, Advocate-General Mayras takes the parallel further and spotlights the insistence of American case law "on the necessity of a common plan"(7). Although the Court's actual judgement of the definition of a concerted practice does not mention whether this element is required for a concerted practice, nor that it is not required (although it does point out how the Commission argued that a common plan between the parties was not necessary(8)), it would be legitimate to infer, on the basis of the Advocate-General's reasoning that this was a basic assumption on which the definition rested.

In the Sugar cases(9) however, in which the meaning ascribed to a concerted practice was elaborated upon, the Court of Justice put an end to any possible doubt or misinterpretation which may have arisen from the Advocate-General's reference to the requirement of a "common plan" in American Antitrust Law. Firstly, the Court reiterated that a concerted practice was constituted by a form of coordinated behaviour, falling short of an agreement, but which "knowingly" lessened the normal risks that competition brings, particularly when it enables, as in this case, the participating firms to crystalise the position which they have secured to the detriment of the free movement of goods in the Common Market and to the freedom of consumers to choose their suppliers.(10)

Two of the applicants, Suiker Unie and Centrale Suiker Maatschappij (hereinafter referred to as SU ans CSM) argued before the

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(7) *Supra*, n.1 p669
(8) *Supra*, n.1 para 55
(9) Cases 40-48, 50, 54-56, 111, 113-114/73 Suiker Unie and Others v EC Commission[1975] ECR 1663
(10) *Ibid.* n.9 pp1942-43

that their behaviour could not constitute a concerted practice because this presupposes the existence of a plan, the aim of which is to remove any doubt about each other's future conduct. Thus they submitted that "the reciprocal knowledge that each party could have of the parallel or complementary nature of their respective decisions alone cannot be sufficient to establish a concerted practice; otherwise, every intelligent reaction of an undertaking to the acts of its competitors would be an offence"[11]. The latter part of this comment will be considered in greater depth in discussions in this and specifically in the following chapter as to how far the concept of a concerted practice does, or has the potential to extend into 'ordinary' business practice. But for the moment it is the Court's response to this argument which is of concern.

The Court expressly denied that the existence of a concerted practice demanded any kind of advance plan; there is no necessity for a plan to enable the sort of coordination and cooperation which constitutes a concerted practice. It went on to explain how SU and CSM were mistaken about the stifling effect the prohibition of concerted practices would have on ordinary business if Article 85(1) were allowed to operate against conduct which was absent a 'plan':

"Although it is correct to say that the requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect

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(11) *Supra*, n.9 para.172

contact between such operators, the object or effect whereof is either toinfluence 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"(12).

The Court's emphasis that the factors which indicate the existence of a concerted practice should be considered not in isolation but in the light of inferences raised by a study of the market in which they arise reinforces the indication of the previous quote that there are safeguards to prevent a natural individual response (whatever the Commission's opinion of this might be) to market conditions being caught up in a concerted practices charge. The certain impression from the Court's account is that parties will not intentionally be penalised for the unwilling or unknowing commission of an offence and that the concept of a concerted practice does require an element of intention - that the conduct observed must have a common motivation.

However, in practice, problems may still exist in pin-pointing a particular form of behaviour as falling under that definition. Moreover, even in the abstract, there is some controversy about what the Court really meant.

Gijlstra and Murray, for example, see the judgement in Sugar as requiring "no more than reciprocal communication between competitors, by which each of the parties involved makes it clear to the other parties

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(12) *Supra*, n.9 para.174

that it will act in a certain way"[13], without there being any necessity that they acknowledge the communication. This would approximate the form of a concerted practice too closely to that of an agreement. But what do Gijlstra and Murray really mean by acknowledgement here? Obviously, their interpretation casts aside any requirement that the parties should specificaly reply either orally or in writing. But could it not be said that by reciprocating in their behaviour, either on the market or simply by indicating their own intentions the parties are indirectly acknowledging the communcation? In this respect, without qualification, Gijlstra and Murray would be wrong to say that no acknowledgement is necessarily when at the same time they also say that a concerted practice involves reciprocal communication.

Mann on the other hand suggests that a more tangible form of communication is required. He emphasises that "practical cooperation"[14] cited as the test in Dyestuffs presupposes a "conscious or knowing cooperation or coordination, that is to say, a subjective element which renders the behaviour of the traders a joint one, and indicates some sort of plan, a common intention of identical action"[15]. Mann's contention that a concerted practice requires a plan of some description suggests that his view of the concept of a concerted practice is one which the Court subsequently invalidated in Sugar. His justification for this interpretation lies in the fact that concerted practices are on the same level in Article 85 as agreements and decisions

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(13) Gilstra and Murray, 'Some Observations on the Sugar Cases', 1977 *CMLRev* 45 p59
(14) *Supra*, n.1 para.64
(15) Mann, 'The Dyestuffs Case in the Court of Justice of the European Communities' 1973 *ICLQ* 35 p36

and therefore established Treaty interpretation demands that their meaning be *ejusdem generis.* Consequently he asserts that there must be an element of consensus involved in a concerted practice in just the same way as there is in agreements and decisions - "in other words, mere parallel action is insufficient"[16]. In stating that a concerted practice is not the same as mere parallel action Mann clarifies his statement concerning the requirement for a plan. It seems that he does not mean a pre-conceived arrangement of the type the Court in Sugar seemed to disapprove, but merely something which signifies a "conscious... or subjective element"[17] of intention in the coordination and no more. Nevertheless, a concerted practice in terms of "common intention of identical action" seems to suggest a much closer relationship between the parties than that alluded to by commentators such as Gijlstra and Murray.

Both these commentaries have a common thread in their underlying assumption that to satisfy a charge of a concerted practice, anti-competitive behaviour must have a subjective element. Steindorff, in his annotation of the Dyestuffs case[18], like Gijlstra and Murray on Sugar, asserts that the judgement denies the necessity for any plan between the parties and in doing so, merely prematurely affirms the clear policy of Sugar; but he also implies that the "plan" which is not necessary is synonymous with "common aim". In Sugar, where the Court outrightly condemned any suggestion that a plan should be necessary, it

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(16) *Ibid,* n.15 at 36
(17) *Ibid.*
(18) Steindorff, 'Annotation of the decision of the European Court in the Dyestuffs Case of July 14th 1972' 1972 *CMLRev* 502

spoke in terms of "the working out of an actual plan"[19]. It is submitted that by arguing in reverse this may be interpreted as meaning that parties cannot be convicted of taking part in a concerted practice without having some sort of common aim, albeit that their intentions to make the market more transparent need not be directly communicated to one another. Reinforcing this inference, is the fact that in Dyestuffs, the Court said the parties must "knowingly substitute[]" for the risks of competition, "practical cooperation"[20]: this state of affairs would not necessitate the construction of a plan, but surely, it inevitably involves some common aim, that is to say, the conscious aim to lessen the risks of competition by practical cooperation?

Steindorff, contends that the Court's explanation of the nature of a concerted practice is much more extensive in its scope and approximates it to the dictum of Lord Diplock in Basic Slag concerning the requirements for an "arrangement" under section 6(3) of the Restrictive Trade Practices Act 1956:

"it is sufficient to constitute an arrangement between A and B if

(i) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way;

(ii) such representation is communicated to B, who has knowledge that A

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(19) *Supra*, n.9 para.173
(20) *Supra*, n.1 para.664

so expected and intended, and;

(iii) such representation, or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way."(21).

In this version there obviously is communication by which one party makes it clear how it intends to act thus enabling competitors to correspond accordingly to their joint advantage. The communication must be made in such a way that the recipient realises that the first is intent on cooperating, but Lord Diplock's dictum differs from the judgement of the other members of the Court, and from Gijlstra and Murray's interpretation of a concerted practice as expressed by the Court of Justice in Dyestuffs in one fundamental point: Lord Diplock's definition does not seem to require that the communcation should be reciprocal; it is sufficient if only one party informs the others of his future conduct. Clearly, this interpretation would square with the contention that the definitions in Dyestuffs and Sugar allow no room for any sort of common aim in the notion of a concerted practice, since if only one party takes an initiative, then the aim or intention of only one person exists. However, although Steindorff recognises the difficulty in accurately assessing the Court's definition in Dyestuffs (owing to the fact that the question of definition is combined with evidential matters), it is submitted that his adoption of Lord Diplock's precise illustrated definition as being very close to the Dyestuffs one should be treated with caution as it is a quite specific and detailed conclusion

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(21) Re British Basic Slag Ltd's Application (1963) L.R. 4 R.P. 116 p155

to draw from a rather general statement of the Court about cooperation and coordination.

Yet there may be some foundation in the opinion of the Advocate-General for drawing concerted practices so far. Advocate-General Mayras in Dyestuffs seemed to suggest that collusion was not a necessary component of a concerted practice, so long as there was still coordinated behaviour. Although in fact he did infer collusion, or as he put it, "the existence of a certain common will[22], from the various facts before the Court, he suggested that one firm stating an intention to put up prices by the same percentage for a large and defined range of products two months in advance of its taking effect would amount to a "concerted practice", if the firm intended that its ostensible competitors would hear of it and respond accordingly. Korah[23] considers that in saying that it must be shown that

"the consciously parallel behaviour is not exclusively or even mainly due to the economic conditions or to the structure of the market,"

and that

"where there is no express meeting of minds, sufficiently clear, unequivocal presumptions lead to the conviction that the parallel conduct was the result of concertation, of a coordinated policy"[24],

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(22) *Supra*, n.1 p673
(23) Korah, '"Concerted Practices"' 1973 *Modern Law Review* 220
(24) *Supra*, n.1 p673

the Advocate-General takes the definition of a concerted practice beyond the scope afforded to "concerted action" in the United States which, according to case law, does require a meeting of minds and not merely a coordinated policy. As with Lord Diplock's formulation, there is no reference to a reciprocation of communication but arguably the Advocate-General's opinion goes even further than this. At least in Basic Slag, his Lordship restrained the ambit of "arrangement", adding that somehow the parties must consider themselves bound, if only morally to act in a certain way[25] - although it must be conceded that this impliedly contradicts his three-stage definition as it is difficult to see how more than one party could feel obliged to another when only one has been so bold as to express its intentions.

However, the judgement of the Court in Dyestuffs was not so precisely formulated, or extreme in its definition, as the Advocate-General was in his illustrative example of a concerted practice. The Court clearly states in its judgement that "parallel behaviour may not by itself be identified with a concerted practice"[26], although of course it may constitute strong evidence of one. Notwithstanding this categorical statement, Pfeifer[27] is doubtful as to whether Article 85 does in fact require an element of *mens rea* in relation to concerted practices because of the words "in practice" into the definition of a concerted practice as

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(25) *Supra*, n.21 p154
(26) *Supra*, n.1 para.66
(27) Pfeifer, 'Uniform pricing in concentrated markets: is conscious parallelism prohibited by Article 85 ?' 1974 *Cornell International Law Journal* 113 p117

"a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes pratical cooperation between them for the risks of competition"(28)

Although the word "knowingly" implies the need for some sort of consciousness to make the behaviour illegal, its juxtaposition with the phrase "practical cooperation", which Pfeifer sees to mean "cooperation in fact" or "in effect", changes the thrust of the definition. On this basis, he interprets the definition to mean,

"a form of coordination which has the effect of consciously substituting a practical cooperation for the risks of competition"(29).

This seems to suggest that by using the words "practical cooperation" instead of simply "cooperation", the Court is focussing on the ends of the behaviour rather than on the means - in which case, it could be said that any element of culpability has become immaterial. Pfeifer attempts to reinforce his argument by referring to the way in which the Court discussed the relationship between conscious parallelism and concerted practices: conscious parallelism can be a

"decisive indication of collusion where 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 number

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(28) *Supra*, n.1 para.66
(29) *Op.cit*, n.27

of the undertakings, and the volume of the said market"[30]

Pfeifer interprets this as leading to the conclusion that when abnormal market conditions are apparent, conscious parallelism is no different to a concerted practice. He illustrates this by the fact that the Court fixed liability on the grounds that the conditions which prevented uniform parallel conduct, were eliminated by the arrangements, and not because there was a positive understanding to act in such a way[31].

An enquiry into the facts which led the Court to conclude there was a concerted practice will better enable Pfeifer's interpretations concerning the minimum proof of the existence of a concerted practice to be assessed.

The Commission was alerted to the possibility of a concerted practice because of the abnormality of uniform prices on a market such as that in which the dyestuffs manufacturers were operating. It then sought to prove that these price increses were the result of concerted practices on the basis of the various facts from which collusion could be inferred: the producers had met on two occasions where they had the opportunity to discuss prices (at Basle, shortly before the 1967 increases, when Geigy announced its intention to increase its prices by 8%, and previously in London). In 1964, four of the head offices telexed instructions within one hour of one another to their subsidiaries

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(30) *Supra*, n.1 para.66
(31) The matter of whether conscious parallelism itself requires a positive understanding to restrict competition will be dealt with in the following chapter

in the different member states to raise their prices; and two more telexed their subsidiaries with the same instructions within the following two hours. Even more indicting was the fact that in several cases, their "separately" sent instruction were worded practically identically. On these indications the Commission decided that the dyestuffs producers had colluded and were engaged in concerted practices, and fined then accordingly.

It is generally accepted that the Commission was justified in inferring collusion from the strength of the evidence cited above. However, concern has been expressed that because of the way in which the Court evaluated the evidence, and in some cases, chose not to use some of the evidence available there may be in fact no requirement of an element of collusion in the proof of the existence of a concerted practice.

In emphasising that the parallel conduct before it by which the parties were able to stabilize prices at an anti-competitive level was particulaly strong evidence of a concerted practice(32) the Court seemed to attach much importance to the glaring uniformity of the manufacturers' behaviour. In the first place, the timing of the price rises was significant, indicating increasing cooperation between the manufacturers. Ciba increased its prices in 1964 within a few days throughout the Common Market, but in 1965 BASF allowed time to let the producers climb down when ACNA did not follow in Italy; and the increase by Geigy in 1967 afforded the parties two months during which the reactions of competitors

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(32) *Supra*, n.1 para.67

could be taken into account. Secondly, the Court found it unusual that although the markets for dyestuffs were compartmentalised into five national markets, each having different price levels and structures, the price increases in each market were identical. Finally, the price increases applied to the same types products, ie., most of the dyestuffs based on aniline, other than food colourings, pigments and cosmetics.

On these facts, the Court held that mere parallelism had been refuted: "By means of these advance announcements the various undertakings eliminated all uncertainty between them as to their future conduct"[33], but as Pfeifer remarked, the Court seemed merely to "assume" that by having made the market more transparent by their announcements, the undertakings had eliminated some of the preconditions for competition on the market which stood in the way of the achievement of parallel uniformity of conduct, without really explaining how parallel behaviour was otherwise impossible.

Korah too expressed doubt about the soundness of the Court's reasoning which led to the conclusion that the behaviour could not have been spontaneous[34]. To begin with, the Court (as did the Commission) stressed how unlikely it was that there should be identical price increases in each industry for the same range of products. But this does not necessarily have to be the result of collusion, because in each country there were only two or three firms making some of the products. Each would know that if it were to charge less, his competitors would

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(33) *Supra*, n.1 para.101
(34) Korah, 'The EEC Dyestuffs Case' 1972 *Journal Of Buisiness Law* 319

respond, as a result of which, they all would suffer reduced profits. Moreover, because the profits in the industry were already low each firm would welcome Ciba's announcement in 1964, BASF's in 1965, and Geigy's in 1967 and would follow without hesitation. Where actual price competition was likely to take place, it would be via secret discounts to the important buyers in the separate firms(35).

Again, the proximity of the dates on which the price rises were put into effect in the different member states need not necessarily have been brought about by collusion; once Ciba had announced its proposed increase, it would be expected to carry them out in all the countries in which it sold its dyes.

As for the reliance placed by the Court on the compartmentalisation of the markets as a pointer to collusion, this is not proof. Each firm must have known that if it were to go out of its traditional area, especially if it also competes openly in price, the others would be certain to react. And again, although the Court found that the number of manufacturers made it impossible to consider the dyestuffs market as an oligopoly of the strict sort where price competition would no longer play a role, it did not say or prove that overt price competition would necessarily play such a role in the absence of collusion. However, the Court's assumptions with respect to the speed with which the announcements of increases followed one another are legitimate. Although it would be possible for this to occur within a few days in the absence of collusion - because news does travel fast in an oligopoly or

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(35) This is a point for further development in Chapter Four

near oligopoly market - it is difficult to conceive that in 1964, four parent companies sent instructions to their subsidiaries within one hour of each other without a facilitating device of collusion.

In summary, some critics say that the Court did not prove collusion on the basis that the behaviour observed was inexplicable in the absence of collusion; that the conduct could have arisen from the economic circumstances of an oligopolistic market. Although there is little concern that the companies were wrongly condemned, because economically, while some say there is no actual proof the conduct nonetheless entitled justified suspicions of a concerted practice which were corroborated by evidence of meeting and telexes sufficient to prove a concerted practice. Fears have been expressed by commentators, for instance Steindorff[36], that in not using the evidence at its disposal, the Court raises an implication that "a coordinated course of action" is as the phrase suggests, wider than collusion and that there is no necessity for a *mens rea* to constitute a concerted practice. It must be stressed however throughout the preliminary discussion to the actual judgement the Court insists that parallel behaviour itself cannot alone constitute a concerted practice, and it devotes some discussion of the factors which refute mere parallelism.

However, the Court's failure to consider some vital evidence and the comments of the Advocate-General lead to some ambiguity as to the likely result in the case where there is no actual direct evidence of

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(36) *Supra*, n.20

collusion. Evidential issues such as this will be developed in Chapter Four. For the present, however, it seems logical to consider when conscious parallelism may occur, and whether it rightly ought to be equated with a concerted practice and condemned as unlawful anti-competitive collusion. This shall be the subject of the following chapter.

CHAPTER THREE

THE RELATIONSHIP BETWEEN COLLUSION AND CONSCIOUS PARALLELISM

Chapter Three

The Relationship Between Collusion and Conscious Parallelism

In resume the key arguments which the dyestuffs manufacturers[1] sought to rely on as a defence of their uniform conduct concerned the phenomenon of conscious parallelism - that their simultaneous price rises were the manifestation of this concept in action. Two issues of significant moment to the whole question of concerted practices and the related evidential problems they bring are raised by this defence. Firstly, the basic assumption that conscious parallelism is a legitimate form of business practice distinguishable from collusion; and secondly, that the Commission, not only in this particular case but also in the abstract is able to satisfactorily prove to required evidential standards that any restrictive conduct which arises on the market is the result of something other than conscious parallelism.

This chapter aims to present arguments to the effect that the evidential nature of a concerted practice makes it virtually indistinguishable from conscious parallelism, and that definitionally too, as far as the element which makes the concerted practice unlawful (ie., the *mens rea* concerning the working in concerte to restrict, distort or prevent competition) there are grounds on which the two

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(1) Case 48/69 'Imperial Chemical Industries Ltd v. EC Commission [1972] ECR 619

concepts can be equated. Thus it is sought to argue that the inclusion of conscious parallelism within the provision would not create a strict liability offence. It is an additional proposition that to view conscious parallelism as a form of unlawful cooperation (and therefore include it in the concerted practices arm of Article 85(1)) would be consistent with Community competition policy in preventing activity which is deliberately disruptive to the normal processes of competition, and more particularly with reference to the particular subject of this thesis, would make the evidential problems which concerted practices bring less difficult to deal with. By treating the two terms as synonymous, the burden of determining whether the uniform conduct could conceivably have taken place in the absence of collusion, a task which can only be done through an in depth economic analysis of the market would be removed.

The Chapter is divided into three. Part I deals with the evidential problems facing the Commission in the proof of a concerted practice on the hypothesis that conscious parallelism is a legitimate form of business behaviour. The analysis of when conscious parallelism is likely to arise indicates that its frequency is so rare and difficult to prove that it is hardly worth making the distinction. Part II summarises the Court's treatment of conscious parallelism as it related to the dyestuffs market , and Part III comprises a critique of United States Antitrust law, and raises arguments of American lawyers and economists that conscious parallelism is already prohibited under the Sherman Act, or that if it is not, that it certainly ought to be. It is

to be hoped that the comparison will stir some thoughts about the implications for conscious parallelism under Article 85(1).

I

How is conscious parallelism to be distinguished from collusion?

In the Dyestuffs case it was asserted in the Court of Justice that "parallel behaviour may not by itself be identified with a concerted practice"(2). But even this seemingly unequivocal statement can mean two things: it may refer to mere coincidental similarity of action which may be as innocuous in its consequences as the use of identical vehicles on common routes to supply their similar merchandise. On the other hand it might be a uniform act which directly effects the price the customer has to pay, as might be the motive behind a concerted practice;

On the other hand, the phrase "parallelism of behaviour" may suggest something more suspect and contrived. Indentical behaviour which is performed with the *deliberate intention* of corresponding to the acts of "competitors" - to their joint benefit in the market or to avoid a loss which might ultimately be shared by all as a result of a period of active competition (for example, as would occur after a price war), but which does not arise as the result of an arrangement or even an acknowledgement between the competitors. The end product of their behaviour is indistinguishable from that of a concerted practice. In both cases there is a restriction or distortion of normal competition to the benefit of the participants and usually to the detriment of the customer. What is different is that although what takes place as conscious parallelism may not be competitive it is arguably natural to a particular economic

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(2) *Ibid*, para 66

climate and is not motivated by the deliberate desire to restrict competition by colluding. However, the different motivations of parallel behaviour cannot be assumed by the Commission without a skilful economic analysis, and there is cause for concern that in some situations a distinction between the two forms of behaviour may not be possible.

Some theories about the occurence of conscious parallelism

1. The theory of conscious parallelism concerns what is known as an oligopolistic market, where power is held by a very small number of firms. In such a market each firm is obliged by common business sense, to take into account the conduct of its competitors and to assess their probable reaction to its own economic measures before taking action itself. Thus, the essential characteristic of the oligopoly is the mutual or circular *interdependence* of the members' decisions, which will not manifest itself in any other market situations. Three brief examples will serve to illustrate how the extent to which the market is oligopolistic dictates the degree of interdependence. The most significant and obvious variable is the number of firms operating on the market and the respective market shares they possess:

(a). If in a very concentrated oligopolistic structure with only three suppliers, each holding an equal share of the market, one of them were to reduce his prices, any expansion in the number of his customers would be

at the expense of his rivals. In order to avoid a dramatic reduction in their market share and profit, they too must reduce their selling prices. If one of them were to raise his prices, because perhaps his production costs were higher than the others', because their numbers are small and because they have equal market shares, it would be to the advantage of the remainder to maintain their selling prices at the lower level, and as a result take over a proportion of the price riser's market and thus increase their profits. Consequently, the first firm will be compelled to resile from his price increase. All three have conformed for the sake of their individual interest but to the detriment of their collective interest, as ultimately, their joint profits will be lower and no-one individually gains anything. Since this is the obvious outcome of a price reduction in such a market the sensible approach is for no-one to take the risk of lowering prices; and thus the interdependentists have a plausible explanation for parallel behaviour in respect of the absence of price reductions.

(b). Alternatively, if there were ten competitors, while the gain in custom and profit which the first enterprise would earn on reducing his prices would be at the expense of its competitors, their loss would be more or less evenly shared and so individually they would suffer only to a very small extent; and depending on the amount by which the price is reduced and on the size of the market and the stage of its cycle, it is conceivable that the remaining suppliers would lose more revenue if they were all to meet the price-cutter's rates and thereby regain their share of the market, than if they were to resign themselves to a smaller market

share, with the compensation of drawing a larger profit on each item sold.

(c). The final situation is one comprising hundreds of producers. Self-evidently, any price alterations made by one of them will have negligable effects on the rest. And as a consequence there is no disincentive for price reductions and any retention of uniform prices during the sort of economic period in which this uniformity is improbable, would not be explicable by natural economic phenomena but must indicate concertation.

It is impossible to trace a distinct dividing line between these three types of structure, and correspondingly difficult to discover which oligopolistic situations might naturally accomodate conscious parallelism. The degree to which members of an industry are interdependent depends not only on the number of competitors, but on several other factors of the particular market. As explained above it is a common known fact that interdependence supposes a limited number of producers - the fewer producers, the bigger their individual market shares are likely to be; and the more sensitive to one another's actions they are, the more intense will their interdependence be. However, there are qualifications to this principle:

(i) Although the presence of only a small number of firms on the market indicates the potential for oligopolistic interdependence, the total number of producers is less significant a factor than the proportion of them which holds the largest market share between them.

For example. there may be as many as fifty enterprises in sum and superficially, interdependence between them is improbable. But if forty-six of them hold only four per cent of the market, then the remaining four firms which together hold the appreciable part of the market are a likely interdependent group.

(ii) There is a difference between the situations in which four firms each hold twenty-five per cent of the market, and where there is one very large enterprise and three less powerful ones. In the first case, each one wants to maintain the status quo; in the second, there will be a tendency towards *independent* behaviour on the part of the dominant firm who has no fear of economic reprisals for his acts and conversely, the conduct of the other companies will exercise no influence over the major enterprise's policies.

2. The conclusion is that interdependence is greater where the market is held in equal parts by only a few firms. This condition, according to *inter alia*, de Jong[3], and Turner[4], is a consequence of their respective cost structures. For instance, where cost prices are approximately the same for each competitor, there is a greater temptation towards either collusion or interdependence, because there is no initial starting advantage for any of the firms to reduce selling prices, as

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(3) De Jong, 'Aspects Economique du Compartement Parallel sur le marche' 1971 *Cahiers de Droit Europeen* 385

(4) Turner, 'The Definition of Agreement under the Sherman Act; Conscious Parallelism and Refusals to Deal', *Harvard Law Review*, vol. 75, p655

there would be if one of them with the advantage of lower costs.

3. A third factor to influence the degree of interdependency is homogeneity of the product in question, which has considerable bearing on its cross-elasticity of demand. If the goods offered are exactly the same and can be easily substituted by the goods of other producers, any slight difference in price will mean that demand will immediately be directed towards the cheapest product. Thus, a producer cannot raise his prices without losing at least some of his custom. His competitors will have no cause to follow his price rises; rather the initiator will be obliged to withdraw his increases or else suffer ultimate exclusion from the market. Alternatively, however, if in a market populated by few suppliers one of them were to reduce its prices the rest must follow suit for fear of losing a substantial proportion of their market.

The corollary is that in the case of heterogeneous products which cannot easily be substituted, any firm can set its prices without having to face the prospect of losing customers; nor will it be of concern to the initiator if the others do not follow suit, as even a reduction in their prices would not effect the first firm. In a similar way, none of the enterprises would be obliged to follow an initiator's price reductions because price is only one of the many factors which determine the source of goods for the customer(5).

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(5) . In practice however, the formula is not so straight forward; although the range of products may oe homogeneous, there are other factors which determine the cross elasticiy of demand; for example, advertising will make one manufacturer's product more attractive that another's, as may after sales service, presentation, and more favourable terms of delivery. Long-term contracts between supplier and customer too would make mobility of demand more difficult.

4. Transparency of the relevant market is clearly a contributory factor to the degree of interdependency among competitors. In a transparent market it is difficult if not impossible in some cases to gain an advantage when any price modification would be instantly perceived and copied by the rest. Were the market otherwise, a clandestine reduction in price, for instance via covert concessions, would not be met and beaten, and the initiating firm would realise higher profits from increased demand. Similarly, in an opaque market, an increase in prices would not be immediately noted by rivals, nor by customers who would continue to gain their supplies from the higher priced producer(6).

5. Less obvious determinants of parallel behaviour are respective capacities of production stocks and the ability of the firms on the market to adapt swiftly to meet potential increased demand. There would be no sense in following a price reduction, if given other relevant circumstances such a reduction would lead to increased demand which the enterprise could not meet because it did not have the necessary production units or immediate access to raw materials(7).

6. The stability of the price of the product in question may provide an indication of whether common price alterations are natural or the result of collusion

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(6) The degree to which a market is transparent depends on factors such as the manner in which prices are fixed - whether they are published or negotiated; the differentiation and multiplicity of products; the speed of technical progress, information being more important for products in constant evolution; and composition of demand - for instance, whether there is a single buyer or many.

(7) In the opposite case, where demand increases of its own accord, clearly enterprises will put up prices, regardless of whether stocks are available.

7. The stage in the cycle of a product's life, particularly if the market is oligopolistic. In the stages of introduction and commencement of expansion, there will be few suppliers - what competition there is at this period will be penetration competition, newer producers trying to conquer a place for themselves on the market. During the introduction and early expansion of the industry, stocks are moderate and demand should be increasing rapidly. For these reasons it would be foolish to follow the price reductions of another firm because the enterprises will be in a position to increase their profits with the excess demand despite the retention of the old high price. Even if the initiator does draw some of their customers, they can expand their market share with new customers from the growing market.

When the stage of the product's latter phase of expansion is reached, more competitors having entered the market the oligopoly becomes less concentrated and there will be a tendency towards independence with more scope for rivalrous behaviour, there being so many of them that the acts of one will not effect the others. For example, firms can cut costs and increase their market share without encroaching significantly on the territory of any one of the others, either individually or as a group. Moreover, customers will react to a reduction in price by disproportional increased buying. Since each producer wants as large a portion of the market as possible, there will be no desire for concertation, nor any necessity for conscious parallelism.

These two situations are to be sharply contrasted with the periods of maturity and decline. The market ceases to expand and there

is a renewed tendency towards oligopolistic structures. With customers buying less, any price reduction does not encourage them to increase spending but merely to switch to the cheapest supplier. Furthermore, at this stage costs may be high and stocks in excess. Consequently, even though there may be several firms involved, a decrease in price at this phase in the product's life cycle would be felt by all of them. Thus there would be a greater temptation towards parallelism or concertation between the remaining producers because of declining sales rather than because of a reduction in price . In these circumstances, a supplier may be inclined either to augment his own share of the market and profits by overt or disguised price reductions (such as concessions for bulk buying, or allowances in transport fees), or alternatively to cooperate with his competitors for a higher standard price and the assurance of maximum profit for all. But there may be two kinds of cooperation: deliberate collaboration, or mere uncommunicated collusion arising from interdependence. If the hypothesis that conscious parallelism is an acceptable form of business behaviour is correct it is paramount that the Commission carefully determines which of these two possible forms the apparently non-competitive behaviour is. Although the possibility of illegal collusion may never unremittingly be rejected, if the economic conditions which are favourable to the germination and cultivation of conscious parallelism described above are found to exist, the Commission ought to look for more concrete evidence if it wishes to prove a concerted practice. Correspondingly, where these conditions are not fulfilled the requisite degree of interdependence would not be present and concerted activity can be logically presumed to be the cause of uniform conduct, even in the absence of additional proof.

It should be noted here that when deciding whether the behaviour concerned constitutes a concerted practice or is the result of conscious parallelism, the Commission might also consider the possibility that the uniform conduct under investigation may be the result of neither of these two phenomena:

1. It may be a response to a set of economic facts having provoked an increase in costs for each firm (although bearing in mind that many factors individual to each firm are involved in this - wage increases, national fiscal charges, new legislation requiring higher standards this is unlikely). Normally in an interdependent situation, a price leader will have to withdraw because his recalcitrant opponents will take over a part of his own market share - but if the price increases originates from a genuine necessity which applies to all the enterprises, the firms would act in individual self interest by raising their prices. In addition, they would have a legitimate excuse in not competing in that they perhaps could not risk waiting to see if their abstention from price increases would be rewarded with an expanded market share.

2. Another exception to the rule that uniform behaviour is the result of concertation or conscious parallelism exists when the market is in a state of expansion. If one of the producers increases its prices, even if the remainder keep their prices low, any loss resulting from a reduction it suffers in its old market will be absorbed by the increase of new customers in their euphoria to buy the product.

3. Alternatively the parallel price rise may be the result of price leadership - an economic state which when genuine precludes the existence of interdependence and provides a credible alternative explanation to collusion. Usually for there to be a price leader, one firm must be in a position of relative power with respect to cost, dimension or technology.

Power based on Costs

The greater the leader's cost advantages, the less he need concern himself about his rivals not reciprocating any price rise on his part; indeed any increase will be considered a windfall to the others who in consequence can cover their costs by increasing prices without fear of being at a new competitive disadvantage with the large firms (they would not have dared raise their prices had the leader not done so first). Moreover, if they opted not to follow in the hope of gaining more custom and the price leader felt threatened by this inactivity the latter would be in a position to start a price war which could lead to the expulsion of some of its rivals from the market. Thus in this situation it would be perfectly rational to follow such a price rise in the absence of concertation. It might be assumed that a more likely course would be for the leader to take full advantage of his cost benefits by reducing his prices and taking away custom from the higher priced firms. However, the economic theory is that these latter, although perhaps little able to afford it would have no option but to follow the leader's lead which

would mean that the former would gain nothing but an overall reduction in profit.

Power based on market share

It should be stressed that the proposition that price leadership is likely where one firm holds a large share of the market is a generalisation, and that as far as the leader's market power is concerned it is necessary to make a triple distinction:

(a) Where there is one large leader and the other firms are small, as is the assumption above, apart from it being to their advantage to follow any price increase the remaining firms are too weak not to follow the leading firm for fear of severe economic reprisals, for instance in the form of a price war.

(b) If the competitors are large enough to adopt an individual pricing policy, but still not strong enough to make an impression on the leader it would be to their advantage to augment their market share by disregarding the increase. Since the price leader is immune to their acts, the smaller enterprises need not be apprehensive of reprisals. However, for the leader to be unaffected, heterogeneous products must be assumed, and the market would not be an oligopoly.

(c) If the smaller firms can collectively constitute a threat to the leader, it is probable that they will act like the marginal firms in the

first example. Again, the initiative is rational because it is almost certain to be followed, and so parallelism is explicable on economic factors rather than on the factors of collusion.

In the Dyestuffs market[8], although dimensions and costs between the firms were varied, they were not sufficiently divergent to give rise to price leadership - in effect there were several powerful firms who could be the price leader. While of course any one of them may be the prolific producer for a particular national market, none can be the leader for every market.

Barometric price leadership

This version of price leadership in which the normal factors which determine the price leader do not necessarily apply is less suspect and less liable to be mistaken for collusive behaviour (and of course *vice versa*) than the previous two.. In barometric price leadership, the initiator is copied because his policy is a quick and accurate reflection of the prevailing conditions of the market. Although there is a view that there is no explanatory hypothesis which identifies barometric price leadership, as with price leadership of the dominant firm type, there is a pattern which denotes the leading enterprise. For historical and institutional reasons, there will be a firm which has rapid knowledge of changing market conditions. In the majority of cases, barometric price leadership has a competitive character, but occasionally its results

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(8) *Supra*, n.1

are restrictive. Thus barometric price leadership could provide a reference for cases of anti-competitive parallel behaviour which cannot be explained purely by economics. It is not always easy to ascertain in such an appropriately anti-competitive case whether what is operating is in fact barometric price leadership, but as a guide it will be less innocuous and more suspect if the price leader is always the same one; if the price changes and the dates on which they are put into effect are the same for each party; and if the alterations are announced first to competitors rather than to customers. Of course this is not to say that if there were time lags between the dates of implementation, or if the announcements were first made to agents or customers in the knowledge that this information would rapidly reach "rivals" the possibility of concertation could be dismissed.

Finally, there might be a parallel price increase which is not the result of collusion and is totally unconnected with oligopolistic interdependence theories. It arises when the initiator is in a position not to care if his price measures are not followed as he increases his prices simply because it is beneficial for him to do so. Under this phenomenon, it is beneficial for the the remaining firms to correspond to the leader's policy because if the latter is unaffected by his rivals policy of abstaining, they do not stand to gain any of his market share. This however, will not occur in a situation of oligopolistic constraint, because the phenomenon requires the existence of prices to which producers are indifferent - which is impossible in an oligopoly.

II

Conscious parallelism in Dyestuffs

The facts and arguments in this case have been analysed more proficiently in a Chapter Two of an explanation of conscious parallelism as it related to the case in a way which was not averted to in the previous chapter which might clarify the Court's reasoning and put an end to criricism that the Court was wrong in rejecting the possible existence of conscious parallelism. In their economic reasoning the producers relied on the model of oligopolistic interdependence, which it was argued leads to a double constraint. This has been explained more fully above, but summarised is as follows:

1. The majority of producers are obliged to follow any price reductions which a price leader makes in order to prevent him from expanding his share of the market at their expense;

2. It imposes an obligation on any enterprise which raises its selling prices to withdraw the increase because in a concentrated oligopoly the remaining firms would keep their prices low in order to lure the price leader's market and divide it between them. To avoid heavy losses, the first firm would be forced to resile.

The consequence is that in an oligopoly, no firm which knows its market will dare to reflect its costs and sale prices. It also means that the arguments of the dyestuffs manufacturers about market structure

dictating uniform and simultaneous price increases is a fallacy. While interdependence imposes conscious parallelism with respect to price reductions, it does not impose parallelism when increases are concerned - in fact, it leads to their withdrawal(9). Consequently the parallel price increases could only be explained from an economic point of view if the oligopolistic restraint did not exist - and if it was present, the only way in which parallelism could have arisen is through concertation. Nonetheless, the Court permitted the applicants to raise the argument without any correction to their reasoning. It is submitted that it is the faulty foundation on which the Court based its reasoning which encouraged misgivings, expressed in Chapter Two, to arise about the validity of its reasoning leading to the conclusion that there was no room for parallel behaviour. Paradoxically, the Court reached the most appropriate decision but through inaccurate reasoning. It was assumed in the judgement that a degree of interdependence which is only small confirms the absence of spontaneity - the number of producers on the dyestuffs market meant that there was not an oligopoly "in the strict sense"(10), in consequence, it held that there must have been concertation to account for the evidenced parallelism; but on the contrary, in theory the absense of oligopolistic constraint makes spontaneous parallel price increases conceivable. However, the Court ignored the existence of conditions which would refute this possibility in the particular circumstances, such as the fact that the market was not in a phase of introduction nor of early expansion and which would

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(9) However, when the market concerned is in a phase of expansion; or in the event of an increase in production costs throughout the industry, this rule operates with the exceptions discussed above

(10) *Supra*, n.1 para 105

indubitably point to the existence of collusion. Secondly, the Court maintained that it is in the interest of producers not to follow a price increase and that the dyestuffs manufacturers were sufficiently powerful to try to compete - if they do adopt a policy of price increases, it can only be the result of concertation. This might be true but its corollary is that it would be to their advantage to maintain the existing prices without attempting to profit by raising them in the first place, which in fact confirms the existence of an oligopolistic restraint.

In the end, however, although the Court's economic reasoning when applied to the facts may be criticised, its errors in the final analysis were unimportant and probably will be in future cases too. Because the definition of a concerted practice was formulated so widely, and because presumptions of collusion raised by economic evidence, were corroborated by some element of direct evidence of collusion (which it is submitted, depending on the respective weights of it and economic evidence, in future cases will outweigh doubtful economic indications(11)) the Court was able to bypass the economic arguments to prove concertation.

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(11) See Chapter Four for a discussion of the roles of direct and indirect evidence.

III

Conscious parallelism under the anti-trust laws of the United States

The concern of the first part of this chapter has been to deal with the problem of how to recognise the true nature of uniform behaviour which may conceivably be either the result of a concerted practice or conscious parallelism. This second section delves further into the complexities which these two phenomena can create by considering whether in point of fact, in so far as the essential elements which make a concerted practice unlawful are concerned, there really is a distinction between concerted practices and consciously parallel behaviour; and even if a distinction between the two forms as concepts can be seen, whether this distinction manifests itself on the market in such a way as to make practical differentiation between the two concepts, when proving the existence of anti-competitive collusion, practicable or possible.

The issues in this thesis of course revolve around the problems issuing from the manner of proof for concerted practices under Article 85 EEC. However, the discussions in this chapter are based mostly on the work of American lawyers and economists in reference to section 1 of the Sherman Act 1890, the U.S. counterpart of Article 85. While there may be some differences in the way in which the provision is applied to the facts in US law, the economic theories and legal arguments which are propounded about conscious parallelism and its relationship with the less cohesive types of collusion prohibited under the act must apply with

equal validity and strength to the relationship between conscious parallelism and concerted practices.

Section 1 of the Sherman Act prohibits "Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states or with foreign nations. It is the "conspiracy" aspect of the section which most closely resembles concerted practices of EEC Law, and which raises similar questions. In Theater Enterprises[12] a private action was brought against a number of motion picture producer-distributors for being parties to a conspiracy to restrict "first run" movies to down town theatres. Although there was evidence from which inferences of an agreement between the distributors might have been drawn, considerable evidence to the effect that the apparently parallel behaviour was the result of independently made decisions was favoured and affirmed by the Supreme Court, which declared that while

"business behaviour is admissible circumstantial evidence from which the fact-finder may infer agreement...this Court has never held that proof of parallel business behaviour conclusively establishes agreement...Circumstantial evidence of consciously parallel behaviour may have made heavy inroads into the traditional judicial attitude towards conspiracy; but *conscious parallelism has not yet read conspiracy out of the Sherman Act entirely.*"[13]

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(12) *Theatre Enterprises v Paramount Film Distributing Corp.*, 346 U.S. 537 (1954)
(13) *Ibid.* p540-41

The widely held interpretation of this case is that however justifiable the grounds for criticising conscious parallelism as a restrictive form of business behaviour, it is not a prohibited agreement for US antitrust purposes.

Professor Turner concedes that the real holding of the case was very narrow, ie., that "a refusal to grant a directed verdict was no error in the face of conflicting evidence"(14), and that it does not mean that in a subsequent case evidence of conscious parallelism alone would be inadequate proof of a Sherman Act conspiracy. The facts in the present case, however, were such that if the defendent's testimony must have been true : even if one of them had offered first run films to the plaintiff, a suburban cinema owner, this would not have affected the judgement of the others. Theirs were identical but unrelated responses to the same set of economic factors and thus were clearly independent. However, from this narrow conclusion can be developed the maxim that while conscious parallelism alone may not constitute evidence of conspiracy, it will only be significant when read in the light of additional facts. There are two situations where the legal status of conscious parallelism is clear:

(i) Where there is a large number of competitors on the market whose prices remain identical in spite of falling demand which has left them all operating at just over half capacity.

(ii) Where there are only a few competitors whose prices are

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(14) *Op.cit.*, n.4 p658

identical for non-standardised products[15].

In these circumstances there is no explanation for uniformity other than the existence of an agreement between them or at least some form of inter-communcation. But are additional factors really necessary to establish the legal status of consciously parallel behaviour in these cases? In making its declaration the Court was ensuring safeguards for the less obvious case where parallel decisions lie between independence and collusion ie., when the parties do not actually agree or even reach an understanding, but there is nonetheless the necessary assurance that parallel action will be taken. The facts in American Tobacco Co. v United States illustrate this[16]. The charge against the three leading cigarette maunfacturers that they had conspired to fix prices was based chiefly on evidence of an economic nature. In its simplest terms this consisted of several identical price rises taking place within a very short time of one another in the face of declining costs and falling demand. Manifestly there was a restraint of competition but on these facts alone it could not be categorically said that there had been a conspiracy for such a purpose. The situation was a model candidate for the theory of oligopolistic interdependence: the sellers were few, and without overt communication or agreement, anti-competitive results might feasibly arise through the rational calculation by each enterprise of the probable consequences of its decision as to what prices should be. This may or may not have been what actually happened. The issue of its actual occurrence is less important than the fact that this case

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(15) See p4, *et sec*, for a detailed consideration of when conscious parallelism will occur.
(16) American Tobacco Co. v United States, 328 U.S. 781 (1946)

illustrates that restraint of trade is conceivable in the absence of an agreement . This is to be contrasted with Theater Enterprises in which the decision of the indvidual companies was independent rather than interdependent.

There are however critics who believe that when what occurs among interdependent producers has detrimental effects on normal competition, the phenomenon is no less an agreement or a conspiracy than that anti-competitive parallelism which arises between fully dependent firms. Under this approach the interdependence theory is denounced as inadequate.

Weaknesses in the interdependence theory

The oligopolistic interdependentists subscribe to the view that supra-competitive prices, when there are no detectable acts of collusion, constitute an economically and legally distinct problem requiring completely different rules and remedies to "traditional" conspiracies - that is if conscious parallelism it is to be checked under Antitrust legislation at all. The crux of the theory is that sellers in a concentrated market are reluctant to initiate a price reduction because they know that this would have an effect on the sales of their competitors to such an extent that they will be forced to respond and wipe out the first seller's advantage, with the net result that all of the actors realise lower profits than before. The theory as presented

here may be perfectly valid, but in practice, the situation is likely to be far more complex.

1. The formulation conceals some inappropriate factual assumptions crucial to its working:-

(i) that there will be no time lag between the initial price reduction and the response of the rivals. On the contrary however, there will be a gap if the decision to decrease prices can be concealed, or if the competitors are a little unsure and are hesitant in their reaction. If there was a short delay in response, the price cut gamble may reward the first actor, even allowing for the fact that eventually his prices would be matched[17].

(ii) that the other sellers will not be in a position to expand their output quickly enough to meet the increased demand at the reduced prices. This will not automatically be the case and the remaining firms may be fearful of reciprocating at all - in which case, the leader benefits at their expense.

2. The interdependence theory overstates the impact that the price reductions of one oligopolist will have on its rivals.

After a price reduction, the price cutter's expansion in sales

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(17) It must be conceded however that there is always a risk (a) that reaction will be immediate, and (b) that even if there is a time lag , the gains which might accrue to the leader might not compensate for loss he ultimately suffers from having to reduce his prices.

will come only in part from his competitors' previous market share. Depending of course on the stage of the market the remainder will be composed of buyers new to the field, or of existing buyers who are encouraged to buy more because of the reduced prices. Thus, it is really the elasticity of demand which determines if and how soon competitors will respond.

3. The distinction between oligopolistic and atomised markets depends on an artificial distinction.

Although a medium-sized increase in output by a seller in an atomised market will have negligable effects on his competitors, the same applies to anything but a large increase by a seller in an oligopolistic market. Similarly, a large increase in output by a seller in an atomised market will induce his competitors to react swiftly. The theory assumes that only these patterns of behaviour will occur and makes no attempt to examine if this is so in every case.

4. The theory emphasises price reductions in the explanation of how it works. Even if it were to be accepted that this theory is valid for price reductions in every case, it does not explain how oligopolistic sellers establish supra-competitive prices. While it is true that if costs or demand decline, a failure to reduce prices may result in a monopolistic price, a supra-competitive price cannot normally be maintained without price increases throughout the whole market. The interdependence theory explains the occurrence of these increases by the phenomenon of price leadership: if one seller raises his prices he knows

that if his rivals do not conform to his policy he will lose custom and the consequential profits. He is prepared to take this risk however, because in reality it is a minimal one, because he knows that his rivals will have the good sense to realise that they will all benefit from uniformly higher prices.

Admittedly this reasoning is plausible - but if it is accurate, it undermines the proposition also propounded by the interdependentists that oligopolistic firms are reluctant to lower prices. This depends on the assumption that an individual price reduction will be matched by remaining firms in the market with the net result that no one gains and everyone takes a cut in their profits. Posner[18] argues that if this situation does result from a price decrease it can be remedied by an appropriate course of price leadership: one enterprise could venture to take the risk of reducing prices and possibly increase sales during a time lag before the general response; and if the market does begin to crumble after a price reduction copied by rivals, the logical course of action would be for the first seller or indeed any of the sellers to revert to the previous price level, an act which would almost certainly be followed by the rest. Of course, there is always the danger that one of the firms might not follow the increase, or more probably, will increase its prices at a slower rate in an attempt to gain a little extra profit. Reasoning such as this might make price reductions risky propositions after all, but at the same time, if this logic is common among oligopolists, it will be difficult for them to reach non-

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(18) Posner, 'Oligopoly and The Antitrust laws: A suggested approach', JE 1969 *Stanford Law Review*, pp1562-1568

competitive pricing in the first place, since each firm will be tempted by the prospect of short term gains at the expense of the leader by procrastinating in its response.

5. Even if it were to be accepted unanimously that the interdependence theory provides a valid explanation of parallel pricing, in reality, the model oligopolistic industry to which the theory applies will rarely exist.

For example, products are only exceptionally standardised, or the production costs for one firm may be lower than those for its rivals, in which case the former firm would be in a position to lower its prices and retain a profit margin while diverting customers from its rivals. In some instances therefore, there is an incentive for the oligopolist to reduce his prices. Similarly, price-elasticity in the demand for merchandise can vary from producer to producer. This factor is crucial to the determination that monopoly profits are simply not attainable for most goods. In the more common "non-model" markets, the "natural" harmful consequences causing so much concern will no longer be interpreted as the inevitable result of market structure, but as a consequence of deliberate collusive behaviour(19).

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(19) For a full account of the variables which influence the likelihood and degree of interdependency refer to Part I

"Tacit Collusion"

Even the interdependentists must be prepared to accept that most oligopolistic industries vary from the model and that even the model industry will not admit the theory in every case, depending on the sort of anti-competitive behaviour concerned (price reductions or increases) and the stage at which the market finds itself. Their argument is that in some situations of oligopoly - certainly not in all- it can provide a plausible explanation for seemingly restrictive behaviour.

However, there is a school which argues that even if conscious parallelism can be said in some cases to be an inevitable consequence of market structure , where it has an anti-competitive result it ought to be controlled by legislation. Some believe that it already qualifies for prohibition without the need for new laws - that it is intentional and morally reprehensible behaviour, and no less a form of collusion than the commonly accepted cooperation which exists in cartels, conspiracies or EEC concerted practices(20). It differs only in the fact that the cooperation which takes place under cartels may involve explicit overt communication; via conscious parallelism, the collusion is *tacit* and concealable. It may take the form of explicit acts which are wholly concealed, or alternatively it may be constituted by an unspoken understanding. This notion that conscious parallelism is a form of collusion may be difficult to accept, Richard Posner however, has set out a credible explanation to tackle the major obstacles which current

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(20) The interdependency theorists may agree that conscious parallelism is harmful but that present US legislation is inadequate to deal with it.

employment of the Sherman Act sets up to widespread acceptance of the theory[21] - obstacles which apply with equal force to the adoption of conscious parallelism as a prohibitive act under Article 85(1):

1. The requirement in section 1 of the Sherman Act that there must be concerted action;

2. The necessity to prove the existence of collusion when no specific acts of collusion are recognisable;

3. The problem of preventing violations of the rule against tacit collusion.

1. Interpretation of section 1 of the Sherman Act in terms of concerted action

In enacting that only that behaviour which constitutes a concerted activity arising from a "contract, combination.....or conspiracy", is illegal, section 1 *prima face* raises an obstacle to the prohibition of non-competitive pricing by oligopolists when there is no evidence of direct communication between the enterprises. However, if conscious parallelism is considered from a semantical point of view, there is nothing contraversial in the statement that activity of this nature is concerted as opposed to unilateral. Therefore it may be said to be

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(21) *Op. cit*, n.17 p1575 *et sec*

tacit collusion. For instance, if A restricts his output, inviting and expecting B to do likewise, there is a "meeting of minds" or "mutual understanding" even in the absence of A making a formal or informal request to B, or of B acknowledging his intention. By resisting the temptation to seek short term gain at each other's expense, the behaviour is analagous to that of the parties to a unilateral contract under which in this example, the seller communicates his "offer" by restricting output, and his competitors "accept" his offer by restricting their output too.

Posner argues that his formulation is not negated by the *dictum* in Theater Enterprises[22] on which exponents of the interdependence theory rely, since in this case, the behaviour of the rival firms was consistent with perfectly independent pricing. He goes on to reinforce the arguments of his thesis with the following hypothetical, but plausible set of facts:

In a particular products industry, the cost of a component part increases. The expected result should be that the selling price of the final product will increase throughout the industry. In such a case, each and every manufacturer would know that the others had raised their prices: their action is collective, parallel and consciously so. But there is no possible inference that their conduct was the result of an understanding to act in that parallel way and yet at the same time, it would be legitimate to say that the rivals had acted in concert - or even in "agreement".

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(22) *Supra*, n.11

An asseveration that this sort of conscious parallelism were to be caught by the Sherman Act would be highly controversial: the actions of the parties in covering their costs was no more than ordinary prudent business behaviour appropriate to changing market factors, and vital to their continued existence. If firms were to go on ignoring cost increases for fear of legal repercussions they would end up running at a loss and out of buisiness. However, Posner maintains that it is perfectly consistent with competition laws to say that the behaviour of these fictitious enterprises constituted tacit collusion and therefore was potentially prohibitable. The statement would be just too - conduct such as this would not be prohibited because it is not in restraint of trade; nor does it oppose market forces. Posner's theory of tacit collusion therefore does not attack legitimate business responses to normal market conditions where the conduct is innocent, but presumably only when it has anti-competitive results and is motivated by the desire for gain over and above legitimate levels of profit. This he feels is the teaching of Theater Enterprises, and is fully consistent with the aim of the Sherman Act when it was introduced in 1890 to stop the banding together of rivals to extract monopoly profits by ending competition and charging the joint maximising price.

The opposition : why conscious parallelism should not be interpreted as conspiracy under the Sherman Act

In opposition to Posner's account of tacit collusion, Professor Turner remains adament that conscious parallelism cannot be synonymous with agreement or conspiracy[23]: according to his reasoning nothing can refute the conclusion in Paramount Film Corporation[24] that conscious parallelism *alone* could not provide a basis for the inference of conspiracy. Turner insists that even if all the enterprises in this or a similar case were fully aware of what each other was doing and that that amounted to the same thing, there could be no agreement without there having been further voluntary acts and the evidence to indicate them.

In American Tobacco Co. v United States[25], a case whose facts are more appropriate to the discussion about conscious parallelism, Professor Turner connects the non-competitive behaviour not with an agreement, but with a rational calculation by each seller of the consequences of his price decision, taking into account the probable or almost certain reactions of his rivals. Unlike in Theater Enterprises it would be wrong to say the decisions are independent; but nor are they dependent. They are interdependent. A will only act in a certain way if he knows that B will do so too. Otherwise, the action which A takes will only inflict harm on him. For instance, although by reducing his prices he will gain initial advantage, A would forego these if he knew

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(23) *Op.cit*, n.4
(24) *Supra*, n.11,
(25) *Supra*, n.15

that B would follow his lead, since in the final outcome, they all will suffer from lower profits.

Turner argues against the theory that because of their mutual awareness, what is in fact taking place is a "tacit agreement":

1. Where conscious parallelism is simply the same independent responses to the same set of economic facts it is not remotely similar to an agreement.

2. Even in more complex economic situations conscious parallelism should not be illegal. Let us assume an industry with two or three sellers of equal size. They each bear the same cost burden, sell the same products, supply and demand are static, and the market is transparent to sellers and buyers alike. Clearly the "best" price for an individual seller would also be the price which is "best"for all, and there would be no hesitation on the part of any of them in asking for it.

In this situation, the decisions are interdependent in that the "best" price depends on the other firms charging the same, but this would be so certain to be the case that there would be necesssity for and therefore no real element of "meeting of minds".

It must be acknowledged that this situation would never arise in reality: there will always be some variations in the circumstances of each seller, together with an element of uncertainty on the market, so that the "best" price will always differ among the producers; and even if

this were the same, each seller's calculations could not be perfect. Consequently, in the absence of fully recognised interdependence, there ought to be some variation in selling prices. The only logical conclusion for such uniform pricing to emerge, is that there must have been something like a meeting of minds of the nature of the "agreement to agree"[26] which, according to Kaysen arises when a seller recognises that it is better for him to rely on a single judgement of the market (ie., that of the trend-setter) than to compete with his rivals. Thus he sacrifices his own judgement in return for a much greater degree of certainty as to what his rivals will do.

But is a meeting of minds of this nature illegal when there has been no explicit communcation? It has been suggested that this fact is irrelevant, when the market makes communication without contact possible. The rational oligopolist behaves in the same way as a prudent seller in an industry with a large number of sellers: they both act so as to make the highest profit possible given prevailing market conditions. The only difference is that the oligopolist has one more factor to take into account, that being the unfavourable repercussions of his conduct in the form of his competitors' reactions to it. If the oligopolist's behaviour is unlawful when the ordinary seller's is not, it must be precisely this very factor which constitues the illegality. But if the oligopolist does not take his rivals reactions into account, he would be acting in an impractical, unbusinesslike manner. His competitors, without any doubt, will react to a price cut, since its effect would be to make a substantial inroad into their sales, there being only a few

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(26) Kaysen, 'Collusion under the Sherman Act', 65 *Q.J. Econ.* 263, 268 (1951)

sellers on the market, each of more or less equal size and holding similar market shares. On the other hand, a seller in an atomised industry need not take into account such a price cut in the formulation of his own plans as it will have little, if any, effect on his own sales - the loss in market share will be spread more or less evenly among each of the numerous competitors. Incidentally it is a comparison of the oligopolists' behaviour with the seller in an atomised market which illustrates how unjust it would be to make conscious parallelism illegal. The oligopolist is no more culpable than his rational counterpart in a larger industry who setting his prices which in the light of all the facts will bring him the best profit. It would be wrong to expect the oligopolist to disregard factors of which he is well informed; and for him to do so would hinder the normal functioning of business.

However, notwithstanding the necessity for an oligopolistic seller to act cautiously, some say that this behaviour can still be viewed as an agreement, due to the fact that each knows what the other is doing and determines his own activity accordingly - there is a communcation by action. But it can also be said, that by refraining from price competition, the sellers are not agreeing with one an other, but merely utilising knowledge of each others' decisions in their own price calculations as impersonal market facts - even Kaysen's "agreement to agree" may be viewed as a situation of individual decisions wherein each seller has decided individually that it is more profitable to avoid price competition, even though price cutting may at first sight and in the short term seem the more advantageous course.

2. Proof of tacit collusion

One of the most convincing reasons for not including conscious parallelism in the definition of conspiracy is that it would be virtually impossible to prove tacit collusion as distinguished from normal parallel behaviour. However, exponents of the "tacit collusion" view while admitting that there are problems in proving concerted action on the basis only of non-competitive pricing believe that they are not insurmountable, there being several types of evidence available from which some sort of tacit "cartel" enabling uniformity can be deduced:

-evidence of systematic price discrimination

-prolonged excess of capacity over demand. Cost changes would be expected to effect the market price proportionally less in a non-competitive market

-the existence of price leadership. Admittedly this is dubious proof because its significance is equivocal: although colluding sellers may use the mechanism of price leadership to assist them in their aim, the phenomenon may emerge simply because one of the firms in the market is known to have a shrewd judgement of market conditions, and hence the others regularly defer to it. However, where price leadership is very uniform and long continued, inference of tacit collusion may be warranted.

In addition, some traditional methods for proving overt collusion may also be used for the purpose of proving tacit collusion; for example:

-the fact that the defendants have fixed market shares for a substantial period

-the fact that they have filed identical sealed bids on non-standardised items

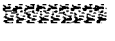
-refusal to offer discounts in the face of substantial excess capacity

-announcements of price increases far in advance of their implementation, as a means of communication to eradicate possible differences of opinion as to each others behaviour

-public statements as to what a seller considers to be the right prices for the industry to maintain, which again serve to remove differences in opinion about respective behaviour.

Clearly there is a wide spectrum of evidence from which collusion may be inferred - whereas interdependentists would require the government to look at structural features and performance characteristics of the market, Posner considers it sufficient to limit the enquiry to conduct from which an absence of effective competition can be inferered.

From past experience however, a point which Posner himself concedes, it seems that these proposals are not so easily workable, since



the Courts in the United States have not shown great skill with economic evidence[27].

This point of course will also apply to the ability of the European Commission to deal with such evidence. At the same time however, these doubts are also valid concerning its capacity to fulfil its current task of distinguishing between concerted practices and conscious parallelism.

3. Administrative difficulties of equating conscious paralleilsm with conspiracy

If non-competitive oligopolistic pricing were to be called an agreement, or by some other means to be made illegal, there would still remain the problem of actually remedying the behaviour. Although Courts in the US would be able to fine the parties and thereby "punish" them for their behaviour (irrespective of whether it is just) in a civil or administrative action the behaviour must actually be put to an end. This aspect as much as any other which makes the prohibition of conscious parallelism unfeasible.

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(27) Posner describes at great length the pitfalls in using such evidence but on such an important problem as this, it would not be unreasonable to suggest that the Government undertook research in the area of cartel and oligopoly. But until such an improvement in knowledge occurs, the Courts should exercise extreme care in drawing inferences of tacit collusion from market conduct.

If firms are to conform to a law prohibiting conscious parallelism they must no longer take into account the probable decisions of their competitors when determining their own prices or output - since it is this very practice which provides the grounds for the charge of conspiracy. But to expect businessmen to comply with this would be to ask for irrational unbusinesslike behaviour - enterprises would be compelled to weigh up which is the less preferable; condemnation by the authorities and the penalties that this carries, or reduction in profit and potential bankruptcy resulting from inactivity.

However, there is of course a more feasible injunction: enterprises would have to ensure that they increase their output only up to the point where the marginal cost equals the price that can be obtained; or alternatively, that they lower their prices to the point where it equals the marginal cost. But even this formualtion causes great problems. If it is adhered to rigidly, it would not only eliminate all monopoly profits, but it would force the seller to endure competitive losses whenever, for example, there was a fall in demand. Apart from the practical problems involved when the Court has to calculate what is and what ought to be in terms of economics(28), the idea is unconvincing and repellant because it entails judicially enforced losses, "certain to lead to bankruptcy in some cases"(29).

Posner implicitly believes that this approach is unnecessary. Rather, he suggests that it is rational for an oligopolist to decide not

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(28) *Op.cit.* n.4 p670 for a full account of the difficulties involved.
(29) *Ibid.*

to collude. What is involved is a decision to expand output until the return accruing to the investors in the industry is roughly equal to what they could earn pursuing other activites. Moreover, even in the absence of sanctions, an oligopolist may find it more beneficial not to restrict output - for example, due to his inability to predict his rival's reactions or because of a fear that they may "cheat".

In opposition to Turner's arguments that where demand was falling competitive prices would lead to losses to the industry, Posner says that firms facing losses anyway will not collude if the anticipated cost of collusion is greater that the gain.

Finally, businessmen will have no difficulty in knowing when they are breaking the law - tacit collusion is *not* unconscious.

The above analysis has shown that in many aspects conscious parallelism and concerted practices are similar. They have identical effects (i.e. anti-competitive) on the market; they are done deliberately with the hope of making some gain or avoiding some loss; in both cases the acts of reciprocation and the motivation behind them are done with mutual cognisance; and this mutual awareness arises without overt communication. It seems strange therefore that one is treated as "innocent" and the other is condemned. Moreover, where there is evidence of parallel behaviour but no categorical proof of a concerted practice there is a likelihood that any indications that the conduct is the result of conscious parallelism may simply be a fortunate cover for collusion. Indeed, businessmen are likely to take advantage of the fact

that their collusive behaviour is very similar in appearance to conscious parallelism if that concept is not prohibited. In this case it is surely more beneficial to the Community that behaviour which may not be strictly proven as a concerted practice, but which is nonetheless anti-competitive in result (and arguably in intent) be stopped than for anti-competitive behaviour which may be a concerted practice to remain unchecked, simply because of a very strict requirement of proof.

The greatest obstacles to the prohibition of conscious parallelism within the EEC however, in my view, are that it may entail "judicially enforced losses"(30) and restrict the freedom of businesses to act in normal prudent businesslike fashion. This notion exists at least in theory despite what Professor Posner says will happen in practice. Even he concedes however, that a good case for not including "tacit collusion" (conscious parallelism) under section 1 conspiracies lies in the practical problem of proving it. It is submitted that if the fear that it would create an unwarranted strict liability offence can be overcome, the practical problem of proving conscious parallelism as opposed to a concerted practice is just as good a case for its inclusion in the prohibition.

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(30) *Ibid.*

CHAPTER FOUR

EVIDENCE IN THE PROOF OF A CONCERTED PRACTICE

Chapter Four

Evidence in the Proof of a Concerted Practice

The central theme of this thesis has been the mode of proving a concerted practice, whether its focus be the contrast with other forms of anti-competitive behaviour, or the burden of proof in establishing a concerted practice as opposed to what might be "innocent" market behaviour. The issues to be dealt with in this chapter are further refinements of that basic issue in two specific situations. Firstly, the chapter seeks to analyse the respective roles of direct evidence and market evidence in the proof of the termination and suspension of a concerted practice; and secondly, to consider the problems in proving a concerted practice which may arise due to the occurence of covert competition where two simultaneous sets of market evidence raise conflicting inferences[1].

The intricacies of proving a concerted practice have been set out in Chapters Two and Three, but the general mode of proof has never been fully discussed. Before dealing with the specific issues of suspension and undercover competition therefore, it is proposed to consider the elements in the proof of a concerted practice which give rise to questions in these areas.

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(1) This is to be contrasted with the situation discussed in Chapter Two *supra*, where only one set of market facts raise two conflicting inferences

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Mode of Proof

Referring again to the key concerted practices case, Dyestuffs[2], the applicants insisted that the existence of a concerted practice necessarily required the existence of a common will and some kind of plan by which that will could be fulfilled. Otherwise they argued, proof of a concerted practice would reside merely in the incidence of parallel conduct, a phenomenon which in the appropriate economic environment may arise unavoidably, even in the absence of an agreement or other form of collaboration[3]. If these arguments were valid, there may be inordinate difficulties in proving the existence of a concerted practice, given the sophistication in present day business practices and techniques - quite apart from the fact that some forms of less unified collusion would escape control altogether. However, conceding that the existence of a concerted practice required a common will and that it was not synonymous with conscious parallelism, the Commission rejected the necessity for a plan. The requisite common will exists not only when there is an understanding among undertakings as to their market conduct, but also where they consciously ensure that one another are informed about their intended conduct, leaving no doubt and no risk in the implementation of their respective programmes which are therefore "worked

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(2) Case 48/69 Imperial Chemical Industries Ltd. v EC Commission [1972] ECR 619
(3) See Chapter Three *supra*, for a consideration of when constious parallelism might occur, and of its merits as a defence *per se*

out in advance"(4). All that was required was "conscious and purposeful cooperation"(5). It might be thought that with such emphasis placed on the necessity for some form of actual collusion in the constitution of a concerted practice, the Court would have also insisted that there should be some evidence of this. However, while the Court appeared to conform to the Commission's view about the "conscious cooperation" part of a concerted practice, the way in which the judgement was reached does not indicate that actual proof of it is an indespensible requirement.

The Court concedes that coordination amounting to a concerted practice would be "apparent from the behaviour of the participants"(6) - this statement is of course not equivalent to saying that whenever parallel or other suspicious behaviour is visible on the market it would constitute adequate proof of a concerted practice. However, the Court's discussion of the issues before the judgement might encourage this interpretation: it states that "it is not necessary to show that the participants have *collaborated*(7) or drawn up a common plan"(8). Moreover, because the Commission "proved...that the dyestuffs manufacturers in question behaved in a uniform way...it [had] adduced sufficient proof that concerted practices existed"(9). The implication of this is that parallel conduct alone may constitue the concerted practice, despite what was said in the grounds of the actual judgement to the contrary(10).

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(4) *Supra*, n.2 p643
(5) *Supra*, n.2 p643
(6) *Supra*, n.2 para.65
(7) My emphasis
(8) *Supra*, n.2 p643
(9) *Supra*, n.2 p643
(10) *Supra*, n.2 para.66

This suggestion is strengthened when the Court says,

"Furthermore [the Commission] has shown that the structure of the market for the products in question was such that there is no explanation of this uniform conduct other than that alleging concerted practices"(11)

as if evidence of this was not absolutely essential. In a similar fashion, the fact that direct evidence of actual collusion was available was treated as a bonus: "Moreover, the Commission has *even* pointed out a series of facts constituting indications of concertation."(12)

However, out of all the Commission's reasoning it is the actual judgement(13) which must be used as the guideline. Thus the statement that "parallel behaviour may not by itself be identified with a concerted practice" but may "amount to strong evidence of such a practice if it leads to [abnormal] conditions of the market"(14) must be taken as superceding the earlier reasoning in the case to the contrary effect. However, there is no indication as to whether the phrase, "strong evidence" means evidence adequate to *prove* a concerted practice, or evdience which is sufficient only to raise an *inference* of a concerted practice which must be substantiated by other types of evidence. In this situation of doubt, the reasoning applied to the specific facts of the case (set out above) must be referred to, and the suggestion is that parallel behaviour alone will be sufficient proof.

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(11) *Supra*, n.2 p643
(12) *Supra*, n.2 p643 (my emphasis)
(13) *Supra*, n.2 pp648-664
(14) *Supra*, n.2 para.66

The Advocate-General in the case suggested that the common will requisite to a concerted practice

"can be deduced...from all the elements of facts gathered together on the conduct of the undertakings, depending on the case; for example, instructions given to representatives, relationships with buyers...contacts between managing bodies and so on"[15],

indicating perhaps that this is an essential requirement of proof. The Commission too referred to direct evidence of contact, but it is by the Court's judgement that the Commission must abide in future cases. Its judgement, however did not provide for the situation in which collusion is not the only explanation for observed parallel conduct - but for which it is nonetheless a possible one. What would be the respective roles of market evidence and evidence more direct to the occurrence of collusion then?

In CRAM & Rheinzinc[16] the Court rejected the evidence which the Commission had adduced to prove that the suspect market observations were the result of collusion as inadequate and overuled its finding of a concerted practice. However, in this case the parties were also able to prove that the market evidence in which the Commission relied was explicable other than by concerted action. There is no guidance in the decision as to what the outcome might have been had the evidence of actual collusion been stronger - whether it would have been sufficient to

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(15) *Supra*, n.2 p671
(16) Cases 29 and 30/83 Comagnie Royale Asturienne des Mines SA and Societe Rheinzinc GmbH v EC Commission [1984] ECR 1679

remove any doubts about the cause of the market behaviour, but it is at least clear that if a concerted practice is to be found on the basis of market evidence alone, the Court must be satisfied that there is no other possible explanation for it than collusion.

It is interesting to note the Commission's own clear policy on the matter of evidence when it states at p58 of its 14th Report on Competition Policy that

"concertation is proved by an economic analysis showing that under the given circumstances the similarity of prices was economically inexplicable unless there was concertation beforehand."

In the very recent concerted practices case, *Woodpulp*, O.J. 1985 L85/1, the Commission put forward some evidence of collusion, but added that a concerted practice must have been the cause of higher prices for a considerable period of time. In effect, the Commission relied largely on economic evidence and that was of rather dubious reliability since it was based on dramatic fluctuations which tend to be expected for a commodity which is sold all around the world. The Court's decision as to whether this is acceptable proof is eagerly awaited. It is submitted that while the merits of the Commission's market evidence may be doubted, the fact that it is market evidence which makes up most of the Commission's case is not incompatible with the Court's own handling (admittedly, over twenty years ago) of the available evidence in Dyestuffs. In addition, if the Court were to uphold the decision, this

might provide some guidance as to the role of direct evidence in a case where the significance of market evidence is open to interpretation.

It will have emerged from the above commentary that there are two distinct (at least in theory) ways of establishing - or presuming - the existence of collusion to restrict competition:

1. the Commission may observe highly suspicious behaviour on the market on the part of the participants to the alleged infringement; or

2. the Commission may have in its possession documentary or other more concrete evidence of some form of contact between the parties during which it has been established that either an understanding was reached, or that there was ample opportunity for an understanding to be reached.

In theory, depending on what quantity of evidence exists, or on how precise it is, either of these two types of evidence might constitute sufficient proof of unlawful collusion. If the concrete evidence available to the Commission is a document containing an agreement, there is no requirement that the Commission look to actual market behaviour[17]; and if there never was an agreement among the parties but a concerted practice is suspected, the Commission is obliged to base its proof primarily on market evdidence of the actual operation of the "arrangement". Alternatively, as was the case in Dyestuffs, incidents

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(17) WEA Filipacchi SA, J.O. 1972, L303/52

of both types of evidence may be available to the Commission in which case the two sets may be placed side by side to corroborate one another and overwhelmingly prove a concerted practice.

But what do these terms, "market evidence" and "direct evidence" really mean; what forms may they assume; and how and when will they interact in the proof of a concerted practice?

In the sense that the nature of the prohibition makes prohibited concerted practices anti-competitive it could be said that all concerted practices are the same - ie., they are forms of collusion by which to remove the risks of competition. Even in their more specific aims they are similar: the Commission often deals with the alleged or proven "concerted practices to preserve market compartmentalisation"(18), or to retain the status quo in market share by which all the parties concerned are ensured a stable profit. However, while these are the general aim of all concerted practices (and indeed of all other forms of prohibited cooperation) the specific means by which they are achieved vary, depending on factors such as the product market in which the parties operate; the geographical market; and the particular threats the participants perceive as dangerous to their operation. Thus the immediate aim of a concerted practice by which to preserve or maximise joint economic comfort will differ from situation to situation. The corollory is that the evidence by which the concerted practices are discovered and proved will differ from case to case (or at least from

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(18) e.g., ICI v EC Commission, *Supra*, n.2; Pioneer Hi-Fi Equipment, O.J. 1980, L60/21

"category" of case to "category" of case) accordingly. While this is stating the obvious for market evidence, it is submitted that the proposition also applies to the type of evidence which constitutes a more direct indication of collusion.

The following pages are intended to be a critique of the various sorts of market and direct evidence which have been raised in concerted practices decisions, and attempt to indicate the situations in which direct and market evidence might be said to overlap.

"Market Evidence"

The concerted practices reported in the Official Journal with which the Commission has had to deal may be grouped into four main categories. These concern pricing; the prevention of parallel imports; specialization processes; and information exchange. The last of these is a rather a dubious categorisation as it does not constitute a discrete topic, but rather it itself may be a part of one of the three other types of practice.

1. Parallel pricing cases

In concerted practices relating to prices, market evidence of collusion will clearly be based around patterns of behaviour which in most market situations are unusual. An obvious example would be simultaneous, or almost simultaneous price increases implemented by several producers.

Once suspicion on these grounds has been aroused, the Commission would consider market evidence of a different nature, that is the economic background to which these circumstances belong to enable an assessment as to whether the unusual behaviour could be accounted for by the prevailing economic environment. Since this is not evidence of what the parties have actually done, it is less direct than the observation of pricing patterns. It acts to corroborate the immediate evidence of suspect conduct by indicating how the parties would be expected to act in the absence of collusion. For example, the homogeneity of the goods in question would have to be considered; whether they are sufficiently similar for the price rises to be explained by a uniform increase in production costs, or whether they are so different that they cannot be interchangeable and therefore not subject to price competition anyway. The rate of expansion of the market may also be considered. In Dyestuffs[19] it was found to be comparatively fast and therfore unlikely to accommodate genuine conscious parallelism. Similarly, the tendency towards a mobile demand meant that in untampered market conditions purchasers would have patronised producers who offered merchandise at lower prices.

In Zinc Producer Group[20], although the alleged concerted practice related to prices, its specific aim and form was very different to that in Dyestuffs. The concern of the producers was not specifically to reduce the risks of competition between them by fixing prices with the aim simply of achieving higher profits, but according to the Commission,

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(19) *Supra*, n.2
(20) Zinc Producer Group O.J. 1984, L 220/27

explantion for the suspicious conduct, in which case the parties are exonerated, or which will show that the uniformity exhibited by undertakings on the particular market is inexplicable in the absence of concertation. Thus, this type of market evidence plays a secondary role and corroborates or rebuts the primary evidence of actual market activity, and it would appear is valued more highly than direct evidence of collusion.

In Woodpulp the Commission found "concerted price fixing"(22) by the firms on the basis of two distinct types of evidence, firstly, of parallel conduct, and secondly of several kinds of exchange of information between them. The latter will be discussed shortly. As regards the former, this arguably may be distinguished into three types.

Clearly the parallel conduct constitutes the primary evidence. This was substantiated as a being a strong indication of a concerted practice by the Commission's economic analysis of the background in which it took place - the secondary market evidence. The number of firms was large, and among them were several strong enough to pursue a perfectly independent pricing policy through which they could improve their positions at the expense of their competitors; the market was not naturally transparent, and so collusion should be more difficult; there was no possibility that the similarity in prices could be "equilibrium prices" since these would be more responsive to changing market conditions than those operated by the woodpulp manufacturers; no single firm was strong enough to take on the role of a price leader; and in

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(22) Woodpulp O.J. 1985, L85/1 p15

view of the large number of producers of pulp and the wide variation ofeconomic conditions in which they operated, the parallel price increases could not be explained as a coincidence in the independent taking of price decisions.

The third type of market evidence in Woodpulp is not distinct but a part of the parallel conduct. The Commission noted that both announced prices and actual transaction prices had been very similar among the producers over several years - although announced and transaction prices did not necessarily correspond to one another. Thus the parties were charged with two concerted practices, one for fixing announced prices and the other for fixing transaction prices. While the observation of parallelism in actual selling prices clearly constitutes market evidence, that concerning announced prices does not necessarily do so. It is not actually what happens on the market - it is not something which the Commission can observe the parties *doing*, as in the case of parallelism of transaction prices. This is particularly so when the announced prices are not adhered to. Therefore, to a certain extent these can perhaps be equated with some kinds of direct evidence, in that it shows what the parties intended to do - or pretended to do - as part of their overall market sharing strategy, just as a meeting might provide an insight into what the participants aim to do. Having said that this is different to the evidence of parallel transaction prices however, it is probably still a branch of the same thing, i.e., market evidence, in that it is evidence of actual parallel conduct (even though it is passive as opposed to active conduct actually implemented on the market) and of

appears that observations of what has taken place on the market has less impact than direct evidence. The injured parties in Hasselblad complained to the Commission that the official Hasselblad suppliers refused to do business with them; in Pioneer and Zinc Products and Zinc Alloys[25] they provided evidence that orders were rejected just prior to implementation after previously having been confirmed, together with evidence of simultaneous suspension of deliveries before completion of an order. While these incidents certainly relate to the market - indeed, they are evidence of the parties' behaviour on the market - they are not themselves evidenced on the market. This is particularly the case where the concerted practice is the refusal to accept orders previously acknowledged, rather than the cessation of an order already begun to be fulfilled. This conceivably could be a consequence of a diminished desire on the part of purchasers to place orders. Thus, there may be grounds to say that while this ought to constitute market evidence, it will in fact very rarely be an actual observation of the market in the absence of some indication from the aggrieved parties of its occurence.

Yet again, like the third type of evidence in Woodpulp, it is more accurate to say that it constitutes "market" rather than "direct" evidence because it at least is an actual reflection of what is happening on the market. The same may be said to apply to incidents of communication from the supplier to the purchaser concerning the former's refusal to supply. They are entirely different from the examples of meetings between the "conspirators" at which what will happen on the market is "planned". However, even acknowledging this, it cannot be

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(25) Rolled Zinc Products and Zinc Alloys O.J. 1982, L352/40

denied that market evidence clearly plays a different and indeed a more powerful role in the proof of the existence of a concerted practice in prices case than it does in cases concerning parallel imports.

3. Concerted practices for specialization and rationalization

Deserving of brief mention is BPCL/ICI[26] in which the aim of the concerted practice was to accelerate and complete a specialization process previously begun by means of agreements notified to the Commission. It is difficult to call any evidence in this case "market" evidence as the events did not take place on the relevant market as such. However, what may be called the "initial" evidence which raised suspicions of a concerted practice was constituted by the closure of several plants not provided for in the agreements. The Commission refused to accept that these were the natural result of the industry-wide excess capacity and the long term independent strategies to deal with the problem, and in doing so relied on secondary market analysis evidence. However, again its significance is not the same as the market evidence in parallel pricing, cases which generally provides the greatest weight of evidence for the concerted practice. In BPCL/ICI the Commission was already alerted to the possible motive of any closures because of the direct evidence of collusion in the form of agreements to the same effect which implied an acknowledgement of the continuation of the specialization process.

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(26) BPCL/ICI O.J. 1984, L212/1

4. Concerted practices concerning the exchange of information

Concerted practices concerning exchanges of information also pose problems in connection with market evidence of them. In COBELPA for example, the Commission referred to what were "at the very least concerted practices"(27) to "restrict and distort competition"(28) by means of several incidents of information exchange. Since the perceived effect is recorded no more specifically than this (except when the Commission lists the potential effect of the information exchange(29)), it must be assumed that the immediate aim of the concerted practice is or that the concerted practice is itself, to exchange information. The exchanges clearly are something which the Commission witnessed, and as in the parallel pricing and prevention of imports cases, they are concerted practices in operation, as opposed to being the prior organisation of them. But they are not what might easily be called market evidence, which normally consists of some sort of active market or economic aspect. Had the Commission not been alert to the conduct so soon it may have had more accurate evidence of the effect of the concerted practice, for example, trade flows being deflected from their normal channels, and an absence of economic interpetration. This would have constituted market evidence proper.

Admittedly the Commission does refer to some real market evidence of the information exchange. Through the exchange of data the parties "worked out their pricing and sales policies in line with those of the

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(27) COBELPA/VNP O.J. 1977, L242/10 para.24
(28) *Ibid.* para.24
(29) *Supra.* n.27 p16

respective domestic producers"[30]. However, the Commission gives this only slight acknowledgement and describes it as an effect of the concerted practice instead of emphasisng it as evidence of the concerted practice in action in the market place. However, it would have been legitimate to say that this itself was the concerted practice - a concerted practice to work out such prices with the ultimate aim of hindering economic interpenetration and therefore keeping markets exclusive for the producers, and that the incidents of information exchange enabled then to so. Thus, this latter, rather like the communication and meetings in Dyestuffs[31] provides the direct evidence of collusion. However, the Commission does not appear to adopt this approach in any of the information exchange cases reported and treats the exchanges of information as the concerted practice. Thus in information exchange cases, "market" evidence takes on a new meaning - or, it is replaced in status by evidence of the actual collusion which no longer is collaboratory in nature but is the crux of the evidence.

It should be noted that this interpretation of the evidence in information exchange cases is based largely on a case whose economic effects had not yet been felt. The Commission said that where information exchange is involved it will always be suspicious that it is a concerted practice for the tacit sharing of markets or concertation over prices. In the light of this statement concerning the potential future consequences of information exchange, perhaps the roles of evidence in these cases is necessarily different owing to the fact that

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(30) *Supra*, n.27 para.34
(31) Case 48/69 Imperial Chemical Industries Ltd. v EC Commission [1972] ECR 619

in reality the concerted practice (for example, price alignment has not yet been carried out. The Commission needs to prevent what it perceives to be an object of the information exchange, and the only way in which it can do this is by attacking the concertation or collusion itself which is begun by the exchange of information. Alternatively the situation might be referred to as a concerted practice to exchange information with potential anti-competitive effects. In this case the only evidence of it is what would normally constitute the reinforcement evidence in a concerted practice that had been implemented - for example, as meetings would be secondary to evidence of uniform price rises. Thus, the exchange of information is not market evidence, but it takes on the same role as market evidence as preliminary proof.

"Direct Evidence"

Although often used to describe this sort of evidence, the word "direct" is misleading. Normally it is used to mean evidence which proves or shows a certain thing happened. In the context of concerted practices law it may be just another type of circumstantial evidence which indicated that the alleged infringement might have or probably did happen. Nonetheless there is a difference between it and the other kind of indirect evidence, ie., evidence of what is actually taking place on the market[32]. Usually it is the first indication of collusion, but it is only an indirect indication in that the conduct observed is

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(32) See pp141 and 142, *supra*, for an account of possible market evidence which does not conform to this principal

unlikely to occur without some form of consultation. The so-called "direct evidence" however is evidence of the parties' behaviour prior to their actions on the market. Unlike market evidence it directly indicates (although not necessarily proves) the existence of collusion because it is evidence of a situation in which the collusion (which is the root of the parties' market behaviour) did or probably did take place.

In prices cases, direct evidence may take the form of either meetings or commnication - letters, telexes, telephone conversations - at which or by which information concerning the parties' intended pricing policy was discussed. Evidence of an announcememt of the desirability of acting in concert to combat a particular prevailing economic problem would be more conclusive, but even the mere exchange of information without such a declaration, if the contents of the data exchanged are so certain so as to remove doubt about each others' policy and are such that if they are acted upon they create a potential threat to free competition, would entitle the Commission to infer that on these occasions concertation with respect to an integrated pricing policy took place. If market evidence indicates that such a policy has been adopted in practice by the parties to the information exchange then the "direct evdidence" of direct or indirect contact at which collusion may have taken place would reinforce and substantiate those initial inferences.

1. Prices Cases

In Dyestuffs[33] direct evidence to corroborate the evidence of uniform price increases took the form of identical wording in the price instructions of different manufacturers to their subsidiaries in different parts of Europe; in addition, the producers made sure that they announced their prices well in advance of implementation thus ensuring that all uncertainty was removed to enable other producers to alter their prices without risk.

In Woodpulp the Commission relied on evidence of "a constant flow of information between the firms"[34] to corroborate the inferences of their market behaviour. Their system of quarterly announcements constituted "at the very least, an individual exchange of information on future market conduct"[35] by which each producer "could expect that the prices he announced would immediately reach his competitors."[36]. There was also an official framework for exchange of information between North American producers in KEA and Fides; and there were several meetings to which the Commission could point at which prices were discussed, as well as telexes in which sensitive information was exchanged.

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(33) *Supra*, n.31
(34) *Supra*, n.22 para.107(a)
(35) *Supra*, n.22 para.108(b)
(36) *Ibid*.

2. Concerted practices to prevent parallel imports

In so far as it involves meetings or other communication where information about intended policy is revealed, direct evdience is of a similar nature where it concerns concerted practices to prevent parallel imports. Obviously, however, the content will be different. In Hasselblad[37] there was substantial documentary evidence available in which the manufacturer and his sole distributors expressed their disapproval of parallel imports and even specifically requested that all attempts should be made to stop them. Replies to these were affirmative. A similar format was evidenced in Pioneer[38]: a meeting in Antwerp partly concerning the detrimental effect of the increasing number of parallel imports to France was followed by specific requests from Pioneer in Belgium to the various sole-distributors to stop direct parallel exports or sales to distributors who would export. Further evidence was available in the letter from Mr.Todd of Shriro (the British distributor) to Audiotronic explaining indirectly how it could not meet orders because of pressure from Pioneer in Antwerp. In this case the Commission clearly had direct evidence of actual collusion, and not merely evidence of a situation in which collusion was likely to have occurred.

It should be noted that evidence of a request for assurance that the goods would not be sold in Germany was not adequate direct evidence to substantiate an inference of collusion raised by a simultaneous

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(37) *Supra*, n.24
(38) *Supra*, n.23

cessation of deliveries (market evidence) for the Court in Rolled Zinc Products and Zinc Alloys[39]. The Court considered that a notification by telex notification from RZ to CRAM of a 3% reduction in its prices on the German market to be inadequate corroborating evidence of the concerted practice between them to stop parallel imports. While it may have been valid evidence in prices cases, there is no indication in the telex of collusion to prevent parallel imports, and although the mutual request for assurance of the destination of the products may constitute direct evidence of a possible concerted practice, it would appear that the absence of relevant communication between the two producers was an obstacle to satisfactory proof. As mentioned above this case offers some indication of the relative strengths of market evidence and direct evidence. It does not reaffirm the inplications of Dyestuffs however, to the effect that where there are no alternative explanations for parallel conduct the Commission is entitled to infer a concerted practice even in the absence of some direct evidence of collusion. Nor does it indicate whether clear evidence of collusion would be adequate to overide the reluctance of the Court to uphold a finding of concerted action when alternative explanations for the behaviour do otherwise exist.

3. Concerted practices concerning the exchange of information

In information exchange cases, as mentioned above, direct evidence plays a different role to that in prices and parallel imports cases. Where it

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(39) *Supra*, n.16

perturbs the Commission, it can only be the actual collusionary part, ie., the exchange of information which provides the evidence of a concerted practice. The fact that data is communicated with an anti-competitive motive is merely *substantiated* by reference to the economic background which might prove to be such that the information transmitted will have anti-competitive consequences if taken advantage of. Certainly in COBELPA[40], the Commission relied entirely on the actual exchanges of information, stressing that where information such as this was concerned, it would be alert to the possibility of its being a device for the tacit sharing of markets or concertation over price.

In both Flat Glass[41] and White Lead[42] on the other hand, the Commission was already aware of agreements (by the time of the investigation terminated) to establish and supervise quotas in the Common Market. The exchanges of information, read in the light of this already proven collusion to actually restrict competition, constituted a sort of secondary evidence of a concerted practice rather than primary as in COBELPA.

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(40) *Supra*, n.27
(41) Flat Glass O.J. 1984, L212/13
(42) White Lead O.J. 1979 L21/16

With the issue of the mode of proving the existence of a concerted practice complete, it is now proposed to consider the Commission's treatment of alledgedly terminated concerted practices: what evidence must the implementors adduce to prove to the Commission's satisfaction that their cooperation is indeed at an end? It is intended that the investigation will reveal that the requirement varies, depending on the types of concerted practice concerned, and that it will illustrate another facet to the inter-relation of direct and market evidence.

II

Evidential Roles in the Proof of the Termination or Suspension of a Concerted Practice

The Commission may meet the situation where it has clear observations of both contact and unnatural market behaviour which are such that together they constitute proof of a concerted practice. After a while, market surveillance suggests that there has been a return to competition; or even less, there may simply be an absence of any evidence that the concerted practice is still being applied. However, in terms of new direct evidence to counteract the initial evidence of actual collusion there is no sign of any contact at which a multi-lateral understanding to end the concerted practice could have been made. Although it is possible that the one-time participants had individually decided that changing market circumstances made it more advantageous for them to withdraw and begin competing with their one-time co-conspirators this is not necessarily an automatic assumption. One only need refer to the Pioneer case(43) for a reminder of the Commission's attitude (and indeed those of the Court and Advocate-General, Sir Gordon Slynn): in circumstances where there is no longer market proof of the continuance of what clearly once was an anti-competitive practice, the onus of showing that it is finally extinguished is on the parties. Thus they are required to produce evidence of pro-competitive activity and not simply an absence of restrictive conduct.

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(43) Cases 100-103/80 Musique Diffusion Francaise v EC Commission [1983] ECR 1825

The parties in Pioneer put forward two distinct items of evidence in an attempt to prove that their concerted practices to prevent parallel imports of hi-fi equipment into France had terminated well before the date which the Commission alleged. According to the Commission the concerted practice between Pioneer, Musique Diffusion Francaise (herinafter referred to as MDF), and Melchers to end parallel imports from Germany into France continued until February 1976, while that between MDF, Pioneer and Shriro to prevent parallel imports from Britain lasted until the end of 1977.

Firstly the sole distributors referred to the economic background in which their alleged concerted practices took place as their line of argument. This will be dealt with subsequently. Their second ground really concerned the establishment of a concerted practice but the comments in reaction to it and the discussion these provoke are applicable to the issue of termination. Like the first ground it was based on market evidence, but of a different nature; Pioneer UK contended that the Commission had not proved the concerted practice beyond 1977 because it had not shown that Comet in the UK had ceased to export.

Comet had indeed, even after the letter from Mr. Todd of Shriro warning him of the severe consequences which parallel imports had for the distribution network, continued to export Pioneer goods to those buyers who came to the firm's premises in the UK to place their orders. Thus, Pioneer UK argued that the Commission could not show that Comet had taken any steps to implement the concerted practice, and *a fortiori*, nor had the sole distributors in not insisting that Comet comply with the

original request. However, the Commission rejected this line of defence. The Advocate-General set out his reasons for commending this approach at page 1941:

"a concerted practice is capable of continuing in existence, even in the absence of active steps to implement it. Indeed, if the paractice is sufficiently effective and widely known, it may require no action to secure its implementation."

If the sole distributors had argued that they had ceased to pressurise Comet in the matter of parallel imports, and that there was no evidence of any communication between them, then what the Commission and Advocate-General say is valid; a mere absence of direct evidence of the continuation of collusion ought not be able to contradict the inferences of on-going market evidence, ie., the continued cessation of exports since the concerted practice may very well be going on without the necessity for this. However, their argument lay in the fact that Comet was exporting contrary to the supposed intention of the concerted practice. While it is true that a concerted practice may be able to go on without steps being taken to implement it, the fact that Comet is supplying goods abroad, by whatever route, surely is perfect market evidence that the concerted practice simply is not being implemented?

The solution to the discrepancy between what the Commission and the Advocate-General say about implementation being unnecessary for the concerted practice to be effective and the apparent ineffectiveness of the concerted practice with respect to Comet must lie in the fact that

"when the parties to a concerted practice have put an end to exports from particular suppliers, it is for them to prove, if they can, that they later delivered them to the supplier *without imposing restrictions*."[44]

Thus a pattern emerges. For the satisfactory proof of a concerted practice, simple economic evidence that the parties have acted suspiciously on the market will be adequate, providing there is no alternative explanation for the behaviour. If there is such an explanation, the Commission may be able to substantiate its suspicions with some evidence of contact between the parties at which collusion is likely to have taken place[45]. In the proof of the termination of an *already established* concerted practice however, the system changes. Firstly, "the burden of proving the illegality of the decision falls...upon the applicant"[46]. Secondly, it is not enough for the applicant to show that steps were not taken to implement the concerted practice, as the parties argued, ie., for him to point to an absence of direct acts of renewed collusion; he must positively show that the members to the concerted practice have "...decided to bring it to an end..."[47]. This clearly is not fulfilled by inferences from the conduct of the parties in no longer troubling to insist that the restrictive policy be carried out (whereas inferences raised at meetings where the subject of the concerted practice may be discussed only in the abstract will be sufficient for the Commission to establish the *existence* of a concerted practice).

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(44) *Ibid.* p1941, opinion of the Advocate-General (my emphasis)
(45) Although see comment on pp134-136 concerning Zinc Producer Gp. indicating the contrary
(46) *Supra,* n.43 p1930, opinion of the Advocate-General
(47) *Supra,* n.43 at 1871

But does the wording of the requirement suggest that direct evidence of such a decision , for example, instructions to the sole distributors to stop the concerted practice, or a meeting at which such a resolution was made, will be adequate? It is submitted that in the case of parallel imports even this ought not to be satisfactory proof. Just as a concerted practice does not require positive steps to secure its implementation, even an acknowledged consensus that the concerted practice should be stopped will not necessarily be fulfilled if market conditions revert to the kind where the concerted practice becomes necessary once more. Each of the ex-participants will be aware of the dangers these conditions present and of their previous plan to combat them and will almost certainly automatically resume its operation. In a prices case re-adoption of the concerted practice will necessarily manifest itself in a display of non-competitive prices and the Commission would clearly know to rely on this market evidence rather than the evidence of the parties' decision to stop the concerted practice. Conversely, the Commission could afford to rely on a declaration of termination, because if genuine it will be clear from the market behaviour of the parties.

In the case of parallel pricing however, if the concerted practice has been so well broadcast that potential buyers from abroad do not think it worthwhile to place orders, the end of the cooperation may not automatically signal the renewal of exports - this will only arise once customers themselves recommence placing orders - which will only be when they become aware of the end of the dissolution of the export ban. Of course, those disassociating themselves form the concerted practice

could announce their independence, but to do so would be to admit their role in a concerted practice and ensure incrimination in any subsequent action by the Commission. Thus the parties may genuinely have decided to end their concertation but the only proof which they can adduce of this is an absence of direct evidence to maintain the concerted practice - which would be wholly inadequate to prove the termination of the concerted practice or to disprove its continued existence. To the Commission there is no indication from market observations that the concertation has ended, and in the absence of direct evidence, it might assume that there is simply a new period of "silent concertation". Unlike in prices cases, market evidence may not necessarily reflect the intention of the parties, and judging how heavy the burden of proving the termination of a concerted practice is on the applicant, it is hardly likely that the market evidence which simply does not show any positive acts of refusal to export will satisfy the Commission that their "decision" has been put into action.

It was said in the case that there were only two ways in which a concerted practice would cease. The first is as above, when the parties decide to bring it to an end; the second is when the market has changed to such a degree that it is no longer necessary. Thus, the parties in Pioneer tried to show this to be the case - the alternative ground of their argument. MDF observed how the Commission had noted that the differences in prices in 1976 and 1977 made parallel imports profitable, and that the high incidence of parallel imports gave rise to a gentlemen's agreement which lasted for the period during which prices in the UK were lower than in France. Adapting the reasoning on which the

Commission based the existence of a concerted practice, MDF argued that the alleged concerted practice with Shriro could not have lasted for two years because in August and September 1976 price differences between the two countries had reduced by such an extent that parallel imports were no longer profitable, and that therefore there was no necessity to take any action during this period. Hence, MDF maintained that the economic link which the Commission perceived to be necessary between parallel imports and the concerted practice was established by no element of fact, indicating that in effect the concerted practice was no longer operating - that it did not exist for the period after Shriro's letters to Audiotronic and Comet. MDF claimed to the Court that the Commission did not even consider the possibility that the concerted practice may have been discontinued despite this argument having been put forward by the parties. Thus, MDF put forward market evidence to rebut both previous market evidence indicating a concerted, practice and the inferences raised by evidence of actual collusion (the meetings in Antwerp and written requests from Pioneer to Shriro, and from Shriro to Comet and Audiotronic to stop parallel imports) . The Court rejected MDF's submissions about the undesirability of parallel imports and therefore discounted their market evidence. Ironically, perhaps the parties defence that Comet continued to export lends support to the Court's assessment of the innecessity for, and therefore the existence of the concerted practice. It is submitted however that even if it could be proved that parallel imports were no longer a substantial threat, it would not have been accepted anyway as proof of the termination of the concerted practice. This inference is drawn from the remark of the Advocate -General that the parties themselves must show that any exports

which did take place were granted without the imposition of restrictions[48]. It cannot be taken as read that the concerted practice was at an end, unless there is some positive proof to this effect. This is to be compared with the indirect proof required to satisfy the Commission of the existence of a concerted practice.

On the strength of this statement, although the particular facts of Pioneer were not appropriate to the following proposition, it could be argued that if market conditions have changed, to an extent which makes the previous collusive behaviour no longer profitable, in the absence of evidence of an uniquivocal decision to terminate and proof of actual pro-competitive behaviour, one interpretation is that the concerted practice has not ended but is merely suspended until economic conditions more favourable to its operation resume. Assuming that restrictive behaviour is evidenced at a later stage, rather than charging the parties with two separate concerted practices (ie., for the time preceding and following the period of inactivity), the Commission might consider the whole time-span as being host to the concerted practice, the only difference being that during the interim period, the parties are adapting their own behaviour to each other's in a non-active way in preparation for the recommencement of parallel behaviour, ie., they are involved in a concerted practice to "lie low"[49].

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(48) *Supra*, p154(F,N,44)
(49) It is not suggested that this is the situation in Pioneer. In this it is a question simply of the presumption of the continuance of a concerted practice not to compete which arises because of the lack of proof to show otherwise, as opposed to *prima facie* evidence of the discontinuance of a concerted practice being interpreted as a concerted practice to "keep underground".

A case whose facts might accommodate this approach is Woodpulp[50]. The Commission found concerted practices among woodpulp producers on the basis of a similarity in announced and transaction prices, inexplicable by natural, untampered market conditions, together with evidence of "different kinds of direct and indirect exchange of information"[51]. This consisted firstly of the system whereby the parties announced to the public or media their prices well in advance of their coming into force so that there would be ample time in which "opponents" could discover the information and alter their own prices accordingly; and secondly, of exchanges of price information at meetings, in telexes, and through export and research and information organisations in America and Switzerland.

It is not necessary to itemise the Commission's decision but it is sufficient to state that it does not find concerted practices between the parties from the moment that collusion was inferred from market evidence or evidence of contact right up till the very last incident of the observed concerted prices. Rather, it divides the charge into distinct periods. For instance, addressee number 7 is found to have breached Article 85(1) with respect to its announced prices in 1977 and 1979-81[52], and not from 1977-81 inclusive. The same pattern applies for the findings concerning transaction prices. Even though the parties were positively shown to have resumed their anti-competitive behaviour, indicating that for the interim period the concerted practices might

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(50) *Supra*, n.22
(51) *Supra*, para.106
(52) *Supra*, n.22 p26

merely be in formal abeyance, the Commission found separate concerted practices. However, there may be explanations for why the Commission did not find concerted practices during these periods, in spite of the absence of any direct proof that the parties had decided to put an end to their cooperation - either for good, or simply for the duration of the altered market circumstances which made the concerted practice redundant - when the parties in Pioneer met with misfortune on similar evidence.

The Woodpulp producers may have come to a decision to discontinue the concerted practice, but there is no direct proof of one having been reached. In the Pioneer case, Pioneer UK tried to point to the existence of active competition on the part of Comet as a substitute for this proof, but it was rejected on the grounds that they had not been able to prove that the resumption of exports involved no restrictions. The Court also pointed out in the same context that the Commission did not need to prove that Comet had stopped exporting because a concerted practice could just as easily be carried out without the necessity for positive steps to implement it. In a prices cases such as Woodpulp however, there is no requirement for reinforcement evidence to fully clarify the position of prior market evidence of *prima facie* collusion. Whether the concerted practice is uniformally terminated, or some firms simply choose to withdraw (as in Woodpulp), the concertation will be positively shown not to exist for a period during which a pattern of non-identical pricing evolves. Such a trend should automatically occur where there is no collusion (except perhaps in a narrow oligopoly situation(53). It seems then that in spite of inferences of collusion

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(53) See Chapter Three

which maybe raised by incidents of previous meetings and information exchange may raise (and for which there is no direct evidence to rebut them), where competitive prices return to the market as in Woodpulp, it cannot be said that the parties are colluding.

In summary it seems that the Commission is prepared to accept market evidence on its own to prove a break in a concerted practice when there is no recent evidence of a more direct nature to indicate the continued existence of collusion: but it will be insufficient to signify the end of the concerted practice in entirety if market evidence shows that there is a concerted practice relating to announced prices, even though this may have no real effect on competition; and thirdly, as was the case in Pioneer, the Commission will not accept a lack of positive evidence of restriction on the market as synonymous with competition and an indication of the end of the concerted practice, temporary or permanent, without some direct proof to show that the parties have decided to extinguish it or withdraw. This is to be contrasted with Woodpulp in which the economic evidence which suggested that concertation was no longer feasible was actually substantiated by market evidence to show that the concerted practice had been withdrawn and that competition had in fact been resumed. In the absence of corroborating evidence such as this it would appear that the Commission will always be suspicious of some ulterior motive in the apparent abandonment of a concerted practice, particularly if there is evidence that the market is prone to fluctuations, or better still if at a later stage, the parties re-adopted it; and in its caution it will examine all the evidence fastidiously for indications that the parties knew that they would resume their concerted

behaviour when market conditions reverted to their normal precarious state.

III

The Role of Market Evidence in a Situation of Undercover Competition

The final element in this critique of the mode of proving a concerted practice is to examine the respective weights of evidence in a situation where signs of secret competition may contradict indications of collusion to restrict competition.

It is a common fact that in the business world agreements and arrangements, lawful or otherwise, are made and abandoned - often without unanimity. Many of the cases which come before the Commission do so because parties to the agreement wish to escape their "obligations" under it by means of a declaration that the understanding was illegal, and therefore without legal effect. But there are other occasions when rather than seeking to evade their responsibilities under the arrangement by having it officially brought to an end, it is more expedient for participants to an agreement or concerted practice to outwardly appear to adhere to the anti-competitive practice but at the same time to adopt a policy of their own which undermines the collusive behaviour. For example, in the case of a concerted practice to charge certain prices for goods so as to ensure a steady profit for all the participants, one member of the group, while continuing to advertise his goods at the agreed price may offer special services to attract customers or secret discounts for customers who are prepared to buy bulk quantities. Thus although superficially he is pursuing a rigid pricing policy in

conformity with his co-conspirators, beneath this he is applying a highly competitive policy which he hopes his opponents will not discover too soon. This phenomenon may arise if the market takes a turn so that the cooperation is no longer imperative. One or two members of the group will see this as an opportunity to dispense with the restrictions of the common strategy and compete instead for a wider market at the expense of the remaining particpants. But to do this openly would in all probability lead to economic reprisals:the arrangement would end and fierce competition from all angles would result, thus wiping out both the advantages which the renegade firms would have achieved, and the security afforded to them all by their collusive strategy. Alternatively or even additionally, the conspirators may close ranks, and covertly set up obstacles to their effective trading. This latter consequence would not apply, however, in the case where all the participants in the concerted behaviour discover the value of undermining the scheme. In such a situation, it would not be possible that the parties remain unaware of the undercover competitive activites of their co-conspirators, and so in effect and in motive, the arrangement is terminated - but not formally, because its terms are still being carried out, and moreover, the market conditions which made the concerted policy necessary in the first place might return, thus bringing an end to the outburst of competition and a resumption of the agreement in practice.

Where the anti-competitive arrangement takes the form of an agreement the fact that competition may be rife beneath the formal display of concertation is irrelevant to the Commission's assessment as to whether for this period there was an anti-competitive arrangement.

Firstly, the terms of the agreement are still being executed; secondly, although there may be no anti-competitive result owing to the incidence of under-cover activity, by the terms of Article 85(1) its "object" is of as much consequence as its effect. Recalling earlier work stating the nature of an agreement and the evidence required to prove it the Commission must already have direct evidence of the agreement to restrict competition in some respect, and so the indirect economic evidence of concealed competition and the consequent pro-competitive effect cannot contradict the proof that the parties designed to restrict competition, and the Commission has obvious justification in prohibiting the agreement and fining the perpetrators as it considers appropriate. But does the same apply when the parties renege on a concerted practice?

As has been stressed before, the essential character of a concerted practice is that it is collective conduct on the market place which arises informally by virtue of "nods and winks" as opposed to any prior arrangement of even the loosest kind which might constitute a "gentleman's agreement". Consequently, the Commission has had to rely on inferences drawn from the conduct of undertakings actually as it takes place on the market - indirect evidence - as proof of the anti-competitive act. In most cases, this poses no problems as commonly where collusion does arise, it is manifested in behaviour which simply would not occur under normal circumstances and cannot be explained in the absence of collusion - although the accused parties would offer claims that there are other economic explanations rather than collusion.(54) However, the problem with which this discussion is concerned is not

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(54) See Chapter Three, *supra*

caused by different interpretations of the same facts, but by conflicting evidence: the contrasting presumptions which two simultaneous sets of facts raise. This situation would also arise if the anti-competitive behaviour concerned were an agreement, but the problems which might evolve are not the same. As explained above, in the case of an agreement, the Commission may rely on direct, possibly documentary or at least oral evidence to substantiate evidence of market behaviour. This would also refute the implications which the more recent evidence of competitive activity raise, ie., that there can be no agreement, and proves that there nonetheless remains at least an intention to restrict competition. Despite the actual competition witnessed by the Commission there still is an agreement not to compete. In the case of a concerted practice, however, the Commission may have no such positive evidence at its disposal. For one thing, at the very loose end of the scale there may have been no "arrangement" to speak of - text book writers have sugested that mutual and reciprocal price announcements, each firm having the intention that the other will act on information in a certain way are sufficiently motivated on both sides to constitute the requisite collusion for a concerted practice. Yet this is hardly like the concrete proof that an actual agreement, or maybe some more concrete types of concerted practice will have. Consequently the Commission may have no option but to rely purely or mostly on market evidence as proof of collusion which the information exchange merely corroborates . In addition, in Dyestuffs it was quite categorically stated that where market conditions were so unusual that they could not have arisen in the absence of collusion, the Commission was spared the burden of investigating for some positive act of collusion. Probably therefore

the Court believed that even if there was something more akin to an arrangement or even to a well disguised agreement, in the above example it might be very difficult to show.

Thus, having to do without the positive evidence of an agreement the Commission must not only acknowledge on one level the lack of anti-competitive effect, but also, because of an absence of restriction of market forces, it should not be entitled to presume that there was any anti-competitive object. This is because although in the majority of cases there may be evidence of preliminary contact, owing to the spontaneous nature of concerted practices at the loose end of the scale the Commission needs proof only of a certain kind of market behaviour to find and prohibit a concerted practice. But on the other hand, for exactly the same reasons of mode of proof, once there are substantial signs that the parties are involved in anti-competitive behaviour for which there can be no other explanation but collusion, the fact that there is also evidence that some of them have disassociated themselves from the concerted practices and are in reality pursuing a competitive policy (while simultaneously maintaining the appearance of toeing the collusive line) should be of no import because it cannot refute what is already proven. Is this an unjust outcome; should undertakings which break away, albeit it clandestinely, from a restrictive arrangement be condemned and penalised? Is the Commission trapped by the method by which it proves a concerted practice into a finding of unlawful concertation which in fact, for some of the parties to the decision is not taking place? Or can it disregard what may be proof of their official policy which it has discovered in market behaviour and react

instead to the reality of the situation seen in market behaviour hiding behind a pretence of restriction?

In practice, the issue of "under-cover competition" may not be as complex a problem for the Commission to handle as it is for theorists (given the discussion above about the possibility of very loose forms of collaboration - especially "tacit" collusion; and the go ahead of the Court in Dyestuffs[55] for proof of a concerted practice on market evidence alone), and may not warrant the concern which the above commentary suggests is necessary.

The essential character of the potentially complex situation lies in the fact that on the surface all the participants continue with the alleged concerted practice while only underneath compete with their co-conspirators. For example, in the case of a concerted practice to stop parallel imports one of the colluders, while refusing to sell merchandise to buyers from his own country whom he knows will export the goods, may decide not to refrain from supplying foreign retailers directly who actually come to the seller's own country to make the transaction. If the other distributors discover this practice, they too might adopt the same competitive policy (of course, simultaneously refusing to supply middle-men against whom they have been warned by the instigators of the concerted practice), and moreover actually stimulate secret price competition in this area of under-cover activity, thus doing more than to merely negate the effect of the concerted practice. It might even be said that in doing exactly what the alleged

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(55) Case 48/69 Imperial Chemical Industries Ltd. v EC Commission [1972] ECR 619

concerted practice was designed to prevent, the renegade firms are in a position to argue that despite what some market evidence might suggest, their competitiveness gives witness to the claim that a concerted practice to prevent parallel imports does not exist. In Pioneer[56], with respect to Comet, impliedly neither the Commission nor the Court accepted as proof that it was undermining the concerted practice or that it never really accepted the "terms" of the concerted practice the fact that it did not stop supplying French buyers who came to England for the purposes of the deal, and that it continued to sell Pioneer equipment in the Channel Islands. Yet on the other hand, with respect to the commencement of the concerted practice, because Audiotronic took over some of Comet's custom after the two English discount firms had received letters from Shriro requesting it not to export, the Court held that its involvement in the concerted practice did not start until it too stopped supplying Continental firms. In neither of these instances did the Commission or Court elucidate on what specific basis they reached these conclusions. Perhaps it was because in the latter case at the crucial time there was no market evidence of the actual commencement of the concerted practice on the market with which evidence of competition had to compete. In the former, however, if Comet had already been proven to be complying with the concerted practice in one area (ie., refusing to export via the normal channels) then the evidence of its competing in other areas negating the actual effect of the concerted practice has to compete with pre-existing evidence of the concerted practice in action. The following paragraphs are an attempt to explain why that

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(56) Case 100-103 Musique Diffusion Francaise v EC Commission [1983] ECR 1825

may be the answers to the "Comet problem", and to offer some explanation of how the Commission might deal with similar problems which undercover competition may create

(a) In taking the example of a concerted practice to maintain market compartmentalisation by means of price alignment which is undermined by an undercurrent of competition in the area of secret discounts, rebates and services, the overall effect of the behaviour might suggest that there is not a conspiracy to bring actual selling prices to the same level or to protect markets. While this may detract from the weight of evidence which suggests that there is a concerted practice, it cannot eradicate the existence of a concerted practice. There remains a concerted practice to align list prices, which is fully carried out. Consequently, there need be no conflict between what is ostensibly proved (a concerted practice which has an anti-competitive object) and what in reality exists (active competition). A concerted practice to some end still does exist and has not been disproved by the competitive market behaviour, which in this analysis takes on a purely incidental role. The Commission would be justified in bringing an action against the restrictive behaviour, but in practice it might be overlooked (depending on how ineffective the pro-competitve conduct rendered it), or fines would be assessed moderately.

(b) The proposition that the Commission will be trapped into proving the existence of a concerted practice because of the undercover competition element rests on the assumption that a concerted practice is proven on

the basis of market behaviour. While this is true[57], the implication of Dyestuffs was that market evidence alone will only be admitted when there is no possible explanation for the behaviour other than collusion. More to the point, although text book writers call for the prohibition of tacit collusion[58] or very indirect communication between enterprises (for example, the announcement of prices to the customer in the knowledge that potential conspirators will soon learn of them and with the intent that they will respond accordingly), there is little to suggest in the case that a concerted practice will exist without some element of contact and acknowledgement. Thus, not only will the occasions in which this mode of proof is legally permissible be rare, in all the cases reported further investigations have revealed the necessary contact and so the situation of legal and actual conflict which provides the subject matter of this section is purely hypothetical. Thus, when there is evidence of information and policy exchange, or the opportunity for transfer of critical information, the undercurrent of competition may tend to refute the conclusions to which the parallel behaviour leads, but it cannot contradict the more direct evidence that a concerted practice in one area of the enterprises' business (in my example, the official pricing policy) is still operating.

(c) It might be said that even with such reinforcement evidence, in legal terms there still can be no concerted practice - the intrinsic feature which determines the identity of a concerted practice and sets it apart from an agreement is that it "happens" rather than is planned, and

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(57) See pp128-134
(58) Posner, 'Oligopoly and the Antitrust Law: A suggested approach' JE *1969 Stanford Law Review* 1562

if the market evidence shows that it is not carried through then it simply has not "happened", and therefore does not exist. However, even if there is not a plan, there must be an immediate aim - a course of action which is carried out fully, ie., in the alignment of official list prices; we are momentarily deceived by the fact that what we expect to be carried out - combined behaviour which allows the concerted practice to serve the purpose intended it, ie., the maintenance of each firm's own market share - is not being executed.

The point here is that while some concerted practices may be akin to conscious parallelism, there are others which are a little more certain and deliberately collusive and are not necessarily conceived at precisely the same moment they are put into effect, for example, those which have a tentative arrangement which does not quite reach the standard of an agreement. But even the sort which can arguably exist through mutual price announcements to the public (made of course with the requisite intent) *can* sensibly have both purpose (a preliminary stage) and result. Just because a concerted practice may be primarily discovered by and proved on the basis of its effect on the market, it does not follow that if the object is not properly achieved, or that the execution of it is "bungled", there was never a purpose or object behind it and that its existence can be denied.

(d) Taking this reasoning to its next stage, even if the intended object (the visible part) of the concerted practice were not attempted, quite apart from the added complexity of undercover competition, if there is evidence of some actual collusion intended to restrict competition, that

eitself surely would be sufficient to fulfil the requirements of a concerted practice[59] because the parties have come together either to acknowledge the desire for a certain policy which has potential anti-competitive effects[60]. Any subsequent behaviour based on this preliminary cooperation would not be a separate concerted practice but an integral part of the overall concerted practice to alter competition.

(e) A different approach would be to say that if a reasonable number of the participants are undercutting one another, given the typical market place, it is logical to assume that they each must be aware of one another's activities. If so, there seems little point in maintaining the appearance of a concerted practice with respect to list prices both to themselves and to Commission investigators, unless there is some overiding ultimate benefit to be gained. Extending the decisions in Pioneer[61] to this specific situation, it seems that the Commission's view would be that in terms of its intended effect the concerted practice was allowed to lapse but that there was no attempt to formally bring it to an end. Thus there would be a mutual recognition of its temporary suspension or abandonment until it became useful again with the tide of the changing market.

(f) A simple argument by which to avoid even the theoretical problems which may arise from the incidence of undercover competition revolves around the fact that in this theory the difficulty potentially arises

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(59) Because Article 85(1) prohibits "arrangements" whose "object or effect is anti-competitive
(60) e.g. Vegetable Parchment O.J. 1978, L70/54;COBELPA/VNP *supra*, n.27
(61) *Supra*, n 56

because there exist simultaneous contradictory behaviour patterns: ((i) the competitive one negating the object of (ii) the anti-competitive one, and possibly its actual existence because there is no longer any collusion to maintain guaranteed profits for all. However, Article 85(1) prohibits concerted practices which also distort the normal pattern of competition on a market and which do not necessarily have a restrictive effect[62]. In both the alignment of prices and in the undercover activity we see such a distortion - had it not been for the former behaviour, the competition would have taken place more spontaneously or in a different form, and so in fact, rather than detracting from the proof of the concerted practice on official prices, the undercurrent of competition increases the evidence of it. Instead of a concerted practice specifically not to compete on selling prices generally, it can be regarded as a concerted practice to distort the market. However, even with the strong legal foundation which this approach provides for bringing an action against the behaviour under a concerted practice head, reference to previous decisions in which a concerted practice has had some beneficial effects[63] or which does not entirely exclude the scope for competition makes it clear that the Commission would take into full account the competitive as opposed to anti-competitive element in its decision to impose fines.

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(62) See Article 85 and e.g., Re German Ceramic Tiles Discount Agreement, J.O. 1971 L10/15
(63) e.g Zinc Producer Group n.20 para.103

CHAPTER FIVE

THE MINIMUM REQUIREMENT OF COLLUSION AND THE MINIMUM AMOUNT OF EVIDENCE BY WHICH A CONCERTED PRACTICE MAY BE CONSTITUTED AND PROVEN: SOME ANSWERS

Chapter Five

The Minimum Requirement of Collusion and the Minimum Amount of Evidence by which a Concerted Practice may be Constituted and Proven: Some Answers

It was said in the early stages of this work that the fact that Article 85 omitted to provide a definition section was proof that the chief aim of the competition rules was to attack anti-competitive results of business behaviour and not the particular form by which these are achieved. Nothing in the investigation into concerted practices' law and practice since that preliminary statement has been revealed to contradict that view. However, the very fact that Article 85(1) specifically sets out three types of anti-competitive behaviour intsead of just listing the particular anti-competitive examples which might form the subject matter of these categories indicates that it is not a provision to catch all manner of conduct which has undesired effects. The Treaty makers specifically intended to prevent *artificial* barriers to free trade. Where for example, non-competitive prices occur as the result of popular demand and a scarcity of raw materials, they do so because of natural environmental factors. Unfortunate though these consequences may be the competition rules cannot prevent or prohibit them unless it is by the imposition of enforced price control or by artificial intervention in the economic background from which the non-competitive prices emerge. Such intervention and control however is contrary to the fundamental principle of the EEC that the common market should be based

on a market economy, determined by the laws of supply and demand under conditions of competition[1]. Thus, Article 85(1) prohibits only that anti-competitive behaviour which is a consequence of the deliberate acts of two or more undertakings which has the effect of restricting competition between them so as to ensure their own well-being at the supposed expense of the customer and of the Community as a whole. In this respect it is not simply the uncompetitive state which is the target of Article 85, but the fact that it has been, or will be achieved through collusion. It is the element of collusion in the Treaty which has given rise ot considerable contoversy over Article 85 and with which this thesis has tried to deal.

Its aim was to answer some of these questions about the operation, and for that matter, the theory of concerted practices law the crucial points being the minimum degree of collusion and the minimum amount of evidence by which a concerted practice may be constituted and proven. With this as the central theme clearly ascertaining an exact distinction between an agreement and a concerted practice is of minor practical significance. The weight of Chapter One pointed to the fact that the way in which the Commission chose to label anti-competitive behaviour was not so important as actually identifying its collusive quality and prohibiting it. In Hasselblad therefore the Commission condemned information exchange as "an ancillary device to ensure the market partitioning"[2] rather than categorically denouncing it as either a concerted practice or an agreement. However to compare the two forms

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(1) See Articles 1-3 Treaty of Rome
(2) Hasselblad O.J. 1982 L161/18 para.49

of prohibited conduct reveals some interesting characteristics of a concerted practice and thereby offers some indication as to the minimum collusion and minimum evidence required for the concept to "exist" and to be prohibited.

Reference to Chapter One will show that the two major distinctions between agreements and concerted practices resided in the respective requirements of acknowledgement and implementation. The study made of Commission decisions showed that what in everyday terms would be said to have been "agreed" did not necessarily constitute an "agreement" for Article 85(1) purposes. For instance, in Flat Glass[3] undertakings were quoted as having "agreed" to exchange information but were charged with having been parties to only a concerted practice. Of course there may have been extraneous factors dictating the Commission's decision to label. For example, the proof of the actual consensus was only indirect - certainly not adequate to prove the existence of an agreement - yet there was satisfactory market evidence to incontrovertibly indicate a concerted practice. Alternatively, what was "agreed" comprised only one part of several acts of concertation which certainly did not constitute an agreement, in which case the particular instances of "agreement" ought not to govern the nature of a whole set of less collusive behaviour. A more straightforward conclusion to draw would be that the term "agreement" to be satisfied requires something more than a recognition of mutual intentions and of the desirability of acting in concert, but an actual meeting of minds as to the fact that what the enterprises have between them is an

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(3) Flat Glass O.J. 1984 L212/13

"agreement". In reality whether this is an accurate distinction between an agreement and a concerted practice is immaterial because the label assigned to collusive behaviour does not determine the gravity of its anti-competitive effects nor the severity of the sanction it merits. However, whatever the distinction is, its consistent application might make a difference to effective enforcement if the second distinction as perceived by the case analysis is held to be true.

Much emphasis has been placed on the Advocate-General's statements concerning the evidential nature of a concerted practice and on the Court's treatment of evidence of the concerted practices in Dyestuffs. In saying that "the participating undertakings must *in fact* have acted in the same way" and that unlike in the case of an agreement it is prohibited...without its being necessary to consider the *real effect*...on competition"(4) the Advocate-General implies that a concerted practice can only exist in the actual performance of anti-competitive acts on the market and that the distinction between the two categories lies in the requirement of implementation. If as the case analysis suggests, the Commission does have consistent criteria by which it defines "agreement", and that these are based on some sort of acknowledgement of the existence of an "agreement", it is likley that the type of collusive behaviour which does not meet the requirements of an "agreement", and whose aim is not carried out, will escape prohibition. Although no harm is done to the competitive state of the relevant market, actual effects are not the only target of EEC competition law. In the supervision of business behaviour it is important that undertakings are

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(4) Case 48/69 Imperial Chemical Industries Ltd. v EC Commission [1972] ECR 619

warned about deliberate harmful behaviour detrimental to undistorted competition and that they are prevented from carrying it out. It is submitted that in the vast majority of situations, if the collusive part of an anti-competitive incident is observed before the implementation of it, it must be sufficiently cogent to satisfy the requirements of an agreement: concerted practices are only adopted as a last resort with the aim of avoiding the attention which an agreement would draw. However, the Polypropylene case(5) provides an illustration of how and when this difficulty might arise. In this case there is some scepticism about the reliability of the Commission's market evidence; it is arguable whether the alleged anti-competitive results are what was intended by the collusion and therefore it is suggested that what was "designed" was never carried out. The alleged collusion took place in several incidents, some of which undisputably did not constitute an agreement, for example, instances of information exchange and some proposals concerning policy, but which, on the authority of previous cases, would normally satisfy the evidential standards to establish a concerted practice. The Commission chose to pronounce its charge in the alternative. If the series of events could not constitute an agreement, they at least amounted to a concerted practice. But if the Court is persuaded that what was hinted at in the above mentioned announcements was neither achieved nor attempted, what will be the consequences for the undertakings and for the efficacy of the competition rules? The Commission was faced with a similar situation in Flat Glass(6) in which the producers did not dipspute their concertation and their anti-

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(5) Decision 86/398/EEC IV/31.149 Polypropylene, see p59 *Supra*
(6) *Supra*, n.3

competitive intent. However, they maintained that concertation had proved unnecessary because market factors and government intervention were such that prices would have been the same anyway. The Commission did emphasise that "whatever the influence of ...[these] factors may have been" data collected showed that concerted practices and agreements were "regularly made"(7), but in the end did not have to make a declaration about the theory that collusion without implementation will constitute a concerted practice as its economic analysis refuted the claims that it was these extraneous factors and not the concerted practice which had produced the crucial results. The Polypropylene case is subject to appeal and the outcome is eagerly anticipated. It is submitted, however, that if collusion can be proved to be genuine (and of course, the question of whether information exchange or mere policy proposals can constitute adequate evidence of an intent and meeting of minds to collude is an entirely different matter) then it would be unfortunate and destructive of the object of the competition rules if the Commission was hindered in stopping the firms concerned simply because their unlawful intentions were overtaken and rendered unnecessary by subsequent market developments. Their culpability is not diminished, and nor would the anti-competitive effects of their scheme be reduced if at a later stage they were to readopt and put their concertation into action. In a case where the Commission observes collusion alone, and the market does not change so as to render the alleged concerted practice unnecessary, would the Commission have to wait until some damage was done before it could take action?

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(7) *Ibid.* para.41

It is submitted that this cannot be the case. If it is true that a concerted practice can exist only in implementation, this can only be because the Treaty makers envisaged a situation wherein undertakings would concert their activities in such a way so as to avoid the visible traces of collusion which an agreement would leave. It would be illogical therefore if the inclusion of concerted practices within the Article 85 prohibition were to leave pockets of freedom. The only conclusion is that it was assumed by the Treaty makers that any anti-competitive behaviour which is not put into action but which is clearly identifiable as anti-competitive in intent must by definition be capable of satisfying the requirements of an agreement. If these are strict they should be relaxed and extended to cover this situation. But it is also submitted that the situation which has potentially arisen in Polypropylene (and it should be borne in mind that it has not yet been fully established that the apparent anti-competitive results are not the direct consequence of the observed acts of collusion) will very rarely if ever exist. Where collusion is observed which does not conform to the requirements of an agreement, it is only likely to be noted because of a deliberate investigation provoked by suspicious anti-competitive market behaviour or by the clues of an informant. To be otherwise capable of coming to the attention of the Commission as initial evidence, then collusion must be sufficiently cogent to be an agreement. In the case where it constitutes secondary evidence, but the primary market evidence is of dubious merit, apparent collusion must be examined meticulously in the context of all the background facts to ascertain whether it can in fact constitute the evidential requirements of collusion, be it an agreement or a concerted practice. It is submitted that this is the

impediment to prohibition and not the mere fact that an unimplemented concerted practice is incapable of existing. A concerted practice can only be proved in its operation because its perpetrators deliberately leave the minimal amount of evidence of actual collusion so as to render it worthless without the reinforcement of market evidence. Paradoxically, this is a reversal of the usual roles whereby direct evidence of collusion serves to substantiate market inferences. This sort of residue evidence will be inadequate when it stands alone it is submitted, because there is an indisputable requirement of collusion in the Article.

While there is a necessity for collusion within the defintion of a concerted practice, the research in Chapter Four revealed that there is no necessity for proof of it within the evidence. However, there must at least be a presumption of collusion which cannot be said to exist in the example where there is no market evidence to indicate concertation. In all the concerted practices which have involved conduct of whose collusive quality the Commission has been satisfied, there has been market evidence of suspicious behaviour together with some more direct evidence of the actual collusion which brought it about[(8)]. However, the clear implication of the judgement in Dyestuffs was that if the Commission could adduce sufficient evidence of anti-competitive conduct which, given the economic background in which it developed, was inexplicable in the absence of concertation, it would have satisfactorily

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(8) Although see Cases 29 and 30/83 Compagnie Royale Asturienne des Mines SA and Societe Rheinzink GmbH v EC Commission [1984] ECR 1679, in which the Court rejected both the authenticity of the inferences which the Commission drew from market evidence and the direct evidence relied on to substantiate these.

established the existence of a concerted practice without any necessity for direct evidence of collusion. In conjunction with the Court's statement that in producing evidence of parallel behaviour the Commission had proved a concerted practice[9] this could be interpreted as meaning that parallel behaviour alone is synonymous with a concerted practice. Reference to para. 66 of the judgement in which the Court said that " parallel behaviour may not itself be identifed with a concerted practice" however, contradicts this. Moreover, although the statement that parallel conduct may constitute "strong evidence" of a concerted practice does not require that evidence of actual collusion be adduced, it does implicitly require proof of it - and that proof exists by virtue of the fact that there is no other explanation for the behaviour but collusion.

Notwithstanding this, it must be conceded that the use of parallel behaviour as evidence of a concerted practice may lead to its unjustified prohibition as a concerted practice. This may lead to the conclusion that collusion is not a necessary element in the requisite "practical cooperation" of a concerted practice.

F.A. Mann believes that the "practical cooperation" test does presuppose a "conscious or knowing cooperation", but he is sceptical that the Court's economic analysis in the Dyestuffs case was accurate and considers that it is prepared to condemn parallel behaviour which conceivably can be conscious parallelism (which impliedly does not involve such a "knowing cooperation") as a concerted practice. His

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(9) *Supra*, n.4 p643

concern is that in reality the Commission's method by which a concerted practice stands to be proved will inflict an unlawful status on otherwise innocent behaviour.

Steindorff seems to take the view that this may have been a deliberate intention of the Dyestuffs definition which he equates with Lord Diplock's dictum concerning the term "arrangement". This clearly does not require a "common aim" if only one party need communicate his policy with the requisite intention that the other should be thereby induced to act in an appropriate anti-competitive way. Pfeifer takes this further. He interprets the "practical cooperation" test as focussing on the anti-competitive results rather than the means by which they are achieved, and in this way infers that Article 85 imposes strict liability for conscious parallelsim. The Court's economic analysis of the facts corroborate this view. It held mere parallelism to be refuted by advance price announcements which eliminated all uncertainty as to future conduct, and failed to fix liability on the grounds of an understanding among the parties to do so; nor did it explain how parallel conduct was otherwise impossible. Thus Pfeifer sees the Court's definition and treatment of the facts as denying the need for collusion and impliedly proclaiming that conscious parallelism constitutes a concerted practice. This notion was developed in Chapter Three which questioned whether in fact, as opposed to in law, conscious parallelism was a legitimate form of business activity.

It would be superfluous to go into the arguments about how and when conscious parallelism will genuinely arise once more. Reference to

Chapter Three however, will serve as a reminder that a collation of the views of economists and lawyers implied that genuine conscious parallelism was very rare because very few industries conform to the "model oligopoly" on which the interdependence theory (briefly, which exonerates undertakings for consciously reciprocating the acts of their opponents) rests. Thus, in the majority of cases, parallel or reciprocal behaviour will be the result of "deliberate collusion" and not "conscious parallelism". This assumes that conscious parallelism is not "deliberate collusion", but even in the model oligopoly, there are grounds to say that the interdependent behaviour observed is no less a form of collusion than that which takes place in an atomised market, the only difference being that the meeting of minds - the common purpose - is tacit and concealable. While Richard Posner acknowledges the existence of a meeting of minds, he submits that it would be irrational and impractical to try to prevent the oligopolist from making what are in reality rational calculations of the likely consequences of his price decision, the likely reactions of his competitors being only one more consideration to take into account than his counterpart in an atomised industry. To do this would be to ask businessmen to behave irrationally and would entail "judicially forced losses". The proponents of the tacit collusion theory however argue that the way in which the meeting of minds occurs is irrelevant when the state of the market makes collusion possible without communication. And their answer to the allegation that it would be impossible to remedy the behaviour because to prohibit it would compel businessmen to make an unacceptable choice, between prohibition and the consequent penalties, and imprudent business activity resulting in reduced profits and potential bankruptcy is simple. Posner

believes that it is rational for the oligopolist to refrain from collusion and there is no necessity to increase profits to a level which is detrimental to the public - which anyway may be neutralized by heavy sanctions; moreover, there would be no difficulty in undertakings realising that they are about to embark on unlawful activity as tacit collusion is certainly not unconscious.

While it is submitted that in motivation the two practices - collusion in a non-oligopoly industry and conscious parallelism in an oligopoly one - are identical or at least very similar(10), and that to outward appearances they are virtually indistinguishable, if the Treaty makers had intended to include "tacit collusion" within the ambit of Article 85 they would have referred to concerted practices "and all behaviour which has a similar appearance and effect," or more specifically " concerted practices which are defined to include conscious parallelism". This omission however, does not necessarily mean that competition policy makers reject the notion that there is an element of deliberateness and collusion in this sort of behaviour, but it is submitted that while conscious parallelism is a deliberate act it arises almost involuntarily. This seems paradoxical, but in consciously choosing between a price alteration which is expected and which is beneficial to itself and to all the actors on the particular market, and one which will provoke unfavourable responses from competitors, an oligopolist has no real freedom at all. Consequently, it would be impractical and non-sensical to attempt to control this sort of conduct via the prohibition and fining route of Article 85.

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(10) See Chapter Three p123

If it is a practice which is genuinely feared as deliberate and detrimental to the Community aim of free and effective competition then it should be dealt with by more satisfactory means which strike at its root such as divestiture. However, it would be remiss not to acknowledge that prohibiting conscious parallelism under Article 85 would solve some of the difficulties involved in proving a concerted practice. It would avoid the evidential difficulties in positively ascertaining that observed conduct could not be the result of conscious parallelism and would present accustations that the Commission is failing in its duty by creating a strict liability offence for a practice which as defined by the Court of Justice should require an element of *mens rea*. Furthermore, it is perhaps better that behaviour with anti-competitive effects, even if these are unavoidable though reluctantly intentional, be prohibited than that genuinely concerted behaviour with anti-competitive effects be allowed to escape the prohibition because of a very strict standard of proof. This is particularly feasible given the scarcity of the genuine occurence of conscious parallelism.

The conclusion to which the various strands of investigation in this thesis have led is that the nature of a concerted practice and the evidence required to prove it are ascertainable. Decisions with which the Commission has had to deal since the Dyestuffs case, on the whole reiterate the validity of that judgement, but at the same time a rigid scrutiny of their facts and the Commission's treatment of them bring to light the problems (referred to above) which still exist concerning what

in theory are knowable definitional and evidential elements of the law relating to concerted practices.

It is submitted that an element of collusion is essential to the concept of a concerted practice. As alluded to earlier, this recognition comes from the very wording of Article 85, and indeed from the aims and principles of the Treaty establishing a common market. In creating a system to ensure that competition is not distorted, the authors of the Treaty evidently made a conscious choice that the economy should be a market one, free of artificial restraints and "state" planning. It would be alien to this philosophy if activity which was spontaneous and independent were to be caught up in the competition rules. This fundamental point should be referred to when ambiguity arises over the implementation of the provision.

At the risk of being repetitive, the comments of the Advocate-General in Dyestuffs and the manner in which the Court reviewed the evidence available has given rise to confusion as to whether the coordinated course of action required is broader in scope than collusion. However, it is submitted that paras. 64 to 68[11] specifically devoted to the concept of a concerted practice are incontovertible. Obviously, the collusion involved is neither as evident nor as cohesive as that which constitutes an agreement - the insertion of a concerted practice provision was specifically to cater for lesser degrees of collusion which would otherwise escape the prohibition. But equally, it is a cooperation which is performed "knowingly" with the aim of eliminating

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(11) See pp3-4 *Supra*

the risks of competition: parallel behaviour alone certainly does not satisfy the test of "practical cooperation". This is quite clear. Ambiguity exists however because of the Court's acknowledgement that parallel behaviour may constitute proof of a concerted practice. This would be a contradiction of the previous statement, but it should always be kept in mind that it will only constitute "strong proof" where an economic analysis has shown it to be incompatible with the prevailing market situation; to be so alien to it that the only explanation for the suspicious behaviour is the existence of concertation.

Chapter Four dealt with the question of how strong "strong proof" was. In the light of the Court's statements setting out its grounds of judgement it was submitted that this would do more than merely raise an inference which would require substantiation from direct evidence. Moreover, it was submitted that for the purposes of "proof" such evidence, while always welcome, would be unnecessary. If it is established that there is genuinely no explanation for the observed conduct other than concertatiorn, concertation will have been proved to no less a degree than an agreement for which there is documentary evidence. It is the mode of proof which is different; not the standard. The real problem however concerning the role of collusion in concerted practices lies in the implementation of this method. Thus the elusive aspect is the minimum collusion and minimum evidence in practice.

While the inclusion of conscious parallelism within the prohibition is categorically denied, it must be conceded that in theory at least, there is a real possibility of its being caught up in it. Is

the Commission adequately qualified and does it have sufficient resources to conclusively prove by a detailed and time consuming economic analysis that suspicious conduct is indeed inexplicable in the absence of collusion? Even in the very first case to establish a definition of a concerted practice, whether the Court did in fact disprove conscious parallelism is the subject of much dispute. And where there are indications of actual collusion, how will these satisfy the evidential standard? In cases with which the Commission has had to deal since Dyestuffs this has usually taken the form of mutual exchange of sensitive information, crucial to the existence of the observed condut; or alternatively it has been comprised of instructions or proposals concerning mutual future policy. But would the advance announcement of price increases in a trade journal which clearly would reach competitors in ample time for them to adapt their own pricing policy accordingly be satisfactory evidence of collusion? And is evidence which has proved adequate in cases where a concerted practice has already been primarily established by market evidence be adequate in situations where there is no decisive proof of the implementation of concertation?

It is submitted that where clear collusion and acknowledgement of that collusion is visible (for example, as in the type whereby parties have "agreed" on a certain immediate course of conduct but where they have not reached an "agreement properly so called"(12)), the requirement of implementation should not stand in the way of prohibition and prevention of a potentially harmful practice. Where the evidence is composed of mere policy proposals or *ad hoc* exchanges of information

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(12) See e.g., Flat Glass on p33 and COBELPA on p39, *Supra*

however, it is submitted that while these may be adequate acts by which an understanding between the parties may be reached, they are inadequate *proof* of such, and ought never to be relied upon in the absence of clear market evidence to corroborate the interpretation of concertation.

Conversely, it is submitted that given the danger that conscious parallelism may inadvertently be caught by the prohibition, the Commission ought to substantiate evidence of what it believes to be market proof of the existence of a concerted practice with direct evidence. Fortunately, in the past this has always been the case - even in CRAM[13] where both forms of evidence were rejected by the Court as inconclusive.

In Wood Pulp less reliance is placed on direct evidence than usual. There is evidence of consultation with respect to prices but it is highly questionable whether this is adequate to govern the long period of concertation alleged. It is submitted that in the appeal, if the direct evidence is rejected as inadequate the Court will uphold the fact of primary reliance on market evidence . But it is to be hoped that while the clandestine nature of concerted practices permits and indeed requires that reliance be placed on market evidence, the Court will find that the holding of a concerted practice on evidence of fluctuations in price over several years for a commodity which is sold throughout the world and for which such patterns are expected, too dangerous an assumption to make. The opinion holds fast even if the direct evidence is found to carry some weight. It is submitted that in order to allay

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(13) *Supra*, n.8

fears and remove doubts that the Commission has misinterpreted the economic evidence available, even when the Commission is satisfied of the proof of a concerted practice which market evidence provides, direct evidence ought to be sought for as far as is possible. However, where market evidence is obviously ambiguous (and this is to be contrasted with the situation where there is no concertation actually on the market and therefore nothing to*contradict* the available direct evidence), direct evidence - unless it is clear enough to point to an agreement - ought to be allowed only to *reinforce* existing market evidence and not to take its place or make its possible inferences more likely. Whether it is a correct assumption that this constitutes the minimum amount of evidence required to prove an infringement under the competition rules remains to be seen.

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