COMPETITION COMMITTEE



Prosecuting Cartels without Direct Evidence of Agreement

Series Roundtables on Competition Policy

N° 59

OECD

2006

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

11-Sep-2006

English/French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF(2006)7
Unclassified

Cancels & replaces the same document of 29 May 2006

Global Forum on Competition

PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

JT03213324

Document complet disponible sur OLIS dans son format d'origine
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English/French

FOREWORD

This document comprises proceedings in the original language of a Roundtable on Prosecuting Cartels without Direct Evidence of Agreement which was held at the Global Forum on Competition in February 2006.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation, dans la langue originale dans laquelle elle a été soumise, relative à une table ronde sur les poursuites contre les ententes en l'absence de preuves directes, qui s'est tenue lors du Forum Mondial sur la Concurrence en février 2006.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegates' written submissions and the Secretariat's background paper, several key points emerge:

1. Circumstantial evidence is employed in cartel cases in all countries.

Competition law enforcement officials always strive to obtain direct evidence of agreement in prosecuting cartel cases, but sometimes it is not available. Cartel operators conceal their activities and usually they do not co-operate with an investigation of their conduct, unless they perceive that it is to their advantage to participate in a leniency programme. In this context, circumstantial evidence can be important. Almost every country making a written or oral contribution to the roundtable described at least one case in which circumstantial evidence was used to significant effect. At the same time, there are limits to the use of circumstantial evidence. Such evidence, especially economic evidence, can be ambiguous. It must be interpreted correctly by investigators, competition agencies and courts. Importantly, circumstantial evidence can be, and often is, used together with direct evidence.

2. The better practice is to use circumstantial evidence holistically, giving its cumulative effect, rather than on an item-by-item basis.

One delegate described the methodology for evaluating circumstantial evidence as like an impressionist painting, comprising many dots or brush strokes which together form an image. Another likened the process to a jig-saw puzzle. In this way, circumstantial evidence, which by definition does not describe the specific terms of an agreement, can be better understood. The materials submitted for the roundtable described a few cases in which courts declined to use this holistic approach, requiring instead that each item of evidence be linked directly to a specific agreement. The result was that the cases failed. Of course, given the ambiguous nature of some circumstantial evidence, the holistic approach can result in errors. Business representatives urged that no case be based solely on circumstantial evidence, given the significant liability facing businesses that are found to have participated in a cartel. It did not appear that any other delegation embraced this position. On balance, the holistic approach is much preferable to a requirement that each item of circumstantial be linked directly to a specific agreement.

3. Complicating the use of circumstantial evidence are provisions in national competition laws that variously define the nature of "agreements" that are subject to the law.

The anti-cartel provisions of all competition laws apply to more than straightforward explicit agreements. Laws use such terms as "concerted practice," "understanding" and "arrangement." When evaluating an evidentiary record, the nature of the agreement to which it applies may not be fully clear. This issue arises in the context of "facilitating practices." These are practices, such as information exchanges, which can facilitate an underlying cartel agreement. Evidence of them is circumstantial evidence of a cartel agreement, but it is probably not sufficient by itself to prove such an agreement. In some countries, courts have separately evaluated facilitating

practices for their anticompetitive effect. In others, however, an underlying cartel agreement must be shown. In other respects, it seems that in most countries the evidentiary burden facing the law enforcement agency does not vary according to whether the conduct is considered to be an "agreement" or some other kind of concerted action described in the law.

4. *There are two general types of circumstantial evidence: communication evidence and economic evidence. Of the two, communication evidence is considered to be the more important.*

Communication evidence is evidence that cartel operators met or otherwise communicated, but does not describe the substance of their communications. It includes, for example, records of telephone conversations among suspected cartel participants, of their travel to a common destination and notes or records of meetings in which they participated. Communication evidence can be highly probative of an agreement. Almost all of the circumstantial cases described by delegations included communication evidence; in some the evidence was compelling.

5. *Economic evidence is almost always ambiguous. It could be consistent with either agreement or independent action. Therefore it requires careful analysis.*

Economic evidence can be categorized as either conduct or structural evidence. The former includes, most importantly, evidence of parallel conduct by suspected cartel members, e.g., simultaneous and identical price increases or suspicious bidding patterns in public tenders. It can also include evidence of facilitating practices, though that conduct could also be characterised as "quasi-communication evidence." Structural economic evidence includes evidence of such factors as high market concentration and homogeneous products. Of these two types of economic evidence, conduct evidence is considered the more important. Economic evidence must be carefully evaluated. The evidence should be inconsistent with the hypothesis that the market participants are acting unilaterally in their self interest. Economics, including the use of game theory, can be instructive on how to make this judgment. It appears that in most countries, however, that kind of analysis is not yet employed. But further, economic evidence can play an important role in the initial stages of a cartel investigation. A proper analysis of it could provide a basis for deciding which of several possible cases are likely to be the most fruitful to pursue, with the hope and expectation that better evidence of agreement, both direct and circumstantial, will be discovered.

6. *National treatment of cartels, such as whether they are prosecuted as crimes or as administrative violations, can affect the burden of proof that applies to the cases, and hence the use of circumstantial evidence.*

In most countries, cartels (and other violations of the competition law) are prosecuted administratively. The principle administrative sanctions applied to this conduct are fines, usually only assessed against organisations but sometimes against natural persons, and remedial orders. In a minority of countries, but a growing one, cartels are prosecuted criminally. In most instances the burden of proof facing the competition agency is higher in a criminal case. The result is that it is usually more important that direct evidence of agreement be generated in these cases. The United States has long used the criminal process in the cartel cases prosecuted by the government, and virtually all of its cases are built on direct evidence. Still, circumstantial evidence is admissible, and useful, in that country and elsewhere.

7. *It can be difficult to convince courts to accept circumstantial evidence in cartel cases, especially where the potential liability for having violated the anti-cartel provisions of the competition law is high.*

A few jurisdictions in which there has been judicial review of decisions by competition agencies in cartel cases reported that courts sometimes view cases built on circumstantial evidence with scepticism. In this regard, as more cases are appealed to courts, the standards that they apply to circumstantial evidence are continuing to evolve. Hopefully, courts will come to see that circumstantial evidence subjected to sound economic analysis and viewed holistically can be highly probative.

8. *There are circumstances in countries that are relatively new to anti-cartel enforcement that could affect the extent to which they rely on circumstantial evidence in their cases.*

A country just beginning to enforce its competition law may face obstacles in obtaining direct evidence of a cartel agreement. It probably will not have in place an effective leniency programme, which is a primary source of direct evidence. There may be lacking in the country a strong competition culture, which could make it more difficult for the competition agency to generate co-operation with its anti-cartel programme. In short, the competition agency could have relatively greater difficulty in generating direct evidence in its cartel cases, which would imply that it will have to rely more heavily on circumstantial evidence. A few delegations confirmed that this is the situation in their countries. But there is a countervailing phenomenon: the relatively high incidence in these countries of "naïve cartels" – cartels in which their members do not attempt to conceal their activity, either because they are unaware that their conduct is unlawful or because they are not sufficiently sophisticated to do so. In the case of naïve cartels direct evidence is relatively plentiful, rendering circumstantial evidence less important. Another point was made by a few countries in which cartels were prosecuted as crimes initially under their new competition laws. It seemed that the higher burden of proof associated with criminal prosecution made the competition agency's anti-cartel burden more difficult. The advice from these countries was to begin administratively, perhaps later moving to criminal prosecution. Finally, there was general agreement in the discussion that a strong competition culture is an essential component of a successful anti-cartel programme. Education and public persuasion are important means of developing such a culture, but an even better one is vigorous enforcement of the law. The competition agency should strive to generate good cartel cases in important sectors, supported by strong evidence and demonstrating the benefits to consumers of effective anti-cartel enforcement.

SYNTHÈSE

par le Secrétariat

L'analyse des discussions, au cours de la table ronde, des soumissions écrites des délégués et du document général du Secrétariat met en lumière plusieurs aspects essentiels :

1. *Tous les pays utilisent des preuves indirectes dans les affaires d'entente.*

   Les autorités chargées d'appliquer la législation sur la concurrence s'efforcent d'obtenir des preuves directes dans les affaires d'entente, mais elles ne sont pas toujours disponibles. Les participants à des ententes dissimulent leurs activités et refusent en général de coopérer avec les enquêteurs, à moins qu'ils ne perçoivent un avantage à le faire dans le cadre d'un programme de clémence. Dans ce contexte, les preuves indirectes peuvent être importantes. Presque tous les pays qui ont apporté une contribution écrite ou orale à la table ronde ont décrit au moins un procès dans lequel des preuves indirectes ont été utilisées de manière significative. Dans le même temps, l'utilisation de preuves indirectes se heurte à des limites. Ces preuves, notamment celles de nature économique, peuvent être ambiguës. Elles doivent être interprétées correctement par les enquêteurs, les autorités de la concurrence et les tribunaux. Surtout, elles peuvent être employées de concert avec des preuves directes, ce qui est souvent le cas.

2. *La meilleure pratique consiste à utiliser des preuves indirectes dans une perspective d'ensemble, plutôt que sur une base individuelle.*

   Un délégué a comparé la méthode d'évaluation des preuves indirectes à une peinture impressionniste, composée de multiples traits ou coups de pinceau qui forment ensemble une image. Un autre a assimilé le processus à un puzzle. Ces analogies permettent de mieux comprendre la nature des preuves indirectes, qui par définition ne décrivent pas les termes spécifiques d'un accord. Les éléments fournis pour la table ronde présentaient certaines affaires dans lesquelles les tribunaux ont refusé de suivre cette approche globale, exigeant au contraire que chaque élément probant soit lié directement à un accord spécifique. Cette approche s'est soldée par un échec. Certes, l'approche globale peut générer des erreurs compte tenu de la nature ambiguë de certaines preuves indirectes. Les représentants des milieux d'affaires ont demandé qu'aucune affaire ne soit instruite uniquement sur la base de preuves indirectes, eu égard à la responsabilité considérable à laquelle s'exposent les entreprises reconnues coupables d'avoir participé à une entente. Aucune autre délégation ne semble s'être ralliée à cette position. Tout compte fait, l'approche holistique est nettement préférable à une obligation de relier directement à un accord spécifique chaque élément de preuve indirecte.

3. *Les législations nationales sur la concurrence contiennent des dispositions qui compliquent l'utilisation de preuves indirectes car elles ne donnent pas toute la même définition de la nature des « accords » soumis à la loi.*

   Les dispositions contre les ententes de toutes les législations sur la concurrence s'appliquent à des accords de nature très explicite. Les textes législatifs emploient des termes tels que « pratique concertée », « entente » et « arrangement ». Lorsqu'on évalue un recueil de preuves, la nature de l'accord auquel il s'applique n'est pas forcément très claire. Ce problème survient dans le

contexte des « pratiques de facilitation ». Ce sont des pratiques, comme l'échange d'informations, susceptibles de faciliter la conclusion d'une entente. De telles pratiques constituent une preuve indirecte d'une entente, mais ne seront probablement pas suffisantes pour prouver son existence. Dans certains pays, les tribunaux examinent séparément les pratiques de facilitation pour déterminer leur effet anticoncurrentiel. Dans d'autres, l'existence d'une entente sous-jacente doit être prouvée. Il semble que dans la plupart des pays, la charge de la preuve qui incombe à l'autorité chargée de faire appliquer la loi soit la même, que la conduite soit considérée comme un « accord » ou comme une autre forme d'action concertée décrite dans la loi.

4. *Il existe deux catégories générales de preuves indirectes : celles fondées sur une communication et celles de nature économique. Des deux, les preuves fondées sur une communication sont considérées comme les plus importantes.*

Les preuves fondées sur une communication attestent que les participants d'une entente se sont rencontrés ou ont communiqué entre eux d'une autre manière, mais ne décrivent pas sur quoi les propos ont porté. Il peut s'agir d'enregistrements de conversations téléphoniques entre des membres suspectés d'une entente, d'un déplacement qu'ils ont effectués vers une destination commune, de notes ou de comptes rendus de réunions auxquelles ils ont participé. De tels indices peuvent receler une très forte valeur probante de l'existence d'un accord. Pratiquement tous les indices indirects décrits par les délégués incluaient des preuves fondées sur une communication ; dans certains cas, ces indices étaient confondants.

5. *Les preuves de nature économique sont presque toujours ambiguës. Elles peuvent corroborer l'existence d'une entente comme celle d'une action indépendante. C'est pourquoi une analyse détaillée est de mise.*

Les preuves économiques se divisent en preuves de comportement ou preuves structurelles. Les premières incluent surtout les indices d'agissements parallèles de la part des membres suspectés de l'entente, par exemple des augmentations simultanées et identiques des prix ou des caractéristiques de soumission suspectes dans des appels d'offres publics. Elles peuvent également inclure des indices de pratiques de nature à faciliter les ententes, bien qu'un tel comportement puisse également être qualifié de « preuve de quasi-communication ». Les preuves économiques de nature structurelle incluent des indices tels qu'une forte concentration du marché et des produits homogènes. De ces deux types de preuves économiques, celles ayant trait au comportement sont les plus importantes. Les preuves économiques doivent être évaluées attentivement. Elles doivent démentir l'hypothèse selon laquelle les participants du marché agissent de façon unilatérale et dans leur propre intérêt. Les indices économiques, qui font intervenir la théorie des jeux, peuvent éclairer sur la manière de parvenir à un tel jugement. Toutefois, il semble que dans la plupart des pays, ce type d'analyse n'est pas employé. En outre, les preuves économiques peuvent jouer un rôle important dans les phases initiales d'une enquête sur une entente. Une analyse approfondie de ces preuves devrait fournir la base permettant de décider, parmi les affaires possibles, celles dans lesquelles des poursuites ont le plus de chances d'aboutir, avec l'espoir de découvrir des éléments probants plus convaincants, tant directs qu'indirects, de l'existence d'un accord.

6. *Le traitement national des ententes, considérées comme un délit pénal ou une infraction administrative, peut influer sur la charge de la preuve qui s'applique à l'affaire, et donc sur l'utilisation des preuves indirectes.*

Dans la plupart des pays, les ententes (et autres violations de la législation sur la concurrence) font l'objet de poursuites administratives. Les principales sanctions administratives prévues dans ces affaires sont des amendes, généralement infligées à l'encontre d'organisations mais parfois aussi contre des personnes physiques, et les ordonnances correctives. Dans une minorité de pays, dont le nombre va toutefois croissant, les ententes font l'objet de poursuites pénales. Le plus souvent, la charge de la preuve qui incombe à l'autorité de la concurrence est plus lourde dans une affaire pénale. Il s'ensuit que, dans ces affaires, mieux vaut produire des preuves directes de l'existence d'un accord. Les États-Unis ont longtemps eu recours aux procédures pénales dans les affaires d'entente instruites par le gouvernement, et pratiquement tous les procès s'appuient sur des preuves directes. Les preuves indirectes sont néanmoins admissibles, et utiles, dans ce pays comme ailleurs.

7. *Il peut être difficile de convaincre les tribunaux d'accepter des preuves indirectes dans des affaires d'entente, surtout lorsque la responsabilité potentielle liée à la violation de dispositions prohibant les ententes contenues dans la législation sur la concurrence est élevée.*

Quelques juridictions dans lesquelles les décisions prises par les autorités de la concurrence dans des affaires d'entente ont fait l'objet d'un examen judiciaire ont fait savoir que les tribunaux considèrent parfois avec scepticisme les dossiers basés sur des preuves indirectes. À cet égard, les normes appliquées par les tribunaux en matière de preuves indirectes continuent d'évoluer, car le nombre d'affaires soumis à leur jugement augmente. Il faut espérer que les tribunaux en viendront à se rendre compte que la preuve indirecte qui fait l'objet d'une analyse de caractère économique et holistique peut être considérée comme étant une preuve évidente.

8. *Dans les pays dans lesquels l'application de la législation contre les ententes est relativement récente, certaines circonstances peuvent influer sur la confiance accordée aux preuves indirectes.*

Un pays qui commence tout juste à appliquer sa législation sur la concurrence peut se heurter à des obstacles pour réunir des preuves directes d'une entente. Il ne disposera probablement pas d'un programme de clémence qui constitue la source principale de preuves directes. La culture de la concurrence y sera vraisemblablement peu développée, ce qui compliquera les efforts de l'autorité de la concurrence pour instaurer une coopération avec son programme de lutte contre les ententes. En résumé, l'autorité de la concurrence pourrait rencontrer plus de difficultés à réunir des preuves directes dans les affaires d'entente, ce qui l'incitera à s'en remettre davantage aux preuves indirectes. Quelques délégués ont confirmé que leur pays connaissait cette situation. Mais on observe le phénomène inverse : l'incidence relativement élevée des « ententes naïves » dans ces pays – ententes dans lesquelles les membres ne cherchent pas à dissimuler leur activité, soit parce qu'ils ignorent que leur comportement est illégal, soit parce qu'ils ne sont pas assez circonspects pour le faire. Dans le cas d'ententes naïves, les preuves directes sont relativement nombreuses, ce qui réduit l'importance des preuves indirectes. Quelques pays dans lesquels les ententes sont passibles de poursuites pénales en vertu de leur nouvelle législation sur la concurrence ont soulevé un autre point. Il semble que le fardeau de la preuve plus lourd associé aux procédures pénales rende la tâche plus difficile à l'autorité de la concurrence. Ces pays préconisent de commencer par engager une procédure administrative, avant de passer ultérieurement à des poursuites pénales le cas échéant. Enfin, les participants à la discussion étaient d'accord pour reconnaître qu'une culture de la concurrence solide est un composant

essentiel de la réussite de tout programme de lutte contre les ententes. L'éducation et la sensibilisation du public sont des moyens importants pour forger une telle culture, mais l'application rigoureuse de la loi est encore plus efficace. L'autorité de la concurrence doit s'efforcer d'instruire des affaires exemplaires portant sur les ententes dans des secteurs importants, étayées par des preuves convaincantes et démontrant tout l'intérêt, pour les consommateurs, d'une application efficace de la législation contre les ententes.

BACKGROUND NOTE

Circumstantial evidence is of no less value than direct evidence for it is the general rule that the law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

* * *

In order to prove the conspiracy, it is not necessary for the government to present proof of verbal or written agreements. Very often in cases like this, such evidence is not available. You may find that the required agreement or conspiracy existed from the course of dealing between or among the individuals through the words they exchanged or from their acts alone.

The above quotations, taken from the jury instructions in the recent successful criminal prosecution of the Chairman of the Sotheby's auction house,[1] illustrates that cartel conspirators can be prosecuted, even against the highest standards of proof, without direct evidence of the agreement or of their involvement in it. Indirect (circumstantial) evidence is used in most jurisdictions including those with the longest and most successful records of cartel prosecutions, where competition law enforcers now enjoy the virtuous circle of strong sanctions in past cases energising leniency programs, which generate direct evidence in new cases, and more strong sanctions.[2] Indirect evidence is particularly important for competition law enforcers in jurisdictions without such enforcement records, given that cartel conspiracies are cloaked in secrecy and direct evidence is not forthcoming.

The focus of this paper is on the use of indirect evidence in cartel investigations, typically triggered by an episode of suspicious parallel pricing or other behaviour that is not readily explained by usual market forces. When the competition agency suspects that the conduct is the result of an agreement but cannot discover direct evidence to prove the existence of an agreement, what amount and quality of circumstantial evidence is sufficient for this purpose?

The key points for the reader to take from the paper are:

- The provisions of competition laws prohibiting anticompetitive agreements apply not only to explicit agreements but also to other types of joint arrangements, variously identified as "arrangements," "combinations" or "concerted practices." In all cases, however, liability for a competition law violation can be imposed only if it can be shown that the parties reached some "conscious commitment to a common scheme."

1 Available on the web site of the American Bar Association, at: http://www.abanet.org/antitrust/committees/criminal/taubman.doc.

2 It should be noted that the United States, well along on the virtuous circle, would not normally bring a criminal cartel case on indirect evidence alone. Even in the Sotheby's case, there was direct evidence of the agreement, and there was some direct evidence linking Sotheby's Chairman to it. Much of the evidence against him, however, was circumstantial.

- Cartels pose a special problem for enforcers because they operate in secret, and their members usually do not co-operate with investigations of their conduct. In experienced jurisdictions, competition authorities in most cases use direct evidence to prove an unlawful conspiracy. It can be difficult to obtain direct evidence of a cartel agreement, however. Enforcers may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence.

- Circumstantial evidence can come in several forms, including evidence of communications between rivals and economic evidence. Economic evidence consists of firm conduct, market structure, and evidence of facilitating practices. All types of evidence can be useful in a case and they should be employed together.

- Economic theories of oligopoly provide several valuable insights for competition law enforcers: They show that acts consistent with unilateral incentives can lead to a different outcome than when firms act collectively, and that oligopoly does not inevitably lead to cooperation and collective action to increase prices. As a result, enforcers and decision makers should carefully examine whether firm conduct can be described as actions in unilateral self-interest absent an agreement to act jointly, or as actions in the collective interest of all competitors. Conduct consistent with unilateral self interest does not constitute good evidence in a circumstantial cartel case.

- Consistent with economic theory, a long line of case law has recognised that evidence of parallel conduct, such as simultaneous price increases by rivals, alone is not sufficient proof of a cartel agreement. There must be additional evidence, which tends to prove the existence of an unlawful agreement as required under the applicable standards of proof. Courts sometimes refer to this additional evidence as "plus factors."

- An important type of plus factor is evidence showing that there were communications among the suspected cartel operators in the course of which they could have reached agreement. Economic evidence is another important class of circumstantial evidence. It includes evidence both of conduct by market participants suggesting that they are acting jointly and of market structure that lends itself to collusive activity. One method of analysing economic conduct evidence is to consider whether the conduct would have been in the self interest of the actors if they had not been acting jointly.

- Circumstantial evidence should be considered in a holistic fashion. The decision maker should assess the cumulative effect of all evidence, rather than require that each item unequivocally support the hypothesis of agreement.

- Countries differ in the way that they develop evidence in cartel cases. Several factors contribute to these differences, including whether cartels are prosecuted administratively, civilly or criminally; and whether a country has been prosecuting cartels for a long time or has begun an anti-cartel programme only recently. There is a trend in OECD countries toward building cases based on direct evidence. But countries continue to bring cases employing mostly circumstantial evidence where it is appropriate.

- It is likely that countries just beginning an anti-cartel programme will have some difficulty generating direct evidence, and hence will have to rely more on circumstantial evidence in early cases. While these cases can be difficult, it is important that the new agency establish credibility for its competition law and for its anti-cartel effort.

1. Cartel agreements

All competition laws prohibit, among other things, anticompetitive conduct by two or more parties acting jointly. Competition laws are written broadly to apply to all forms of agreements, formal and informal, explicit and implicit. Thus, for example, the United States' Sherman act applies to any "contract, combination . . . or conspiracy;"[3] Article 81(1) of the EC Treaty applies to "agreements between undertakings, decisions by associations of undertakings, and concerted practices;" Mexico's competition law applies to "contracts, agreements, arrangements, or combinations;"[4] Chinese Taipei's competition law applies to "concerted actions," which is defined as including any "contract, agreement or any other form of mutual understanding;"[5] and Tanzania's law applies to "any agreement, arrangement or understanding between two or more persons, whether or not it is: (a) formal or in writing; or (b) intended to be enforceable by legal proceedings."[6]

As the broad statutory language suggests, unlawful agreements among competitors can take many forms. The most common in the business context is the explicit agreement, in which the parties communicate directly, either orally or in writing, specifying the relevant terms and conditions of their enterprise. But agreements do not have to be formal. They can be reached through informal means of communication, including conversations at an association meeting; public statements by senior officers; price announcements or advertisements; or communications through customers. One US court famously noted: "A knowing wink can mean more than words."[7]

It is important, however, that in all cases competition laws will impose liability for entering into an unlawful agreement only if firms have consciously acted together, whether through formal or informal means of communication. To prove a competition law violation, it must be shown that there has been a "meeting of the minds" toward a common goal or result, or, in other words, some "conscious commitment to a common scheme."[8] Conversely, liability cannot be found where firms communicated purely in the form of market place action, or where firms communicated, but did not develop some "conscious commitment to a common scheme."[9]

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3 Sherman Act § 1.

4 Article 9.

5 Articles 7 and 14.

6 Articles 2 and 8.

7 Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965).

8 The reader should be careful, though, and not put too much emphasis on these definitions. As other observers have noted, trying to come up with common definitions of "agreement" is not a useful exercise in cases where circumstantial evidence is used to identify a cartel. It is better to describe agreement in terms of what courts in circumstantial evidence cases actually require in terms of firm behaviour that supports the inference of agreement. *See, e.g.*, Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Market Place*, 65 Antitrust L. J. 41 (1996) (arguing that this approach emphasizes the (forbidden) process of reaching supracompetitive market outcomes, rather than the outcome itself, which in turn ensures that remedies focus on forbidden acts that can be enjoined.).

9 In a recent article Greg Werden notes the confusion in terminology that is employed in this field. The terms "express," "explicit," "tacit" and "co-ordinated" are often found, but users do not always ascribe the same meaning to them. For example, the term "tacit collusion" has been used to describe an alleged cartel agreement for which only indirect evidence is available, but also to describe cases of parallel, interdependent conduct that does not amount to an unlawful conspiracy. Werden uses the term "spoken agreement" to refer to an unlawful conspiracy. Gregory J. Werden, *Economic Evidence on the Existence of*

Proving the existence of a cartel agreement, whether formal or informal, poses special problems for the competition law enforcer. Cartels are usually formed and conducted in secret; their participants understand that their conduct is unlawful, and that their customers would object to the conduct if they knew about it, and so they take pains to conceal it. If an investigation into their conduct is undertaken, the participants usually do not co-operate with it, except through a leniency programme. Obtaining *direct* evidence of a cartel agreement -- evidence that identifies a meeting or communication between the subjects and describes the substance of their agreement -- requires special investigative tools and techniques, which the authority may lack.[10] Thus, the competition law enforcer may be faced with the task of proving the existence of a cartel agreement without the benefit of direct evidence. The following section discusses which types of evidence a competition enforcer might be able to use to prove the existence of a cartel, focusing on various types of indirect evidence.

2. Available evidence for proving a cartel agreement

2.1 Categories of evidence

Evidence used to prove a cartel agreement can be classified into two types: direct and circumstantial. Circumstantial evidence, in turn, consists of "communication" evidence and economic evidence, which include firm conduct, market structure, and evidence of facilitating practices.

Common types of *direct evidence* include:

- A document or documents (including email messages) essentially embodying the agreement, or parts of it, and identifying the parties to it.

- Oral or written statements by co-operative cartel participants describing the operation of the cartel and their participation in it.

There are different types of *circumstantial* evidence. One is evidence that cartel operators met or otherwise communicated, but does not describe the substance of their communications. It might be called “communication” evidence for purposes of this discussion. It includes:

- records of telephone conversations between competitors (but not their substance), or of travel to a common destination or of participation in a meeting, for example during a trade conference.

- other evidence that the parties communicated about the subject – e.g., minutes or notes of a meeting showing that prices, demand or capacity utilisation were discussed; internal documents evidencing knowledge or understanding of a competitor’s pricing strategy, such as an awareness of a future price increase by a rival.

A broader category of circumstantial evidence is often called *“economic”* evidence. Economic evidence identifies primarily firm conduct that suggests that an agreement was reached, but also conduct of the industry as a whole, elements of market structure which suggest that secret price fixing was feasible, and certain practices that can be used to sustain a cartel agreement.

Collusion: Reconciling Antitrust Law with Oligopoly Theory, 71 Antitrust L. J. 719, 735-36 (2004). This paper will generally use the terms "agreement" or "cartel agreement" to refer to an unlawful conspiracy.

10 The secret video tapes generated in the *Lysine* investigation certainly qualify; they continue to represent the gold standard in cartel evidence. Unfortunately, obtaining such “real time” evidence of agreement is usually not possible.

Conduct evidence is the single most important type of economic evidence. As noted earlier, observation of certain, suspicious conduct frequently triggers an investigation of a possible cartel. And as the section in this paper on economics highlights,[11] careful analysis of the conduct of parties is important to identify behaviour that can be characterised as contrary to the parties' unilateral self-interest and which therefore supports the inference of an agreement. Conduct evidence includes, first and foremost:

- parallel pricing – changes in prices by rivals that are identical, or nearly so, and simultaneous, or nearly so. It includes other forms of parallel conduct, such as capacity reductions, adoption of standardised terms of sale, and suspicious bidding patterns, e.g., a predictable rotation of winning bidders.

Industry performance could also be described as conduct evidence. It includes:

- abnormally high profits;
- stable market shares;[12]
- a history of competition law violations.

Evidence related to *market structure* can be used primarily to make the finding of a cartel agreement more plausible, even though market structure factors do not prove the existence of such an agreement. Relevant economic evidence relating to market structure includes:

- high concentration;
- low concentration on the opposite side of the market;
- high barriers to entry;
- high degree of vertical integration;
- standardised or homogeneous product.

The evidentiary value of structural evidence can be limited, however. There can be highly concentrated industries selling homogeneous products in which all parties compete. Conversely, the absence of such evidence cannot be used to show that a cartel did not exist. Cartels are known to have existed in industries with numerous competitors and differentiated products.[13]

A specific kind of economic conduct evidence is "*facilitating practices*" – practices that can make it easier for competitors to reach or sustain an agreement. It is important to note that conduct described as facilitating practices is not necessarily unlawful.[14] But where a competition authority has found other

11 Section 3, *infra at p.* 24.

12 Market shares, of course, are also an element of market structure. Stable market shares are classified as conduct for purposes of this discussion because they could be the result of a conscious agreement among competitors not to compete.

13 Consider, for example, the French case against the mobile phone operators, discussed *infra* at p. 376. The market was concentrated, but mobile phone services would normally not be considered a homogenous product.

14 Sometimes, however, and depending on the circumstances, facilitating practices have been condemned in their own right as competition law violations, without the need for showing an underlying anticompetitive

circumstantial evidence pointing to the existence of a cartel agreement, the existence of facilitating practices can be an important complement. They can explain what kind of arrangements the parties set up to facilitate the formation of a cartel agreement, monitoring, detection of defection, and/or punishment, thus supporting the "collusion story" put together by the competition law enforcer. Facilitating practices include:

- information exchanges;[15]
- price signalling;[16]
- freight equalisation;[17]
- price protection and most favoured nation policies;[18] and
- unnecessarily restrictive product standards.[19]

2.2 A brief example

Consider the following brief description of a recent Italian cartel case. It illustrates nicely how a competition authority can combine a range of different types of evidence into a persuasive story of collusion.

2.2.1 Italy – Baby Milk[20]

In October, 2005 the Italian Competition Authority announced that it had fined seven sellers of baby milk, comprising three legal entities, a total of €9,743,000 for engaging in a cartel in violation of Article 81 of the EC Treaty. The Italian Government had noted during the period 2000-2004 that these firms had engaged in parallel pricing of their products, and that their prices in Italy were significantly higher – between 150% and 300% – than prices in other European countries. The Authority developed evidence of

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agreement. See, e.g., Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 Wisconsin Law Review 887.

15 Problematic *information exchanges* include those containing information about current prices, costs, business plans, capacity utilisation, or other nonpublic, business sensitive information. The use of this information in facilitating a cartel is obvious – it aids both in setting the terms of agreement and in monitoring compliance with it.

16 *Price signalling* is a form of information exchange, usually conducted by means of public announcements of future prices or pricing policy. This information obviously can assist rivals in reaching agreement.

17 *Freight equalisation* schemes, whereby products are sold on a delivered basis (freight is absorbed by the seller), or by using a "basing point" system in which freight is charged by all sellers as though their products were shipped from a single location, eliminate a variable component of prices, making it easier for rivals to define the cartel price and to monitor it.

18 *Price protection (meeting competition) and most favoured nation* clauses, whereby buyers are guaranteed the lowest price offered either by a seller's rivals (price protection) or by a seller to other buyers (MFN), are by no means always anticompetitive, but in the right circumstances they can serve as enforcement or punishment mechanisms in a cartel agreement.

19 Agreement on unnecessarily *restrictive product standards* operates to exclude new entry, which could destabilise a cartel.

20 *See* the press announcement of the case on the Competition Authority's website, at http://www.agcm.it/eng/index.htm.

contacts between the firms, both direct and indirect, that supported a finding of concerted action. Direct contacts included participation in special meetings at the headquarters of the manufacturers' Association, following a request by the Health Minister to reduce prices. The evidence showed that there was open discussion among the manufacturers regarding their response to the Minister's request, and that they agreed not to reduce prices by more than 10%.

Indirect contacts occurred as the respondents established recommended resale prices for pharmacies, which were the principal retail outlet for their product. Special characteristics of the market made it possible for sellers to compute their rivals' wholesale prices by reference to their recommended resale prices.

The Authority noted that since it began its case in 2004, prices of baby milk had declined by 25% and there had been other procompetitive developments in the market, including more advertising and consumer information, the introduction of new products and a greater presence of the respondents' products in supermarket chains.

Here is a list of the types of evidence apparently uncovered by the authority:

- direct evidence: the producers apparently agreed on a maximum price reduction;
- communication evidence: the producers had met at the trade association and discussed prices, although with the exception of the maximum price reduction there was no direct evidence that they had reached an agreement;
- conduct evidence: parallel pricing; steep price reductions and increased competition following the investigations which suggested that earlier high prices were not the result of competitive behaviour;
- conduct of the entire industry: across the board, the prices were significantly higher than in other European countries;
- market structure evidence: this was a highly concentrated industry with only three independent suppliers, and they sold a relatively homogenous product; and
- facilitating practices: recommended resale prices for pharmacies with significant price transparency, sales occurred predominantly through pharmacies which eliminated outlets such as grocery stores that likely would have used discount prices.

2.2.2 Some General Comments about Evidence

There are a few general points to be made about these categories of evidence. First, there is not necessarily a bright line between direct and circumstantial evidence, especially when considering various forms of communication evidence. Second, all types of evidence – direct and circumstantial – are helpful to the competition law enforcer. They can be, and often are, used together. And third, quality matters. Direct evidence in the form of testimony from a single, unconvincing witness is less credible than strong and cumulative circumstantial evidence.

There is a broad range of conduct and other factors that enforcers and courts have considered relevant in circumstantial cases against cartels. Decisions have typically identified how much evidence is the

critical mass of evidence for a successful case.[21] This makes the task of the competition enforcer more difficult and outcomes of cases less predictable, but appears to be the inevitable result of the fact specific nature of each case. However, a closer analysis of cases and economic theory suggest that two types of circumstantial evidence are most important, including whether the parties communicated or at least had the opportunity to communicate and an analysis of whether firm conduct was in the firm's best unilateral self interest, absent an agreement to act collectively.[22]

Circumstantial evidence typically is ambiguous; often it is subject to more than one interpretation. For example, certain parallel conduct may also be consistent with independent action; a meeting of parties and communications during the meeting may have had benign purposes. The principal task of the competition law enforcer when it has only circumstantial evidence is to carefully examine whether the conduct under investigation is simply the result of independent action by market participants, each acting according to its own judgment as to its best interests. When it has come to the conclusion that this was not the case, it must convince the decision maker that the evidence proves the existence of an unlawful agreement under the relevant evidentiary standards. Economics has an important role in informing the decision maker as to how to make that judgment.

3. Economic reasoning can help identify probative indirect evidence

Using economic evidence to indirectly prove the existence of a cartel agreement raises a fundamental problem: how to distinguish conduct which is likely due to an unlawful agreement from conduct which arises "innocently" as the product of independent decision-making in a concentrated industry. To make that distinction, some background in economics is necessary. This section briefly describes how economic theory may help to better understand the behaviour of firms that seem to be operating as if they had formed a cartel. The section first explains economic theories that can be used to describe firm behaviour. It then discusses how these theories can help to identify "good" economic evidence that tends to support the finding of an unlawful agreement. Last, it provides some suggestions for the use of economic evidence in cartel cases based on circumstantial evidence.

Generally speaking, one can distinguish three broad categories of economic models that describe firm behaviour. First, firms can independently pursue their "unilateral non-cooperative best response" given what rivals are doing. In these types of models the market equilibrium is determined when each firm pursues it best response given their [its?] rivals' best response. This type of equilibrium – best responses to best responses – is typically called a Nash equilibrium. Two elementary models that use this concept to determine the market equilibrium price and output were outlined long ago.[23] Indeed, much like these very

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21 *See, e.g.,* Andrew I. Gavil et al., *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy* 283 (2002).

22 These two factors are discussed in greater detail below. *See infra*, at p. 29.

23 In 1838 Cournot proposed that firms choose their optimal output level given their rivals' outputs and 1883 Bertrand proposed instead that firms choose the optimal price given their rivals' prices. Both the Cournot and Bertrand models are examples of one shot games. In such games, participants expect that the game will last only for one period. In repeated games (for example, models associated with the Folk Theorem), the players play the one shot game repeated. Repeated games typically identify multiple equilibria and there appears to be a widely held view among economists that the actual outcomes in an oligopoly are determined by factors outside those models. Such factors can include, in particular, agreements among competitors. As a result, the usefulness of in particular infinitely repeated game models to explain firm conduct in circumstantial evidence cases has been questioned, and they are not discussed in greater detail in the text. For an analysis of this issue *see* Gregory J. Werden, *supra* note 9, at 759-765.

Whatever model the parties propose as lawful explanation of their conduct, competition authorities must check that the model's underlying assumptions are a good description of the industry in question.

old models, modern economics makes extensive use of the Nash equilibrium concept to model firm behaviour in many different types of markets.[24]

A second class of "models" argues that firms may at times recognise that mutual accommodation is in their best interests. Theories of this type indicate that certain actions by a firm are only profitable given an accommodating response by their rivals. And, when there is accommodation, firms' actions become "coordinated" in the sense that neither could have achieved that result without the help of the other.[25] Importantly, it should be understood that in models which feature accommodation, firms do not reach an explicit (unlawful) agreement through communication with each other, but rather come to understand what was in their mutual best interests through market place interactions.[26]

A third class of firm behaviour involves cartels. Here the key feature is that firms explicitly reach an agreement through direct communication with one another. The key difference between cartel behaviour and accommodation is that firms directly communicate with each other as they might in the proverbial smoke filled room or as in the US FCC spectrum auction case where firms communicated with each other through the prices they submitted.[27]

Notably, in cartel cases that primarily rely on circumstantial evidence there is no "silver bullet" showing that the parties reached an agreement. Thus, the authority must build a case that attempts to separate accommodating and unilateral behaviour from behaviour tending to show that rivals reached an explicit agreement. The key question is what types of circumstantial evidence tend to push aside the idea of legitimate competition and support the finding of an explicit agreement among competitors

In order to identify economic evidence that is of high quality and hence useful at discriminating among competing theories, the competition authority should have a good sense of the appropriate model that best describes the unilateral incentives of a firm to compete in the market that is being investigated. First, the authority must identify the set of actions that can be characterised as unilateral, non-cooperative best response behaviours in a given case. Then, and only then, can it identify actions that are inconsistent with that behaviour and thus support the hypothesis that an illegal cartel was formed. In other words, actions compatible with unilateral, non-cooperative best response behaviour serve as a benchmark to which a firm's behaviour can be compared during the period of suspicious activity.

The following two examples of dominant-firm price leadership and Cournot oligopoly illustrate this point. A model of dominant-firm price leadership indicates that when the dominant firm's marginal cost goes up, the optimal price charged by it and all of the firms in the market also goes up. Indeed, the price of all firms in the market changes simultaneously. In this model, there is no accommodation, let alone an

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24 Following up on these developments, competition authorities have made extensive use of unilateral effects theories and today many legal complaints are brought primary based on a unilateral effects concern.

25 This reasoning has been the basis of numerous complaints by competition authorities in a variety of merger cases when they speak of a coordinated effects concern.

26 Certain economically minded students of antitrust policy have argued that coordinated or accommodating behaviour by firms should be treated as a violation of competition law. *See* Richard A. Posner, Antitrust Law 94 (2nd ed. 2001). The prevailing view is, however, that cases where competitors have not reached an agreement should not be held to violate competition laws as it would be difficult or next to impossible to design an appropriate remedy. *See, e.g.*, Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Market Place*, 65 Antitrust L. J. 41, 48 (1996). *See also* Gregory J. Werden, *supra* note 9, at 773-77, for a discussion of Posner's view.

27 See United States v. Omnipoint Corporation, No. 1:98CV02751 (D.D.C. November 10, 1998); United States v. Mercury PCS II, L.L.C., No. 1:98CV02751 (D.D.C. November 10, 1998); United States v. 21st Century Bidding Corporation, No. 1"98CV02752 (D.D.C. November 10, 1998).

explicit cartel. Instead, each firm is pursuing its unilateral, non-cooperative best response. This very elementary model, at the very least, serves as a warning that simultaneous or near simultaneous price movements can be consistent with alternative theories of behaviour and not just cartel conduct – let alone identifying the dominate firm as the cartel ringmaster. As mentioned earlier, the competition authority must check whether that model best describes the unilateral incentives of a firm to compete in the market that is being investigated. In the example discussed here, when parties submit that a dominant-firm price leadership model can explain firm behaviour under investigation as legitimate, unilateral conduct, a competition authority must examine whether the assumptions of that model appropriately describe the industry in question. The relevant questions could include, for example, whether in light of industry structure, price setting and other market conduct in the past (during non-collusive periods), the price leadership model is a good explanation for how prices are formed.

Similarly, the Cournot model highlights that evidence showing that prices are higher in markets where there are fewer players than in markets where there are many can be consistent with the independent, unilateral behaviour of a firm, and not only with the actions of a cartel. In fact, higher prices with fewer firms in a market is consistent with unilateral theories, accommodating behaviour and cartel actions. This type of economic evidence would not support the finding of an agreement, and therefore by itself would be of little value in a circumstantial evidence case.

Because it is necessary in each case to carefully identify which actions are in a firm's unilateral self-interest, the broad notion that "interdependent pricing may often produce economic consequences that are comparable to those of classic cartels" is not helpful in analysing circumstantial evidence cases. This point is explained below.

The prisoner's dilemma provides a good example of how unilateral incentives lead to a different outcome than when firms act collectively.[28] For purposes of this paper, the fundamental point of the prisoner's dilemma is that unilateral incentives may lead each firm away from pricing high and earning high profits and towards lowering prices, even though each firm anticipates that the rival will cut prices as

[28] The following table identifies two competitors: firm 1 and firm 2 and defines the profits that correspond to the sets of actions that are available to firm 1 and 2, respectively.

Table: Prisoner's Dilemma

		Firm 2	
		Price High	Price Low
Firm 1	Price High	10, 10	3, 15
	Price Low	15, 3	4, 4

For example, if firm 1 prices high and firm 2 prices low then firm 1 earns 3 and firm 2 earns 15. To find the Nash equilibrium and to highlight how unilateral incentives determine the Nash equilibrium let's begin in the box where both firm 1 and firm 2 are pricing high. This box indicates that both firm 1 and firm 2 each earn 10 in profits. Call these the profits that each would earn if they explicitly agreed to fix prices. In order to understand the incentives facing each firm ask what firm 1 should do if it thinks that firm 2 will price high. If firm 2 prices high then firm 1's profit can be 10 if it also prices high or 15 if instead it defects on the cartel and prices low. Because 15 is more than 10 it is in firm 1's unilateral interest to price low. Now, firm 2 knows that if firm 1 prices low that it could earn 4 if it also priced low or 3 if it continues to price high. Because 4 is more than 3, firm 2 will choose to price low as well. This is, as it turns out, is the Nash equilibrium because each firm's best response to the other firm's best response is for both to price low.

well. Conversely, matching the high price of a competitor may be in the collective interest of all competitors, but is not necessarily consistent with unilateral self interest. Thus, when analysing circumstantial evidence, care must be taken not to conflate the two separate concepts of unilateral self-interest and collective interest of all competitors.

Using the insight of game theory that cooperation cannot be expected to happen spontaneously, Stigler's work on oligopoly emphasised the incentives of cartel members to defect if they believe that they can gain larger profits by cheating than by conforming to the cartel agreement.[29] Stigler identified three "problems" that cartels need to be overcome. First, they need to reach a consensus on the terms of their agreement. This task may be extremely difficult to accomplish without communication – as game theory puts it, there is an abundance of riches, too many possible decisions of market players. Second, cartels need a detection mechanism to ensure that every member follows the cartel rules. Third, a mechanism is needed to punish those who cheat, in order to deter members from defection.[30] Like the prisoner's dilemma, Stigler's model of oligopoly highlights that oligopoly does not inevitably lead to cooperation and collective action to increase prices.[31]

Courts have not always been careful to distinguish between actions in unilateral self-interest and those in the collective interest of all competitors and to realise that increased prices are not a necessary result of oligopoly absent collusion. A good example where a court seems to have made an error in this regard occurred in *Reserve Supply*.[32] In that case, a private action, the plaintiffs cited a series of parallel price increases during a period when demand was low. The defendant countered that it would have been "irrational to attempt to increase sales by maintaining lower prices, because lower prices would be met by their competitors, leaving no increase in market share and reduced profit levels." Finding that demand was inelastic, the court reasoned that by maintaining lower prices the defendant could have attracted only customers of the defendant's competitors. The court concluded that failing to keep prices low "does not suggest that [the defendants] 'acted in a way, that but for the hypothesis of joint action, would not have been in their interest.'" Significantly, this statement is exactly the wrong reasoning. In essence the court failed to appreciate that, depending on the circumstances, firms in the pursuit of their own interests may compete prices down from high levels in ways similar to that described by the prisoner's dilemma game.[33]

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29 George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44-61 (1964).

30 For a good hypothetical, using numerical examples, of the problems faced by firms considering a cartel *see* Andrew I. Gavil et al., *supra note* 21, at 228-35.

31 Stigler's description of the problems faced in the formation and operation of a cartel can provide useful guidance to a competition authority which attempts to build a cartel case using circumstantial evidence since attempts by cartel members to overcome these problems may have created an evidence trail. When seeking to establish that the companies' behaviour was not consistent with unilateral self interest, a competition authority can strengthen its "conspiracy story" if it has evidence that explains how the cartel solved the problems of formation, detection, and/or punishment. For example, the competition authority may be able to explain that certain facilitating practices were used by the cartel member to monitor their compliance with the agreement and provide for the possibility to punish defectors. The Italian baby milk case, discussed supra, at p. 22, provides a nice illustration of this point (facilitating practices included measures to create price transparency, and use of sales channels where price discounts were unlikely). On "facilitating practices," *see supra* at p. 21 Note, however, that evidence concerning the solution of the three cartel problems will not always be available.

32 Reserve Supply Corporation v. Owens-Corning Fiberglas Corporation, 971 F. 2d 37 (7th Circuit 1992).

33 For further examples on the use of the concept of actions against unilateral self interest *see infra* at p. 31.

A classic example of an agency putting together circumstantial evidence showing that firms did not behave in accordance with their unilateral, non cooperative interest comes is *American Tobacco*.[34] In that case the court found a "record of price changes" was "circumstantial evidence of the existence of a conspiracy." On June 23, 1931 the big 3 tobacco firms in the United States all announced simultaneous price changes and no "economic justification for this raise was demonstrated." Other simultaneous price changes followed over the next several years. Precisely because of the simultaneity and because no economic justification (like higher costs) was demonstrated, the court found that this circumstantial evidence was enough to convict the defendants all on criminal charges. In contrast, if costs had increased around the times of the price increases then it would not be clear at all whether there was a conspiracy or not.

To summarise the discussion in this section, below are four points Werden has identified that focus attention on key issues regarding the use of economic evidence:[35]

- First, "something more than interdependence must be shown before agreement can be inferred." For example, when a competitor raises price in response to a rival raising price such activity may be fully consistent with the each firm's unilateral non cooperative best response given its rivals' responses. If we cannot condemn a firm for lowering its price in response to rivals' lowering their prices then we also cannot do so for price increases. Something more needs to be shown. (This 'extra' is further elaborated in the following text).

- Second, "the existence of an agreement cannot be inferred from actions consistent with Nash, non-cooperative equilibrium in a one shot game." Such behaviour, in fact, is fully consistent with vigorous competition and provides a useful benchmark against which suspicious activity can be gauged.

- Third, actions that are inconsistent with the one-shot Nash non-cooperative equilibrium can be used to infer the existence of an agreement, even if they may be consistent with actions taken in an infinitely repeated game model. Infinitely repeated game models do not provide a useful benchmark to identify action contrary to self interest.

- Fourth, for practical and policy considerations, the "existence of an agreement should not be inferred absent of evidence of communications of some kind among the defendants through which an agreement could have been negotiated." This kind of evidence is a useful indication that the conduct observed in the market place was the result of an unlawful agreement and thus can be an important factor to avoid enforcement action in cases of unilateral or accommodating behaviour.

4. Cases inferring an agreement from circumstantial evidence

Cartel cases in which there is no direct evidence of agreement often begin in a familiar way: there is an episode of suspicious parallel pricing or other behaviour that is not readily explained by usual market forces. By definition the competition agency cannot directly prove that the conduct is the result of an agreement. The question presented is, what amount and quality of circumstantial evidence is sufficient for this purpose?

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34 American Tobacco Co. v. United States, 328 US 781 (1946).

35 Gregory J. Werden, *supra* note 9, at 779-80.

Over the years, courts, competition authorities and competition experts have come to accept that "conscious parallelism," which involves nothing more than identical pricing or other parallel behaviour deriving from independent observation and reaction by rivals in the marketplace, is not unlawful.[36] As explained above, this view is well grounded in economic theory. Economic theory and case law have made it clear that something more than conscious parallelism is required. Defining that "something more" has proved difficult; courts in a few jurisdictions have wrestled with the problem for decades. One formulation, developed in the United States in civil cases (criminal cases are discussed below), requires that there exist certain "plus factors," which prove that agreement is more likely the cause of the parallel conduct than independent action. One US court described the standard in a recent decision as follows:

> . . . [W]e have required that plaintiffs basing a claim of collusion on inferences from consciously parallel behaviour show that certain "plus factors" also exist. Existence of these plus factors tends to ensure that courts punish "concerted action"—an actual agreement—instead of the "unilateral, independent conduct of competitors." In other words, the factors serve as proxies for direct evidence of an agreement.[37]

Other jurisdictions do not use the same terminology as US courts, but it seems that the analysis that they apply is similar.[38] This section will first more closely look at how decision makers have used the two factors commonly seen as the most important types of circumstantial evidence: communication or opportunity to communicate; and action against self-interest.

4.1 Communications

One important type of plus factor is that which indicates that the parties communicated about prices in a manner that permitted them to reach an agreement, or at least had the opportunity to communicate. The evidence falls short, however, of proving an explicit agreement. The following civil case from the United States highlights the importance of communication evidence.

4.1.1 Flat Glass[39]

This case, decided in 2004, is useful because the court considered allegations of price fixing in two separate markets, one for flat glass and one for automotive replacement glass. It concluded that in the former there was sufficient circumstantial evidence of price fixing to support a finding of unlawful agreement, while in the latter the evidence was insufficient.[40] In the flat glass market there had been

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36 See, e.g., 6 Phillip E. Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law* (3d ed. 2004), ¶1433a, at 236: "The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination or conspiracy required by Sherman Act §1;" Ivo Van Bael & Jean-François Bellis, *Competition Law of the European Community* (4th ed. 2005), at 55: "Parallel behaviour between two or more undertakings as such does not constitute sufficient evidence to establish the existence of a concerted practice. The EC Treaty "does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors." (quoting from Case 48/69, ICI v. Commission, [1972] ECR 619, para. 118).

37 In re Flat Glass Antitrust Litigation, 385 F 3d 350, 359-60 (3d Cir. 2004).

38 For discussions of the EU jurisprudence on the topic of circumstantial evidence in cartel cases, see, e.g., Mark Jephcott, *Horizontal Agreements and EU Competition Law* (2005); Sigrid Stroux, *US and EC Oligopoly Control* (2004); Lennart Ritter and David Braun, *European Competition Law: A Practitioner's Guide*, 100-110 (3d ed. 2004) ; Richard Whish, *Competition Law*, 514-16 (5th ed. 2003).

39 In re Flat Glass Litigation, *supra* note 37.

40 Most of the recent US civil cases dealing with this topic have been presented to US appellate courts upon appeal from a dismissal of the case by the trial court before a complete factual record had been made.

significant episodes of parallel pricing by the defendants. Several times in the relevant period they raised their list prices by identical amounts and within close time frames. The market structure was consistent with possible collusion. There was high concentration, featuring just a few sellers. The product was relatively homogeneous, where price was the most important distinguishing feature. There were high fixed costs; there was a substantial amount of excess capacity in the industry; and demand was static. The industry was, in the words of the court, "a text book example of an industry susceptible to efforts to maintain supra competitive prices."[41]

There was also evidence that the price increases implemented by the defendants were not consistent with actions which would occur in a competitive market. The increases were not prompted by any change in costs or demand, and their result was to attract a new entrant. They were, concluded the court, actions "contrary to the self interest" of the defendants unless there existed a collusive agreement (that concept is discussed further below). But the court said that while this evidence was important, it was not sufficient in this case: "The most important evidence will generally be non-economic evidence 'that there was an actual, manifest agreement not to compete.' "[42] There was also ample evidence of this kind. There had been a series of meetings and communications in which prices were discussed. Internal records of the participants indicated that they typically had knowledge of one another's pricing policies that they could not have acquired by public means. The court held that in its totality the circumstantial evidence was sufficient to support the finding of an unlawful agreement.

In contrast, in the automotive replacement glass market the circumstantial evidence relating to communications between the defendants was much more sparse. The conduct that formed the principle basis for the allegation of price fixing was a practice by which the industry members provided certain pricing information to a third party trade association, which then published it in a form that permitted the participants to calculate one another's prices. The court found this evidence, standing alone, to be insufficient. Publication of pricing information, it noted "can have a procompetitive effect." It declined to "rest on [an] inference of collusion from this ambiguous, or even procompetitive, fact."

4.2 Economic evidence

Communication evidence is undeniably important – many would say critical in a circumstantial case. Certain economic evidence, however, also can play an important role in these cases. The following decision, written by the influential American jurist and scholar, Richard A. Posner, is a good example of how to analyse circumstantial economic evidence.

Under US "summary judgment" procedures the court can grant judgment in advance of a full trial if the moving party can show that all necessary factual issues are settled or so one-sided they need not be tried. A different, more lenient (to the proponent) legal standard applies to summary judgment motions than to a final judgment. In these cases the appellate court is not deciding finally whether an agreement has been proved, but only whether there is sufficient evidence of agreement to permit that question to be submitted to the fact finder (judge or jury). Nevertheless, these cases are instructive on the issue of proof of agreement in horizontal cases.

41 *Id.*, at 361.

42 Ibid, quoting from an opinion by Judge Richard Posner in In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002).

4.2.1 High Fructose Corn Syrup[43]

The four principal manufacturers of high fructose corn syrup (HFCS), a sweetener made from corn, were alleged in a private civil damages case to have conspired to fix the price of their product during the period 1988-95. The trial court dismissed the case, but the appeals court reversed, sending the case back for trial.

Judge Posner succinctly classified the types of evidence relevant to proof of agreement under the Sherman Act:

> The evidence upon which a plaintiff will rely will usually be and in this case is of two types—economic evidence suggesting that the defendants were not in fact competing, and non economic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types, and is in this case: evidence that the structure of the market was such as to make secret price fixing feasible (almost any market can be cartelised if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies); and evidence that the market behaved in a non competitive manner.[44]

The court noted various elements of economic evidence in the case that were consistent with an agreement: high concentration on the selling side, a "highly standardised" product; a lack of close substitutes for HFCS, a significant amount of excess capacity maintained by the defendants, market-wide price discrimination.[45] The court then turned to (economic) conduct evidence that suggested an agreement. It described a change to a pricing formula that was not based on cost. It also pointed to a change in the length of contracts imposed by the defendants and to a suspicious pattern among defendants of buying and selling from one another. It also noted an unusual stability of market shares in the industry, under circumstances in which one would expect more volatility. And the court gave some credibility to expert testimony showing that the prices for HFCS were higher during the period of the alleged conspiracy than they were before or after.

The court also found that there was communication evidence in the record that supported such a conclusion. It consisted of documents and other statements by officers of the defendants that referred obliquely to agreements and understandings, and gave indications that they had non-public information about their rivals' pricing decisions. The court held that the evidence in its entirety was sufficient for a trier of fact to conclude that there had been agreement.

4.2.2 "Action against self interest"

This is a concept employed in US courts in recent years. As explained in greater detail in the economics section, it is a critical step in the evaluation of economic evidence.[46]

An action against self interest is one that would be against the self interest of the actor in the absence of agreement. The firm would not have acted as it did if it had been acting unilaterally. An action against self interest might take the form of a refusal to deal with a customer or supplier, when there appear to be no

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43 In re High Fructose Corn Syrup Antitrust Litig., *supra* note 422.

44 *Id.*, at 655.

45 Price discrimination is not always anticompetitive, and the existence of it does not always indicate collusion. Judge Posner discusses at some length in the decision why it is relevant in this case. *Id.* at 658.

46 *See supra*, at p. 24.

economic reasons why the party would refuse such a business opportunity.[47] It could involve a pattern of information exchanges – cost information, for example, or information about transaction prices – that businesses normally consider to be confidential, and which rivals in a competitive market could use to their advantage. It could involve a pricing structure that bears no relation to cost, or that otherwise seems to have no market-based justification.

A case in which this concept was important was *Blomkest Fertiliser*.[48] It involved allegations by fertiliser manufacturers that eight potash producers, six of them Canadian, had conspired to fix the price of potash between 1987 and 1994 (potash is an important input into fertiliser). The plaintiffs' case consisted mostly of economic evidence, which included evidence of a pattern of price verifications by the defendants, a form of economic "conduct" evidence described above in Part II.

The case was heard by all of the eleven judges on the appeals court, a rarity in US practice.[49] The eleven judges split six to five in favour of the defendants, affirming the decision of the trial court to dismiss the case The majority found the price verification evidence unpersuasive, first because it occurred only as to *past* transactions, and as such would have minimal implications for future pricing, and second, because in the court's words:

> The price verifications relied upon were sporadic and testimony suggests that price verifications were not always given. The fact that there were several dozen communications is not so significant considering the communications occurred over at least a seven-year period in which there would have been tens of thousands of transactions. Furthermore, one would expect companies to verify prices considering that this is an oligopolistic industry and accounts are often very large. We find the evidence falls far short of excluding the possibility of independent action.[50]

The minority argued persuasively that such conduct would not have been in the defendants' interest if they had not been participating in a cartel:

> . . . if there were no reciprocal agreement to share prices (and the producers certainly do not argue that there was), an individual seller who revealed to his competitors the amount of his privately negotiated discounts would have been shooting himself in the foot. On the other hand, if there were a cartel, it would be crucial for the cartel members to cooperate in telling each other about actual prices charged in order to prevent the sort of widespread discounting that would eventually sink the cartel.[51]

As noted above, however, this view did not prevail in the case.

A good illustration of use of the "action against self interest" concept to determine whether parallel conduct should be regarded as indirect evidence of an agreement is the appeals court opinion in *Brand Name Prescription Drugs*.[52] There, a class of customers brought a case against drug manufacturers alleging that their uniform practice of price-discriminating among groups of customers, as a result of which the plaintiffs were forced to pay higher prices, should be viewed as (indirect) evidence that the defendants had entered into a cartel agreement. The court rejected the plaintiffs' argument, however. It reasoned that

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47 See Petruzzi's IGA v. Darling-Deleware, 998 F.2d 1224, 1243-45 (3d Cir. 1993)

48 Blomkest Fertilzer v. Potash Corp. of Sask., 203 F. 3d 1028 (8th Cir. 2000) (en banc).

49 Most appeal cases in the US Federal system are heard by a panel of only three judges, chosen at random.

50 *Id.*, at 1034-35.

51 *Id.,* at 1047.

52 *In re* Brand name Prescription Drugs Antitrust Litig., 186 F3rd 781 (7th Cir. 1999).

as each defendant drug manufacturer had market power as a result of the patent protection of its drugs, it was consistent with each manufacturer's self interest to exercise that market power and price discriminate among groups of customers, depending on their willingness to pay. The fact that all defendants had adopted similar price discrimination strategies therefore was consistent with action in each defendant's self interest and could note be viewed as evidence of an agreement among them.

4.3 Holistic v. item-by-item approaches to circumstantial evidence

One important issue that affects how courts evaluate circumstantial evidence is whether the court is willing to consider all evidence that is proffered as a whole, giving it cumulative effect, or whether it requires that each item unequivocally support the hypothesis of agreement. In *High Fructose Corn Syrup* Judge Posner strongly adopted the holistic approach. The trial judge in the case had refused to consider the communication evidence that was offered

> … because he thought its character was such as to "require that a substantial inference be drawn in order to have evidentiary significance." This is correct in the sense that no single piece of the [communication] evidence . . . is sufficient in itself to prove a price-fixing conspiracy. But that is not the question. The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment.[53]

Judge Posner noted that a "trap" that confronts the court in these cases is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment.

> It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial? The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.[54]

It should be noted, however, that there are different views even within the United States. Other federal appeals courts have examined each item of circumstantial evidence independently as to whether it tended to exclude independent, unilateral action of competitors.[55]

It appears that in *Wood Pulp*, an important European Union case dealing with circumstantial evidence in a price fixing case, the European Court of Justice court took a similarly strict approach on this issue of evaluating individual items of evidence.

4.3.1 Wood Pulp[56]

The European Commission had declared that more than 40 producers of wood pulp and three associations of producers had engaged in concertation during two periods between 1975 and 1981, in which their announced prices were nearly identical. It was the practice in the industry for buyers and sellers to enter into long term contracts, which gave buyers the right to purchase a minimum quantity of

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53 *Id*., at 661.

54 *Id*., at 655-56.

55 *See* Williamson Oil Co. v. Philip Morris USA, 346 F.3rd 1287 11th Cir. 2003).

56 Cases C-89/85 etc., Ahlstrom Oy v. Commission, [1992] ECR I-1307.

wood pulp at prices no higher than announced prices. The producers announced their prices each quarter, at virtually the same time. The Commission produced a substantial quantity of economic evidence, in addition to the parallel pricing conduct, in support of its decision: a large number of sellers, who differed significantly from one another in terms of national origin (they were from Finland, Sweden, Spain, Portugal, the US and Canada); varying cost structures; differing freight costs; variation in national markets across the Community; announced prices significantly above spot market prices; apparent breakdowns in price discipline twice during the period; prices published in the trade press; prices announced in advance of their application; all prices quoted in US dollars.

The Commission also adduced communication evidence supporting concertation, consisting of documents and telexes from the files of the parties showing that they had attended meetings at which prices were discussed. However, the ECJ required the Commission to link each document to concertation between specific producers and for specific periods. The Commission took the position that it need not do so, that the evidence was relevant generally to the alleged concertation. The ECJ did not accept the Commission's view, however, and excluded the documents from consideration.

The court then turned to whether the economic evidence alone was sufficient to establish concertation. The standard that it applied to this inquiry was whether "concertation constitutes the only plausible explanation for such conduct." It concluded that there were valid business reasons for the long term relationships and the pricing practices that had evolved in the industry. The court had employed two experts, who did not rule out concertation but who also found legitimate reasons for the conduct under consideration. The simultaneity and parallelism of announced prices could be explained by the "very high degree of transparency that existed in the market."[57]

The strict standard adopted by the court for evaluating the economic evidence in the case – that concertation constitutes the only plausible explanation for such conduct – may have been the principal reason for reversing the Commission decision, but it is likely that the ECJ's unwillingness to consider in a holistic fashion the communication evidence that was proffered also contributed substantially to the result. In subsequent cases decided by the Commission and EU courts, however, it does not appear that the authorities have adopted such a strict approach.[58]

It is inevitable under such an "itemised" approach that each item of circumstantial evidence will almost always be ambiguous if analysed in isolation. If the evidence is cumulative, on the other hand, the overall ambiguity may be ameliorated. It would seem that the better approach, as articulated by the court in *High Fructose Corn Syrup,* would be to be consider the available evidence as a whole and evaluate whether all evidence in its entirety can be sufficient under the applicable standards of proof.

5. Cartels and circumstantial evidence – the national experience

Circumstantial evidence is treated differently in different countries.[59] The law regarding the use of circumstantial evidence in cartel cases will undoubtedly develop according to these national norms. Other factors will also dictate how these cases evolve across countries, notably whether cartels are administrative or civil violations, or whether they are prosecuted as crimes. Further, countries are at different places in

57 Id. at para. 81. See also, Suiker Unie v. Commission (*Sugar Cartel)*, OJ [1973] L 140/17.

58 *See, e.g.*, *PVC II*: OJ [1994] 239/14, substantially upheld on appeal, Cases T-305/94 etc., Limburgse Vinyl Maatschappij v. Commission [1999] ECR II-931 (CFI confirming that "…items of evidence should be regarded not in isolation but in their entirety […] and individual items of evidence cannot be divorced from their context"); *Plasterboard*, OJ [2005] L. 166/8.

59 Although, as suggested above, there might be differences even within one and the same country.

the development of their anti-cartel programmes. Some countries have been prosecuting cartels for decades, others for only a short time. Some have highly effective leniency programs; others have only recently introduced one. The impact of these factors on prosecuting cartels with circumstantial evidence is explored further below.

5.1 Prosecuting cartels as administrative or civil violations

In the majority of countries cartels are prosecuted administratively or civilly (in most of these the process is administrative; that term will be employed exclusively from here on out in this section). The trend in OECD countries that treat cartels as administrative violations is toward developing direct evidence. Thus, virtually all cartel cases prosecuted by the European Commission since 2001 or so have generated direct evidence.[60] Further, the Third Report by the OECD Competition Committee on hard core cartels[61] describes several recent cartel cases originating in OECD countries and a few non-Member observer countries. Almost all of these, it seems, employed direct evidence.[62] There may be at least two reasons for this trend, and they are related: Leniency programmes, which bring a greater number of cartels to the authorities' attention and generate at least some direct evidence, are becoming ever more effective. And countries are increasingly imposing very large fines for cartel conduct. Severe sanctions make leniency programmes more effective. Independently, it is easier to justify the imposition of large fines if one has direct evidence of the violation, including, if possible, evidence of knowing, intentional wrongdoing.[63] Finally, countries have strengthened their investigatory techniques, including dawn raids.

There is another, important benefit from cases built on strong direct evidence: they can lead to more plea bargains and fewer appeals. In some jurisdictions, the parties in these cases usually consent to a finding of a violation and to the imposition of strong sanctions. This has significant resource implications; litigation can take a great deal of time and consume enforcement resources that could otherwise be employed in generating more cases.

Still, when only circumstantial evidence is available and it is strong, countries with a longer enforcement record continue to be willing to bring cases based on it. One example is the Italian *Baby Milk* case, discussed earlier. Another recent case is the French decision concerning a mobile phone operators cartel.

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60 Based upon a review of Commission press releases during the period, available on the Commission's website.

61 OECD, *Implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels: Third Report by the Competition* Committee (2005), available on the OECD web site at www.oecd.org/competition.

62 Of course, in many of these cases there was circumstantial evidence as well. As noted above, the different types of evidence may be used together in a case.

63 For example, between 2001 and 2005 the European Commission imposed fines totaling almost €4 billion for cartel conduct in violation of Article 81. See, speech by European Commissioner Neelie Kroes before the International Forum on Competition Law, April 7, 2005, available on the European Commission website, at http://europa.eu.int/comm/competition. As noted above, all of these cases apparently were based, at least in part, on direct evidence.

5.1.1 France – Mobile Telephones[64]

On 1 December 2005 the Conseil de la concurrence announced that it had fined three mobile telephone providers a total of €534 million for collusive activity. There are two parts to the case. The first is a course of dealing between 1997 and 2003 by which the respondents exchanged detailed and confidential information on the numbers of new customers signed up the previous month, and the numbers of people who opted to cancel their subscriptions. This conduct was deemed to have anticompetitive effects apart from any direct effect on prices.

More relevant to this discussion, the Conseil also found that between 2000 and 2002 the three operators had entered into a market sharing agreement centred on stabilising their market shares. The Conseil stated that it had

> . . . uncovered a number of pieces of serious, specific and corroborating evidence pointing to the existence of such an agreement. These included handwritten documents with explicit references to an "*agreement*" between the three operators, the "*pacification of the market*" and the "*Yalta of market share*".

The Conseil pointed to certain market practices that the respondents had simultaneously adopted in 2000, including "a hike in prices and the adoption of measures such as giving priority to contracts with commitments over pay-as-you-go cards, or the introduction of billing per 30-second increments after a minimum first minute." The Conseil appeared to evaluate these actions in the context of the "against self interest" standard discussed above:

> These measures . . . could clearly have led to a drop in sales (and therefore market share) for any operator who took the step of introducing them unilaterally. The collusion was therefore intended to make it easier for the operators to introduce this strategy, by enabling them to ensure that they all adopted the same policy simultaneously, and that their market shares would consequently remain stable.

5.1.2 Brazil – Steel

In 1999, CADE, the Brazilian competition tribunal, concluded what many considered to be the first cartel case under its current competition law, which was enacted in 1988. The case involved an alleged agreement in 1996 to increase the prices of certain flat rolled steel products. There were only three domestic producers of those products, two of which were linked by a 50% cross-ownership. In July of 1996 representatives of the Brazilian Steel Institute met with officials of Brazil's Secretariat for Economic Monitoring (SEAE) and informed them that its members intended to increase their prices on these products by certain specified amounts on a specific day. The background to this meeting is that until 1992 these products were subject to price controls, which were administered in part by SEAE. Producers were required to submit proposed price increases to SEAE. There were no such controls in 1996, however.

On the day after the meeting SEAE informed the Institute by fax that such an agreement was a violation of the competition law and illegal. Nevertheless, the three producers each implemented price increases on these products in early August of that year. The increases were approximately the same as those given to SEAE by the Steel Institute. They were not identical across the three companies, but in

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[64] The press release by the Conseil de la concurrence is available on the Conseil's website at http://www.conseil-concurrence.fr/user/standard.php?id_rub=149&id_article=501. The complete decision is available at http://www.conseil-concurrence.fr/user/avis.php?avis=05-D-65. The defendants have announced their intention to appeal the decision.

most cases they did not vary by more than .5%. About one year later the companies implemented another, similar increase, though there was no preliminary notice given to SEAE.

The defendants denied that they had formed an agreement. They admitted that prior to the meeting with SEAE the top executives of the firms had met, but they denied that an agreement had been reached. The Brazilian competition agencies were not able to develop direct evidence of an agreement. They were unable to question executives of the three firms directly about the matter. The agencies concluded, however, that there was sufficient circumstantial evidence of agreement. That evidence included the executives' meeting prior to the SEAE meeting, the statement of intent to increase prices at the SEAE meeting, the nearly identical, nearly simultaneous increases in August of 1996, and the lack of evidence otherwise supporting independent decisions by the steel companies to increase prices at that time. CADE concluded that the 1996 conduct was unlawful. It did not include the 1997 increase as a part of the violation, however, as there was no evidence of a meeting or communications among the firms prior to that increase.

The tribunal imposed the minimum fine under the law of 1% of the previous year's gross turnover of each firm, which amounted to about R$51 million (then the equivalent of about USD48 million).[65] The defendants appealed the decision and the fines, and some aspects of the case, unfortunately, are still not resolved. More recently, the Brazilian competition agencies have become more aggressive in their anti-cartel effort and have perfected their use of dawn raids and other specialised investigative techniques. They have created a leniency programme, which has generated some cases.[66]

5.1.3 Latvia – Hens' Eggs

This case is a good example of the use of different types of circumstantial evidence:

- communication evidence, including evidence of meetings of competitors through an industry trade association, and documents evidencing that prices were discussed at these gatherings;

- economic evidence showing an increase in prices after the relevant meetings, and evidence rebutting the claim by the respondents that their pricing was the result of market forces.

The case is also relevant because it occurred in the agricultural products sector, where it seems that many cartels exist in countries beginning anti-cartel enforcement.

In 2003 The Latvian Competition Council initiated an inquiry into possible price fixing by producers of hens' eggs upon reading in the local press an announcement by the leading producer that it intended to raise its prices. The article also stated that the Latvian Association of Egg Producers had recommended that its members raise their prices. The Competition Council then lacked mandatory inspection powers, but its investigators appeared simultaneously at the offices of three producers to conduct voluntary interviews. Later the investigators interviewed other producers.

The investigation developed the following evidence: There were 12 members of the Producers' Association. The Latvian market was dominated by one producer, which had a market share of 50%. Three others each had shares of 8-11%. In the interviews, the investigators were told that there had been

65 For further discussion of this case, see, Paulo Corrêa and Frederico G. de Aguier, *Circumstantial Evidence and Plus Factors in Cartel Cases*, available on the SEAE website, at http://www.fazenda.gov.br/seae/english/index_english.html.

66 See, OECD, *Competition Law and Policy in Brazil: A Peer Review*, at 50-54 (2005), available at the OECD website, at http://www.oecd.org/dataoecd/12/45/35445196.pdf.

discussions about raising prices at association meetings in two periods, July – August 2002 and March – April 2003. The investigators obtained a copy of a fax sent to association members by the dominant firm prior to a meeting in March 2003. The fax stated that the agenda of the meeting would include the topic of "price policy (the increase of prices is planned starting from April 1, 2003)." The fax also stated that the dominant firm would not respond to proposals from retailers for special low price promotions for the upcoming Easter season, and it concluded: "Therefore, in order to ensure successful trade in Easter we invite you not to support the actions of retailers of above-mentioned nature."

The Council also developed economic evidence in support of its case. It analysed egg prices during the relevant periods and found that prices did indeed raise after the association meetings. Moreover, it seemed that the increases could not be justified either by higher costs or by supply and demand considerations. Indeed, the producers produced a surplus of eggs during the relevant periods.

The Competition Council concluded that the producers had engaged in price fixing activity in violation of the Latvian competition law, and fined the respondents. The case is currently on appeal.

5.1.4 Chinese Taipei – petrol and diesel fuel

This case is useful because it occurred in a sector in which many countries initiate cartel investigations – retail sales of petrol. It is also notable because it contains no communication evidence – only economic evidence. The competition authority apparently employed a form of economic analysis like that discussed above in Part III, but it is not clear why the agency rejected the hypothesis of unilateral non cooperative best response – in particular the dominant-firm price leadership model.

At the time the investigation began in 2003, the refined petroleum sector in the Chinese Taipei market for petrol and diesel fuel was a duopoly. The leader, with a market share of 70%, had been a monopolist until the entry of another firm in 2000. A third firm, a large American company, had entered in 2002 but subsequently withdrew.

For two years the prices charged by these two suppliers to retail petrol stations had moved in parallel fashion. There were at least 20 instances of simultaneous and nearly identical price adjustments. In each instance, one of the parties announced new prices publicly, to take effect in the future. The other party would then react, also announcing its new prices publicly. If on occasion the second party did not follow the prices announced by the first, the initiating party would either withdraw its changes or amend them to conform to those announced by the other.

There was no direct evidence of agreement. The Chinese Taipei Fair Trade Commission concluded that the duopolists had reached a "meeting of the minds," however. It considered the following factors in making that judgment:

- the parallel conduct of the two parties, covering many price adjustments over a period of years;
- the fact that the price changes were announced publicly, and in advance;
- the fact that retail petrol station operators reacted quickly to the price changes by posting new prices; these announcements served as a monitoring mechanism for the two suppliers;
- an in-depth analysis of the cost structures of the two firms, showing significant differences between them in terms of sources of imports, refinery costs, transportation costs, capacity utilisation, and others.

The FTC also apparently employed game theory in its analysis of the conduct, concluding that the results were consistent with a form of agreement.[67]

The Commission concluded that the conduct constituted a violation of Chinese Taipei's Fair Trade Law, and it fined each of the two respondents NT$6,500,000 (about USD200,000).

5.2 Cartels as crimes

A minority – but a growing one – of countries prosecute cartels as crimes. The standard of proof in criminal cases is the highest, and this would translate into stricter standards for the use of circumstantial evidence. Still, such evidence can be used in these cases. The experience in two countries where cartel conduct is a crime is described below.

5.2.1 United States

The US has a relatively long history in prosecuting cartels as crimes.[68] There were some early criminal cases under the Sherman Act that were built on circumstantial evidence.[69] In the past several years, however, all criminal convictions under the Sherman Act have been based on direct evidence. Since the mid-1990s, the US' leniency programme has become its most important tool in its anti-cartel arsenal, and most cases result from an application under the programme. Most are also resolved without trial, on the basis of guilty pleas.

Of course, circumstantial evidence can also be useful and important. The *Art Auctions* case noted in the introduction above was one case in which it was. The case involved an agreement between the two leading art auction houses, Sotheby's and Christie's, fixing their commission rates. The trial involved Sotheby's Chairman, A. Alfred Taubman; the other parties had either pled guilty or were not prosecuted because they had entered the US' leniency programme. There was direct evidence resulting from the leniency application proving the existence of the cartel agreement. The evidence linking Taubman to the agreement was more tenuous, however. It consisted of communication evidence, much of it written, showing that Taubman had met with his counterpart at Christie's and discussed prices, and that he had

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67 A more complete description of this case is available on the APEC website, at http://www.apeccp.org.tw/doc/Taipei/Case/D094q108.htm.

68 The Sherman Act provides for both criminal and civil sanctions, but for many years after its enactment in 1890 most of the cases brought under it were civil. Also, for many years, a Sherman Act violation was classified as a misdemeanor – a lesser crime. In the 1970s, however, the act was amended to make a violation of it a felony, and the maximum penalties were increased. There were further increases in the maximum penalties, so that today a corporation can be sentenced to pay a fine of up to $100 million (and even more, pursuant to an alternative sentencing provision in US law), and a natural person can be sentenced to a jail term of up to 10 years and a fine of up to $1 million. Sentences actually imposed have kept pace with the increasing authorisations; corporations have paid fines of hundreds of millions of dollars, and individuals are regularly sentenced to jail terms of three years or more. *See*, Scott D. Hammond, "An Overview Of Recent Developments In The Antitrust Division's Criminal Enforcement Program," speech before the America Bar Ass'n, January 10, 2005, available at http://www.usdoj.gov/atr/public/speeches/207226.htm.

69 One of these was *American Tobacco*, *supra* note 34, decided in 1946. It was an appeal from a criminal conviction of three leading tobacco companies and some of their executives. Each defendant was convicted on three counts of violating the act and each was fined a total of $15,000, which was then the maximum fine. There was apparently no direct evidence of an agreement between the defendants, but as outlined in Part III above, the Supreme Court upheld the convictions on the basis of patterns of price changes, which it found to be "circumstantial evidence of the existence of a conspiracy."

supervised discussions between his subordinate and a Christie's executive on the subject.[70] The jury convicted Taubman on the basis of this evidence, and he was sentenced to one year and a day in jail and a fine of $7.5 million.

5.2.2 Canada

Canada has also long classified cartels as crimes. Like the US, there were some early cases in which convictions were based only on circumstantial evidence, and in which the sanctions – fines – were minimal.[71] In 1980 an important case in the evolution of the use of circumstantial evidence in criminal cases was decided by the Supreme Court of Canada.

5.2.3 Atlantic Sugar[72]

The defendants, three sugar refiners, were accused of, among other things, entering into an agreement to maintain traditional market shares over a period of several years. There was no evidence of communication between the defendants on this subject, however. The evidence, as characterised by the court, was entirely "circumstantial." It included the rigid stability of the defendants' shares over a long period and at least one facilitating practice – basing point pricing. In addition, there was documentary evidence showing that the defendants deliberately – but apparently independently – chose not to initiate price cuts that would destabilise this environment.

The trial judge concluded that the circumstances were "the result of a tacit agreement between the accused," brought about by the desire of each defendant to avoid a destructive price war.[73] The judge held, however, that such conduct did not constitute a violation of the applicable criminal law. The Supreme Court upheld the trial court (an intermediate appellate court had overturned it). It emphasised the apparent lack of communication between the defendants on this point. Then:

> In those circumstances did the "tacit agreement" resulting from the expected adoption by the competitors amount to a conspiracy? I have great difficulty agreeing that it did because the author of Redpath's [the pricing leader] policy was conscious that its competitors would inevitably after some time become aware of it in a general way and also expected them to adopt a similar policy which would also become apparent.[74]

The *Atlantic Sugar* decision engendered concern that "tacit agreements" were no longer subject to the criminal conspiracy provisions of the Competition Act. The Act was amended in 1986, adding (among other things) the following provision:

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70 There was also oral testimony offered by Taubman's subordinate, however, which the US government considered to be direct evidence. A good description of the evidence introduced by the government can be found in a government filing in the appeal from the conviction (which was upheld), available at http://www.usdoj.gov/atr/cases/f11300/11329.htm.

71 One of these was *McGavin Bakeries*, a case decided in 1951 by the Supreme Court of Alberta. Rex v. McGavin Bakeries, Ltd., 3 W.W.R. (N.S.) 289, at p. 10 (1951). The court noted that ". . . the crown's case here is based almost entirely on circumstantial evidence," but it concluded that the "massive amount of factual material" relating to conduct over a 17 year period by bakers in three western provinces resulted in the "inescapable inference . . . that there was the conspiracy charged." The maximum fine that could be applied to the conduct, however, was CAD10,000. Six defendants were fined a total of CAD30,000.

72 Atl. Sugar Refineries Co. v. A.G.Can.., [1980], 2 S.C.R.644.

73 *Id.*, at p. 7.

74 *Id.*, at p. 15.

> **Evidence of conspiracy** – In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.[75]

The following interpretation of the amendment is provided in a comment to the law:

> The new subsection makes clear that tacit agreements, in the sense of agreements proved by circumstantial evidence alone, fall within the scope of s. 45(2.1). However, the section does nothing to clarify the more difficult questions of what in law constitutes an agreement, what sort of communication among the alleged conspirators is necessary and how to distinguish agreements from mere "conscious parallelism." [76]

In any case, it seems that the trend in Canada, like that in the US, is toward an increasing number of cartel cases generated by its immunity programme.[77]

6. Conclusion

In prosecuting cartel cases, competition officials prefer to have direct evidence of the cartel agreement, and they are getting better at acquiring it. Circumstantial evidence continues to play an important role in cartel cases, however, either alone or, more commonly, together with direct evidence. Circumstantial evidence may be relatively more important in early cartel cases in countries just beginning an anti-cartel effort, as those new agencies may not have perfected their ability to develop direct evidence.

There are various types of circumstantial evidence, and it is difficult to generalise about them, because each case is highly fact specific. However, communication evidence and conduct evidence that tend to show that the parties' actions were not consistent with each party's unilateral self-interest are widely considered most important. Other economic evidence typically will be relevant as well to establish a persuasive case.

The great challenge in establishing a circumstantial evidence case is that such evidence typically is ambiguous and subject to more than one interpretation. There is a risk that enforcers will too readily condemn parallel conduct even though it is simply the result of independent action by market participants, each acting according to its own judgment as to its best interests. As demonstrated above, application of sound economic principles plays an important role in interpreting the conduct of firms to distinguish lawful, unilateral acts from joint action that results from an unlawful agreement.

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75 Competition Act, §45(2.1).

76 Robert S. Nozick, *The 2004 Annotated Competition Act* (Toronto: Thomson Carswell, 2004), at 87.

77 See, e.g., Sheridan Scott, *Cartel Enforcement: International and Canadian Developments*, a paper presented before the Fordham Corporate Law Institute, October 7. 2004, available on the Competition Bureau's web site at http://www.competitionbureau.gc.ca.

NOTE DE RÉFÉRENCE

Les preuves indirectes n'ont pas moins de valeur que les preuves directes car la loi ne fait par principe aucune différence entre elles, mais exige simplement qu'avant de condamner un prévenu le jury ait acquis l'intime conviction de sa culpabilité à la lueur de toutes les preuves qui ont été présentées au cours du procès.

* * *

Pour démontrer la réalité d'une entente, il n'est pas nécessaire que le ministère public apporte la preuve d'un accord oral ou écrit. Très souvent, dans ce genre d'affaires, cette preuve n'existe pas. En fait, c'est à partir des relations qui ont existé entre les personnes, des paroles qu'elles ont échangées ou de leurs actes eux-mêmes que l'on pourra déduire l'existence de l'entente ou de l'accord supposé.

Ces citations, extraites des instructions données au jury à l'occasion de l'action pénale qui a récemment abouti à la condamnation du président de la maison de ventes aux enchères Sotheby's[1], montrent que l'on peut intenter des poursuites contre les membres d'une entente, même au regard des exigences les plus strictes en matière de preuves, sans disposer de preuve directe de l'entente en question ou d'une participation supposée à celle-ci. La plupart des juridictions admettent en effet les preuves indirectes (circonstancielles), y compris celles qui ont l'expérience la plus longue et la plus fructueuse de la répression des ententes, et où les autorités chargées de faire respecter le droit de la concurrence ont réussi à enclencher le cercle vertueux selon lequel la conjonction de lourdes sanctions et de programmes de clémence ont permis d'obtenir des preuves directes de nouvelles infractions, passibles à leur tour de lourdes sanctions[2]. Étant donné le secret qui entoure les ententes, la possibilité d'utiliser des preuves indirectes à leur encontre, à défaut d'éléments plus probants, revêt donc un intérêt particulier dans les juridictions qui n'ont pas autant d'expérience.

La présente note traite de l'utilisation des preuves indirectes dans le cadre d'enquêtes sur des ententes généralement déclenchées après un épisode douteux de parallélisme des prix ou autre phénomène qui ne semble pas résulter directement du jeu des forces du marché. Lorsque l'organisme chargé de la concurrence soupçonne l'existence d'une entente sans pouvoir en apporter la preuve directe, en effet, la question qui se pose est alors celle de l'ampleur et de la qualité des preuves indirectes qu'il va devoir réunir pour constituer son dossier.

1. A consulter sur le site web de l'American Bar Association, à l'adresse : http://www.abanet.org/antitrust/committees/criminal/taubman.doc.

2. On notera qu'aux États-Unis, où le cercle vertueux décrit ici est déjà bien engagé, les autorités renonceraient normalement à porter une affaire d'entente devant la justice si elles disposaient uniquement de preuves indirectes. Même dans le cas de Sotheby's, il y avait une preuve directe de l'entente ainsi que certains témoignages de première main impliquant le président. En ce qui concerne ce dernier, cependant, la mise en cause reposait pour l'essentiel sur des preuves indirectes.

Les principaux points à retenir sont résumés ci-dessous :

- Les dispositions de la législation de la concurrence qui prohibent les ententes anticoncurrentielles visent non seulement les ententes explicites mais aussi d'autres types d'accords parfois qualifiés d'"arrangements", d'"association d'intérêts" ou encore de "pratiques concertées". Dans tous les cas, cependant, il doit être démontré que les parties sont parvenues d'une manière ou d'une autre à un "accord de volonté délibérée en vue d'un projet commun" pour qu'il y ait violation du droit de la concurrence.

- Les ententes créent un problème particulier pour les autorités car il s'agit d'accords secrets dont les parties prenantes refusent généralement de coopérer lorsque des enquêtes sont menées à leur sujet. Dans les juridictions expérimentées, les autorités de la concurrence ont le plus souvent recours à des preuves directes pour démontrer l'existence d'une entente illicite, mais il n'est pas toujours facile d'obtenir ce type de preuves, et il peut donc s'avérer nécessaire de faire appel à d'autres éléments.

- Il y a plusieurs formes de preuve indirecte, parmi lesquelles notamment les indices attestant l'existence de communications entre des concurrents et les preuves économiques. Les preuves économiques sont liées au comportement de l'entreprise, à la structure du marché et aux pratiques de nature à faciliter certains agissements. Tous les moyens de preuve peuvent être utiles et il convient de n'en laisser aucun de côté.

- Les théories économiques de l'oligopole apportent plusieurs éclaircissements intéressants pour les autorités chargées de faire respecter le droit de la concurrence : elles montrent que des actes motivés par des incitations unilatérales peuvent aboutir à des résultats différents de ceux qu'obtiennent des entreprises agissant collectivement, et qu'un oligopole n'entraîne pas inévitablement une coopération et une action concertée pour augmenter les prix. Par conséquent, lorsqu'ils examinent la conduite d'une entreprise, les responsables doivent veiller à bien faire la distinction entre ce qui relève d'une action accomplie unilatéralement pour satisfaire un intérêt individuel, en l'absence d'accord pour agir de concert, et ce qui relève d'une action accomplie dans l'intérêt collectif de tous les concurrents. Dans le cas où l'intérêt individuel explique l'action, celle-ci ne peut pas constituer une bonne preuve indirecte d'entente.

- Conformément à la théorie économique, une jurisprudence bien établie reconnaît que les indices de comportement parallèle, comme des augmentations de prix concomitantes chez des concurrents, ne constituent pas à eux seuls une preuve suffisante de la réalité d'une entente. Il faut des éléments supplémentaires pour démontrer l'existence d'un accord illicite conformément aux exigences en vigueur en matière de preuves. C'est ce que certains tribunaux nomment les "facteurs complémentaires".

- Tout élément permettant de démontrer que les membres présumés d'une entente ont communiqué entre eux et que cette communication a pu déboucher sur une concertation est considéré comme un facteur complémentaire de poids. Les preuves économiques sont une autre catégorie importante de preuves indirectes. Il s'agit à la fois d'indices de comportement suggérant une action menée en commun et d'éléments révélateurs de structures propices à des actes de collusion. L'analyse d'un comportement dans cette optique consiste par exemple à se demander si le comportement en question répondrait au critère de l'intérêt individuel sauf à supposer que ses auteurs ont agi d'un commun accord.

- Les preuves indirectes doivent être envisagées dans leur ensemble. C'est en fonction de l'effet cumulatif de l'ensemble des moyens de preuve que le juge doit statuer, et non pas en considérant

que chacun des éléments présentés doit être de nature à corroborer sans équivoque la thèse de l'entente.

- Dans les affaires d'entente, les modes de preuve diffèrent selon les pays. Plusieurs facteurs expliquent ces différences, notamment le choix de la procédure, civile, pénale ou administrative, applicable aux ententes et l'expérience plus ou moins longue du pays en matière de répression des ententes. Dans les pays de l'OCDE, les tribunaux ont plutôt tendance à privilégier les preuves directes. Certains pays continuent néanmoins d'employer essentiellement des moyens de preuve indirecte lorsqu'il y a lieu.

- Dans les pays qui viennent de se doter d'un programme de lutte contre les ententes, il est probable qu'à l'occasion des premières affaires les autorités auront du mal à obtenir des preuves directes et devront donc faire davantage appel à des preuves circonstancielles. Il importe cependant de ne pas s'arrêter à ces difficultés afin d'asseoir la crédibilité des règles de la concurrence et des moyens adoptés pour les faire respecter.

1. Les ententes

Tous les textes de loi sur la concurrence interdisent, entre autres, les comportements anticoncurrentiels entre deux ou plusieurs parties agissant d'un commun accord. Il sont rédigés en des termes assez généraux pour pouvoir s'appliquer à toutes les formes d'accords, formels et informels, explicites et implicites. Ainsi, aux États-Unis, la loi Sherman vise tout "contrat, association … ou entente"[3] ; dans le traité CE, l'article 81 s'applique à "tous les accords entre entreprises, toutes les décisions d'associations d'entreprises et toutes les pratiques concertées" ; au Mexique, la législation de la concurrence s'applique aux "contrats, accords, arrangements ou associations"[4] ; celle du Taipei chinois, aux "actions concertées", définies comme incluant tout "contrat, accord ou toute autre forme de consentement mutuel"[5] ; et la législation tanzanienne s'applique à "tout accord, arrangement ou entente entre deux ou plusieurs personnes, qu'ils aient ou non a) un caractère formel ou écrit ; et qu'ils soient ou non b) destinés à être rendus applicables par voie d'action en justice "[6].

Comme le suggèrent les formulations générales des textes de loi, les accords illicites entre concurrents peuvent revêtir de nombreuses formes. La plus courante, dans le contexte des entreprises, est celle de l'accord explicite dans le cadre duquel les parties communiquent directement, oralement ou par écrit, en précisant les modalités et conditions de leur arrangement. Mais les accords n'ont pas toujours un caractère aussi formel. Ils peuvent être conclus par d'autres moyens de communication, tels que conversations à l'occasion d'une réunion, déclarations publiques de dirigeants, annonces de prix ou publicités, ou encore par l'intermédiaire de clients. Comme l'a si justement faire remarquer un tribunal des États-Unis, "un clin d'œil entendu vaut parfois mieux que tous les discours"[7].

Dans toutes les législations, cependant, il est important de le noter, la participation à une entente illicite ne constitue une infraction que si les entreprises concernées ont agi ensemble sciemment, par des moyens de communication formels ou informels. Pour que l'atteinte au droit de la concurrence soit constatée, il faut pouvoir démontrer qu'il y a eu un "consentement" sur un objectif ou un résultat défini en

3. Loi Sherman, article 1.

4. Article 9.

5 Articles 7 et 14.

6 Articles 2 et 8.

7 Esco Corp. v. United States, 340F.2d 1000, 1007 (9th Cir. 1965).

commun, ou, en d'autres termes, une forme ou une autre d'"accord de volonté en vue d'un projet commun"[8]. A l'inverse, il ne peut y avoir d'infraction si les entreprises ont communiqué entre elles uniquement par le canal du marché, ou si elles ont communiqué, mais sans avoir eu d'une façon ou d'une autre "l'intention délibérée de prendre part à une initiative commune"[9].

Pour les autorités chargées de faire respecter le droit de la concurrence, prouver l'existence d'une entente, formelle ou informelle, pose un problème particulier. La conclusion d'une entente se fait généralement dans le secret ; ceux qui y participent savent que leur conduite est illégale et que leurs clients s'y opposeraient s'ils étaient au courant, aussi font-ils tout ce qu'ils peuvent pour la dissimuler. Lorsqu'ils font l'objet d'une enquête, ils sont donc rarement disposés à coopérer, sauf dans le cadre d'un programme de clémence. Pour obtenir des preuves *directes* d'une entente – éléments révélant l'existence d'une réunion ou d'une communication entre les intéressés, ainsi que le contenu de l'accord passé entre eux –, il faut des outils et des techniques d'investigation particuliers dont ne disposent pas toujours les autorités de la concurrence[10]. Il est donc des cas où celles-ci sont confrontées à la difficulté d'avoir à démontrer l'existence d'une entente sans en posséder de preuves directes. Les différents moyens de preuve qui peuvent être invoqués pour établir l'existence d'une entente, en particulier les moyens indirects, sont récapitulés ci-après.

2. Moyens de preuve permettant d'établir l'existence d'une entente

2.1 Types de preuves

Il existe deux grands types de preuves utilisables dans les affaires d'ententes : les preuves directes et les preuves circonstancielles ou indirectes, ces dernières comprenant à leur tour les preuves ayant trait aux "communications" entre participants et les preuves économiques, c'est-à-dire celles qui se rapportent au comportement de l'entreprise, à la structure du marché et aux pratiques ayant pour effet de faciliter les ententes.

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8 Il convient cependant d'adresser une mise en garde au lecteur en lui demandant de ne pas attacher trop d'importance à ces définitions. Comme d'autres observateurs l'ont déjà noté, essayer de parvenir à une définition commune de la notion d'"accord" ne présente guère d'intérêt dans les cas où l'on a recours à des preuves indirectes pour démontrer l'existence d'une entente. Mieux vaut décrire les comportements dénoncés dans les termes effectivement considérés par la justice comme nécessaires pour étayer une présomption d'entente. Voir, par exemple, Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Market Place*, 65 Antitrust L. J. 41 (1996) (pour lequel cette approche met l'accent sur le processus (interdit) conduisant à l'obtention de résultats supraconcurrentiels, plutôt que sur les résultats eux-mêmes, permettant ainsi d'axer les recours sur les actes frappés d'interdiction).

9 Dans un article récent, Greg Werden note la confusion qui règne entre les termes utilisés dans ce domaine. Ainsi en est-il de termes courants comme "formel", "explicite", "tacite" et "coordonné", qui n'ont pas toujours le même sens selon la personne qui les utilise. L'expression "collusion tacite", par exemple, a été employée pour décrire une entente présumée sur laquelle on ne possède que des preuves indirectes, mais aussi pour décrire des comportements parallèles et interdépendants qui ne constituent pas des ententes illicites. Werden utilise le terme "accord oral" (*oral agreement*) pour désigner une entente illicite (*unlawful conspiracy*). Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 Antitrust L. J. 719, p. 735-36 (2004).

10 Les enregistrements vidéo secrets qui ont été utilisés dans l'affaire de la lysine restent à ce jour ce que l'on peut faire de mieux en matière de preuves contre une entente. Mais il est hélas très rare d'arriver à obtenir des indices comme ceux-ci, montrant "en temps réel" l'accord en train de se conclure.

Les *preuves directes* les plus courantes sont les suivantes :

- Les documents (y compris les messages électroniques) comportant tout ou partie de l'accord et identifiant ceux qui y participent.

- Les déclarations orales ou écrites de membres d'une entente ayant décidé de coopérer avec les autorités, qui décrivent le fonctionnement de ladite entente et les modalités selon lesquelles ils y participaient.

Les preuves *indirectes* sont également de plusieurs types. L'une d'elles consiste à montrer que les membres d'une entente se sont rencontrés ou ont communiqué entre eux par d'autres moyens, sans toutefois décrire le contenu de leurs échanges. C'est ce qu'on appellera ici les preuves de "communication", lesquelles comprennent notamment :

- les relevés de communications téléphoniques entre concurrents (sans indication de contenu) ou les éléments attestant de voyages vers une destination commune ou de participation à une réunion, par exemple à l'occasion d'une manifestation commerciale.

- d'autres éléments indiquant que les parties ont communiqué au sujet des faits suspectés – comptes rendus de réunions ou notes établissant qu'il a été débattu des prix, de la demande ou de l'utilisation des capacités ; documents internes mettant en évidence la connaissance de la stratégie d'un concurrent en matière de prix, par exemple la connaissance anticipée d'une majoration que celui-ci va pratiquer.

Il existe aussi une catégorie plus large de preuves indirectes, englobant ce que l'on appelle souvent les preuves *économiques*, c'est-à-dire essentiellement les comportements d'entreprises individuelles tendant à prouver l'existence d'une entente, mais aussi les comportements de l'ensemble d'un secteur, les éléments de la structure du marché évoquant la possibilité d'une entente secrète sur les prix et certaines pratiques de nature à soutenir une entente.

La preuve de *comportement* est la plus importante de toutes les preuves économiques. Comme on l'a noté précédemment, les agissements suspects sont souvent l'élément qui déclenche l'ouverture d'une enquête. Et comme l'explique la section de ce document consacrée au raisonnement économique[11], il est très important d'étudier de près le comportement des parties pour détecter les actes pouvant être considérés comme contraires à l'intérêt individuel et unilatéral de chacune d'elles et par conséquent comme autant d'indices de l'existence d'une entente. Le premier de ces comportements indiciaires est :

- le parallélisme des prix – c'est-à-dire l'observation de variations de prix identiques, ou quasiment identiques, et simultanées, ou quasiment simultanées, entre des entreprises concurrentes. Des comportements parallèles peuvent aussi se manifester d'autres manières, par exemple au travers de la réduction des capacités, de l'adoption de conditions de vente uniformes et de pratiques suspectes en matière de soumission à des appels d'offres (telles qu'une rotation prévisible des adjudicataires).

Les performances commerciales peuvent aussi fournir des indices de comportements suspects, notamment :

- des profits anormalement élevés ;

[11] Voir plus loin la section 3, page 51.

- des parts de marché stables[12];
- des antécédents d'infractions à la législation de la concurrence.

Les preuves liées à la *structure du marché*, bien qu'insuffisantes pour établir l'existence d'une entente, sont surtout utilisées pour rendre plus plausibles les autres éléments dont on peut disposer à ce sujet. Il s'agit notamment des facteurs suivants :

- forte concentration ;
- faible concentration à l'extrémité opposée du marché ;
- niveau élevé des barrières à l'entrée ;
- forte intégration verticale ;
- produits uniformes ou homogènes.

La valeur probante des facteurs d'ordre structurel est cependant limitée. Il y a des secteurs très concentrés qui vendent des produits homogènes et où la concurrence s'exerce néanmoins entre toutes les parties. A l'inverse, ce n'est pas parce que ces caractéristiques ne sont pas observables que l'on peut conclure à la non-existence d'une entente. On sait qu'il y a eu des ententes sur des marchés caractérisés par la présence de nombreux concurrents et des produits différenciés[13].

Les "*pratiques de nature à faciliter*" la mise en place ou le maintien d'une entente constituent un type particulier de preuve économique. Il importe de noter que les comportements assimilables à ces pratiques ne sont pas nécessairement illicites[14]. Mais lorsque d'autres preuves indirectes ont été découvertes qui laissent présumer l'existence d'une entente, ils peuvent compléter utilement l'argumentation. Les pratiques en question sont révélatrices des moyens mis en œuvre par les parties pour faciliter l'établissement d'une entente, la surveillance dont elle fait l'objet, la détection des défections et, éventuellement, l'application de mesures de rétorsion, toutes ces informations venant ainsi étayer la thèse de la collusion. En voici une liste :

- échanges d'informations[15] ;
- envoi de signaux sur les prix[16] ;

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12 Les parts de marché font aussi partie, bien entendu, de la structure du marché. Mais nous les avons classées ici sous la rubrique des comportements parce que leur éventuelle stabilité peut très bien résulter d'un accord délibéré entre des entreprises qui s'abstiennent de se faire concurrence.

13 Le cas de la téléphonie mobile, en France, en est une illustration (voir p. 64). Le marché était certes concentré, mais il est difficile de considérer les services de téléphonie mobile comme un produit homogène.

14 Il est déjà arrivé, toutefois, dans certaines circonstances, que des pratiques de ce genre aient été condamnées en tant que telles pour violation du droit de la concurrence, sans qu'il ait été nécessaire de démontrer l'existence d'une entente anticoncurrentielle sous-jacente. Voir, par exemple, Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp*., 1983, Wisconsin Law Review 887.

15 Les *échanges d'informations* suspects sont ceux qui portent sur les prix courants, les coûts, les plans d'exploitation, l'utilisation des capacités ou d'autres sujets commerciaux sensibles et confidentiels.

- péréquation du fret[17] ;
- clauses de protection des prix et de la nation la plus favorisée[18] ;
- normes de produits inutilement restrictives[19].

2.2 Une brève illustration

L'affaire brièvement décrite ci-après, concernant une entente récemment découverte en Italie, illustre bien l'usage qui peut être fait de différents types de preuves pour bâtir une argumentation convaincante dans un cas de collusion présumée.

2.2.1 Italie – Lait pour bébés[20]

En octobre 2005, l'autorité italienne chargée de la concurrence a annoncé qu'elle avait infligé des amendes à sept fabricants de lait pour bébés, dont trois personnes morales, pour un montant total de 9 743 000 euros, à l'issue d'une enquête ayant démontré l'existence entre eux d'une entente contraire aux dispositions de l'article 81 du traité CE. Au cours de la période 2000-2004, en effet, les autorités ont pu mettre en évidence une évolution parallèle manifeste des prix pratiqués par ces entreprises, avec en outre des écarts considérables – entre 150 % et 300 % – par rapport aux prix des mêmes produits dans d'autres pays européens. D'autre part, il est apparu que des contacts directs et indirects avaient eu lieu entre les concurrents, étayant la thèse d'une action concertée. Les contacts directs avaient pris la forme de réunions spéciales organisées au siège de l'association des fabricants, suite à une demande adressée par le ministère de la santé pour qu'ils réduisent leurs prix. D'après les conclusions de l'enquête, les fabricants avaient alors débattu ouvertement de la réponse à donner au ministère et décidé d'un commun accord de ne pas consentir de baisse supérieure à 10 %.

Les contacts indirects avaient eu lieu à l'occasion de la fixation des prix de vente recommandés aux pharmacies, principale filière de distribution des produits, le marché étant organisé de telle sorte que les vendeurs étaient alors en mesure de calculer les prix de gros de leurs concurrents à partir des prix de détail recommandés.

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16 Il s'agit d'une forme d'échange d'informations, généralement par le canal d'annonces publiques relatives aux prix ou à la politique de prix envisagée pour l'avenir, qui peuvent à l'évidence déboucher sur des accords entre concurrents.

17 Les systèmes de *péréquation du fret*, dans lesquels les produits sont vendus à un prix qui comprend la livraison chez le client (le fret étant à la charge du vendeur), ou selon une tarification avec point de parité, c'est-à-dire en évaluant le coût du transport à partir d'un point choisi comme si tous les vendeurs expédiaient leur produits depuis un seul et même lieu, éliminent une composante variable des prix et font ainsi qu'il est plus facile pour les concurrents de s'entendre sur un prix et de surveiller son application.

18 Les clauses de *protection des prix (alignement sur la concurrence) et de la nation la plus favorisée*, qui garantissent aux acheteurs le prix le plus bas proposé soit par les concurrents d'un vendeur (protection des prix), soit par un vendeur à d'autres acheteurs (clause NPF), n'ont pas toujours un caractère anticoncurrentiel, loin de là, mais dans certaines circonstances elles peuvent servir de moyen pour faire appliquer et respecter une entente.

19 Un accord sur des *normes de produits inutilement restrictives* permet de barrer l'entrée du marché aux nouveaux concurrents qui risqueraient de déstabiliser une entente.

20 Voir le communiqué de presse publié à ce sujet sur le site de l'autorité chargée de la concurrence, à l'adresse http://www.agcm.it/eng/index.htm .

L'autorité italienne de la concurrence fait remarquer que depuis le début de l'affaire en 2004, le prix du lait pour bébés a diminué de 25 % et le marché a connu d'autres évolutions propices à la concurrence, notamment le développement de la publicité et de l'information destinée aux consommateurs, l'arrivée de nouveaux produits et une présence accrue des fabricants sanctionnés dans les chaînes de supermarchés.

Voici une liste des divers éléments de preuve apparemment mis au jour par les autorités :

- preuve directe : les fabricants s'étaient mis d'accord sur une baisse maximale des prix ;

- preuve de communication : les fabricants s'étaient rencontrés au siège de leur association et avaient débattu de la question des prix, mais à l'exception de la marge de réduction maximale, rien ne permettait de démontrer directement qu'ils avaient conclu un accord entre eux ;

- preuve de comportement : parallélisme des prix ; la forte baisse des prix et le renforcement de la concurrence qui ont suivi l'enquête donnent à penser que le niveau élevé des prix observé auparavant n'était pas le résultat d'un comportement concurrentiel ;

- comportement de l'ensemble du secteur : de façon générale, les prix étaient sensiblement plus élevés que dans les autres pays d'Europe ;

- preuve liée à la structure du marché : c'était un secteur très concentré qui comptait uniquement trois fournisseurs indépendants, et le produit vendu était relativement homogène ;

- pratiques de nature à faciliter une entente : les prix de vente recommandés aux pharmacies étaient assez transparents pour les concurrents ; les ventes ayant lieu essentiellement par le biais des officines pharmaceutiques, cela permettait d'éliminer les autres distributeurs comme les commerces d'alimentation qui auraient sans doute pratiqué des rabais.

2.2.2 Quelques commentaires d'ordre général sur les preuves

Quelques commentaires s'imposent à propos des différents modes de preuve. Tout d'abord, la frontière n'est pas toujours très nette entre preuves directes et preuves indirectes, surtout en ce qui concerne les communications. Ensuite, toutes les preuves – qu'elles soient directes ou indirectes – présentent un intérêt pour les autorités chargées de faire respecter le droit de la concurrence. Elles peuvent être utilisées ensemble, et elles le sont du reste souvent. Enfin, la qualité est une dimension importante. Une preuve directe constituée par un seul témoignage peu convaincant est moins crédible qu'une accumulation de preuves indirectes.

En l'absence de preuves directes, les autorités de la concurrence et les tribunaux ont reconnu la pertinence de toute une série de comportements et d'autres éléments invoqués dans le cadre d'affaires portant sur des ententes. En règle générale, les décisions rendues ont ainsi établi la masse critique des preuves à rassembler pour obtenir gain de cause[21]. Cela rend la tâche plus difficile pour ceux qui sont chargés de faire respecter le droit de la concurrence, et l'issue des procédures n'en est que plus incertaine, mais il semble que ce soit là le résultat inévitable de la spécificité des faits observés dans chaque cas. Cependant, un examen plus attentif des différentes affaires et de la théorie économique montre que parmi les preuves indirectes, il en est deux sortes qui revêtent la plus grande importance, à savoir le fait que les parties aient ou non communiqué entre elles, ou tout au moins qu'elles aient eu la possibilité de le faire, et,

[21] Voir, par exemple, Andrew I. Gavil *et al* , *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy*, p. 283 (2002).

en l'absence d'accord attestant une volonté d'agir collectivement, le fait que les actes considérés répondent ou non à l'intérêt individuel et unilatéral de l'entreprise concernée[22].

Les preuves indirectes sont généralement ambiguës et se prêtent souvent à des interprétations diverses. A titre d'exemple, certains comportements parallèles peuvent aussi être compatibles avec une action indépendante : une réunion des parties et les communications qui ont eu lieu à cette occasion peuvent s'avérer parfaitement anodines. La première chose à faire quand on ne dispose que de preuves indirectes est de s'appliquer à déterminer si les faits considérés sont le simple fruit d'une action indépendante de la part d'entreprises qui ont agi chacune selon ce qu'elle estime être le plus avantageux pour elle. Si l'enquête montre que tel n'est pas le cas, il faut alors convaincre le décideur que les éléments dont on dispose démontrent bien l'existence d'une entente illicite compte tenu des normes requises en matière de preuve. C'est là que la théorie économique peut s'avérer extrêmement utile.

3. Le raisonnement économique peut aider à cerner les preuves indirectes

Le recours à des preuves économiques pour démontrer indirectement l'existence d'une entente pose un problème de fond : comment distinguer un comportement probablement imputable à une entente illicite d'un comportement "innocent" qui résulte d'une décision prise de façon indépendante dans un secteur industriel concentré. Pour y parvenir, quelques notions générales d'économie sont nécessaires. Nous verrons donc brièvement dans cette section en quoi la théorie économique peut aider à mieux comprendre le comportement d'entreprises qui semblent fonctionner comme si elles participaient à une entente. Nous nous intéresserons pour commencer aux différentes théories qui décrivent le comportement des entreprises, avant de voir plus précisément comment ces théories peuvent aider à identifier les "bonnes" preuves économiques dans les affaires d'ententes illicites, et nous terminerons par quelques suggestions concernant leur utilisation.

De manière générale, on distingue trois grandes catégories de modèles économiques qui décrivent le comportement des entreprises. En premier lieu, il y a ceux qui partent du principe que les entreprises recherchent de façon indépendante "la meilleure solution unilatérale non coopérative" en tenant compte de ce que font les concurrents. Dans les modèles de ce type, le marché parvient à l'équilibre lorsque chaque entreprise cherche à faire le meilleur choix compte tenu de celui que son concurrent [ou ses concurrents ?] fera [ou feront]. Cet équilibre – entre solution optimale des uns et solution optimale des autres – est couramment désigné sous le nom d'équilibre de Nash. Deux modèles élémentaires faisant appel à ce concept pour déterminer le prix et la production d'équilibre sur le marché ont été établis il y déjà très longtemps[23]. Mais tout comme ces modèles anciens, l'économie moderne se sert beaucoup de l'équilibre de Nash pour modéliser le comportement des entreprises sur un grand nombre de marchés différents[24].

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22 Ces deux éléments sont examinés plus en détail dans la suite du document. Voir ci-après, p. 56.

23 En 1838, Cournot avait fait l'hypothèse que chaque entreprise déterminait la quantité optimale qu'elle allait produire en prenant pour référence la production des autres, et en 1883, Bertrand avait repris ce raisonnement pour l'appliquer aux prix. Les modèles de Cournot et de Bertrand sont tous deux des exemples de jeux simples dans lesquels les joueurs s'attendent à une seule partie ou période. Les jeux répétés (illustrés notamment par les modèles associés au "folk" théorème) sont des jeux simples réitérés plusieurs fois de suite. Ils se caractérisent généralement par des équilibres multiples et il semble largement admis chez les économistes que, dans le cas d'un oligopole, les résultats effectifs sont en fait déterminés par des facteurs extérieurs à ces modèles, facteurs qui peuvent comprendre, en particulier, les ententes conclues entre des entreprises concurrentes. C'est pourquoi on peut douter de la pertinence des modèles de jeux répétés, surtout ceux où la répétition est infinie, pour expliquer le comportement des entreprises dans les affaires d'ententes reposant sur des preuves indirectes, raison pour laquelle ces modèles ne sont pas présentés plus longuement dans le corps du texte. Pour une étude de la question, voir Gregory J. Werden, note 9 ci-dessus, p. 759-765.

Une deuxième catégorie de "modèles" considère que les entreprises ont parfois tout intérêt à un accommodement mutuel. Ces théories supposent que certaines actions ne sont profitables que si les concurrents y réagissent de façon accommodante. Et si tel est le cas, ces actions deviennent alors "coordonnées" en ce sens qu'aucune entreprise n'aurait pu obtenir le résultat constaté sans l'aide des autres[25]. Il importe de faire remarquer que les modèles fondés sur la notion d'accommodement mutuel ne postulent pas l'existence d'une entente (illicite) explicite obtenue par voie de communication entre les entreprises, mais plutôt que celles-ci parviennent à comprendre en quoi consiste leur intérêt mutuel par déduction des interactions observées sur le marché[26].

La troisième catégorie de modèles est celle des ententes, c'est-à-dire des situations caractérisées par le fait que les entreprises ont explicitement passé un accord par voie de communication directe les unes avec les autres. La principale différence avec le comportement accommodant tient à ce que les entreprises communiquent directement "en coulisse" ou, comme aux États-Unis dans l'affaire de la mise aux enchères de bandes de fréquences par la FCC, par l'intermédiaire des prix proposés[27].

Dans les affaires d'ententes où la procédure repose essentiellement sur des preuves indirectes, en particulier, rien ne permet jamais de démontrer de façon irréfutable que les parties ont passé un accord. Les autorités sont donc obligées de construire leur argumentation sur la distinction entre comportement accommodant et unilatéral, et comportement tendant à montrer que les concurrents ont conclu un accord explicite. La question essentielle est alors celle de savoir quels éléments utiliser pour écarter l'idée de concurrence légitime et au contraire appuyer celle d'une entente explicite entre les concurrents.

Pour pouvoir choisir des preuves économiques de qualité, c'est-à-dire utiles pour faire le tri entre des théories concurrentes, l'autorité de la concurrence doit avoir une bonne idée du modèle qui décrira le mieux les incitations unilatérales qui peuvent pousser une entreprise à affronter la concurrence sur tel ou tel marché. Pour cela, elle doit en premier lieu identifier les actes dont on peut dire qu'ils constituent un comportement optimal, unilatéral et non coopératif dans les circonstances considérées. Après cela, et seulement après cela, elle pourra essayer de déterminer ce qui est incompatible avec les actes ainsi définis et peut donc étayer l'hypothèse d'une entente illicite. Autrement dit, ce sont les actes compatibles avec un comportement jugé optimal, unilatéral et non coopératif qui doivent servir de référence pour apprécier la conduite d'une entreprise pendant la période où ses activités sont apparues suspectes.

Quel que soit le modèle proposé par les parties pour justifier leur comportement, les autorités de la concurrence doivent impérativement vérifier que les hypothèses sur lesquelles il repose rendent bien compte du secteur considéré.

24 Dans le prolongement de ces évolutions, les autorités de la concurrence se sont largement appuyées sur les théories des effets unilatéraux, au point qu'un grand nombre d'affaires aujourd'hui soumises à la justice le sont principalement sur la base du critère de l'effet unilatéral.

25 C'est sur ce raisonnement que se fondent un grand nombre de plaintes déposées par les autorités de la concurrence dans diverses affaires de fusions où il est question d'effets coordonnés.

26 Certains observateurs de la politique antitrust sensibles aux arguments économiques estiment que les comportements coordonnés ou accommodants observés parmi les entreprises devraient être considérés comme incompatibles avec la législation de la concurrence. Voir Richard A. Posner, Antitrust Law 94 (2nd ed. 2001). L'opinion qui prévaut, cependant, est qu'en l'absence d'entente conclue entre les concurrents, il ne paraît pas justifié de constater un manquement au droit de la concurrence puisqu'il serait difficile, sinon impossible, d'y apporter un recours. Voir, par exemple, Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Market Place*, 65 antitrust L. J. 41, 48 (1996). Voir également Gregory J. Werden, note 9 ci-dessus, p. 773-77, pour un commentaire sur le point de vue de Posner.

27 Voir United States v. Omnipoint Corporation, No. 1:98CV02751 (D.D.C. 10 novembre 1998); United States v. Mercury PCS II, L.L.C., No. 1:98CV02751 (D.D.C. 10 novembre 1998); United States v. 21st Century Bidding Corporation, No. 1”98CV02752 (D.D.C. 10 novembre 1998).

Les deux exemples qui suivent – pilotage des prix par une entreprise dominante et oligopole de Cournot – illustrent ce principe. Dans le premier cas, lorsque le coût marginal de l'entreprise dominante augmente, le prix optimal qu'elle pratique et que pratiquent également toutes les autres entreprises du marché augmente lui aussi. Les prix fixés par toutes les entreprises varient ainsi simultanément sur le marché. Il n'y a pas de comportement accommodant et encore moins d'entente explicite : chaque entreprise recherche la meilleure solution possible pour elle-même, de façon unilatérale et non coopérative. Ce modèle très élémentaire doit au moins attirer l'attention sur le fait que des mouvements de prix simultanés ou quasi simultanés peuvent être compatibles avec différentes théories concernant le comportement des entreprises et pas seulement avec l'hypothèse de l'entente – ni a fortiori avec celle qui prétendrait faire de l'entreprise dominante la principale instigatrice de l'entente. Comme on l'a vu précédemment, l'autorité de la concurrence doit impérativement vérifier si le modèle d'explication choisi est celui qui décrit le mieux les incitations unilatérales que peut avoir une entreprise pour affronter la concurrence sur le marché considéré. Dans l'exemple donné ici, lorsque les parties affirment que le modèle de l'entreprise dominante qui pilote les prix suffit à expliquer le comportement des entreprises en cause, l'autorité de la concurrence doit absolument se demander si les hypothèses de ce modèle décrivent correctement le fonctionnement du marché considéré. Entre autres questions pertinentes, elle doit chercher à savoir, par exemple, si, compte tenu de la structure du secteur, de l'évolution des prix et d'autres caractéristiques du marché qui ont pu être observées dans le passé (pendant les périodes antérieures à l'épisode de collusion présumée), le modèle de l'entreprise dominante offre une bonne explication de la manière dont se forment les prix.

De la même façon, si l'on peut démontrer que les prix sont plus élevés sur les marchés où les acteurs sont rares que sur les marchés où ils sont nombreux, le modèle de Cournot permet de comprendre que cette situation peut très bien refléter le comportement unilatéral et indépendant d'une entreprise, et pas seulement l'action d'un cartel. En fait, l'existence de prix élevés sur un marché qui comprend peu d'entreprises est compatible à la fois avec les théories du comportement unilatéral, du comportement accommodant et de l'entente. Ce type de preuve économique ne pourrait donc pas conforter la thèse de l'accord, et ne serait guère utile, en soi, dans une procédure reposant uniquement sur les preuves indirectes.

Puisqu'il est nécessaire, dans chaque cas, de bien cerner les actes qui répondent au critère de l'intérêt individuel et unilatéral de l'entreprise, l'idée générale selon laquelle "l'interdépendance des prix peut souvent avoir des conséquences économiques comparables à celles des ententes au sens classique du terme" n'est pas d'un grand secours pour l'analyse des preuves circonstancielles. C'est ce que nous expliquons ci-dessous.

Le dilemme du prisonnier est un bon exemple de la façon dont des incitations unilatérales peuvent aboutir à des résultats différents de ceux qu'obtiendraient des entreprises qui agiraient de façon concertée[28].

[28] Le tableau ci-dessous met en présence deux concurrents, l'entreprise 1 et l'entreprise 2, et définit le profit correspondant aux différentes options qui s'offrent respectivement à l'un et à l'autre.

Tableau : Dilemme du prisonnier

		Entreprise 2	
		Prix élevé	Prix bas
Entreprise 1	Prix élevé	10, 10	3, 15
	Prix bas	15, 3	4, 4

Si, par exemple, l'entreprise 1 fixe son prix à un niveau élevé et l'entreprise 2, à un niveau bas, l'entreprise 1 gagne 3 et l'entreprise 2 gagne 15. Pour trouver l'équilibre de Nash et montrer comment les incitations unilatérales déterminent cet équilibre, commençons par la case où les entreprises 1 et 2 fixent toutes deux leur prix à un niveau élevé. On y voit que chacune réalise alors un bénéfice de 10.

Dans le cadre de notre analyse, l'intérêt fondamental du dilemme du prisonnier est que des incitations unilatérales peuvent conduire chacune des entreprises à décider de baisser son prix au lieu d'opter pour un prix et un profit élevés, même si chacune pense que l'autre va également baisser son prix. A l'inverse, s'aligner sur le prix élevé d'un concurrent peut être dans l'intérêt de tous les concurrents, mais n'est pas nécessairement compatible avec l'intérêt de chacun d'eux. C'est pourquoi il faut bien prendre garde de ne pas confondre les deux notions distinctes d'intérêt individuel et d'intérêt collectif lorsqu'on analyse un cas d'entente présumée sur la base de preuves indirectes.

En empruntant à la théorie des jeux l'idée que la coopération ne peut pas avoir lieu spontanément, Stigler, dans ses travaux sur l'oligopole, montre l'incitation qu'ont les membres d'une entente à dévier de l'accord conclu lorsqu'ils estiment qu'ils ont plus à gagner en trichant qu'en s'y conformant[29]. D'après lui, pour qu'une entente puisse s'organiser entre des entreprises, il y a trois "problèmes" à surmonter. Premièrement, il faut que les concurrents se mettent d'accord sur les modalités de leur arrangement, ce qui peut s'avérer extrêmement difficile à faire sans communication – comme le souligne la théorie des jeux, tout peut arriver, il y a un trop grand nombre de décisions possibles entre les acteurs du marché. Deuxièmement, la collusion suppose un mécanisme de détection pour s'assurer que tous les participants respectent les règles convenues. Troisièmement, il faut aussi un mécanisme de punition pour sanctionner ceux qui trichent et dissuader les autres d'en faire autant[30]. Tout comme le dilemme du prisonnier, le modèle de Stigler montre qu'un oligopole ne conduit pas inévitablement à une situation de coopération et d'action concertée pour accroître les prix[31].

Considérons ce bénéfice comme celui qui reviendrait à chaque entreprise si elles passaient un accord explicite de fixation des prix. Pour comprendre les incitations qui s'offrent à chaque entreprise, il faut se demander ce que l'entreprise 1 devrait faire si elle pensait que l'entreprise 2 allait fixer son prix à un niveau élevé. On voit que si l'entreprise 2 fixe son prix à un niveau élevé, l'entreprise 1 peut gagner soit 10 si son prix est également élevé, soit 15 si elle ne respecte pas l'accord et baisse son prix. Un profit de 15 étant supérieur à un profit de 10, l'intérêt unilatéral de l'entreprise 1 est de baisser son prix. De son côté, l'entreprise 2 sait que si l'entreprise 1 fixe son prix à un faible niveau, elle pourra gagner 4 si elle en fait autant ou 3 si elle maintient son prix à un niveau élevé. Un profit de 4 étant supérieur à un profit de 3, l'entreprise 2 optera elle aussi pour un prix bas. C'est cette situation, dans laquelle la meilleure offre de chaque entreprise compte tenu de la meilleure offre de l'autre consiste à pratiquer un prix bas, qui correspond à l'équilibre de Nash.

29 George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ., p. 44-61 (1964).

30 Pour une bonne description, exemples chiffrés à l'appui, de tous les problèmes auxquels sont confrontées les entreprises qui envisagent de conclure une entente, voir Andrew I. Gavil *et al.* , note 22 ci-dessus, p. 228-35.

31 La description faite par Stigler des problèmes que posent la mise en place et le fonctionnement d'une entente peut apporter des indication utiles pour une autorité de la concurrence qui chercherait à démontrer l'existence d'une entente au moyen de preuves indirectes, car dans l'hypothèse où les entreprises concernées ont eu à surmonter ces problèmes, il devrait en principe en rester des traces. En d'autres termes, pour établir que le comportement des entreprises n'était pas compatible avec le critère d'intérêt individuel et unilatéral, l'autorité de la concurrence aura de bons arguments si elle est en mesure d'expliquer comment les membres de l'entente ont résolu les problèmes de coordination, de détection et/ou de punition. Elle pourra, par exemple, mettre en avant certaines pratiques destinées à faciliter la détection des comportements déviants et éventuellement leur punition. L'affaire italienne du lait infantile évoquée à la page 22 ci-dessus, illustre bien ce point (les pratiques en question comprenaient des mesures favorisant la transparence des prix et le choix de canaux de distribution qui rendaient les rabais peu probables). A propos des pratiques visant à faciliter les ententes, voir plus haut à la page 21. En ce qui concerne les solutions apportées aux trois problèmes posés par les ententes, on notera cependant qu'il ne sera pas toujours possible d'en obtenir des preuves.

Dans leur analyse des comportement des concurrents, les tribunaux n'ont pas toujours pris la peine de faire la distinction entre intérêt individuel unilatéral et intérêt collectif, et donc de reconnaître que des hausses de prix ne sont pas toujours la marque d'une concurrence oligopolistique sans collusion. L'affaire *Reserve Supply* est un cas exemplaire de l'erreur qu'un tribunal semble avoir commise à cet égard[32]. Dans cette affaire privée, les requérants dénonçaient une série d'augmentations parallèles des prix qui avaient eu lieu à un moment où la demande était faible. Le défendeur leur rétorqua qu'il aurait été "irrationnel d'essayer d'augmenter les ventes en maintenant les prix à un faible niveau, étant donné que dans ce cas les concurrents se seraient alignés sur lui, avec pour conséquence l'impossibilité de gagner des parts de marché et une réduction des profits". Constatant que la demande était inélastique, le tribunal estima alors qu'en maintenant des prix bas le défendeur n'aurait pu attirer que des clients de ses concurrents, et il en conclut que le fait de ne pas avoir opté pour cette solution "ne veut pas dire que [le défendeur] a agi d'une façon qui, sauf à supposer une action collective, n'aurait pas été avantageuse pour lui". C'est là un raisonnement tout à fait erroné. En fait, ce que le tribunal n'a pas compris, c'est que dans certaines circonstances, des entreprises qui cherchent à satisfaire leurs propres intérêts peuvent faire baisser les prix par le jeu de la concurrence en se comportant d'une façon analogue à ce que décrit le dilemme du prisonnier[33].

Une autre affaire, celle d'*American Tobacco*, est un exemple classique de l'utilisation de preuves indirectes pour démontrer que des entreprises ne se sont pas comportées de façon unilatérale, non coopérative et conformément à leur intérêt individuel[34]. Dans ce cas, la Cour a estimé qu'"une série de changements de prix" constituait "une preuve indirecte de l'existence d'une entente". Le 23 juin 1931, les trois grandes compagnies de tabac des États-Unis avaient annoncé simultanément des majorations de prix sans qu'"aucune justification économique de cette hausse puisse être démontrée". D'autres changements de prix simultanés avaient également été observés au cours des années suivantes. C'est précisément à cause de la simultanéité et parce qu'aucune justification économique (comme une hausse des coûts) n'a pu être démontrée que le tribunal a jugé suffisante cette preuve indirecte pour déclarer les défendeurs coupables de tous les chefs d'accusation portés contre eux.

Pour résumer les arguments développés dans cette section, voici quatre points sur lesquels Werden attire l'attention en ce qui concerne l'utilisation de preuves indirectes[35]:

- Premièrement, "il faut montrer quelque chose de plus qu'une simple interdépendance avant de suggérer la possibilité d'une entente". Ainsi, lorsqu'une entreprise relève ses prix parce qu'un concurrent en a fait autant avant elle, ce comportement peut être tout à fait compatible avec le modèle selon lequel il s'agit de la réaction optimale, unilatérale et non coopérative de l'entreprise en question compte tenu du comportement de ses concurrents. S'il est impossible de condamner une entreprise qui baisse ses prix pour riposter au fait que ses concurrents ont également baissé les leurs, alors il n'est pas non plus possible de le faire en cas de hausse des prix. Il faut apporter des éléments supplémentaires. (Nous reviendrons plus en détail sur cette notion de "supplément" de preuve dans la suite du document.)

- Deuxièmement, "on ne peut pas présumer l'existence d'un accord à partir d'actes compatibles avec l'équilibre non coopératif de Nash dans un jeu à une seule partie". Ces actes sont en fait entièrement compatibles avec l'exercice d'une concurrence vigoureuse et ils constituent un point de référence utile pour détecter les comportements suspects.

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32 Reserve Supply Corporation v. Owens-Corning Fiberglas Corporation, 971 F. 2d 37 (7th Circuit 1992).

33 On trouvera d'autres exemples sur la notion d'action contre son propre intérêt dans la suite du document, à la page 59.

34 American Tobacco Co. v. United States, 328 US 781 (1946).

35 Gregory J. Werden, voir ci-dessus la note 9, p.779-80.

- Troisièmement, les actes qui ne sont pas compatibles avec l'équilibre de Nash non coopératif dans un jeu à une seule partie peuvent servir d'argument pour étayer l'hypothèse d'un accord, même s'ils peuvent être compatibles avec les comportements observés dans les modèles de jeu à horizon infini. Les jeux indéfiniment répétés n'offrent pas un bon cadre de référence pour détecter les comportements qui ne répondent pas au critère de l'intérêt individuel.

- Quatrièmement, pour des raisons d'ordre pratique, "il ne faut pas présumer l'existence d'un accord en l'absence d'éléments tendant à prouver que les défendeurs ont communiqué entre eux, d'une façon ou d'une autre, et qu'un accord aurait pu être négocié à cette occasion". Ce type de preuve est très utile pour démontrer que le comportement observé sur le marché résulte d'un accord illicite et peut donc s'avérer un facteur important pour éviter le déclenchement d'une procédure en cas de comportement unilatéral ou accommodant.

4. Présomption d'existence d'un accord sur la base de preuves indirectes

Les affaires d'ententes dans lesquelles on ne dispose pas de preuve directe de l'existence d'un accord commencent souvent de la même façon, à savoir par un épisode suspect de parallélisme des prix ou autre phénomène difficile à expliquer par le jeu habituel des forces du marché. Par définition, l'autorité de la concurrence ne peut pas prouver directement que cette situation résulte d'un accord et elle doit donc alors se poser la question de savoir à quelles exigences elle doit satisfaire, du point de vue quantitatif et qualitatif, pour pouvoir exploiter des preuves indirectes.

Au fil du temps, les tribunaux, les organismes chargés de la concurrence et les experts en sont venus à accepter l'idée que le "parallélisme conscient", c'est-à-dire ni plus ni moins que la fixation de prix identiques ou autre comportement parallèle découlant de l'observation indépendante du marché et des réactions des concurrents, n'était pas contraire à la loi[36]. Comme il a été expliqué plus haut, cette conception trouve de bons arguments dans la théorie économique. La théorie économique et la jurisprudence montrent en effet clairement que le parallélisme conscient n'est pas une preuve suffisante pour conclure à l'existence d'une entente ; il faut quelque chose de plus. Or c'est ce "quelque chose de plus" qui est difficile à définir : cela fait des décennies que les tribunaux d'un petit nombre de pays se débattent avec ce problème. L'une des formules adoptées dans le cadre de procédures civiles aux États-Unis (les procédures pénales sont examinées plus loin) requiert l'existence de "facteurs complémentaires" démontrant que l'accord suspecté est plus vraisemblablement la cause d'un parallélisme de comportement que d'une action autonome. Une décision rendue récemment par un tribunal des États-Unis expose la norme applicable en ces termes :

> … [Nous] avons demandé aux parties requérantes qui fondaient leur grief de collusion sur l'hypothèse d'un comportement parallèle conscient de démontrer également l'existence de certains "facteurs complémentaires". Ces facteurs complémentaires permettent généralement aux tribunaux d'avoir la certitude qu'ils punissent une "action concertée" – c'est-à-dire un accord effectif – et non

[36] Voir, par exemple, Phillip E. Areeda et Herbert Hovenkamp, *Fundamentals of Antitrust Law* (3d ed. 2004), para. 1433a, p. 236: "Les tribunaux sont quasiment unanimes à reconnaître que le simple parallélisme interdépendant ne suffit pas à établir l'existence du contrat, de l'association ou de l'entente exigés par l'article 1 de la loi Sherman" ; Ivo Van Bael et Jean-François Bellis, *Competition Law of the European Community* (4th ed. 2005), p. 55: "Le parallélisme de comportement entre deux ou plusieurs entreprises ne constitue pas en tant que tel une preuve suffisante pour établir l'existence d'une pratique concertée". Le traité CE "n'exclut pas le droit des opérateurs économiques de s'adapter intelligemment au comportement constaté ou à escompter de leurs concurrents" (citation tirée de l'affaire 48/69, ICI contre Commission des Communautés européennes, [1972] ECR 619, para. 118).

pas le "comportement de concurrents agissant de façon indépendante et unilatérale". En d'autres termes, les facteurs complémentaires suppléent l'absence de preuves directes d'un accord[37].

D'autres juridictions utilisent un vocabulaire différent de celui des tribunaux des États-Unis, mais l'analyse qu'elles font semble être la même[38]. Nous verrons maintenant de plus près l'usage qui a été fait jusqu'ici des deux facteurs le plus souvent considérés comme les moyens de preuve indirecte les plus déterminants, à savoir la communication ou la possibilité de communiquer, et l'action contre son propre intérêt.

4.1 Communications

Un type de facteur complémentaire important consiste à pouvoir montrer qu'il y a eu entre les parties une forme de communication sur les prix qui leur a permis de conclure un accord, ou au moins que les parties ont eu l'occasion de communiquer entre elles. Il n'est certes pas possible avec ce type d'éléments de démontrer l'existence d'un accord explicite, mais nous verrons ci-après, avec l'exemple d'une action civile engagée aux États-Unis, l'importance que peuvent avoir les preuves relatives à la communication.

4.1.1 Affaire du verre plat[39]

L'intérêt de cette affaire, qui a été jugée en 2004, tient au fait que le tribunal y était saisi d'un grief de fixation des prix concernant deux marchés distincts, celui du verre plat et celui du verre pour pièces de rechange automobiles, et qu'il a conclu à l'existence d'éléments indirects suffisants pour valider la thèse de l'accord illicite dans le premier cas, mais pas dans le second[40]. S'agissant du verre plat, un schéma récurrent de fixation parallèle des prix avait été observé sur le marché, les parties défenderesses ayant à plusieurs reprises au cours de la période en cause relevé leurs prix de catalogue dans des proportions identiques et à des dates rapprochées. La structure du marché favorisait le risque de collusion : forte concentration et petit nombre de vendeurs, produit relativement homogène dont le prix était le principal trait distinctif, coûts fixes élevés, fort excédent de capacité dans le secteur et demande statique. Pour reprendre les termes du tribunal, c'était "l'exemple parfait du secteur industriel qui se prête au maintien de prix supra concurrentiels"[41].

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37 Flat Glass Antitrust Litigation, 385 F 3d 350, 359-60 (3d Cir. 2004).

38 Pour une analyse de la jurisprudence de l'UE sur la question de l'utilisations de preuves indirectes dans les affaires d'ententes, voir, par exemple, Mark Jephcott, *Horizontal Agreements and EU Competition Law* (2005); Sigrid Stroux, *US and EC Oligopoly Control* (2004); Lennart Ritter et David Braun, *European Competition Law: A Practitioner's Guide*, 100-110 (3d ed. 2004) ; Richard Whish, *Competition Law*, 514-16 (5th ed. 2003).

39 Flat Glass Litigation, voir ci-dessus la note 37.

40 La plupart des procédures civiles portant sur cette question qui se sont déroulées récemment aux États-Unis ont été rejetées en première instance et portées devant les juridictions d'appel avant que tous les faits aient été réunis. Conformément aux procédures de "jugement sommaire" prévues par le système américain, une affaire peut être conclue avant l'ouverture d'un procès en bonne et due forme si la partie qui en fait la demande est à même de montrer que toutes les questions de faits matériels sont réglées ou si manifestement déséquilibrées qu'elles ne peuvent faire l'objet d'un procès. La norme juridique applicable est plus indulgente (pour le requérant) en cas de requête de jugement sommaire qu'elle ne l'est pour un jugement définitif. Dans ce cas, en effet, la juridiction d'appel ne statue pas définitivement sur l'existence ou non d'un accord, mais seulement sur le point de savoir si les preuves apportées concernant cet accord sont suffisantes pour que la question soit soumise à un juge ou à un jury. Quoi qu'il en soit, tous ces exemples sont instructifs pour ce qui est des preuves utilisées dans les affaires d'ententes horizontales.

41. *Idem*, p. 361.

D'autre part, les faits montraient que les hausses de prix pratiquées par les défendeurs n'étaient pas conformes à ce qui se passerait normalement sur un marché concurrentiel. Elles n'étaient pas motivées par une augmentation des coûts ou de la demande, et elles ont eu pour conséquence d'attirer un nouveau concurrent. Pour le juge, ces comportements étaient donc "contraires à l'intérêt individuel" des parties défenderesses, sauf à supposer l'existence d'une entente (ce point est examiné ci-après). Toutefois, malgré l'importance de ces éléments, ils n'étaient pas jugés suffisants : "En règle générale, l'élément le plus important est une preuve non économique permettant d'établir 'l'existence d'un accord effectif et manifeste de non-concurrence'"[42]. Or, les preuves de ce type ne manquaient pas. Il y avait eu une série de réunions et de communications qui avaient permis de discuter de la question des prix. Les documents internes des participants indiquaient que chacun était en général au courant de la politique de prix menée par les autres, ce qui n'aurait pas pu être le cas s'ils avaient eu accès uniquement aux données publiques. Finalement, le tribunal a décidé que toutes ces preuves indirectes étaient suffisantes pour étayer la thèse de l'accord illicite.

Dans le cas du verre pour pièces de rechange automobiles, en revanche, les preuves indirectes relatives aux communications entre les parties défenderesses étaient beaucoup plus minces. Le comportement sur lequel était fondé le grief de fixation des prix était une pratique qui consistait à fournir certaines informations tarifaires à une association commerciale tierce, laquelle les publiait ensuite sous une forme permettant aux participants de calculer les prix des concurrents. Le tribunal a estimé que cette preuve, à elle seule, était insuffisante. La publication d'informations concernant les prix, a-t-il observé, "peut avoir un effet favorable à la concurrence". D'où l'impossibilité de "retenir la thèse de la collusion à partir de ce fait ambigu, sinon favorable à la concurrence".

4.2 Preuves économiques

Si les éléments de preuve relatifs aux communications sont indéniablement importants – beaucoup diraient même essentiels – dans les procédures qui s'appuient uniquement sur des preuves indirectes, certaines preuves économiques peuvent elles aussi jouer un rôle. La décision exposée ci-après, rédigée par le grand juriste et théoricien Richard A. Posner, est un bon exemple de la façon d'analyser des preuves économiques circonstancielles.

4.2.1 Affaire de l'isoglucose[43]

Dans une action privée en dommages-intérêts intentée au civil, les quatre principaux producteurs d'isoglucose, un édulcorant à base de maïs, étaient poursuivis pour entente présumée sur le prix de leur produit. La partie plaignante ayant été déboutée en première instance, la juridiction d'appel avait alors infirmé cette décision et renvoyé l'affaire pour jugement.

Voici comment le juge Posner décrivait à cette occasion les différents types d'éléments de preuve applicables aux ententes en vertu de la loi Sherman :

> Les éléments de preuve sur lesquels s'appuie le plaignant sont en général, et dans le cas d'espèce, de deux types – les preuves économiques indiquant que les défendeurs n'étaient effectivement pas en situation de concurrence, et les preuves non économiques indiquant qu'ils ne se faisaient pas concurrence parce qu'ils avaient passé entre eux un accord pour ne pas se faire concurrence. Les preuves économiques sont à leur tour en général, et dans le cas présent, de deux types : les preuves indiquant que la structure du marché était telle qu'elle rendait possible une entente secrète sur les

42 *Ibid.,* citation extraite d'un avis formulé par le juge Richard Posner dans l'affaire High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002).

43 High Fructose Corn Syrup Antitrust Litig., voir ci-dessus la note 42.

prix (pratiquement tous les marchés peuvent être cartellisés dès lors que la législation permet aux vendeurs d'établir des mécanismes formels et explicites de collusion, tels que des concessions de vente exclusive), et les preuves indiquant que le marché s'est comporté de façon non concurrentielle[44].

D'après le juge, plusieurs éléments de nature économique pouvaient laisser penser à l'existence d'un accord : forte concentration du côté des vendeurs, "grande homogénéité" du produit, absence de produits de substitution proches de l'isoglucose, large excédent de capacité entretenu par les défendeurs, différenciation des prix dans l'ensemble du secteur[45]. S'agissant du comportement des entreprises en cause, les preuves (économiques) avancées étaient un système de prix non fondé sur les coûts, ainsi qu'une modification de la durée des contrats imposée par les défendeurs et un phénomène suspect d'achats et de ventes entre eux. Le tribunal mettait également en évidence une stabilité inhabituelle des parts de marché dans des circonstances qui auraient plutôt laissé attendre l'inverse, et accordait une certaine crédibilité au témoignage d'expert selon lequel les prix de l'isoglucose étaient plus élevés pendant la période de l'entente présumée qu'avant ou après.

Au chapitre des communications, le dossier comportait par ailleurs des éléments à l'appui de la présomption d'entente. Il s'agissait de documents et de déclarations émanant d'employés des défendeurs qui faisaient allusion indirectement à des accords et à des arrangements, et indiquaient qu'ils étaient en possession d'informations non publiées sur les décisions des concurrents en matière de prix. Le juge décida que ces preuves étaient dans leur ensemble suffisantes pour conclure sur les faits à l'existence d'un accord.

4.2.2 "Action contre son propre intérêt"

C'est aux États-Unis qu'est apparu le concept d'action contre son propre intérêt, et il y est maintenant employé depuis quelques années. Comme il est expliqué plus en détail dans la section consacrée à la théorie économique, il s'agit d'un point capital pour l'appréciation des preuves[46].

L'action contre son propre intérêt s'entend de toute action qui serait contraire à l'intérêt de son auteur en l'absence d'accord. C'est ce que l'entreprise n'aurait pas fait si elle avait agi de façon unilatérale. Il peut s'agir, par exemple, du refus de traiter avec un client ou un fournisseur, alors qu'il n'y a apparemment aucune raison économique pour l'entreprise de se priver de cette opportunité[47]. Il peut s'agir d'échanges d'informations – sur les coûts ou sur les prix de transaction – généralement considérées comme confidentielles et que des concurrents pourraient utiliser à leur avantage si le marché fonctionnait librement. Ou encore d'une structure de prix qui n'a aucun rapport avec les coûts, ou bien qui ne semble avoir aucune justification économique.

L'affaire *Blomkest Fertiliser* a permis de mettre en évidence l'importance d'un tel argument[48]. Plusieurs fabricants d'engrais avaient intenté une action contre huit producteurs de potasse, dont six canadiens, auxquels ils reprochaient d'avoir passé une entente pour fixer le prix de la potasse au cours de la période comprise entre 1987 et 1994 (la potasse est un composant majeur des engrais). Les plaignants

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44 *Id.*, p. 655.

45 La différenciation des prix n'est pas toujours contraire à la concurrence, et l'existence de prix différenciés n'est pas nécessairement un signe de collusion. Le juge Posner explique avec précision dans sa décision les raisons pour lesquelles il considère néanmoins ce phénomène comme pertinent dans le cas examiné. *Id.*, p. 568.

46 Voir p 51.

47 Voir IGA v. Darling-Delaware, 998F2.D 1224, p. 1243-45 (3d Cir. 1993).

48 Blomkest Fertilizer v. Potash Corp. of Sask., 203F.3d 1028 (8th Cir. 2000) (en formation plénière).

s'appuyaient essentiellement sur des preuves économiques, notamment une série de vérifications de prix qu'auraient effectuées les défendeurs, soit une forme de "comportement" révélateur parmi ceux décrits ci-dessus à la section 2.

Fait très rare dans la pratique judiciaire aux États-Unis, les onze juges de la cour d'appel étaient réunis pour statuer sur l'affaire[49]. Six se prononcèrent en faveur des défendeurs, confirmant la décision rendue en première instance de débouter les plaignants. La majorité de la Cour estima que les preuves avancées concernant les vérifications de prix n'emportaient pas la conviction, d'une part parce qu'elles portaient uniquement sur des transactions passées, et ne pouvaient de ce fait avoir que peu de conséquences pour les prix futurs, et d'autre part parce que, selon les termes de l'arrêt :

> Les vérifications de prix invoquées étaient sporadiques et, d'après les témoignages, n'avaient pas toujours été consenties. Le fait qu'il y ait eu plusieurs dizaines de communications n'est pas significatif compte tenu de la durée de la période au cours de laquelle elles ont eu lieu, c'est-à-dire au moins sept ans, période durant laquelle les transactions ont dû se compter par dizaines de milliers. En outre, dans un secteur oligopolistique caractérisé par des marchés souvent très importants, il semble logique que les entreprises aient procédé à des vérifications de prix. Nous concluons donc que les preuves avancées sont loin d'exclure la possibilité d'une action menée de façon indépendante[50].

La minorité soutenait au contraire avec force que le comportement incriminé n'aurait pas été dans l'intérêt des parties défenderesses si celles-ci n'avaient pas passé entre elles une entente :

> … s'il n'y avait pas eu d'accord réciproque de mise en commun des prix (et les producteurs nient en effet cette éventualité), un vendeur individuel qui aurait révélé à ses concurrents le montant de ses rabais secrètement négociés se serait littéralement tiré une balle dans le pied. D'un autre côté, s'il y avait bel et bien une entente, il était essentiel pour ceux qui en faisaient partie de coopérer en se communiquant leurs prix respectifs afin d'éviter un phénomène de rabais généralisés qui auraient fini par couler le cartel[51].

Comme il a été indiqué plus haut, cependant, ce point de vue ne l'a pas emporté.

L'opinion de la cour d'appel dans une autre affaire, en l'occurrence *Brand Name Prescription Drugs*, offre une bonne illustration de l'utilisation du concept d'"action contre son propre intérêt" pour déterminer le point de savoir si le parallélisme de comportement doit être considéré comme une preuve indirecte d'entente[52]. Dans ce cas, un groupe de consommateurs qui poursuivaient des fabricants de produits pharmaceutiques faisaient valoir que leur pratique uniforme de différenciation des prix entre catégories de clients, qui avait pour effet de faire payer des prix plus élevés aux plaignants, devait être considérée comme une preuve (indirecte) du fait que les défendeurs avaient conclu une entente. Mais la Cour a rejeté cet argument, estimant que puisque chacun des fabricants mis en cause disposait d'un pouvoir de marché grâce à la protection de ses médicaments par des brevets, il était de son propre intérêt d'exercer ce pouvoir et de pratiquer des prix différenciés suivant les groupes de consommateurs, compte tenu de leur disposition à payer. Par conséquent, le fait que tous les défendeurs aient adopté une stratégie analogue de différenciation des prix était jugé compatible avec l'intérêt individuel de chaque défendeur et ne pouvait pas être considéré comme une preuve de l'existence d'un accord entre eux.

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49 Dans le système fédéral des États-Unis, la plupart des affaires en appel sont entendues par un groupe de seulement trois juges, choisis au hasard.

50 *Id.*, p. 1034-35.

51 *Id.*, p. 1047.

52 Voir Brand name Prescription Drugs Antitrust Litig., 186 F3rd 781 (7th Cir. 1999).

4.3 Examen des preuves indirectes : approche globale ou approche individuelle

La façon dont les tribunaux examinent les preuves indirectes, c'est-à-dire soit globalement en considérant leur effet cumulatif, soit individuellement en exigeant que chaque élément corrobore de façon incontestable la thèse de l'entente, est un facteur important de l'appréciation portée sur leur pertinence. Dans l'affaire de l'isoglucose, le juge Posner était fermement partisan de l'approche globale, faisant remarquer que si le juge de première instance avait rejeté la preuve relative aux communications, c'était :

> … parce qu'il estimait qu'elle était de nature à "exiger un large recours à la déduction pour pouvoir avoir une valeur en tant que preuve". Cela est vrai en ce sens qu'aucun élément de preuve [en matière de communication] … ne suffit à lui seul à démontrer l'existence d'une entente sur les prix. Mais là n'est pas la question. La question est simplement celle de savoir si cette preuve, considérée globalement et en même temps que les preuves économiques, est suffisante pour mettre en échec le jugement sommaire[53].

Le juge Posner notait en outre que le "piège" dans ces cas-là est de supposer que si aucune des preuves soumises par le plaignant ne confirme à elle seule sans ambiguïté la thèse de l'entente, alors les preuves considérées comme un tout ne peuvent pas non plus mettre en échec le jugement sommaire. Il est vrai que zéro plus zéro égale zéro. Mais les preuves sont susceptibles d'interprétations diverses, dont une seule soutient la cause de la partie qui la produit, et n'est donc pas totalement dépourvue de valeur probante pour celle-ci. Sinon quel besoin y aurait-il jamais d'intenter un procès ? Dans un cas comme celui-ci, la question pour le jury devrait simplement être de savoir si, lorsque les preuves sont considérées globalement, l'entente sur les prix est plus probable que l'absence d'entente[54].

On notera cependant que les avis sur ce point divergent même à l'intérieur des États-Unis. D'autres cours fédérales d'appel ont examiné une à une les preuves qui leur étaient présentées pour déterminer si elles tendaient à exclure la possibilité d'une action indépendante et unilatérale de la part des concurrents mis en cause[55].

Dans une affaire importante de concertation sur les prix intéressant l'Union européenne, l'affaire *Pâte de bois*, la Cour européenne de Justice a adopté elle aussi une approche étroite de la question des preuves indirectes en décidant d'examiner ces dernières individuellement.

4.3.1 Pâte de bois[56]

La Commission européenne avait constaté que plus de 40 producteurs de pâte de bois et trois de leurs associations professionnelles s'étaient concertés sur les prix au cours de deux périodes comprises entre 1975 et 1981, les faits ayant montré que leurs prix annoncés étaient alors quasiment identiques. Dans l'industrie de la pâte de bois, les acheteurs et les vendeurs avaient l'habitude de conclure des contrats à long terme qui donnaient aux premiers la possibilité d'acheter une quantité minimale de pâte à un prix ne dépassant pas celui annoncé. Les annonces de prix avaient lieu tous les trimestres, pratiquement au même moment. Outre le parallélisme des prix, la Commission avait réuni quantité de preuves économiques à l'appui de ses conclusions : un grand nombre de vendeurs différents les uns des autres du point de vue de l'origine nationale (les producteurs concernés étaient établis en Finlande, en Suède, en Espagne, au Portugal, aux États-Unis et au Canada), de la structure des coûts, des frais de transport, des marchés

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53 *Id.*, p. 661.

54 *Id.*, p. 655-56.

55 Voir Williamson Oil Co. v. Philip Morris USA, 346 F.3rd 1287 (11th Cir. 2003).

56 Affaires C-89/85 etc., Ahlstrom Oy v. Commission, [1992] ECR I-1307.

nationaux desservis à l'intérieur de la communauté européenne ; des prix annoncés nettement supérieurs aux cours du marché spot ; une rupture apparente de la discipline des prix à deux reprises au cours de la période considérée ; des prix publiés dans la presse spécialisée ; des prix annoncés avant leur entrée en vigueur ; libellé de tous les prix en dollars des États-Unis.

A l'appui du grief de concertation, la Commission apportait également des preuves en matière de communication, en l'occurrence différents documents et télex émanant des parties et indiquant que celles-ci avaient pris part à des réunions au cours desquelles il aurait été question des prix. Toutefois, la CEJ demanda à la Commission de démontrer le lien existant entre chacun des documents et la concertation supposée entre des producteurs spécifiques et pour des périodes spécifiques. La Commission fit valoir que cela n'était pas nécessaire et que les preuves proposées se rapportaient de façon générale à la concertation présumée. Mais la CEJ rejeta cette argumentation et décida que les documents en question seraient écartés des débats.

Sur le point de savoir si les preuves économiques étaient suffisantes à elles seules pour établir la concertation, la Cour adopta la règle selon laquelle les comportements incriminés ne pouvaient être considérés comme probants que si "la concertation en constitue la seule explication plausible". Elle conclut que les relations à long terme et le système de prix qui s'étaient développés dans l'industrie de la pâte de bois étaient justifiés par des raisons commerciales valables. Les deux experts qui avaient été désignés par la Cour estimèrent eux aussi, sans écarter l'hypothèse de la concertation, que des raisons légitimes expliquaient les comportements considérés et que la simultanéité et le parallélisme des annonces de prix pouvaient être regardés comme la conséquence de "la très grande transparence qui caractérisait le marché"[57].

La norme stricte adoptée par la Cour pour évaluer les preuves économiques en l'espèce – à savoir que l'explication par la concertation doit être la seule plausible – est peut-être la raison principale qui a finalement conduit à l'annulation de la décision de la Commission, mais il est probable que la position de la CEJ, qui a refusé d'envisager globalement les preuves relatives aux communications entre les parties, a aussi contribué dans une large mesure à ce résultat. Il ne semble pas cependant qu'une approche aussi stricte ait été de nouveau appliquée par la suite dans des affaires tranchées par la Commission et les juridictions de l'UE[58].

Avec une approche aussi "détaillée", chaque élément de preuve indirecte sera presque toujours ambigu si on l'analyse isolément. Dans une perspective globale, en revanche, les preuves perdront sans doute de leur ambiguïté. Il semble que la meilleure approche devrait consister, comme l'a indiqué le juge dans l'affaire de l'isoglucose, à considérer les preuves présentées dans leur ensemble et à déterminer si elles sont suffisantes, globalement, pour satisfaire aux exigences retenues.

5. Ententes et preuves indirectes – expériences nationales

Les preuves indirectes ne sont pas traitées de la même façon dans tous les pays[59], et c'est en fonction des différentes normes nationales, bien entendu, qu'évolueront les règles concernant l'utilisation de ces

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57 *Id*., paragraphe 81. Voir également Suiker Unie v. Commission (*Industrie européenne du sucre*), OJ [1973] L 140/17.

58 Voir, par exemple, *PVC II*: OJ [1994] 239/14, décision confirmée sur le fond en appel, affaires T-305/94 etc., Limburgse Vinyl Maatschappij v. Commission [1999] ECR II-931 (l'arrêt du tribunal de première instance indiquant que "… les preuves ne devraient pas être considérées isolément, mais dans leur ensemble […] et les preuves individuelles ne pourraient être dissociées de leur contexte") ; *Plaques en plâtre*, OJ [2005] L. 166/8.

59 Comme on l'a vu précédemment, il peut y avoir aussi des différences à l'intérieur d'un même pays.

preuves dans les affaires d'ententes. D'autres facteurs interviendront aussi dans cette évolution, notamment la nature – administrative, civile ou pénale – des poursuites engagées contre les ententes. En outre, tous les pays n'en sont pas au même point dans les efforts qu'ils déploient pour réprimer les ententes. Certains ont des dizaines d'années d'expérience dans ce domaine, d'autres quelques-unes seulement. Certains ont déjà mis en place des programmes de clémence très efficaces, d'autres n'ont adopté ce moyen d'action que récemment. Les conséquences que peuvent avoir ces divers facteurs pour la répression des ententes sur la base de preuves circonstancielles sont examinées plus avant ci-après.

5.1 Procédure administrative ou procédure civile

Dans la majeure partie des pays, les procédures engagées contre les ententes sont de nature administrative ou civile (comme il s'agit dans la plupart des cas de procédures administratives, c'est de cette qualification qu'il sera exclusivement question dans la suite de cette section). Dans les pays qui traitent les ententes comme des infractions administratives, la tendance est à l'utilisation de preuves directes. Ainsi, depuis 2001 environ, la quasi-totalité des poursuites intentées contre des ententes par la Commission européenne se sont appuyées sur des preuves directes[60]. Si l'on se fonde sur le troisième rapport du Comité de la concurrence de l'OCDE concernant les ententes injustifiables[61], il en va de même, semble-t-il, de plusieurs affaires récentes ayant eu pour cadre des pays de l'OCDE et quelques pays non membres disposant du statut d'observateur auprès de l'organisation[62]. Il y aurait au moins deux raisons à cette tendance, et elles sont liées l'une à l'autre : d'une part, les programmes de clémence deviennent sans cesse plus efficaces, permettant ainsi aux autorités de détecter un plus grand nombre d'ententes et de disposer contre celles-ci d'au moins quelques preuves directes ; d'autre part, les pays ont de plus en plus recours à des peines d'amende très lourdes pour sanctionner les ententes, ce qui, comme on le sait, contribue à l'efficacité des programmes de clémence. Par ailleurs, il est plus facile de justifier l'imposition de lourdes amendes lorsque l'on dispose de preuves directes de l'infraction, y compris, si possible, d'éléments démontrant le caractère conscient et intentionnel du comportement illicite[63]. Enfin, les pays ont renforcé leur arsenal de techniques et de moyens d'investigation, en y ajoutant notamment la possibilité de visites surprises.

Les affaires qui reposent sur des preuves directes solides présentent un autre avantage de taille en ce qu'elles se traduisent par un plus grand nombre de transactions judiciaires et un plus petit nombre d'appels. Dans certaines juridictions, les parties reconnaissent généralement l'infraction qui leur est reprochée et acceptent de se voir infliger de lourdes sanctions. Cette procédure a des implications importantes en termes de moyens ; les actions en justice peuvent durer très longtemps et mobiliser des ressources que les autorités chargées de faire appliquer la législation pourraient sans cela consacrer à d'autres affaires.

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60 D'après les communiqués de presse publiés par la Commission au cours de la période et consultables sur son site web.

61 OCDE, *Mise en oeuvre de la recommandation du Conseil concernant une action efficace contre les ententes injustifiables : Troisième rapport du Comité de la concurrence* (2005), consultable sur le site web de l'OCDE à l'adresse www.oecd.org/competition .

62 Bien entendu, dans un grand nombre de ces affaires, le dossier comportait aussi des preuves indirectes. Comme il a été indiqué précédemment, les différents moyens de preuve peuvent en effet être utilisés simultanément.

63 A titre d'exemple, entre 2001 et 2005, la Commission européenne a infligé pour près de 4 milliards d'euros d'amendes au total dans des affaires d'ententes contrevenant à l'article 81 du traité CE. Voir l'allocution prononcée par le commissaire européen Neelie Kroes dans le cadre de l'International Forum on Competition Law, le 7 avril 2005, dont le texte peut être consulté sur le site web de la Commission européenne à l'adresse http://europa.eu.int/comm/competition. Comme il a été indiqué précédemment, toutes ces affaires reposaient au moins en partie, semble-t-il, sur des preuves directes.

Cela dit, dans les pays qui ont une assez longue expérience de la lutte contre les ententes, les autorités continuent d'exercer des poursuites lorsqu'elles disposent de preuves indirectes solides. Le cas du *Lait infantile* en Italie, évoqué plus haut, en est un exemple. Un autre cas récent concerne une entente entre opérateurs de téléphonie mobile en France.

5.1.1 France – Téléphonie mobile[64]

Le 1er décembre 2005, le Conseil de la concurrence a annoncé qu'il avait prononcé des sanctions pécuniaires d'un montant total de 534 millions d'euros contre trois opérateurs de téléphonie mobile pour avoir mis en œuvre des pratiques d'entente. L'affaire comporte deux volets. D'une part, il était reproché aux opérateurs d'avoir échangé entre eux, de 1997 à 2003, tous les mois, des chiffres précis et confidentiels concernant les nouveaux abonnements qu'ils avaient vendus durant le mois écoulé, ainsi que le nombre de clients ayant résilié leur abonnement. Bien que ne portant pas directement sur les prix, le Conseil a considéré que ces échanges d'informations étaient de nature à restreindre la concurrence sur le marché.

Le second volet, plus intéressant pour notre propos, concerne l'existence d'un accord passé entre les trois opérateurs afin de stabiliser leurs parts de marché entre 2000 et 2002. L'existence d'une telle concertation a été établie :

> … grâce au recoupement de plusieurs indices graves, précis et concordants, tels que l'existence de documents manuscrits mentionnant de manière explicite un "*accord*" entre les trois opérateurs ou la "*pacification du marché*" ou encore le "*Yalta des parts de marché*".

Dans sa décision, le Conseil dénonce plusieurs pratiques mises en œuvre simultanément en 2000 par les opérateurs concernés, notamment "un relèvement des prix et l'adoption de mesures comme la priorité donnée aux forfaits avec engagements contre les cartes prépayées ou l'instauration des paliers de 30 secondes après une première minute indivisible". L'appréciation qu'il porte sur ces agissements semble tenir compte du critère de l'"action contre son propre intérêt" évoqué précédemment. Selon les termes du communiqué :

> Ces mesures … présentaient le risque de provoquer une baisse des ventes (et donc des parts de marché) de l'opérateur qui se serait aventuré à les mettre en œuvre unilatéralement. L'intérêt de la concertation était donc de faciliter la mise en place de cette stratégie, en permettant aux trois opérateurs de s'assurer qu'ils poursuivaient simultanément la même politique et que leurs parts de marché relatives resteraient par conséquent stables.

5.1.2 Brésil – Acier

En 1999, le tribunal brésilien de la concurrence a statué sur ce que beaucoup considèrent être son premier cas d'entente au regard de la législation actuelle du pays en la matière, qui date de 1988. L'affaire portait sur un accord passé en 1996 pour augmenter le prix de certains produits d'acier laminé. Il n'y avait à l'époque que trois entreprises nationales qui fabriquaient ces produits, dont deux étaient liées par une participation croisée à hauteur de 50 %. En juillet 1996, des représentants de l'Institut brésilien de l'acier avaient pris contact avec des fonctionnaires du Secrétariat pour le suivi économique (SEAE) pour les informer que les membres de leur organisme avaient l'intention de relever leurs prix d'un certain montant prédéterminé à une date précise. On rappellera que jusqu'en 1992, les produits en question faisaient l'objet

64 Le communiqué de presse du Conseil de la concurrence peut être consulté sur le site web du Conseil à l'adresse http://www.conseil-concurrence.fr/user/standard.php?id_rub=149&id_article=501. Le texte intégral de la décision est publié sur le même site à l'adresse http://www.conseil-concurrence.fr/user/avis.php?avis=05-D-65. Les entreprises sanctionnées ont annoncé leur intention de faire appel de la décision.

de mesures de contrôle des prix en partie administrées par le SEAE. Ces mesures ne s'appliquaient toutefois plus en 1996.

Le lendemain de la réunion, le SEAE avait informé l'institut par télécopie que l'accord envisagé constituait une atteinte au droit de la concurrence et était de ce fait illicite. Les trois producteurs passèrent outre et décidèrent néanmoins d'appliquer les augmentations prévues au début du mois d'août de la même année. Les majorations étaient à peu près celles qui avaient été communiquées au SEAE par l'institut. Elles n'étaient pas strictement identiques d'un producteur à l'autre, mais leur marge de variation ne dépassait pas 5 % dans la plupart des cas. Environ une année plus tard, les trois entreprises appliquèrent une autre augmentation du même ordre, cette fois sans en avertir préalablement le SEAE.

Les producteurs mis en cause nièrent l'existence d'un accord entre eux. D'après eux, leurs dirigeants s'étaient effectivement rencontrés avant la réunion tenue avec le SEAE, mais ce n'était pas pour passer un accord. De leur côté, les autorités brésiliennes chargées de la concurrence, faute d'avoir pu interroger elles-mêmes les dirigeants des trois entreprises sur la question, n'étaient pas en mesure de produire des preuves directes de l'existence d'un accord. Elles conclurent néanmoins que les preuves circonstancielles étaient suffisantes pour fonder leur grief. Il s'agissait notamment de la réunion organisée par les dirigeants avant celle avec le SEAE, de l'annonce faite lors de cette dernière concernant les augmentations de prix, des majorations pratiquement identiques et pratiquement simultanées intervenues en août 1996 et de l'absence d'indice soutenant la thèse selon laquelle les augmentations de prix résulteraient de décisions prises de manière indépendante par chacun des producteurs à la même époque. Finalement, le tribunal déclara que les faits constatés en 1996 constituaient une infraction aux règles de la concurrence, mais pas ceux de 1997 puisque rien ne prouvait qu'une réunion ou des communications avaient eu lieu entre les entreprises avant les augmentations.

La sanction fut fixée au montant minimum de l'amende prévue par la loi, à savoir 1 % du chiffre d'affaires brut de l'année écoulée pour chaque entreprise, soit environ 51 millions BRL (équivalant alors à quelque 48 millions USD)[65]. La décision et les sanctions prononcées ont fait l'objet d'un recours, et certains aspects de la procédure ne sont malheureusement pas encore réglés. Plus récemment, les autorités brésiliennes chargées de la concurrence ont renforcé leurs efforts de lutte contre les ententes et perfectionné leurs moyens d'intervention tels qu'enquêtes inopinées et autres techniques d'investigation. Elles ont également mis en place un programme de clémence qui a permis de faire émerger de nouveaux cas[66].

5.1.3 Lettonie – Œufs de poule

Cette affaire offre un bon exemple de l'usage que l'on peut faire de différents types de preuves indirectes, à savoir :

- indices de communications, y compris les réunions entre concurrents organisées dans le cadre d'associations professionnelles et les documents faisant état de discussions sur les prix à cette occasion ;

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65 Pour de plus amples explications sur cette affaire, voir Paulo Corrêa et Frederico G. de Aguier, *Circumstantial Evidence and Plus Factors in Cartel Cases*, sur le site web du SEAE à l'adresse http://www.fazenda.gov.br/seae/english/index_english.html.

66 Voir OCDE, *Competition Law and Policy in Brazil: A Peer Review*, p. 50-54 (2005), consultable sur le site web de l' OCDE à l'adresse http://www.oecd.org/dataoecd/12/45/35445196.pdf.

- preuves économiques mettant en évidence une hausse des prix à la suite des réunions suspectes et éléments infirmant les explications données par les parties en cause selon lesquelles l'évolution de leurs prix résulterait du fonctionnement normal du marché.

Elle présente également de l'intérêt parce qu'elle concerne un secteur, celui de la production agricole, qui semble caractérisé par l'existence de nombreuses ententes dans les pays qui commencent à faire appliquer le droit de la concurrence.

En 2003, le Conseil letton de la concurrence a commencé à enquêter sur une affaire d'entente supposée entre des producteurs d'œufs de poule après avoir lu dans la presse locale un article dans lequel le principal acteur du secteur annonçait qu'il allait augmenter ses prix. L'article indiquait en outre que l'association lettone des producteurs d'œufs avait recommandé à ses membres de relever leurs prix. Le Conseil, qui ne disposait pas alors de pouvoirs d'enquête en bonne et due forme, avait néanmoins chargé plusieurs de ses agents de se présenter simultanément dans les bureaux des trois producteurs pour y interroger leurs représentants de façon informelle. D'autres producteurs furent également questionnés dans le cadre d'investigations ultérieures.

Les enquêtes firent apparaître plusieurs éléments : l'association des producteurs comptait 12 membres ; le marché letton était dominé par un producteur à hauteur de 50 % ; trois autres producteurs avaient chacun une part de marché de 8-11 % ; il y avait effectivement eu des discussions sur les augmentations de prix à l'occasion de réunions organisées à deux reprises dans le cadre de l'association, en juillet-août 2002, puis en mars-avril 2003 ; une télécopie envoyée aux membres de l'association par l'entreprise dominante avant la réunion de mars 2003, dont les enquêteurs avaient obtenu une copie, indiquait que la question de la "politique des prix (augmentation prévue à compter du 1er avril 2003)" serait portée à l'ordre du jour ; ladite télécopie précisait en outre que l'entreprise dominante ne répondrait pas aux demandes de rabais promotionnels soumises par les revendeurs en prévision de la période de Pâques, et concluait ainsi : "En conséquence, nous vous invitons à ne pas donner suite aux démarches de cette nature entreprises par les détaillants, afin de garantir le succès des ventes pendant la période de Pâques".

Le Conseil fondait également son argumentation sur des preuves économiques. Une analyse du prix des œufs au cours des périodes considérées faisait effectivement apparaître des augmentations après les réunions de l'association, augmentations qui ne semblaient pouvoir s'expliquer ni par une hausse des coûts, ni par des considérations touchant l'offre et la demande, la production d'œufs étant alors excédentaire.

Dans ces conclusions, le Conseil de la concurrence constate que les producteurs ont enfreint la législation nationale de la concurrence en mettant en place entre eux une entente sur les prix, et il prononce une sanction à leur encontre. Cette décision a fait l'objet d'un recours actuellement pendant devant la cour d'appel.

5.1.4 Taipei chinois – essence et carburant diesel

Cette affaire est instructive car elle concerne un secteur – la distribution d'essence – qui fait l'objet d'enquêtes sur des ententes dans de nombreux pays, mais aussi parce qu'elle repose uniquement sur des preuves économiques, en l'absence de tout indice relatif à d'éventuelles communications. Apparemment, l'autorité de la concurrence a eu recours à une forme d'analyse économique comme celle évoquée plus haut, à la section 3, mais les raisons pour lesquelles elle a rejeté l'hypothèse de la solution optimale recherchée de façon unilatérale et non coopérative par chaque concurrent – et plus particulièrement le scénario du pilotage des prix par l'entreprise dominante – n'apparaissent pas clairement.

A l'époque où l'enquête a débuté, en 2003, le secteur du pétrole raffiné, sur le marché de l'essence et du carburant diesel du Taipei chinois, était caractérisé par un duopole. L'entreprise dominante, qui détenait

70 % du marché, avait été en situation de monopole jusqu'à l'arrivée du premier concurrent en 2000. Un troisième acteur, en l'occurrence une grande compagnie américaine, était venu s'ajouter aux deux premiers en 2002, mais s'était ensuite retiré du marché.

Pendant deux ans, les prix appliqués par les deux fournisseurs aux stations-service avaient évolué en parallèle. A vingt reprises au moins, les prix avaient été ajustés de façon simultanée et dans des proportions quasiment identiques. Chaque fois, l'une des parties annonçait publiquement à l'avance les nouveaux tarifs qu'elle allait appliquer, et l'autre réagissait en publiant à son tour ses nouveaux prix. S'il arrivait que la seconde entreprise ne s'aligne pas sur les prix annoncés par la première, celle-ci annulait alors les ajustements envisagés ou les modifiait en fonction de ceux annoncés par le concurrent.

Il n'y avait aucune preuve directe d'entente, mais la Commission de la concurrence du Taipei chinois conclut à l'existence d'un "accord des volontés" entre les deux entreprises, en s'appuyant pour cela sur les éléments suivants :

- le parallélisme de comportement des deux parties, mis en évidence par de nombreux ajustements de prix opérés pendant plusieurs années ;

- le fait que les ajustements de prix étaient annoncés publiquement et à l'avance ;

- le fait que les exploitants de stations-service affichaient très vite les nouveaux prix annoncés, le mécanisme des annonces servant de moyen de surveillance aux deux fournisseurs ;

- une analyse approfondie de la structure des coûts des deux entreprises faisant ressortir entre elles des différences importantes en termes de sources d'importation, de coûts de raffinage, de coûts de transport et d'utilisation des capacités, entre autres.

Il semble que la Commission ait eu également recours à la théorie des jeux dans son analyse de la situation, ce qui l'a amenée à constater que les résultats observés étaient conformes à une forme d'accord entre les parties[67].

Dans ses conclusions, la Commission sanctionne les deux entreprises pour infraction à la législation du Taipei chinois en matière de concurrence et leur inflige à chacune une amende de 6 500 000 TWD (environ 200 000 USD).

5.2 Procédure pénale

Une minorité croissante de pays traitent le comportement d'entente comme un délit passible de poursuites pénales. Les exigences en matière de preuves étant plus strictes en droit pénal, il s'ensuit que les preuves indirectes sont plus difficiles à utiliser. Ces preuves sont néanmoins admissibles, comme l'illustre ci-après l'expérience de deux pays où les ententes relèvent de la procédure pénale.

[67] On trouvera une description plus complète de cette affaire sur le site web de l'APEC à l'adresse http://www.apeccp.org.tw/doc/Taipei/Case/D094q108.htm.

5.2.1 États-Unis

La pénalisation des ententes n'est pas un fait nouveau aux États-Unis[68]. Si quelques-unes des premières procédures pénales intentées en vertu de la loi Sherman ont fait appel à des preuves indirectes[69], toutes les condamnations prononcées ces dernières années se sont appuyées sur des preuves directes. Depuis le milieu des années 90, le programme de clémence mis en place par les autorités est devenu la pièce maîtresse du dispositif de lutte contre les ententes, et la plupart des nouvelles affaires qui voient le jour en sont la résultante. Elles sont désormais réglées pour la majeure partie par un système de transactions pénales qui permet de clore la procédure avant d'arriver au procès.

Bien entendu, les preuves indirectes peuvent aussi jouer un rôle utile et important. L'affaire *Art Auctions* à laquelle il était fait illusion en introduction en apporte un exemple. Elle mettait en cause les deux principales maisons de ventes aux enchères, Sotheby's et Christie's, accusées d'entente sur leurs taux de commission. Le procès était celui du président de Sotheby's, A. Alfred Taubman, les autres parties ayant soit reconnu leur culpabilité, soit bénéficié d'une immunité de poursuites dans le cadre du programme de clémence. Grâce à ce dernier, il y avait des preuves directes de l'entente entre les deux maisons, mais les éléments permettant d'établir le lien avec M. Taubman étaient plus ténus. Il s'agissait d'indices relatifs à des communications, pour une bonne part écrites, montrant que M. Taubman avait rencontré son homologue de chez Christie's pour discuter de questions de prix, et qu'il avait supervisé les discussions entre l'un de ses subordonnés et un cadre de Christie's sur le même sujet[70]. C'est sur la base de ces éléments que le jury a finalement condamné M. Taubman à une peine d'un an et un jour d'emprisonnement et à une amende de 7,5 millions de dollars.

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68 La loi Sherman ouvre la possibilité de sanctions aussi bien pénales que civiles, mais pendant de nombreuses années après son adoption, en 1890, la plupart des procès intentés dans des affaires d'ententes l'ont été devant des juridictions civiles. En outre, pendant longtemps également, les infractions à la loi Sherman sont restées classée dans la catégorie des *misdemeanors* (délits mineurs) et il a fallu attendre les amendements votés dans les années 70 pour que cette qualification passe au niveau de *felony* (délit grave) et que le montant maximum des amendes prévues soit revu à la hausse. Ce maximum a été de nouveau augmenté par la suite, de sorte qu'aujourd'hui une entreprise peut se voir infliger une amende pouvant se monter à 100 millions de dollars (et même plus en vertu de dispositions spéciales prévues par la loi) et une personne physique encourir jusqu'à 10 ans de prison et 1 million de dollars d'amende. Les sanctions effectivement imposées ont reflété l'évolution de la législation : les amendes atteignent régulièrement des centaines de milliers de dollars pour les entreprises et les peines d'emprisonnement trois ans et plus pour les particuliers. Voir Scott D. Hammond, "An Overview Of Recent Developments In The Antitrust Division's Criminal Enforcement Program", allocution prononcée devant l'American Bar Association, 10 janvier 2005, consultable à l'adresse http://www.usdoj.gov/atr/public/speeches/207226.htm.

69 L'une d'entre elles, *American Tobacco* (voir plus haut la note 35), a été jugée en 1946. Il s'agissait d'un recours en appel formé par trois grandes compagnies de tabac et quelques-uns de leurs dirigeants qui avaient été reconnus coupables de trois chefs d'accusation pour infraction à la loi et condamnés à payer une amende de 15 000 dollars chacun, soit le maximum légal à l'époque. Il n'y avait apparemment aucune preuve directe de l'existence d'un accord entre les défendeurs, mais, comme il est indiqué à la section 3 ci-dessus, la Cour suprême a confirmé la condamnation en invoquant une série de changements de prix considérés par elle comme "une preuve indirecte de l'existence d'une entente".

70 Il y avait aussi la déposition du subordonné de M. Taubman, que le parquet considérait comme une preuve directe. On peut trouver une bonne description des pièces produites par le ministère public dans le dossier constitué pour la juridiction d'appel (qui a confirmé la condamnation) consultable à l'adresse http://www.usdoj.gov/atr/cases/f11300/11329.htm.

5.2.2 Canada

Le Canada fait lui aussi partie des pays où les ententes sont considérées depuis longtemps comme des infractions pénales. Comme aux États-Unis, il y a eu quelques affaires, au départ, dans lesquelles des ententes ont été condamnées uniquement sur la base de preuves indirectes et sanctionnées par des peines d'amende minimales[71]. En 1980, cependant, une affaire portée devant la Cour suprême du Canada a marqué une étape important dans l'utilisation des preuves indirectes.

5.2.3 Atlantic Sugar[72]

Les parties défenderesses, en l'occurrence trois raffineries de sucre, étaient notamment accusées d'avoir passé un accord pour geler leurs parts de marché sur une période de plusieurs années, mais il n'y avait aucune indice concernant l'existence de communications entre elles à ce sujet. Comme le notait la Cour, les preuves réunies en l'espèce étaient purement "circonstancielles". Elles résultaient de la constatation d'une très forte stabilité des parts de marché des trois raffineurs pendant une longue période et d'au moins une pratique de nature à faciliter une entente, à savoir un système de fixation des prix avec point de parité. Il y avait aussi des documents montrant que les parties défenderesses avaient choisi délibérément – mais apparemment de façon indépendante – de ne pas pratiquer des réductions de prix qui auraient pu être déstabilisantes.

Dans sa conclusion, le juge de première instance estima que la situation considérée était "le résultat d'un accord tacite entre les prévenus", motivé par le désir de chacun d'eux d'éviter une guerre des prix destructrice[73], mais que ce comportement ne constituait pas une infraction pénale. La Cour suprême confirma ce jugement (qui avait été annulé entre-temps par une juridiction intermédiaire) en insistant sur l'absence apparente de communication entre les prévenus sur le point litigieux :

> Dans ces circonstances, l'accord tacite" résultant de son adoption probable par les concurrents était-il assimilable à un complot ? J'ai beaucoup de mal à admettre qu'il l'était effectivement du simple fait que le responsable de la politique de Redpath [l'entreprise qui pilotait les prix] savait très bien que ses concurrents s'en rendraient compte inévitablement de manière générale après quelque temps et qu'il comptait sur eux pour adopter une politique similaire qui apparaîtrait alors également au grand jour.[74]

Après l'arrêt rendu dans l'affaire *Atlantic Sugar*, la crainte se fit jour de voir les "accords tacites" échapper aux dispositions de la loi sur la concurrence concernant les infractions pénales. Cette loi fut amendée en 1986 et on y ajouta alors, entre autres choses, les dispositions suivantes :

> Preuve de complot – Lors d'une poursuite intentée en vertu du paragraphe (1), le tribunal peut déduire l'existence du complot, de l'association d'intérêts, de l'accord ou de l'arrangement en se basant sur une

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71 Voir par exemple l'affaire *McGavin Bakeries* dans laquelle a statué la Cour suprême de l'Alberta en 1951. Rex v. McGavin Bakeries, Ltd., 3 W.W.R. (N.S.) 289, p. 10 (1951). Comme le notait alors le juge : "… l'accusation se fonde presque exclusivement sur des preuves indirectes", mais il concluait que "la masse de données concrètes" relatives au comportement dont ont fait preuve les boulangeries pendant une période de 17 ans dans les trois provinces occidentales conduisait "à la conclusion inévitable … que l'entente présumée avait réellement existé". A l'époque, l'amende maximum qui pouvait être infligée se montait à 10 000 CAD. Les six parties défenderesses furent condamnées à payer au total 30 000 CAD.

72 Atl. Sugar Refineries Co. v. A.G. Can.., [1980], 2 S.C.R.644.

73 *Id.*, p. 7.

74 *Id.*, p. 15.

> preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'association d'intérêts, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'association d'intérêts, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable[75].

Cet amendement est interprété comme suit dans un commentaire sur la loi :

> Le nouveau paragraphe établit clairement que les accords tacites, c'est-à-dire ceux dont on peut déduire l'existence uniquement sur la base de preuves circonstancielles, tombent sous le coup des dispositions du paragraphe 45(2.1). Cependant, il n'apporte aucun éclaircissement sur les questions plus difficiles de ce qui constitue un accord en droit, du type de communications nécessaires pour établir le complot et de ce qui distingue un accord d'un simple "parallélisme conscient"[76].

Quoi qu'il en soit, il semble que la tendance, au Canada comme aux États-Unis, soit à une augmentation du nombre des affaires d'ententes engendrées par le programme d'immunité mis en place[77].

6. Conclusion

Lorsqu'elles engagent des poursuites contre des ententes, les autorités de la concurrence préfèrent disposer de preuves directes et c'est du reste ce qui se produit de plus en plus souvent. Les preuves indirectes continuent néanmoins de jouer un rôle important, soit isolément, soit, de façon plus générale, en complément des preuves directes. Dans les pays qui viennent de se doter d'un programme de lutte contre les ententes, elles peuvent avoir relativement plus de poids, au moins dans les premières affaires, lorsque les autorités ne se sont pas encore dotées de tous les moyens nécessaires pour recueillir des preuves directes.

Il existe divers moyens de preuve indirecte, et il est difficile de généraliser à ce sujet car dans chaque affaire les éléments du dossier sont très spécifiques. Cela dit, il est généralement admis que les plus importantes de ces preuves sont celles qui ont trait aux communications et aux comportements et qui tendent à montrer que chaque partie a agi d'une façon qui n'était pas conforme à son propre intérêt. Les preuves économiques font aussi généralement partie des éléments convaincants.

Le grand problème que pose l'utilisation de preuves indirectes est que celles-ci sont généralement ambiguës et sujettes à des interprétations diverses. Il y donc un risque de voir condamner trop facilement des comportements parallèles qui résultent en fait simplement de décisions autonomes, chaque partie agissant selon ce qu'elle estime être le plus avantageux pour elle. Comme on l'a vu plus haut, le raisonnement économique peut être d'un grand secours dans ce cas, pour distinguer les actes licites et unilatéraux des actions concertées résultant d'une entente illicite.

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75 Loi sur la concurrence, §45(2.1).

76 Robert S. Nozick, *The 2004 Annotated Competition Act* (Toronto: Thomson Carswell, 2004), p. 87.

77 Voir, notamment : Sheridan Scott "Cartel Enforcement, International and Canadian Developments", document présenté au Fordham Corporate Law Institute le 7 octobre 2004 et disponible sur le site web du bureau de la concurrence : http://www.competitionbureau.gc.ca.

COUNTRY CONTRIBUTIONS

ALGERIA

1. General framework

The economic reforms undertaken over the past decade have broadly contributed to liberalising the regulation of the economy and commerce in Algeria. The measures implemented have helped to re-establish macroeconomic and financial balances and to clarify the respective roles of the State and the liberalisation of foreign trade.

These reform measures are now playing a key role in the establishment of the free-trade area with the European Union and in the determined efforts being made to prepare for Algeria's accession to the World Trade Organization (W.T.O.).

To this end, Algeria has presented a programme for the revision of legislative and regulatory texts.

It is in this perspective that the Government prepared Ordinance n° 03.03 of 19 July 2003 on competition. Prior to this ordinance, the legislative and regulatory framework in this field had a number of shortcomings, such as:

- insufficient development of a competition culture;
- the low number of complaints filed with the competition authorities;
- operational difficulties of the Competition Council.

These dysfunctions, combined with the competitive pressures generated by the opening up of our economy to international trade, have made it necessary to update the legislative framework governing competition and bring it in line with international practice.

The main reasons for revising the former Ordinance issued in 1995 were as follows:

1. firstly, the fact that *the regulations on competition* (cartels and illegal agreements, abuse of dominant position and mergers) were separate from the *regulations on commercial practices (failure to issues invoices or indicate prices, etc.)*;

2. secondly, the need to break with the repressive character of our legislation and introduce consultation mechanisms promoting contacts and co-operation between the commerce administration, the Competition Council and the business sector so that firms can become more familiar with the competitive functioning of the market;

3. thirdly, the need to restore the Competition Council to its role as the main market regulator;

4. fourthly, the requirements for integration into both the regional economy (European Union) and global economy (WTO), which unquestionably calls for the modernisation and harmonisation of our national competition legislation.

The main objectives targeted by this legislative framework are to set the conditions for competition on the market, to prevent any practice that restricts competition and to monitor economic concentrations in order to stimulate economic efficiency and improve consumer well-being.

This legislation applies to all production, distribution and service activities. Its scope covers the activities of all public entities except when these are exercising public power prerogatives or carrying out public service missions.

In addition to illegal agreements and abuse of dominant position, the new Ordinance issued in 2003 prohibits other practices which distort competition such as:

- the abuse of economic dependence;
- the establishment of import monopolies through exclusive purchase contracts;
- and the practice of predatory pricing.

It must be pointed out that the Ordinance provides for exceptions to this general prohibition, when the restrictive practices and agreements are authorised by a specific legislative or regulatory text. These exceptions also cover agreements and practices that enable small and medium-sized enterprises to strengthen their competitive position on the market or that promote employment.

This Ordinance also includes a new provision introducing a preventive and educational measure consisting of a clearance certificate. Under this new procedure, firms concerned that their behaviour may not be in compliance with the rules of competition may ask the Competition Council to verify whether the practices or agreements that they are planning are compatible with the law and to grant them a clearance certificate.

2. Presentation of the regulatory framework in the field of cartels

With regard to economic concentration, the new Ordinance renews the jurisdiction of the Competition Council. Plans for concentration must be notified to the Competition Council when these will result in exceeding a threshold of 40% of the sales or purchases on a given market.

However, the Ordinance provides for an exception to this principle by allowing the Government to authorise economic concentrations rejected by the Competition Council when the public interest so requires and this is justified by objective economic conditions in order to develop and ensure the competitiveness of domestic firms facing international competition, to create jobs or to develop new technologies.

In short, this text restores to the market its role as a stimulus for productive activities and broadens the competitive nature of transactions by strengthening the regulations aimed at preventing and correcting behaviour and practices that can interfere with or distort the free play of competition.

For example, the following are prohibited: concerted practices and activities, explicit or tacit arrangements and agreements when they have the effect of restricting market access or the exercise of commercial activities, allocating markets or sources of supply or interfering with the pricing process by favouring higher or lower prices, abuse of a dominant or monopolistic position on a market or market segment, etc.

However, some agreements, arrangements or practices are not always intended to create barriers or obstacles to market access, for they can also be aimed at improving the commercial organisation of firms,

creating jobs, reducing supply costs or pooling management resources or new technologies and making firms more competitive on the market.

It was in this context that Executive Decree n° 05-175 of 12 May 2005 specifying the procedures for obtaining a clearance certificate regarding agreements and dominant position on the market was issued in accordance with the provisions of Section 8 of Ordinance n° 03-03 mentioned above, which lay down that:

> "*The Competition Council may certify, at the request of the enterprises concerned, the fact that there is no reason for it to object, on the basis of the elements known to it, to an agreement, a concerted activity, arrangement or practice as defined in Sections 6 and 7 above"*.

The clearance certificate is defined as being an authorisation issued by this regulatory authority to show that the agreement or dominant position does not constitute a barrier to competition, but is intended to ensure economic or technical progress and that it helps to improve employment or consolidate the competitive position of small and medium-sized enterprises.

This decree also laid down the procedure for obtaining a clearance certificate regarding an agreement or a dominant position on the market being planned by a company or companies requesting the Competition Council's opinion regarding these practices.

These provisions enable companies to verify beforehand whether the Competition Council, on the basis of the elements known to it, considers that the agreement or dominant position planned on a given market is or is not prohibited by the Ordinance on competition.

In the light of the elements provided to it, the Competition Council may decide that there is no basis for it to object to the behaviour being planned with regard to an agreement, a concerted activity, an arrangement or any other practice falling within the scope of the legislation in force.

The Council then issues an administrative document *known as a clearance certificate.*

However, this certificate may be challenged by a referral to the Competition Council alleging evidence that the market is being disrupted. Consequently, the clearance certificate is not final and does not mean that cases involving parties that have been granted certificates cannot be brought before the Competition Council.

Thus, this procedure, which is of a preventive and educational nature, will enable companies that wish to ensure that their practices are in compliance with the regulations in force to apply to the Competition Council for the relevant clearance certificate.

Given the growing complexity of competition regulations and the business world and the fact that firms are not sufficiently familiar with these regulations, this procedure will enable businesses to take advantage of the Competition Council's expertise in this field.

Consequently, it will be up to the economic operators concerned to justify and demonstrate that their activities and practices are in compliance with the legislative provisions in force by using the information form annexed to the decree in order to indicate the following:

- how the company applying for clearance will benefit from the activity or practice;
- why the behaviour of the company or companies concerned will not prevent, restrict or distort the free play of competition on a given market;

- how the relevant activity or practice will be beneficial to competition, users and consumers;
- how long the planned operation (agreement or dominant position) will last.

This procedure will also make it possible to reduce the caseload of the Competition Council, since the prior, preventive review of applications by firms for a clearance certificate, will enable these economic operators to avoid breaking the law and having cases brought against them by adversely affected competitors or by the Competition Council acting on its own initiative.

3. Privatisation and competition

Firstly, it is crucial to remember that privatisation is first and foremost an eminently political act. Privatisation is aimed at meeting many objectives that are not all convergent and that must be prioritised by organising a privatisation programme.

In the case of Algeria, the objectives such as those mentioned below may change and be adapted depending on the activity or enterprise being privatised, for privatisation is not an ideological goal but a means of restoring growth and creating useful jobs by pursuing the following key objectives:

- to make the economy much more efficient, thereby stimulating growth and job creation;
- to promote competition and eliminate administrative rigidities;
- to make transactions more transparent and combat anticompetitive practices;
- to relieve budgetary constraints in order to reduce the public debt burden in the medium term;
  - to promote certain enterprises commercially and with foreign investors;
  - to promote wider participation of the population in equity markets and employee share ownership (an explicit objective of the privatisations in the UK and France).

There have been a number of reforms of the strategy of privatisation of the public economic sector, culminating in Ordinance n° 01- 04 of 20 August 2001 on the organisation, management and privatisation of public economic enterprises. The purpose of this text is to define the rules for the control and privatisation of these enterprises. It is also aimed at channelling the transfer of the public economic sector towards private ownership and/or management in compliance with the rules on transparency, fairness and competition using competitive bidding procedures.

This Ordinance specifies that the assets of public enterprises may be transferred and sold under ordinary law. The Council for State Assets (*Conseil des Participations de l'Etat*, CPE) is responsible for setting the overall strategy and implementing policies and programmes for the privatisation of State-owned economic enterprises.

The CPE is a collegial body chaired by the Head of the Government and composed of representatives of the ministries concerned and which makes the final decision regarding the privatisation operations submitted to it.

In addition, the Council for State Assets has provided Asset Management Companies (*Sociétés de Gestion des Participations*, SGP) with the legal tools required so that they can handle directly at their level

all opportunities that may arise with regard to investors, particularly when the State-owned enterprise is an SME.

The framework established can be summarised as follows:

- Any investor interested in acquiring all or part of the capital of an independent operating unit may express its interest to the SGP or the enterprise in question;

- In this case, the SGP must announce that the State-owned enterprise is open for privatisation, that one or more parties have expressed interest and that interested investors should come forward within a maximum period of 4 weeks;

- The interested party or parties then submit a bid;

- the SGP and the State-owned enterprise then make an estimate of the value of the enterprise or the assets to be sold;

- negotiations are initiated between the SGP and the prospective buyer or buyers;

- after both parties have reached an agreement, the SGP or the unaffiliated enterprise forwards the file to the Ministry responsible for State assets and investment promotion, which gives its approval and proposes that it be submitted to the Council for State Assets, which meets regularly.

In this regard, the Ministry responsible for the privatisation process has implemented a plan of communication with the public and investors regarding privatisation policies and opportunities for equity investment in public economic enterprises (cf. website).

It should be emphasised that the Government does not negotiate the terms directly with purchasers. Instead, the Asset Management Companies or State-owned enterprises not affiliated with them conduct the negotiations with investors.

However, both the supply and the potential demand for privatisation are only estimated. The supply is calculated by estimating the value of the enterprises to be placed on the market. This assessment is based primarily on the enterprises' accounts and actual real estate holdings.

These enterprises' accounting systems must therefore be upgraded and their assets clearly identified in order to conduct these assessments, which in any case can only be used as a general guide. The demand for privatisation expressed in terms of resources can be based on the domestic savings of enterprises and foreign direct investment.

The techniques of privatisation are adapted to the economic objectives**.** The legitimate concerns of the State, such as the protection of employment and activity, the development of employee share ownership and investment in renovation and modernisation are taken into account in the privatisation specifications. If a competitive bidding procedure is not used, the approach being promoted is to encourage a joint venture involving domestic private parties and foreign partners to take over the State-owned enterprise.

Another possibility available is to choose operators through a call for tenders open to all parties, setting minimum and/or maximum equity ownership amounts for local and foreign purchasers. Sale through competitive bidding generates a capital and securities market and makes it possible to lay the foundations for a real market economy.

4. Conclusion

Despite this legislative and regulatory system, it should be mentioned that no case of a cartel has been detected thus far at the local level. This is explained by the newness of the system within a market economy.

The fact is that the majority of large strategic companies are State owned and are in a virtually monopolistic position because of the lack of competitors. This is true of the cement, pharmaceutical and milk production sectors.

Privatisation of the public sector remains timid and the process is affected by some endogenous barriers mainly related to the organisation of State land ownership and the definition and assessment of assets, all of which closely involve property issues, and local expertise is not well adapted to these types of operations.

The State, in disengaging from the economic and production sectors, is introducing a series of measures to facilitate the privatisation of the public sector without adversely affecting the interests of workers. It engages in regular consultations with management and workers' representatives.

ARGENTINA

1. Special definition of Hard Core Cartels

In Argentina article 1° of the Competition Law (Law 25.156) prohibits acts or conducts, related to the production and exchange of goods or services, whose intent or effect is to restrict or to distort competition, and those that constitutes an abuse of dominant position, so that damage for the general economic interest can result. On the other hand, article 2° of the mentioned law enumerates in a non exhaustive form a series of conducts, that to be considered illegal must fulfil at the same time the requirements of article 1°. In this way a special definition for hard core cartels is absent in the Argentine antitrust law. To the extent that the law refers to "acts or conducts", it can be observed that the demonstration of the existence of an explicit agreement is not required. In that sense it is possible to sanction conducts on the basis of the demonstration of consciously parallel conduct plus one or more facilitating practice. It must be noted that the National Commission for the Defence of Competition (CNDC) is the technical organism that produces the reports (called "dictamenes") on the basis of which the Secretary of Technical Coordination makes the final decisions in the administrative branch.

2. Status of Hard Core Cartels under the Antitrust Law

Under the Argentine antitrust law hard core cartels do not have any special status. Neither there are criminal provisions in the Law. The law effective prior to the present one contained criminal sanctions but they were never applied. The Argentine antitrust law does not contemplate "*per se*" illegal conducts. With regard to the harshness of the sanctions, article 49 of the law establishes that in the imposition of fines it will have to be considered, among other elements, the loss incurred among all the persons affected by the prohibited activity, the benefit obtained by all the persons involved in the prohibited activity, the gravity of the infraction, the damage caused, the intention. Therefore by virtue of this provision the fines imposed to hard core cartels could be increased according to the mentioned criteria. It should be mentioned that the maximum amount of the fine that allows the law ascends to one hundred fifty million Argentine pesos ($ 150 000 000), approximately. US$ 50 000 000. Under the Law there is not a more demanding standard to prove hard core cartels than to prove other anticompetitive conducts.

3. Prove of Cartels through indirect evidence

Yes, it is possible to prove the existence of an agreement of cartelisation or other types of anticompetitive practices without direct evidence. In the case of the cement cartel fined by the CNDC in July of the present year a combination of indirect evidence, economic evidence and facilitating practices (exchange of sensible competitive information) was used to sanction the involved companies.

4. Judicial experience in cases of indirect evidence in Cartels

To date judicial resolutions have not existed pronouncing on this topic.

5. Difference in the applicable sanctions

In principle, that the evidence of the cartel is direct or indirect it does not make a difference in relation to the applicable sanctions.

6. Prosecution of Cartels

The possibility of prosecuting cartels without need to produce direct evidence is a key factor for an effective fight against that type of practices, mainly in Argentina, that has not yet implemented a clemency program.

7. Evidentiary standards for developing countries

Evidentiary standards should not have to be more lenient by the circumstance that in developing countries little experience in the prosecution of cartels exists, since otherwise constitutional guarantees of due defence could be affected.

8. Example of a case of cartel in Argentina

- In Argentina recently, in the month of July of the current year, a record fine was imposed to the cement companies for having cartelised the cement portland market during a period of almost twenty years. The investigation took account of a journalistic publication whose source turned out to be an ex-employee of one of the investigated companies. This ex- employee, according to the journalistic publication, had compiled documentation and written an unsigned document (Book) where all the functioning of the cartel was described in detail. Unfortunately; this person could not be found during the investigation. The hard core cartel consisted basically of the allocation to each cement company of a predetermined percentage of the market on national scale, complemented with agreements on prices and other commercial conditions at a local (city/region) scale. The illegal practice was demonstrated with a series of elements of indirect evidence.

- One of the most important elements of indirect evidence turned out to be the competitively sensible exchange of information between the cement companies via the association that gathered them (Association of Cement Manufacturers Portland - AFCP). The AFCP handled a Statistical System of exchange of information by which each associated cement company sent to the AFCP information on its production and quantities of cement sold, with a high degree of detail. In that sense the companies sent with monthly regularity the production by plant of each company. On the other hand, the monthly sales (in quantities) were sent with diverse openings: by localities of a size suggestively narrow, by province, and also on a national scale, by type of client (public sector, private sector and export), by package (bags and bulk), and by means of transport (by truck, railroad, by sea, by waterway and internal consumption). In some occasions the AFCP also processed information of cement sales (quantities) of weekly character. The interchanged information had recent character, in the sense that it referred to the months immediate previous to the production of the information. After processing all this information, the AFCP gave back to the companies the production and individual sales (quantities) of all the companies associated. In this way each company knew strategic commercial information of its competitors. The interchanged information was classified as "confidential". The Statistical System was improved throughout the investigated period, displaying a degree of increasing sophistication whereas the information disclosed through the official publications of the AFCP was becoming more and more sparse. The System was designed to produce exits that allowed to compare the market share of each company and their evolution over time. In addition to numbers of definitive sales the statistics included provisional sales, which demonstrated that the companies needed the provisional numbers to adjust more perfectly to the agreement, since the definitive numbers were produced with a delay of only a month. In conclusion, the implementation of an exchange of information with the aforementioned characteristics could only be fully explained by the necessity to control the fulfilment of an anticompetitive practice in the cement industry.

- Another element of indirect evidence turned out to be three audits of invoicing and sales (quantities) that the AFCP ordered to consulting companies. Specialised literature emphasises the existence of audits like a typical characteristic of the cartelisation of an industry, whose purpose is to verify that the participants in these practices do not cheat declaring inferior sales or departing in some other way from the terms of the agreement.

- Thirdly, it was proved that the people who took part by the companies in the exchange of information through the AFCP, sending or receiving data, and/or in the operation and implementation of this system, turned out to be in their great majority commercial personal from the area of sales, of diverse hierarchies within each company.

- In fourth place, it was proved the existence of reclamations of the companies and the AFCP when delays in the sending of the information on the part of any of the associate companies took place. The typical delays in the delivery of some of the statistics of competitively sensible information that the statistical system of the AFCP produced did not go beyond few months: two, three, four or at the most five months. At the same time the reclamations made reference to the information exchanged as a "tool" that was useless if produced “out of time” and consequently it would lose its "value". The CNDC concluded that this type of reclamations, conducted so much by the companies associated as by the AFCP, obeyed to the urge of each associate to control other‘s market share and to fit its commercial decisions to the terms of the agreement, otherwise it is not understandable why delays of two, three or four months would make lose "value" to the mentioned "tool".

- Another element of indirect evidence turned out to be the fact that the information in which the journalistic article was based was provided by an ex-employee of one of the cement companies. This circumstance was considered by the CNDC as an element that gave credibility to the facts narrated in the Book and that ex-employee told to the journalist. On the other hand, although the cementer company where this person worked repeatedly claimed that the Book comprised of a manoeuvre of extortion in his against and that the journalistic publication was slander, at no moment it mentioned that it had initiated legal actions on the matter, as was expected if the version in it contained were false.

- An element of economic evidence consisted of the accreditation of diverse episodes of collusion in prices and other commercial conditions in different localities (city/region), that appeared mentioned in the documentation accompanied by the journalist, who was as well given to him by the mentioned ex-employee.

- The CNDC also proved the existence of meetings between personnel of sales of the companies investigated outside the scope of the AFCP. These meetings are mentioned in the Book and the documentation accompanied by the journalist, who as well received it from the mentioned ex-employee.

- Another element of economic evidence consisted of a predatory action undertaken in concert by the associates against one of the companies associated to force it to add itself to the cartel. This coordinated operation, that according to the Book was called “Operativo Patagonia”, consisted of invading the patagonic region, in which the mentioned company was established, with cheaper cement and much more soft conditions of sale that the effective ones in the rest of the country. This joint invasion was an atypical behaviour as in it participated companies whose plants were located very far away and was initiated in a simultaneous way by the firms. After this incursion the mentioned companies practically disappeared of the zone. At the same time during these

years there was a fall in the sales and participation of market of the company attacked in the alluded region that was not explicable either considering its advantages from location.

- Another evidence of economic character turned out to be the evolution of the market shares on a national scale of the cement companies during the investigated period. These market shares behaved in accordance with which the Book indicated like fruit of the agreement. The allocation of market shares on a national scale for each one of the companies constituted the fundamental variable in the agreement during the investigated period. According to the narration contained in the Book, in year 1981 the initial market shares were agreed among the companies, and were subsequently modified in 1983 and 1991. The CNDC considered as a suggestive circumstance - corroborating in that sense the narration contained in Book- the fact that the three audits of invoicing and sales ordered by the AFCP took place very close to the years when according to the Book the market shares were fixed. Throughout all the investigated period the market shares observed indeed adjusted remarkably with the agreed participation.

- Finally, the CNDC considered that the facts independently verified gave credibility to the central aspects of the narrative contained in the Book, even though this was an unsigned document. In that sense it was proved a series of core affirmations contained in this document, as far as which: a) in the system of exchange of information participated personal in the companies of the commercial area, b) the information was processed by the employees of the AFCP, c) the imputed companies, by its side and with similar lists, verified the process, d) the system tracked the sales factory by factory and company by company and the respective participation within the dispatched total of cement, e) of those numbers also took an accumulated ones that was watched in a percentage form, f) there existed an interchange of weekly numbers of sales, g) the interchanges of numbers had confidential or reserved character, h) to ensure that the associate companies did not cheat in the numbers of interchanged sales the Association contracted an external auditor, i) between years 1987 and 1989 it was verified the so called "Operativo Patagonia", and j) the companies agreed in prices in diverse localities.

- The amount of fines applied to the cement producers and the AFCP was the following: Loma Negra (US$ 138 700 000, U$S 47,8 millions), Minetti (US$100 100 000, US$ 34,5 millions), Cementos Avellaneda (US$34 600 000, US$ 11,9 millions), Cemento San Martín (US$28.400.000, US$ 9,8 millions) and Petroquímica Comodoro Rivadavia (US$7 300 000, US$ 2,5 millions), AFCP(US$ 529 289, US$ 182.513). In total: US$309 629 289 000, US$ 106,70 millions.

- A recent pronunciation of the Court of Appeals confirmed the decision of the Antitrust Agency in this case with regard to the statute of limitation. The decision on the substantive matters is still pending.

BRAZIL

This paper discusses the legal aspects of prosecuting a cartel in Brazil without direct evidence of collusion, as well as which are the steps taken by the Secretariat of Economic Law when a complaint is filed in such situation. Further on, some cartel cases where the Administrative Council for Economic Defence (CADE) found the parties guilty based on indirect evidence of collusion will also be analysed.

In Brazil, cartels can be prosecuted both criminally and administratively and in neither spheres there are legal restrictions about prosecuting and/or condemning a case only with circumstantial evidence. Specifically regarding the administrative jurisdiction, Law 8.884/94 does not award any discretion for the authority to decide whether or not to investigate a case. Therefore, whenever a complaint of a cartel is filed, there is a legal obligation to investigate the case, regardless of the value of the evidence presented. Nevertheless, the competition authority can decide which procedure it will adopt in order to investigate the complaint.

More generally, every case submitted to the competition authority is filed as an Administrative Procedure (*Procedimento Administrativo*) and, depending on the strength of the evidence and the circumstances of the case, the competition authority will have the following options: i) initiate a preliminary investigation (*Averiguação Preliminar*); ii) initiate an Administrative Process (*Processo Administrativo*); or iii) dismiss the claim without further investigation, if the complaint is unrelated to competition matters or if the practice clearly does not pose any anticompetitive harm. The competition authority can adopt any of such decisions, provided that it includes relevant justification.

It is also worth mentioning that, aside from the decision to dismiss the case while it is still an Administrative Procedure; all the other decisions of the Secretariat of Economic Law are submitted for the approval of CADE. If CADE disagrees with the decision of the Secretariat of Economic Law to close a case, it can send that case back to the Secretariat and demand that further investigations are conducted.

Specifically regarding cartels, complaints will always be investigated, even if filed only with circumstantial evidence, regardless of its strength. Depending on the findings derived from this investigation, SDE will decide which procedure to take. It is important to reiterate that our system has no formal restrictions about prosecuting and/or punishing a cartel case based only on circumstantial evidence.

In the criminal jurisdiction (Law 8.137/90), the situation is alike, with few procedural differences. Within this jurisdiction, the case is submitted to the Public Attorney's Office, which evaluates the given evidence. If the evidence is considered insufficient, the “Public Attorney's Office” can close the case, provided that a formal justification for the dismissal is presented. It can also send the case to the Police Department so that it conducts further investigations, where a technical report will be prepared at the end of the procedure, in which it can recommend whether or not the case should be closed. The Public Attorney's Office, then, can accept or reject the content of the technical report, but always justifying why.

So, as a matter of fact, there are several possibilities to deal with cases that are based on circumstantial and/or economic evidence, but in all of them, there is the obligation to, at least, conduct some preliminary investigations in order to decide whether the case should be summarily closed or not.

1. Special criteria to evaluate complaints on gasoline retail market

Complaints must always be investigated, however, since this is a time consuming endeavour and the Brazilian Competition System faces human resource limitations, it's important to have some criteria to evaluate them.

In practice, some complaints can be dismissed based merely on economic grounds, when there is no direct evidence associated to it. For instance, cartel complaints involving the gasoline retail market are no longer pursued whenever there is no market indication of collusion. The use of economic methods in the evaluation of complaints has reduced the time spent in the analysis. This is a major step, considering the large number of complaints in this sector, and the fact that in most of these complaints the only cartel evidence presented is the homogeneity of prices (or similar price raise).

In order to avoid time-consuming procedures, the Secretariat for Economic Monitoring developed a method to analyse those complaints taking into consideration pricing behaviours and profit margins. Such method – which is a first attempt to reach a filter and is still under discussion – is three pronged. Complaints are only prosecuted if cumulative conditions based on economic analysis are met.

First, the profit margin tendency is verified. If the profit margin should decrease, the market is considered to be under a competitive behaviour, in which case the complaint is dismissed. Second, we analyse whether the margin increase is linked to the reduction of price dispersion. If not, the case is dismissed. Third, if there is such a margin increase, then we verify whether the margin and price dispersion behaviours follow the same pattern within a State geographical area (we consider that the monitoring costs of a cartel in a State – as opposed to a City - would be much too high). If they do, the case is dismissed. Therefore, we prosecute cases only if there is a margin increase linked to the reduction of price dispersion not following the State pattern. In these cases, we continue with the investigation, trying to gather more evidence through the investigative methods allowed by Brazilian law, such as inspections, dawn raids and wiretapping.

It is very difficult to reach a conviction in the gasoline retail market based solely on economic evidence, nonetheless, this methodology might enable Seae and SDE to eliminate cases that do not deserve to be thoroughly investigated and concentrate resources on those where there is a preliminary indication of collusion and thus, of potential harm to consumers.

2. Summary of relevant cartel cases based on circumstantial evidence

2.1 The Steel Cartel Case

In Brazil, the steel cartel is the leading case where CADE found the parties guilty based on indirect evidence of collusion.

The case involved an agreement to increase the prices of flat rolled steel products. There were only three domestic producers in the market, two of which were linked by a 50% cross-ownership. "*In July of 1996 representatives of the Brazilian Steel Institute met with officials of SEAE and informed them that its members intended to increase their prices on these products by certain specified amounts on a specific day. The background to this meeting is that until 1992 these products were subject to price controls, which were administered in part by SEAE. On the day after the meeting SEAE informed the Institute by fax that such an agreement was a violation of the competition law and illegal. Nevertheless, the three producers*

each implemented price increases on these products in early August of that year. The increases were approximately the same as those given to SEAE by the Steel Institute".[1]

Aside from the information the parties themselves presented to the competition authority during the meeting, there was no direct proof that the firms had coordinated the price increase; therefore the investigation was based on the economic evidence of collusion. Two interesting points the Respondents raised in their defence were that the steel market is an example of market with "price leadership", which would explain the "apparent" concerted behaviour of the Respondents; and that whenever a case deals only with indirect evidence, a condemnation would only be acceptable if no rational explanation for the fact were available.

In the steel case, CADE expressly stated that it was possible to condemn a cartel based exclusively on economic evidence, if all the other possible rational explanations for the practice were excluded. It should be noted, however, that CADE did not only consider the economic evidence in this case. In fact, CADE's decision that the parties were guilty was based on the "parallelism plus" theory: the first issue taken into account was the fact that the price increase of the companies, at similar rates and dates, could not be explained just by referring to it as oligopoly's interdependence.

In addition to that, although CADE did not consider the meeting as direct evidence of collusion, the commissioners understood that it constituted a strong indication that there had been previous meetings among the companies to discuss matters before actually taking them to the government. According to CADE, the circumstantial evidence indicated that the steel companies had already reached a decision regarding the price increase when they asked for a meeting at SEAE.

In two other cartel cases, a strong weight was also given to circumstantial evidence in CADE's decision: the Rio de Janeiro – São Paulo airline case and the investigation involving the four largest newspapers in Rio de Janeiro .

2.2 The Rio de Janeiro – São Paulo Airline Case

This case was initiated after some of the major newspapers in the country reported that the presidents of Brazil's four major airlines had met at a hotel and five days later, the prices of the plane ticket for the Rio de Janeiro- São Paulo route had simultaneously increased by 10%. *"SEAE's investigation concluded that the price move was not merely a case of conscious parallelism. In addition to the meeting of the companies' executives, evidence revealed that price data were exchanged among the companies through postings on ATPCO, the computerised airline price data system maintained by the Airline Tariff Publishing Company. A company could configure a price change notice so that, for an initial three-day period, the change could be viewed only by other airline companies and not by consumers or travel agents. The posting company was thus able to abort the change if competitors failed to follow suit. This feature of the ATPCO system had earlier been attacked by the US Department of Justice, but system modifications arising from that case had been implemented only in North America. In September 2004, CADE determined that the four airlines had colluded to raise prices. Each carrier was fined 1% of the revenue earned on the affected route during 1999 and was enjoined from fixing prices and from posting price adjustments in advance. In March 2005, in a separate action, CADE accepted a settlement agreement negotiated between SDE and ATPCO under which ATPCO terminated the three-day notice feature of its system with respect to Brazilian airlines."*[2].

1. From "Brazil OECD 2000 Report", elaborated by John Clark.

2. Peer Review of Brazil's Competition Law and Policy DAF/COMP(2005/8)

Apart from the chairmen's meeting, the investigation showed that the companies had a very efficient tool for coordinating their prices, which was the ATPCO system.

Based on the association of three factors (the price parallelism, the chairmen's meeting and the tool for coordinating prices), CADE decided that there was a strong indication that the firms were colluding to fix prices. It should also be noted that CADE, in its decision to punish the firms, made a point of justifying why the "price leadership" theory could not be applied in the case.

2.3 The Newspaper Cartel Case

The case involved the four largest newspapers in Rio de Janeiro. Here, there was also a price increase at the same time and same percentage rates. In addition to the price parallelism, the indirect evidence consisted in the fact that the newspapers published simultaneously an editorial note informing readers of their price increase on the same day and with very similar content.

In addition to this aspect, during the investigation, executives of the companies gave testimonies to the authorities and CADE identified numerous contradictions in their statements, specially referring to the explanation for the price increase. For example, one of the newspaper's executives stated that they simply waited for the leading newspaper company to raise their price so as to do the same. However, this newspaper was unable to explain why the price rise happened exactly on the same day of their competitor, considering that on the same day of the price rise the other newspapers were out with the modified price.

CADE found the firms guilty of cartel because of the association of price parallelism with the publication of the editorial note to explain the price increase, together with the lack of a plausible explanation for the price increase at the same time and at the same percentage rates.

In short, the jurisprudence shows that CADE admits indirect evidence as proof to punish a cartel. Nonetheless, some qualifications are appropriate: First, in all previous cases, CADE has indicated that it is important to exclude the "price leadership" explanation for the price parallelism; and second, although the indirect evidence available in the cases were important to indicate the existence of illegal behaviour, CADE did not punish the firms exclusively based on that. In the cases referred above, in addition to the economic evidence, some circumstantial event was associated to the price parallelism. Thus, CADE applies the "parallelism plus" theory to condemn cartel based on indirect evidence.

CHILE

1. A brief view of the Chilean system.

Chile has an important tradition on competition. The first principles about competition and market access were issued in 1959, even when the actual institutionality on competition was created by the Decree Law number 211 of 1973 and the subsequent reforms approved during the past decade.

The competition law in force has not considered a special definition or treatment for hard core cartels. This situation is explained by the fact that the Chilean law has only generic definitions of anticompetitive conducts.

The article 3 indicates: "He who enters into or executes, whether individually of collectively, any deed, act or contract that prevents, restricts or hinders free competition or tends to produce such effects shall be liable to the measures prescribed by article 26 of this law, without prejudice to the corrective or restrictive measures that may be decreed in each case in respect of any such deed, act or contract. Among others the following deeds, acts or contracts shall be regarded as preventing, restricting or hindering free competition: (a) Expressed or implied agreements between business agents or concerted practices between them having the intent of fixing sale or purchase prices, limiting production or assigning themselves market zones or quotas, abusing the power conferred upon them by such agreements or practices."

In simple words, according with the law, the hard core cartels are included in the generic form of "collectively agreements between business agents" under an explicit or implicit way. In the first case, the hard core cartels have an explicit agreement (but usually not written) in order to affect or cause distortion on the market. In the second, there is not an agreement, just a common behaviour between the competitors that produces the same effect. Both kinds of conducts are illegal under the Chilean competition law. The cartel under an "implicit agreement" creates a consciously parallel conduct.

From the view of the sanctions, the cartels, like all other anticompetitive conducts, are not prosecuted criminally in Chile, and they are principally subject to fines up to US$12.5 millions. Also, the law gives to the Competition Court the faculty to impose the amend or terminate the acts, contracts, agreements, systems or arrangements which are contrary to the provision of the law, including the amendment or dissolution of the partnerships, corporations of other private-law entities involved in the conduct.

The proof and the evidence are very important issues in the hard core cartel investigation and prosecution. In the Chilean case, the competition law provides some flexibility. One of them (and the most relevant) is the evaluation of the proof according with the *"sana crítica"* rule. This form of evaluation gives to the judges the opportunity to assign value to every single proof in harmony with the merit of the process and his or her logic and experience.

Other important matters are the presumptions or circumstantial evidence which is admitted in the process like effective way to prove a conduct. The article 22 indicates: *"The means of evidence indicated in the article 341 of the Code of Civil Procedure shall be admissible as proof, as well as any findings or grounds that, in the opinion of the Court, are fit to establishing the relevant facts…"*

The economic evidence is particularly relevant in those cases because the cartels and the collusive conducts in general, are not crimes under the Chilean law. Thus, the power of the Prosecutor to investigate is limited by law and cannot consider measures like interception telephones or other ways of communication.

In merit of that, the Court's treatment of cartels implies a thorough analysis of the facts and proof to conclude in economic evidence that permits enacting the collusive agreement. However, from the legal perspective, there is not any difference between the cartel with direct evidence and the other case (without it). In both cases, it is power of the Court to determine the sanctions and fines, considering, for legal mandatory, the "seriousness of the conduct" (article 27).

From the view of our system, the existence of some rules that give flexibility to the proof in the investigation of cartels and all other anticompetitive conducts, permits effective prosecution. However, the lack of some rules to investigate –in terrain- more effectively the conducts some time can create difficulties to carry on a case behind the Court.

2. "The fresh milk case"

On 1995, the Fiscalía Nacional Económica started an investigation in the market of fresh milk[1]. The investigation pretended to determinate the existence of some anticompetitive conducts among the six more important industries of milk-based products in the center and south of Chile.

After a long investigation, the competition authority required behind the "Resolutive Commission" (the preceding of the current Court of Competition) for the followings conducts: market distribution, refuse to buy[2], price discrimination, arbitrary reduction of prices in prejudice of providers and absence of a regular, clear and public process for the control of the fresh milk quality.

The Court's decision, issued in 2004, resolved this case and determined three relevant aspect for this market: (1) even when there is no barriers to entry or to exit from the market, it is very necessary to avoid the explicit or implicit agreements among the companies in order to coordinate they price politics, specially because they conform an effective oligopsony; (2) according with the proof, the market shows some imperfections and transparency absence that it needs to be correcting to prevent the exercise of market power; and (3) the transparency and the "no discrimination principle" are consubstantial for the competition, and it must be considered in the price determination process.

The more important measures in the decision were: (1) the milk processor industries must have a price list to buy with adequate information for the sellers; (2) any change in the conditions to buy, by the industry, must be notified at least with month in advance to the fresh-milk providers; (3) the refusal to buy must be founded; (4) the milk industries must have a register of refusal-bids; (5) the milk process industry must implement, within six months after the decision, a common system to determinate the milk quality. Also, this system must be approved by the competition agency.

This case shows with clarity a kind of agreement among competitors where there was no direct evidence of it. The Court, following the evidence and the proof compiled by the competition agency, stressed the necessity to incorporate such measures in order to improve the information on the market, giving protection to the providers and reducing the asymmetry information.

1. This market includes the milk producers like sellers and the milk products industry like buyers.

2. Refusal to buy for the fresh milk provider of the competitors in the market restricting the mobility of the provider in the milk industry.

At present, the competition agency is watching over the behaviour of the industries in this market to prevent those kinds of conducts, especially because the fresh-milk market structure is favourable to parallel conducts or agreements.

CROATIA

1. Croatian Competition Act – Legal Definitions

Croatian Competition Act (CCA; CCAct)[1] (2003) provides legal definitions for hard core cartels. The notion of hard core cartels is covered under the section of the CCA which establishes the prohibitions of certain categories of agreements among undertakings[2].

2. Prohibited Agreements among Undertakings

The CCAct stipulates that there shall be prohibited all agreements between undertakings, contracts, single provisions of agreements, explicit or tacit agreements, concerted practices, decisions by associations of undertakings (hereinafter: agreements) the object or effect of which is to prevent, restrict or distort competition in the relevant market, and in particular those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- 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.

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1 Croatian Competition Act - CCA (2003) stipulates the rules and the system of measures for the protection of competition, regulates the powers, duties and the organisation of the authorities entrusted with the protection of competition, as well as the procedure for the implementation of this Act. CCA shall also apply to all forms of prevention, restriction or distortion of competition within the territory of the Republic of Croatia or outside its territory, if such practices take effect in the territory of the Republic of Croatia, unless differently stated by particular regulations for certain markets. Furthermore, the CCA shall also apply to companies, sole traders, craftsmen and other legal and natural persons that participate in economic activities in trade of goods and/or services. The provisions of this Act shall apply correspondingly to all legal and natural persons that are engaged in a single or temporary trade of goods and/or services in the market. This Act shall apply to legal and natural persons that have their seat and permanent residence abroad, provided that their participation in the trade of goods and/or services affects the home market. This Act shall also apply to legal persons, whose founders, shareholders or holders of share capital are the state or local and regional municipalities. This Act shall also apply to legal and natural persons entrusted pursuant to special regulations with the operation of services of general economic interest, or which are by exclusive rights allowed to undertake certain business activities, insofar as the application of this Act does not obstruct, in law or in fact, the performance of the particular tasks assigned to them by special regulations and for the performance of which they have been established; (art. 1 thru 4)

2 Art. 9 of the CCA

The above listed agreements that prevent restrict or distort competition, and which may not be exempted from above mentioned prohibitions, shall be declared as null and void.

3. Exemptions from the General Prohibitions

The conditions for exceptions from the prohibition of restrictive agreements, both individual and group, have been determined by the CCA and they are in line with the provisions of Article 81 (3) of the EC Treaty. Article 10 of the Competition Act lays down the conditions for exception for certain categories of agreements, such as agreements that contribute to improvement of production or distribution of goods and/or services, promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that such agreements do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the goods and/or services in question.

Furthermore, the CCAct recognises that certain categories of agreements that contribute to improving the production or distribution of goods and/or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit shall be granted individual or block exemption under certain conditions[3].

However, such agreements among undertakings may never:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and

- afford such undertakings the possibility of eliminating competition in respect of a substantial part of goods and/or services constituting the subject of the agreement.

3.1 Block Exemptions

The Competition Act provides in several provisions for horizontal and vertical restrictions the agreements may not contain, i.e. those which they may contain if they meet certain conditions. The restrictions concerned are set out in Article 9 of the Competition Act, according to Article 81 (1) of the EC Treaty. Block exemptions for agreements containing horizontal and vertical restrictions of competition fall within the scope of Article 10 of the Competition Act. The provisions of Article 10 regulate basic conditions the agreements must satisfy in order to be exempted; however, the detailed regulations on the matter are yet to be adopted pursuant to Article 10 paragraph (1) of the Competition Act. These regulations shall determine the conditions that particular agreements must contain, restrictions or conditions they may not contain, as well as other conditions that have to be fulfilled so as to make block exemption applicable.

The CCAct establishes the notion of block exemptions for certain categories of agreements among undertakings which relate to the following categories of agreements[4]:

- agreements between undertakings not operating on the same level of production or distribution, and in particular, agreements on exclusive distribution, selective distribution, exclusive purchase and franchising;

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3 see Art.10 of the CCA

4 see Art. 11 of the CCA

- agreements between undertakings operating on the same level of the production or distribution, and in particular, research and development and specialisation agreements;
- agreements on transfer of technology, license and know-how agreements;
- agreements on distribution and servicing of motor vehicles, and
- insurance agreements.

Finally, block exemptions are regulated by corresponding bylaws adopted pursuant to the CCA, which are legally binding and based on EC Regulations 240/96, 2790/1999, 2658/2000, 2659/2000, 1400/2002 and 358/2003.

3.2 Individual Exemptions

The CCA provides for individual exemptions from the prohibition of restrictive agreements, and covers basic provisions on block exemptions. Individual exemptions are defined in Article 12 of the Competition Act, which lays down the procedure in deciding upon individual exemption for certain categories of agreements that contribute to improving the production or distribution of goods and/or services, or to promoting technical and economic progress, or those allowing consumers a fair share of the resulting benefit.

Namely, at the request of the parties to the agreement in question, the Agency may take a decision granting individual exemption from the banning of the agreement in question, if that particular agreement fulfils the conditions set out in the Law[5].

Articles 10 and 11 of the Competition Act regulate the main issues concerning block exemptions, laying down conditions such agreements must comply with and restrictions they may not contain; at the same time they determine the adoption of regulations, which shall identify particular cases of block exemptions applied to vertical agreements, particularly exclusive distribution and selective distribution agreements, exclusive purchase agreements, franchise agreements; as well as horizontal agreements, and especially to the categories of research and development agreements, specialisation agreements, transfer of technology agreements, licensing and know-how agreements, agreements on motor vehicles distribution and servicing and insurance agreements.

The decision on individual exemption shall be issued upon the request of the parties to the agreement, for a limited five-year-period, whereby it may be extended for not longer than additional five years at the most. Further provisions define the decision on individual exemption in more detail, provide for the possibility to meet additional conditions and apply measures required for exemption, as well as time limits to be observed.

3.3 De Minimis Rule

CCA in its Article 13 establishes a notion of the d*e minimis* Rule, whereby it identifies agreements of minor importance as agreements in which parties to the agreement and the controlled undertakings have an insignificant common market share, on the condition such agreements do not contain provisions that in spite of the insignificant market share lead to prevention, restriction or distortion of competition. The agreements concerned shall be granted exception from the prohibition laid down in Article 9 of the

5 see Art. 12 in connection with the Art. 10 of the CCA

Competition Act, if they comply with the Competition Act and meet the conditions laid down by a separate regulation.

According to the provision of Article 13 paragraph (4) the Agency holds the power to ex *officio* initiate proceedings on assessment of the agreement that complies with the conditions set for the agreements that fail under the scope of the *de minimis* Exemption.

4. Investigative Techniques

4.1 Collecting of Data

In order to assess the very nature of the agreement among entrepreneurs, Agency conducts an investigation, during which it by the means of a written request[6]:

- seeks from the undertaking which participate in the agreement in question, in writing or through oral statements, all the required data, and ask for submittal of the required data and documentation for the inquiry;
- seeks to undertake a direct inspection of all business premises, all immovable and movable property, business books, data bases and other documentation;
- seeks the submission of other necessary data and information from other persons, which the Agency deems may contribute to solve and clarify certain issues on prevention, restriction or distortion of competition;
- orders to the undertaking to pursue other activities which it deems necessary for the purpose of stating all the facts relevant to the procedure.

4.2 Right to Search Apartment, Business Premises and Seizure of Property

If there is a reasonable doubt that any of the parties to the proceedings or a third person, holds in possession documents or other instruments relevant to the establishing of the material truth in the proceedings, the Agency shall request the competent Court of Misdemeanour in Zagreb to issue a written warrant ordering the search of particular persons, apartments, or business premises, and the seizure of objects and documents in possession of the undertakings concerned or a third person[7].

The Agency can also request the competent r Court of Misdemeanour in Zagreb to issue a written warrant referred to in paragraph (1) of this Article also in cases when a party to the proceedings or a third person fails to act in accordance with the request of the Agency[8].

4.3 Right of Access to Files

Parties to the proceedings carried out before the Agency have the right of access to case files and are allowed by the Agency to make a photocopy of the file or of single documents at their own expense[9].

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6 see Art. 48 of the CCA

7 Art. 49 of the CCA

8 As referred in the Art. 37 item 8 and 9, and Article 48 of the CCA.

9 Art. 50 of the CCA

Without prejudice of the stated above, drafts of the decisions of the Agency, official statements and protocols from the sessions of the Council, internal instructions and notes on the case, correspondence and information exchanged with the European Commission or other authorities of the European Communities, as well as other documents considered an official secret in the sense of the CCA or other legal statutes, may neither be inspected nor photocopied.

4.4 Secrecy obligation

The president and the members of the Council, as well as the employees of the Agency, are obliged to keen and not to disclose any information classified as an official secret, irrespective of the way they came to know it, and the obligation of official secrecy shall also continue to be in effect after the expiry of their engagement with the Agency[10].

Under the term "official secret" are considered, in particular the following:

- all which is defined to be an official secret by law or other regulations;
- all which is defined to be an official or a business secret on the basis of bylaw regulations or other regulations of the undertakings,
- all that undertakings, or natural persons who are parties in the respective proceeding, have defined as a business or an official secret;
- all correspondence with the European Commission and other authorities of the European Communities.

Without prejudice of the above, data and documents which have been made accessible to the general public in any way, or decisions of managing or administrative bodies of the undertakings published to be available to the general public pursuant to particular regulations, shall not be considered an official secret.

4.5 Keeping Files and Documentation

Files and documentation of the undertakings received by the Agency in the course of the proceedings or those elaborated by the Agency itself in order to carry out the proceedings, shall be kept in the archives of the Agency in accordance with the relevant rules on keeping of archive materials.[11]

4.6 Oral Hearing

It is obligatory to hold the oral hearing in all cases with parties of contrary interests. The oral hearing is open to public[12].

The Agency is entitled to conduct the oral hearing in any case when it deems useful, but, if the Agency, after it has received the written statement of the party against which it has started the proceedings, decides that the facts of the case between the parties is beyond dispute and that there are no other hindrances preventing the decision to be made, and if it is in the public interest, the Agency may render a decision without calling for the oral hearing.

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10 art. 51 of the CCA

11 art. 52 of the CCA

12 art. 54 of the CCA

If any of the summoned parties, or their attorneys, fails to appear at the first hearing in the proceedings, the Agency shall, as a rule, postpone the oral hearing and call for a new one.

If any of the summoned parties to the proceedings fail to appear at the following hearing, convened in accordance with the provision laid down in the CCA, the Agency shall not convene another oral hearing, but shall make its decision on the basis of its own findings, data and information.

5. Interim Measures

The Agency may decide upon interim measures where it deems that particular activities of restriction, prevention or distortion of competition, within the meaning of this Act, represent a risk by creating a direct restraining influence on undertakings, or on particular sectors of the economy or consumers' interests[13].

In its decision on interim the Agency would suspend all actions, and order the fulfilling of particular conditions or impose other measures reasonably necessary to eliminate prevention, restriction or distortion of competition, as well as the duration of the relevant measure, which as a rule, may not exceed the period of three months.

6. Time Limits for Decision-Making

The Agency enacts decisions within the time frame of three (3) months following the day of the resolution on institution of the proceedings[14], having in mind that the entire proceeding shall be closed within four (4) months following the day of the starting of the proceeding. However, the Agency may also extend the time limit for the decision making for a subsequent period of three i.e. four months in cases where it is necessary to carry out additional expertise or analyses defining the state of facts and examination of the evidence, or where delicate industries or markets are concerned, about which the Agency has the obligation to inform the parties to the proceedings before the expiry of the prescribed time limits.

6.1 Types of the Agency's Decisions, as Regards their Meritum

In relation of the assessment of agreements among entrepreneurs, the Agency[15] is, inter alia, entitled to render following decisions:

- whereas the assessment of the compliance of the agreement in case with the provisions of the CCA is made;
- whereas the exemption of an particular agreement pursuant to CCA is granted;
- whereas the interim measures are ordered, for the purposes of reinstating the fair competition conditions on the market;
- whereas it annuls, cancels or amends the previously made decision by means of a separate decision;

13 see art. 55 of the CCA

14 see art. 56 of the CCA

15 see Art. 57 of the CCA

- whereas it determines particular measures to be taken in order to restore efficient competition in cases of prohibited concentrations,

- whereas it renders other kinds of decisions, whatsoever, which serve as the legal basis for various kinds of procedural orders in a course of the proceeding.

6.2 Court Protection

Article 58

> Against the decisions of the Agency referred to in previous section of this paper, no appeal is permitted, for they are final as regards their *litis* pendation before the administrative authorities, but the challenging party may file an administrative dispute before the Administrative Court of the Republic of Croatia[16].

6.3 Publication

Decisions, i.e. verdicts that Agency brings are published in the Official Gazette[17] *Narodne novine*. Also the rulings and other kinds of decisions rendered from the side of the Administrative Court in matters concerning claims against the Agency's decisions are published in the Official Gazette. Frequently Agency publishes some of its decisions and/or expert opinions which might be of greater interest for wider public on its website (*www.aztn.com).*

However, the data which are contained in the respective acts of the Agency are treated as official secret, [18] and therefore are never published without prior permission of the parties.

7. Penalties

7.1 Initiation of Proceedings before the Court

Based on the condemnatory ruling of the Agency, whereas as a result of the proceeding before the Council, the infringement of the Competition Act was found, the Agency issues a claim, which is served to the Court of Misdemeanour, for starting the proceeding against the undertaking and/or its management. [19]. The result of said proceeding would be, if the Court established the violation as it was proposed by the Agency's claim, financial fine for the party against which the proceeding was led.

7.2 Severe Violations of the Provisions of this Act

The undertaking – legal or natural person, shall be fined at the most 10% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed[20], if it:

- concludes a prohibited agreement or participates in any other way in the agreement that caused prevention, restriction or distortion of competition in the sense of Article 9 of the CCA;

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16 see Art. 58 of the CCA

17 see Art. 59 of the CCA

18 in the sense of Article 51 of the CCA

19 Art. 60 of the CCA

20 see Art. 61 of the CCA

- abuses a dominant position (Article 16 of the CCA);
- participates in prohibited concentration of undertakings (Art. 18 of the CCA); or
- fails to comply with the decision made by the Agency in which it orders some obligatory interim or final measures (Article 57 items 1 to 7of the CCA).

For the above listed infringements referred the management of the undertaking – legal person concerned can also be fined ranging from cca 10.000 through 40.000 Euro.

7.3 Fines for Other Violations of the Provisions of this Act

The undertaking – legal or natural person shall be fined at the most with 1% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed[21], if it:

- submits to the Agency incorrect or untrue information which may influence the rendering of the decision on individual exemption of the agreement (Article 14 paragraph (1));
- fails to notify the Agency on the proposed concentration (Article 22);
- submits to the Agency incorrect or untrue information in the concentration assessment proceedings (Article 25, Article 26 paragraph (1) item 1);
- fails to act according to the request of the Agency (Article 47 paragraph (3), Article 48 paragraph (1) and (3);
- fails to act according to the decision of the Agency (Article 57, item 8);
- fails to act according to the written order of the misdemeanour court (Article 49).

For the infringements listed in paragraph above the responsible person of the undertaking – legal person concerned can also be fined in an amount ranging from 2,000.00 to 10,000.00 Euro

7.4 Fines for Persons that are not Parties to the Proceedings

The undertaking - legal person that is not a party to the proceedings before the Agency - shall be fined for the infringement committed an amount ranging from 2 000 to 10 000.00 Euro if it fails to act upon the request of the Agency[22]

For the infringement referred to in paragraph above, the responsible persons of the legal person in question can also be fined an amount ranging from 1 000 to 2 000 Euro.

Furthermore, the undertaking and/or natural person that is not a party to the proceedings before the Agency and that fails to act according to the request of the Agency can be fined for the minor infringements in amounts up to 2 000 Euro. [23]

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21 see Art. 62 of the CCA

22 see Art. 63 of the CCA; in connection with Article 37 items 8 and 9, Article 48 paragraph (1) items 3 and 4 and paragraph (3).

23 Article 37 items 8 and 9 and Article 48 paragraph (1) items 3 and 4 and paragraph (3) of the CCA.

8. Statutory Limitation

The minor offence proceedings instituted upon the violation of the provisions of the Competition Act may not be started after three years from the day when the infringement was committed[24].

The limitation period referred to in paragraph above shall be interrupted by any action of the competent body undertaken for the purpose of persecuting the offender. After any interruption, the limitation period shall be restarted; however, the minor offence proceedings may in no case be conducted after the expiry of the double time limit laid down in paragraph above.

Furthermore, the imposed penalties may not be enforced if three years have passed from the date when the decision on the violation became legally valid.

However, the statutory limitation for the enforcement of the penalty shall be interrupted by any action of the competent body that is undertaken for the purpose of the enforcement. After any interruption, the limitation period concerned shall be restarted; however, the penalty may not be enforced after the expiry of the double time originally needed for statutory limitation, i.e. six (6) years.

9. Concluding Remarks; Cooperation with the Courts

As final words in finishing of this paper it is certainly worth to stress out that Agency cooperates with courts, as well as other administrative authorities, in resolving the cases relating to prevention, restriction or distortion of competition in the market of the Republic of Croatia[25].

[24] See Art. 64. of the CCA

[25] see Art. 65 of the CCA

CZECH REPUBLIC

1. Introduction to the Czech cartel law

Cartel agreements rank among the most serious infringements of competition rules, having a negative impact both on competition in the market and on consumers. By raising prices and restricting supply, which are obvious consequences of collusion, goods and services are made even unavailable to some purchasers and unnecessarily expensive for the others. Competition authorities worldwide therefore impose harsh sanctions on such misconduct. The highest fines ever imposed by the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as "the Office") took place in price-fixing cartel agreement cases, e.g. fuel distributing companies case, building savings companies case, bakeries case etc.

The Czech Act on the Protection of Competition (Act No. 143/2001 Coll., as amended; hereinafter referred to as "the Act") clearly states in its Article 3 that collusion of at least potential detrimental effect on competition in the relevant market shall be prohibited. If the Office finds that an agreement with at least potential negative impact on the market has been concluded, it declares such fact in a decision, and prohibits performance of the agreement for the future.

Among cartel agreements, the Act also distinguishes the so called "hard-core" cartels, similarly to the European Community legislation and case law. The Act provides legal framework recognising three main types of the most harmful anti-competitive conduct:

Horizontal agreements that contain provisions on

- direct or indirect fixing of prices, rebates or other payments;
- limitation or control of production or sales;
- division of market or sources of supply.

The competition law theory usually adds to the category of hardcore agreements also the so called *bid rigging* collusive practices, occurring in the area of public procurement.

Hard-core cartel agreements, directly pointed out by the Act as having extremely harmful impact on the market, are explicitly deprived of *de minimis* exemption from the prohibition of collusive agreements. Such arrangements are automatically considered unlawful and therefore always forbidden. By the definition, hard-core cartel agreements shall be deemed to mean such a conduct that causes competition distortion (or threatens to cause it) by its very nature, that is detrimental effects are always inherent to the sole existence of such agreements. Mere existence of agreements complying with the characteristics attributed to hard-core collusions is sufficient so that the Office may declare their inconsistency with the rule of law.

2. Relation between the type of infringement and categories of evidence available

The concept of "cartel agreements" /agreements distorting competition/ used in the Czech antitrust law covers all the three basic forms or categories of anti-competitive arrangements between undertakings, which are more or less prone to producing direct or indirect evidence:

- Agreements in the narrow sense of a word - a prohibited agreement itself, constituting direct evidence, may be obtained, which then creates basis for further proceeding by the Office; in the Office's practice, few cartel procedures were initiated when only indirect evidence on written or oral prohibited agreement was available

- Decisions by associations of undertakings, usually in the form of a code or set of rules or recommendations drawn up by such associations for their members as more or less binding, are examined upon gaining the relevant document, which then would present direct evidence on anti-competitive behaviour.

- Other arrangements between competitors that express their common interests Concerted practices - on the other hand, are usually decided by the Office on the basis of circumstantial evidence since no actual agreement exists by the nature of such competition distorting conduct (concerted practices are not based upon legal acts executed by the individual participants, which distinguishes them from agreements in the narrow sense of a word).

As regards approach of the Office towards the assessment of the three basic above-mentioned forms of anti-competitive arrangements, the question arises whether they may be treated as having similar or the same effect on competition in terms of the intensity of the violation of the law. As the Czech legal doctrine, similarly to the EC legislation and case law, uses the concept of a "cartel agreement" as comprising all the three mentioned forms and provides rules relevant for such anti-competitive conduct as a whole, no matter in which way it is performed, the form of such an arrangement proves irrelevant in this respect. Division of individual cartel types (price-fixing, market-dividing etc.) then rather aspires to classify collusive arrangements according to their impact on the market. However, the individual cartel forms must be approached differently as regards gathering evidence and assessment of the aspects of a case.

Concerning the relation of intensity of engagement in a collusive arrangement with the type of evidence that is likely to be found, two possible "scenarios" usually come to question in the Office´s practice:

- the companies in breach of competition law either don't take their conduct for indisputably infringing the rules, and see no need to hide or destroy potential evidence

- or they do, in which case they would probably have discussed the illegal nature of it, and the need to avoid detection by competition rules enforcers

The situation where the undertakings do not consider their conduct unlawful would often arise in case of various "general" or "framework" business agreements, drawn up by the undertakings themselves or by their consultative bodies or associations and intended to set rules for running the business, define mutual rights and duties, and improve the services provided to customers. These agreements often contain prohibited price fixing or other provisions though, and would have probably been destroyed if the competitor held them for clearly forbidden. In such cases the evidence on the conduct is usually clear enough for finding existence of a prohibited agreement, and possible further procedure consists in arguing whether such provisions are in compliance with the Act or not.

In the latter case it is most likely that any possible evidence on collusion would have been concealed or destroyed. This can be illustrated by the following sentence that was revealed during local investigation by the Office in an undertaking's correspondence (for further details see the case study below): *"PS. After I send off the e-mail, I'm going to erase it, as the Devil and the Antimonopoly Office never sleep."*

3. Occurrence of the individual types of evidence in the Office´s practice

In this context it should be mentioned that almost all the Office´s decisions based on direct evidence fall within the first category, as it is shown by the following statistics:

- Between 2001 and 2004, practically 100 % of all cartel proceedings relating to cartel agreements in the narrow sense of a word (i.e. written agreements), or decisions by associations of undertakings, were revealed upon obtaining such an agreement, usually publicly available (above-mentioned "general" or "framework" agreement, code or set of rules drawn up by associations of undertakings etc.).

- In the same period of time, more than 80 % of cartel proceedings closed by a second instance decision were initiated by the Office on the basis of such an agreement, only few then were conducted when only indirect evidence was in the hands of the officers. And only in one case of this amount a cartel agreement in the narrow sense of a word was proved by circumstantial evidence. However, it must be emphasised that in the practice of the Office most cases winning the highest sanctions and attracting the biggest attention of the public were just the ones, where only indirect evidence was acquired (e.g. The Fuel Distributors, The Building Savings Companies…).

4. Classification of evidence in the Office´s practice

The Czech Antitrust Office applies the classical concepts of direct and non direct (circumstantial) evidence in a case. Both of the individual types of evidence are usually found in one or more of the following forms:

- Documentary /paper or electronic version:
  - business correspondence (top management);
  - minutes of business dealings, consultations etc. ;
  - preparatory documents for
- Verbal (testimony of a witness)

4.1 Direct evidence

Direct or so-called best evidence to prove a cartel agreement is typically a document containing written anti-competitive arrangement, actually the agreement itself or a memorandum written to report on business dealings or consultations during which an agreement had been concluded between competitors. In the case that the Office acquires a document that would beyond all questions prove that forbidden type of contract had been concluded, there's no need to supply other (circumstantial) evidence.

Testimony of a witness - participant in business dealings or consultations during which collusion had been agreed may be considered a direct evidence as well; such proof has to be supported by another evidence though (e.g. testimony of the other participants in business dealings/consultations or minutes of the dealings).

Confirmed testimony of a witness representing an undertaking that had been contacted by their competitor/competitors in order to join cartel agreement may also be used as direct evidence.

Other types of evidence on collusion are considered non-direct in the practice of the Office.

4.2 Non direct (circumstantial) evidence

The rather rare procedures by the Office based mainly (or solely) on circumstantial evidence resulted (except one case) in decisions on performance of prohibited concerted practices. These practices eliminate competition among the undertakings by co-operation that takes the place of independent and competitive behaviour, exclude uncertainty of future business conduct of competitors, and are reached through direct and indirect contacts. This concept doesn't assume existence of an agreement; the factual behaviour of the undertakings in the market is examined instead, that would show signs of prohibited interaction beyond reasonable doubts.

Common attitude to the assessment of circumstantial evidence is that such a set of information on undertaking's behaviour must be gathered that would exclude any interpretation of the evidence but that stating existence of a collusive arrangement. In other words, there must be no doubt the conduct of undertakings in question is illegal, non-justifiable and that it is resulting from performance of prohibited type of agreement.

Therefore in proceedings lacking direct evidence such as an agreement on collusion or positive testimony of an eye-witness, it is necessary to gather all available pieces of non direct evidence that would form a sufficient body of evidence for issuing a decision able to stand possible further appellate procedure before a court.

Non direct evidence – examples:

- hand-written notes;
- correspondence and email traffic between competitors;
- minutes of business dealings or negotiation;
- testimony of a witness (not participant in an agreement);
- telephone logs;
- travel records;
- other anonymous denunciations etc.

For detailed illustration of the individual types of evidence dealt with in the practice of the Office see the case study below.

5. Supportive types of indirect evidence

The collected indirect proofs often require further reasoning by means of supportive indirect evidence on collusion in a case. Assembling all the aspects and possible views on the case then resembles putting together small pieces of a mosaic. Following main types of supportive evidence are distinguished in the practice of the Office:

5.1 Economic evidence

Economic analysis enables the Office to describe behaviour of the undertakings by means of economic terms, methods and simplifications. The purpose of economic evidence is to distinguish whether mere parallel conduct of undertakings occurred in the relevant market or whether there's a sign of competition distortion. Possible alternative explanation (e.g. increasing prices of inputs) for the competitors' behaviour must be excluded reliably.

5.2 Information about collusion facilitating practices/circumstances

Certain evidential value may be attributed to practices or circumstances that facilitate cartel formation, or make it easier for competitors to reach or sustain an agreement, especially communication of competitors through consultative bodies or sector chambers (associations of undertakings). Typically, information would be exchanged beyond the authorisation of an association (e.g. the association requires its members to provide it with given type of information regularly, which complies with relevant rules). The members may then co-ordinate the information exchange and provide additional information.

5.3 Characteristics of a market predisposed to collusion

Market situation showing following features may be regarded as predisposed to collusion:

- Existence of entry barriers (requirements for licenses etc.);
- Market saturation and low product or technology innovation;
- Symmetry among the main competitors (relating to capacity, costs, market shares);
- Structural links, co-operation arrangements (personal and property interests);
- Market transparency for the competitors;
- Product homogeneity;
- Slow increase in demand and low demand elasticity;
- Multi-market contacts.

5.4 Possible sources of evidence

When collecting evidence, the Office acts on the authority granted to it by the Act, according to which the Office is authorised to request that undertakings and, unless a special legal regulation states otherwise, the bodies of public administration provide it with documents and information the Office needs for its activities, and to ascertain their completeness, truthfulness and correctness. In proceedings conducted by the Office pursuant to the Act, undertakings shall be obliged to submit to investigation by the Office.

Before formal steps are taken, information has to be gathered that would make sure that there is evidence on violation of the law sufficient for taking further action. First of all, information from sources other than relevant undertaking/undertakings is collected in order to obtain as much objective and impartial information as possible. There are many information sources serving this purpose such as mass media, Internet etc. Materials issued by associations or councils of undertakings represent important and reliable source of precise and up-to-date information. Pursuant to the Czech law, the Office may use evidence once

already acquired, after proper updating and verification of it (the use of evidence isn't limited to the case for which it was gathered).

If there is reasonable assumption of competition rules infringement but not enough affirmative evidence in a case, the Office initiates administrative action formally and carries out simultaneous local investigations – so called dawn raids - to collect further information from the alleged competition rules violators. These inspection procedures bring significant advantage to the Office in the form of element of surprise that prevent frustrating the proceedings by concealing or destruction of evidence on the collusion.

Leniency programs represent other source of evidence to which the national competition authorities gradually turn more and more often, as the cartel agreements, secret by their nature, become more and more sophisticated. Such a program provides particular conditions allowing the fine otherwise imposed on companies in breach of competition law to be remitted or substantially reduced. This offers undertakings engaged in collusive arrangement quite stimulating incentive to co-operate with the Office in providing information on their and the other cartel members´ behaviour. Accordingly, the Czech leniency program states that: "The Program is designed for those undertakings that would like to terminate their further participation in cartel, but so far have not dared to do so because of their fear of imposition of a substantial fine."

So-called whistle-blowers (often dismissed or dissatisfied employees) may provide useful information on the undertaking's behaviour as well. It may therefore prove fruitful to request the investigated undertakings for providing lists of employees dismissed in recent months.

Co-operation with sector supervision or regulatory authorities can be very helpful in gaining information on undertakings and their behaviour in the market, relevant market structure, other than competition rules that are to be observed by the undertakings. The Office may in this way obtain better overall picture of the market situation. The Office would typically ask relevant supervision or regulatory authority to prepare an expertise that would subsequently be applied to a case.

According to the Office´s practice it is advisable to investigate anonymous denunciations as well (see the case study below).

6. Cartel prosecution in the Czech Republic

Nowadays, neither legal entities nor natural persons are prosecuted criminally for any competition rules violation under the Act. However, the Czech Penal Code provides certain types of acquisitive offences that may be applied to possible breach of the law, e.g. provisions on tender manipulating (agreements on bid rigging).

The Act holds liable undertakings violating its provisions in administrative not criminal proceedings, in which the Office may impose fines of up to CZK 10 millions or up to 10% of the net turnover achieved in the preceding calendar year. Both intentional and negligent infringements of the prohibitions stipulated in the Act are subject to the sanctions. When the Office establishes an infringement of the prohibitions stipulated by the Act, it may decide, according to the subject matter of the case, to impose remedial measures as well.

When deciding on the amount of the fine, the Office shall take into account in particular the gravity, possible recurrence and duration of the infringement of the Act. When assessing the gravity of the infringement, account must be taken of its nature, its actual impact and the size of the relevant geographic market. Horizontal restrictions such as price-fixing and market-sharing cartels are both in jurisprudence and in the practice of the Czech competition authorities regarded very serious infringements that are likely to be fined with the highest amounts possible. Again, the form of the breach of the law is not determining

for the total amount of the fine; the degree of wrongfulness of such a breach is what matters. The need of sufficiently deterrent effect is also pursued by the Office in setting harsh fines for cartel formation.

6.1 Case study – Concerted Practices of Bakery Producers

An example of an agreement distorting competition, where the Office´s decision was based solely upon indirect evidence, follows:

The three most important producers of bakery products operating in the Czech Republic were held liable for performing concerted practices in the relevant market, specifically for fixing of prices of their products, by which they engaged in horizontal hard-core cartel. The bakeries co-operated particularly in the way of the exchange of information, which normally would have been be a subject of their business secret or that of their partners. They shared information on their business strategy towards their business partners - purchasers (supermarket chains), which enabled them to increase their prices simultaneously, and to retain their market shares without a threat of possible reprisal from their competitors.

Unannounced inspections (dawn raids) were conducted in the premises of all the three undertakings. As direct evidence, such as an agreement on collusion or positive testimony of an eye-witness, was lacking, other types of evidence must have been applied.

Correspondence (mostly e-mail) between the competitors was detained during the dawn raids that subsequently formed the major part of the evidence in the case, confirming anti-competitive character of the competitors' contacts. An E-mail written by the director of A company, sent to the director of B company, and forwarded to the director of C company, containing price analysis of their major purchaser (a supermarket chain), and common price strategy towards this purchaser, belongs to the most important documents acquired in the proceedings. A request of a member of a company middle management directed to the director of the company for the instructions on the dealings with the competitors concerning their price strategy may be mentioned as well.

Other type of evidence collected during the dawn raid in the companies' premises is represented by minutes of top management meeting held by a company, comprising price information on B Company, not publicly available at the time the meeting was held, which provably were communicated to a company by their competitor in advance.

During the administrative proceedings, time and place of two of the competitors' secret meetings were communicated to the Office anonymously. The Office's employees were charged with examining the information, which turned out to be truthful. The meeting indeed took place, and photographs were taken of both of the parties' cars parked in front of a building where the meeting was held (license plates were eventually identified as belonging to both of the competitors). Even though less significant indirect proof was obtained, it was still useful for completing the "mosaic" of evidence.

Testimony of witnesses (supermarket chains' representatives) supported economic evidence on the anti-competitive conduct of the bakeries, concerning the non-substitutability of the main suppliers of bakery products that constituted their huge bargaining power, actually the control over the market, which the minor bakery producers were not able to compete, and the coordinated approach to their business partners. The intended price increase was announced to the purchasers of the undertakings on the same day, with similar or the same words, arguments and conditions, and the amounts by which were the price increased.

Personal and property interests also played a big part in the competitors' position in the market: the A and B companies were co-owners of a company distributing a part of their production, and B and C company were vertically connected to the producers of flour that strengthened their position in the market.

Sufficient evidence was collected that supported the Office's view that the situation in the relevant market was showing competition distortion rather than a mere parallel business conduct of the competitors. The Office found that prohibited practices were accomplished in the market, declared this in a decision, imposed fines on the undertakings amounting to CZK 120 million, and prohibited performance of the practices for the future. Aggravating factors (hard-core intentional competition rules infringement, strong position of the undertakings in the market due to their vertical integration, significant market shares, substantial damage incurred by the consumers through the cartel performance), as well as sufficiently deterrent effect were taken into account by the Office when setting the fines in the case.

ESTONIA

In Estonia both horizontal and vertical anticompetitive cooperation (agreements between undertakings, concerted practices and decisions by associations of undertakings) are prohibited under the Competition Law. The Competition Law neither define nor even mention hard core cartels – all forms of anticompetitive co-operation are treated alike.

According to Penal Code these two types of collusion are regarded as criminal offences and the Penal Code does not differentiate between the two either. Therefore, any kind of anticompetitive co-operation is criminally punishable. Both undertakings (legal person) and members of the management or of the supervisory board of a legal person will be liable and may be punished for the committed crime.

As referred to above, Estonian legislation does not provide any definition of the hard-core cartels but in practice the distinction is drawn between hard core cartels, other cartel activities and vertical anticompetitive activities. In Estonian Competition Law, the above-mentioned restrictive anticompetitive cooperation is seen exactly the same way as in the European Union competition law (Article 81 of the EC Treaty).

As any kind of anticompetitive cooperation is prohibited, there is no requirement to prove an explicit agreement between the parties. Prohibited cooperation may manifest itself in any form, even tacit collusion. Still, it is highly unlikely that tacit collusion could actually be criminally punished because of the high standard of proof which comes with criminal procedure.

In order to impose criminal sanctions it is not important to show the actual effect of the restrictive practices – it is presumed that the anticompetitive co-operation will produce negative effects on competition. Sanctions for competition related crimes are not higher than in cases of other crimes – the rules are uniform throughout all of the Penal Code. The actual punishment depends on the circumstances of the case (including mitigating and aggravating circumstances). Of course, if the restrictive practice actually causes negative effects it could influence the sanctions depending on the effects.

Although it is possible to prove anticompetitive co-operation without different evidence in the administrative proceedings where part of the burden of proof is vested on the person whose activities are under investigation, the standard of proof in criminal cases is somewhat higher. Although in certain circumstances the indirect evidence could theoretically be sufficient enough to prosecute a person, for now there is no case-law to actually confirm it.

The hard core cartels are especially harmful to competition, so, in our view they have to be prosecuted as strictly as possible. In Estonia there is no need for the existence of explicit agreement between the parties to prove a cartel but in case of collusion not involving an agreement it is harder to find clear direct evidence and therefore we will proceed more carefully in order not to impose unjust sanctions on persons. This does not weaken the fight against cartels but enables stability and legal certainty.

We find the leniency programs very helpful in discovering the cartels, especially the secret cartels. We already have the necessary legal framework for leniency in the Criminal Procedure Code and we are currently working on the detailed conditions for the application of leniency. As soon as the detailed conditions are ready, they will be enforced by the Chief Public Prosecutor.

EUROPEAN COMMISSION

1. Introduction

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

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

2. The definition of a cartel

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

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

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

Second, the Commission's guidelines on the method of setting fines[4] set three categories of infringements for the purposes of calculating fines: minor, serious and very serious infringements. Hard core cartels would be seen as very serious infringements, which, following the guidelines "will generally

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

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

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

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

be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market".

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

3. Agreements and concerted practices

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

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

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

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

Conduct may as amount to a **concerted practice** even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour[8]. Furthermore, the process of negotiation

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

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

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

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

and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also be characterised as a concerted practice.

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

Finally in cases of a **complex infringement** over time, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The anticompetitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. It would be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time[10].

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

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

4. Administrative nature of the Commission's proceedings

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

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

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

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

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

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

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

5. Direct and indirect evidence

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

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

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

It has become a common practice to provide corporate statements in the framework of cooperation under the Commission Leniency Notice. These corporate statements often include recollections of

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

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

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

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

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

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

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

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

employees involved in the infringement[22]. Finally oral evidence can be obtained during the oral hearings under Art. 27 of Regulation 1/2003.

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

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

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

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

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

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

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

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

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

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

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

The notion of **indirect or circumstantial evidence** in contrast comprises of evidence which is appropriate to corroborate the proof of the existence of a cartel by way of deduction, common sense, economic analysis or logical inference from other facts which are demonstrated. For example, the Commission often finds evidence on the precise rates of prices increases implemented by the companies suspected having participating in a cartel. Parallelism of behaviour for instance in price increases is only an indication and does not in itself constitute evidence of collusion and this indication can only be appraised in the light of the anticompetitive object that the parallel behaviour is supposed to have[29]. It will be necessary, therefore, to uncover other elements of proof or indications from which the existence of collusion may be inferred.

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

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

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

In the Suiker Unie case the Advocate General pointed out that "the evidence of concerted practice may, in most cases, only consist of evidence or presumptions which the investigations of the Commission have brought to light. It is the combination of these presumptions - provided they are strong, precise and

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

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

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

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

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

relevant - which more often than not alone enables the existence of a concerted action corroborated by the actual conduct of the undertakings concerned to be proved [...]"[33].

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

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

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

Most essential for the use of indirect evidence is that it always has to be seen in conjunction with all the other direct and indirect evidence available in the concrete case. The picture of a cartel as a whole emerging in a case can be reason enough to interpret one piece of evidence in one way or another. Accordingly the CFI stated in the PVC II case: "*Moreover, items of evidence should be regarded not in isolation but in their entirety [...] and individual items of evidence cannot be divorced from their context.*[36]" This applies with regard to both the pieces of direct and indirect evidence.

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

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

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

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

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

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

manifestations of the agreement is immaterial. The fact that the various actions form part of an overall plan owing to their identical object, on the other hand, is decisive".[37]

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

FRANCE

Cette note a comme point de départ les indications données par le Secrétariat de l'OCDE à chaque autorité de concurrence nationale sous forme de « guidelines » pour la préparation des contributions par pays pour cette table ronde. Cette note pose la problématique suivante : Comment établir l'existence d'un cartel alors que l'autorité en question ne dispose pas de preuves directes pour le faire ?

1. Le cadre des débats sur les ententes en l'absence de preuves directes

D'après la note du Secrétariat, la réponse est n'est pas évidente surtout dans la perspective d'autorités de concurrence de pays en développement qui sont en phase de montée en puissance de leurs moyens d'investigations et avec la formation de leurs enquêteurs à développer, notamment en raison de la diversité des méthodes utilisées dans les différents pays s'agissant du traitement des cartels. Pour pouvoir apporter des éléments de réponse à la problématique posée par l'OCDE, il convient tout d'abord de s'interroger sur les questions suivantes :

- Le traitement des cartels se différencie des autres pratiques anticoncurrentielles, notamment des ententes horizontales ?

- Si oui, existe-il une définition explicite, ou pour le moins implicite d'un cartel ?

- Et s'il en existe, cette définition repose-t-elle ou non sur la présence d'un accord explicite entre les opérateurs faisant parties du cartel ?

Force est de constater que les cartels sont généralement considérés, notamment selon le rapport de l'OCDE sur la question, comme des pratiques anticoncurrentielles les plus graves faussant le libre jeu de la concurrence sur un marché donné. La détection d'un cartel revêt, donc, une importance particulière tant pour le fonctionnement et le bien être du marché que du point de vue économique. Encore faut-il que l'autorité de concurrence s'appuie sur des éléments de preuve suffisants pour pouvoir les détecter. Or, le problème qui se pose en la matière, c'est que les entreprises sont de plus en plus informées et que de ce fait il y a de moins en moins de preuves directes à la disposition des autorités de concurrence. C'est notamment ce cas de figure qui est mis en question dans le cadre de la problématique posée par le Secrétariat de l'OCDE dans le cadre de cette table ronde consacrée aux cartels. Cette situation est d'autant plus aggravée par le fait que le système dit de la politique de clémence n'est pas mise en place dans toutes les juridictions. Cette absence est notamment dû au fait que cette politique de clémence nécessite l'existence d'une pratique juridictionnelle et d'une expérience de mise en œuvre du droit de la concurrence confirmées.

Pour le Secrétariat, les différents types de preuves qui peuvent être utilisés afin d'établir un cartel sont les suivants :

- *Des preuves directes :* un document qui contient les éléments essentiels de la collusion, ou encore un e-mail les décrivant, ou un document écrit émanant d'une entreprise partie au cartel ;

- *Des preuves indirectes :* un enregistrement téléphonique, ou des correspondances entre les entreprises concernées, des e-mails, ou encore des documents prouvant les rencontres entre les dirigeants des sociétés concernées ;

- Des pratiques facilitant l'établissement d'un cartel et assurant la pérennité de celui-ci : les échanges d'informations, la police de prix ;

- *Des preuves « économiques » :* les comportements parallèles notamment en matière de prix, qui ne s'expliquent pas par le fonctionnement et par la seule structure du marché en question.

2. Un cas récent traité par le Conseil de la concurrence dans le marché des transports publics urbain de voyageurs

Le Conseil de la concurrence a notamment eu l'occasion de se prononcer sur de telles questions dans le cadre de sa décision du 5 juillet 2005[1] relative au marché du transport public urbain de voyageurs dans laquelle il a sanctionné les sociétés Kéolis, Connex et Transdev pour s'être concertées, entre 1996 et 1998, au niveau national, en vue de se répartir les marchés des transports lancés par les collectivités publiques.

Il a été constaté que les dirigeants de ces entreprises de transport de dimension nationale et internationale ont constitué **un cartel** visant à se répartir le marché national du transport public urbain de voyageurs. La règle de conduite adoptée par le cartel consistait en ce que les trois entreprises en cause ne se faisaient pas concurrence lorsqu'un marché détenu par l'une d'entre elles était soumis à renouvellement.

Sous l'égide du cartel, les entreprises pouvaient aussi s'échanger des marchés lorsqu'elles trouvaient à cet échange un avantage objectif pour leurs propres intérêts ou encore se répartir le marché par le moyen de la sous-traitance.

Ces pratiques anticoncurrentielles ont permis à ces entreprises d'imposer leur prix aux collectivités territoriales, lesquelles ont été, de ce fait, amenées à supporter dans le cadre de la concession de leurs réseaux de transport, des charges plus élevées que celles qui auraient résulté d'un fonctionnement concurrentiel de ces marchés.

La décision du 5 juillet 2005, en dehors du fait qu'elle a permis au Conseil de prononcer des sanctions pécuniaires maximum prévues par le code de commerce - dans sa rédaction antérieure à la loi NRE – a conduit ce dernier à préciser les éléments caractéristiques d'un cartel. L'analyse de cette décision montre qu'un cartel est surtout caractérisé par sa stabilité et par sa pérennité. A cet égard, le Conseil constate dans cette décision que *« …la surveillance active du marché allant jusqu'à l'étude des représailles possibles a rendu l'entente stable et pérenne, ce qui lui confère les caractéristiques d'un cartel ».*

En l'absence de preuves directes, le Conseil a par ailleurs utilisé ***la technique « classique » du faisceau d'indices graves précis et concordants*** pour pouvoir établir l'existence du cartel en question. Le Conseil s'est appuyé notamment sur des notes manuscrites des dirigeants des sociétés afin de démontrer les rencontres de ceux-ci. De même, plusieurs notes internes ont permis au Conseil d'établir que les entreprises coordonnaient leurs comportements au plan local et au plan national et qu'il y avait bien une surveillance du marché par la possibilité d'exercer des représailles à l'encontre de celui qui ne respecte pas la règle de *« chacun chez soi ».*

L'approche du Conseil dans cette décision a été de dire que les collusions sur des marchés locaux entre les entreprises concernées n'étaient que le reflet d'une entente plus globale nationale, présentant les caractères de stabilité et de pérennité propres au cartel. Un tel cartel, d'envergure nationale possède une dimension qui dépasse le cadre national et possède un impact à l'échelon régional lorsque les marchés nationaux sont intégrés à des ensembles géographiques plus vastes, comme c'est le cas dans l'Union

[1] Décision n° 05-D-38 du 5 juillet 2005 relative à des pratiques mises en œuvre sur le marché du transport public urbain de voyageurs

Européenne. Par définition, cette entente est donc susceptible d'affecter sensiblement le commerce intracommunautaire par sa dimension et sa vocation même : empêcher les concurrents, qu'ils soient nationaux ou étrangers de remporter les marchés.

Cette gravité est encore accrue lorsque la pratique est mise en œuvre par des groupes parmi les plus renommés des groupes français, en raison de la malheureuse valeur d'exemple qu'ils fournissent. Elle légitime qu'une sanction exemplaire soit infligée aux entreprises en cause.

Dans cette affaire, le Conseil de la concurrence a décidé en conséquence d'infliger **les sanctions pécuniaires maximum** prévues par le code de commerce - dans sa rédaction antérieure à la loi NRE, applicable à l'espèce compte tenu de l'ancienneté des faits - soit 5% du Chiffre d'affaires national.

JAMAICA

1. Introduction

These notes fully embrace the widely held view that "hard core cartels are the most egregious violations of competition law". It is also true to say that developing countries are least able to afford to pay the high prices which are generated by cartels operating in many industries; and sadly it is these same countries that find it most difficult to identify, investigate and prosecute cartel activity.

In Jamaica's case, the main challenges may be categorised under the following headings:

- legal framework;
- size of the economy;
- human and financial limitations.

2. Challenges

2.1 Legal Framework

- Of note is the fact that the enabling statute, The Fair Competition Act, 1993 (The Act/The FCA) does not contain the expression "hard core cartel" or the word "cartel". Accordingly there is no statutory definition of these terms. Instead, the Act seeks to prohibit certain activities, which can be identified as cartel activities e.g. price fixing; carving out and controlling markets; bid rigging. It could be said that the definition of hard core cartel is implicit rather than explicit in the FCA, and perhaps an inexperienced agency needs to be guided in more explicit terms. Admittedly however, this in and of itself might very well be a positive feature: agreements not hitherto contemplated could be caught, as long as the substantial lessening of competition is established.

- The offences identified above are for the most part *per se* offences; the Commission must therefore take the *rule of reason* approach to determine whether the relevant activity amounts to an offence. Under one section of the Act, the activity must have or be likely to have the effect of substantially lessening competition; another section speaks of restraining or injuring competition unduly.

- Note however that price-fixing and bid rigging manage to appear as *per se* offences elsewhere in the Act, but the Commission would be hard-pressed to justify investigating a case under these provisions, instead of under the provisions which require the *rule of reason* approach.

  The obvious conflict breeds confusion and renders the staff insecure in its efforts to apply the law.

- It is of course, no secret that "the threat of severe sanctions" can operate as an effective deterrent for persons who would be minded to engage in cartel activity. To that extent a strong case can be made for bringing such conduct within the reach of the criminal jurisdiction. The prospect of

incarceration has proved exceptionally effective in some jurisdictions, notably, The United States of America (USA).

Cartel activities under the FCA are not criminal offences and there is therefore no such threat of incarceration.

High levels of fines may also deter persons, but it is questionable whether a maximum fine of Five Million Jamaican Dollars (J$5M) i.e. US $83,000.00 can be considered sufficiently severe a sanction. The reported average annual turnover of thirty-four (34) locally listed companies for the year 2004 is US$111,643.00; and the average annual before tax profit is US$15,275,002.00.

- If fines are not sufficiently punitive then it becomes extremely difficult to conceive of a meaningful leniency programme. There is virtually no incentive for potential whistle blowers to approach the Commission.

- The Commission has no authority to impose fines. That is the sole prerogative of the Courts; and given the inordinate delays for which the Court System is reputed persons who would engage in cartel activity are less than scared of running afoul of the law. It is important to state here that to date the Courts have not been called upon to adjudicate upon a cartel case.

- An examination of the provisions which provide the actual tools for investigating cartels will reveal that although there is a power of entry and search, there are many weaknesses which can undermine the staff's best efforts:

  – While the Act allows for a warrant to be obtained to enter and search, "premises" it does not define premises so there is doubt as to whether a motor car or a boat, for example, constitutes "premises". Questions would arise too as to whether persons would be liable to being searched.

  – There is no provision authorising the sealing off of premises.

  – Documents may be removed only for the purpose of making copies and may be retained for seven days only. Admittedly, a further warrant may be obtained.

  – The relevant provision does not contemplate search of computers and other electronic systems; nor does it speak to seizing of such equipment.

  – In its current form the Act does not give the staff the power to interview/examine persons, pursuant to an entry and search warrant.

In sum the legislative framework and the actual investigative tools are weak.

2.2 Size of the Economy

It is being posited that it might be significantly more difficult to detect and investigate cartel activity in an economy as small as Jamaica is, than it would be in a large economy; and the following points are being highlighted in support of that position.

- Relationships are very tightly interwoven at various levels and in an elaborate array of interlocking settings. One is therefore required to be extremely cautious in arriving at

conclusions as to purport of persons who might be seen together. We need to be acutely aware of the line between correlation and co-ordination.

- To be branded an "Informer" is to be regarded as the basest among men and unworthy of the society of "honourable" men. An "Informer" might even find himself in danger of physical harm. Thus whistle blowing holds very little promise for cartel investigation.

- In their effort to pick winners/protect national champions for whatever purpose(s), public officials tend to rely not only on official Government policies but also on unofficial measures and a variety of "connections" to achieve their aims. Such official measures have the clear potential to facilitate collusion in such protected sectors; and the Competition Authority could find that its efforts to investigate are undermined.

As can be imagined the Commission must also meet all the other challenges associated with cartel detection and investigation, where there is no direct evidence. The size of the economy serves to exacerbate the problems encountered.

3. Resources

3.1 Financial

Whereas the Commission is fully funded from the national budget; does not have the authority to impose fines or to charge fees, its financial resources are chronically limited. The situation was put into real perspective by Mr Gilles Ménard, UNCTAD Consultant, who recently conducted a review of competition policy and law in Jamaica. His Report made the observation that a survey of the budgets of competition authorities in developing countries indicates that their average budget varies from 0.06% to 0.08% of the Governments' non-military expenditures. In Jamaica's case the budget is approximately 0.03% of the Government's non-military expenditure, 80% of which goes to paying salaries. *Res ipsa loquitur* – the thing speaks for itself. Serious cartel investigation requires proper funding.

3.2 Human

- To a large extent, the limitations that exist in this area arise out of the financial constrains under which the Commission operates. The staff is largely untrained in evidence gathering and the various techniques which would be facilitated by disciplines such as information technology, engineering and accountancy. In every sense the level of expertise and experience available in the Commission is below the required standards.

- There is deficiency in numbers as well. The professional staff comprises three (3) economists and three (3) lawyers. As at December 30, 2005 there are sixty one (61) cases assigned to the three (3) economists – seven (7) of which relate to misleading advertising; five (5) represent requests for opinions and two (2) are cartel investigations, arising out of complaints without any direct evidence.

4. Conclusion

In addition to the hurdles already highlighted it is conceivable that there is also lack of awareness of the harm caused by cartel activity. For this the Commission must take some responsibility. Law makers and other Government officials need to be properly sensitised as to their own responsibility to avoid actions and policies which might/could facilitate cartel activity. Effective competition advocacy must

become the *sine qua non* of the Commission's work. In this regard, the Commission anticipates meaningful assistance from UNCTAD, as an outcome of the already mentioned peer review exercise.

The Commission looks forward too, to receiving assistance through a consultant to be provided under a current IDB assistance Programme. This should help to boost not only the knowledge base but also the confidence of the staff. Indeed, if one feels less than competent, one will experience insecurity and that in itself is an inhibitor to action.

JAPAN

1. Introduction

A cartel agreement is generally reached behind closed doors among entrepreneurs. It is a very important challenge for a competition authority to determine how to detect and prove the existence of such an agreement. As entrepreneurs have recently been more skillful in establishing cartel agreements for fear of being prosecuted by competition authorities, it is becoming more and more difficult to detect direct evidence of agreement in a cartel. Thus, in cartel cases without direct evidence, it is essential to prove the existence of cartels reasonably by the accumulation of relevant facts which are established based upon indirect evidences. The Japan Fair Trade Commission (hereinafter referred to as the "JFTC"), the competition authority in Japan, bases its approach on the theory that explicit agreement among the entrepreneurs is not necessary to prove a cartel agreement; i.e., "liaison of intention," and a tacit agreement suffices. In the Toshiba Chemical case, which involved a cartel without direct evidence, the Tokyo High Court recognised this theory.

The following describes sanctions of cartels as "Unreasonable Restraint of Trade" and how a violation is proven in cartel cases without direct evidence of agreement.

2. Enforcement against cartels in Japan

2.1 Unreasonable Restraint of Trade

In the Recommendation of the Council concerning effective action against hard core cartels, a "hard core cartel" is defined as the following:

- A "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by (i) competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce; and (ii) is not reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies[1].

- There is no clear definition regarding a "hard core cartel" in the Antimonopoly Act in Japan; however, the JFTC prohibits a "hard core cartel" as defined in the above OECD Recommendation of the Council as a form of "Unreasonable Restraint of Rrade"(Section 3 of the Antimonopoly Act).

- Unreasonable Restraint of Trade is defined as the following: when any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its name, with other entrepreneurs, mutually restricts or conducts their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade (Section 2 (6) of the Antimonopoly Act).

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[1] Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL.

2.2 Measures

The JFTC conducts necessary administrative investigations based upon Section 47 of the Antimonopoly Act when the JFTC suspects that there exists any violations, based upon the information the public provided and/or any facts that the JFTC detects. When the JFTC finds a violation, the JFTC can issue orders for elimination measures such as an injunction of the violation, and will order a surcharge payment in the case including hard core cartels.

The revised Antimonopoly Act, which was enacted on 20 April 2005 and enforced on 4 January 2006, imposes stricter measures on violating firms. In order to give an incentive to defect from a cartel and to pursue rapid restoration of competitive order, a leniency program has also been introduced in the revised Act[2].

2.3 Criminal sanctions

Criminal sanctions as well as administrative actions such as orders for elimination measures and a surcharge payment are imposed in the case of a serious violation of the Antimonopoly Act, such as that of cartels. Criminal sanctions shall be considered only after an accusation of the JFTC has been filed (Section 96 and 74 (1) of the Antimonopoly Act). Regarding criminal sanctions, the JFTC published its policy on criminal accusations regarding antimonopoly violations in 1990. The JFTC established the policy of actively accusing in order to seek criminal sanctions. As compulsory measures for criminal investigations and a leniency program were introduced by enforcement of the revised Antimonopoly Act on 4 January 2006, the JFTC revised the above policy and published its new policy on criminal accusations and compulsory investigation of criminal cases regarding antimonopoly violations (on 6 October 2005)[3].

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2 See the document below for more information about the Amendment of the Antimonopoly Act.

OECD Annual report on competition policy developments in Japan (2004), page 2

I Changes regarding competition laws and policies – Outline of new regulations in competition laws and elated legislations

1 Amendment of the Antimonopoly Act

3 The Fair trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal ases Regarding Antimonopoly Violations (abstract)

1 The Policy on Criminal Accusation

The JFTC will actively accuse to seek criminal penalties on the following cases:

(1) Vicious and serious cases which are considered to have widespread influence on people's livings, out of those violations which substantially restrain competition in certain areas of trade such as price-fixing cartels, supply restraint cartels, market allocations, bid rigging, group boycotts and other violation.

(2) Among violation cases involving those firms or industries who are repeat offenders or those who do not abide by the elimination measures, those cases for which the administrative measures of the JFTC are not considered to fulfil the purpose of the Act.

However, the JFTC will not file accusations against the following persons:

a. The first entrepreneur that submitted reports and materials concerning the immunity from the surcharge before the investigation start date*. (The entrepreneur that submits reports and materials pursuant to the provision of Section 7-2 (7) of the Act. However, the JFTC will not apply this provision to the entrepreneur that is found to be fallen under any of the paragraphs of Section 7-2 (12) of the Act; the said reports or documents contains false information, the said entrepreneur fails to submit the reports or materials or submits false reports or materials in response to the additional requests by the JFTC, and the

3. Establishment of cartel cases in Japan without direct evidence of agreement

3.1 Proof of cartels

Typically, a cartel agreement is reached behind closed doors between two or more entrepreneurs, making it extremely difficult for an outsider to know what specific arrangements have been made in the cartel agreement. As anti-cartel enforcements have been tightened in recent years, violating firms have become increasingly careful not to leave any material evidence of cartel agreements such as minutes and memoranda of meetings among the parties to the cartel. Without direct evidence, it is essential to prove the existence of cartel reasonably by accumulating relevant facts which are established based upon indirect evidences.

3.2 Finding of agreement

In order to satisfy the requirements for Unreasonable Restraint of Trade as provided in Section 2(6) of the Antimonopoly Act, one must find that a "liaison of intention" existed among the entrepreneurs concerned. Any concerted action among the entrepreneurs does not in itself provide sufficient proof of the "liaison of intention." In the Toshiba Chemical case (Tokyo High Court Judgment on 25 September 1995), the court found that a "liaison of intention" means that an entrepreneur recognises or anticipates implementation of the same or similar kind of price-raising among entrepreneurs and accordingly intends to collaborate with such price-raising. Thus, explicit agreement binding the related parties is not necessary in order to prove "liaison of intention;" a tacit agreement will suffice.

In the Toshiba Chemical case, which involved a cartel without direct evidence, the Tokyo High Court found that the existence of a tacit agreement is sufficient proof of a "liaison of intention." In order to prove "liaison of intention," though the mere recognition or acceptance of an entrepreneur's price-raising by another entrepreneur is not sufficient, explicit agreement binding the related parties is not necessary. In other words, "liaison of intention" can be proven by showing mutual recognition of other entrepreneurs' price-raising and tacit acceptance of such price-raising by another. The court gave the following reason for this interpretation: "By the nature of such an agreement as "Unreasonable Restraint of Trade," companies usually try to avoid making such an agreement explicitly to the public. If we interpreted that explicit agreement is necessary to prove "Unreasonable Restraint of Trade," the entrepreneurs could easily get around the hands of the law, and therefore it is obvious that such an interpretation is not appropriate in reality."

As regards the proof of a tacit agreement, the court in the Toshiba Chemical case stated: "Recognition and intention of the entrepreneurs should be considered by examining various circumstances before and after the price-raising, and then evaluation of whether there is mutual recognition or acceptance among entrepreneurs regarding the price-raising or not." Thus, in the absence of any explicit, mutually-binding agreement, the existence of a tacit agreement may be proven by indirect evidence attesting to: (i)

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said entrepreneur coerced another entrepreneur to commit the violative act or blocked another entrepreneur from ceasing to commit of the violative act.)

b. The officer, employee, or other person of the said entrepreneur who commit the violative act of the Act and is deemed to be in a circumstance appropriate to be treated as same as the said entrepreneur, regarding the said entrepreneur's submission of reports and materials to the JFTC, response to the investigation by the JFTC following the said submission, and others.

* "The investigation start date" means the date when the JFTC initiates its on-the-spot inspection, official inspection and search, etc., regarding the case relating to the violative act.

the existence of prior exchange of information and opinions among the parties concerned; (ii) the content of negotiations among the parties concerned; and (iii) a concerted act as a result.

3.3 Cases finding a tacit agreement without direct evidence of an explicit agreement

Different cases require different forms of evidence to prove the existence of a "liaison of intention." In particular, judgment on a tacit "liaison of intention" has to be made on a case-by-case basis. The three criteria identified in the Toshiba Chemical case would require that the following indirect facts, for example, be found:

- Existence of prior exchange of information and opinions among the parties concerned
  - Frequent meetings prior to the price increase
  - Telephone conversation or e-mail on such meetings
- Content of negotiations among the parties concerned
  - Current condition of the industry
  - Exchange of information on current price, etc.
  - Declaration of intention to raise the price
  - Discussion of measures to be taken against discounters
- Concerted act as a result
  - Actual price-raising by the entrepreneurs
  - Entrepreneurs' pricing decision process

The following are two of the cases where a tacit agreement was found in the absence of any direct evidence of an agreement.

3.4 Kyowa Exeo case – judgment against claim seeking to overturn a JFTC decision (Tokyo High Court judgment on 29 March 1996):

3.4.1 Outline of the case

The JFTC ordered the payment of a 22.12 million yen surcharge by Kyowa Exeo Corporation, a company mainly involved in the construction and storage of various types of telecommunication facilities, electrical facilities and their ancillary equipment (Surcharge Payment Order of 30 March 1994). The JFTC found that Kyowa Exeo colluded with nine other companies in the same industry to designate in advance who would make the successful bid in a tender offered by the US Pacific Air Force Contracting Center (hereinafter referred to as the "Contracting Center") for the operation and maintenance service of telecommunication facilities. The other bidders agreed to cooperate to ensure that the designated company would be awarded the contract. By substantially restricting competition in the market of the operation and maintenance service of telecommunication facilities ordered by the Contracting Center the practice constituted "Unreasonable Restraint of Trade" as provided in Section 2(6) of the Antimonopoly Act and

therefore violated Section 3 of the Act. The practice also pertained to the price of services to which the surcharge stipulated in Article 7-2(1) of the Act is applicable.

Kyowa Exeo filed an appeal with the Tokyo High Court requesting the decision to be overturned on the grounds that the JFTC's decision had not been established by substantial evidence attesting to the facts at issue including a basic agreement on bid-rigging. The Tokyo High Court rejected the appeal and supported the JFTC's decision.

3.4.2 Outline of indirect evidence and fact-finding

In this case, no direct evidence attested to the existence of a basic agreement to allocate received orders among Kyowa Exeo and the other nine competing companies. Nonetheless, the Tokyo High Count found that a basic agreement on bid-rigging may be inferred from the following indirect facts, among others:

- Background and objective of establishing the Kabuto Club

  By March 1981 at the latest, Kyowa Exeo, along with the other nine competing companies, had established the "Kabuto Club" for smoothly receiving orders from the Contracting Center for the operation and maintenance service of telecommunication facilities (operation and maintenance service for telecommunications and micro communications). Kyowa Exeo claimed that the Kabuto Club had been established to promote personal relationships between counterparts in the industry, and not to maintain anticompetitive practices. The Tokyo High Court, however, found that a common interest among the parties concerned was behind the establishment of the Kabuto Club, which was intended to facilitate communication in receiving orders as well as to promote friendship between counterparts. In addition to this background, it should be noted that after the Club was established, a meeting was held, sometimes preceded by an informal gathering to see whether each member was willing to participate in the bidding, with regard to each of the orders to be placed by the Contracting Center, which was then followed by cooperation in the bidding to help the designated bid-winner receive the order. In light of the fact that such practices, which had been carried out only by the members of this group, ceased with the disbandment of the Club, the establishment of the Club was in itself a valid indirect fact that attested to the existence of a basic agreement.

- Participants in, and contents of, individual meetings

  Kyowa Exeo claimed that only four contracts had been specifically identified as results of negotiation among members by the JFTC's decision, which was not sufficient to prove the existence of the alleged basic agreement. Regarding this point, the Tokyo High Court noted that participation in other contracts, which only involved asking about the intention to receive the order, was also limited to those Club members who were interested in the contract and attended an on-site briefing session. The fact that the participants remained unidentified did not necessarily prevent the assumption that a basic agreement had existed. Even if only four contracts had actually been results of negotiation among members, Club members gathered on the occasion of on-site briefing sessions, etc. for other contracts to see if any of them was willing to receive the order. No further negotiation ensued just because only one of the members was willing to bid for the contract. In the final analysis, a system had been maintained among the Club members to ensure discussion on all contracts offered by the Contracting Center. Thus, the facts regarding the participants in, and contents of, individual meetings provided compelling evidence of the alleged basic agreement.

3.5 Case against Hiroshima City Federation of the Hiroshima Prefecture Petroleum Retailers' Cooperative (JFTC Decision of 24 June 1997)

3.5.1 Outline of the case

In its decision, the JFTC found that the Hiroshima City Federation of the Hiroshima Prefecture Petroleum Retailers' Cooperative, an association of retailers primarily dealing in petroleum products in a specific area of Hiroshima Prefecture (hereinafter referred to as "the Federation") had decided in its Executive Working Group meeting on 18 August 1992 to raise the retail price of regular gasoline by four yen except for large users, effective from 1 September 1992, and to instruct every member to follow suit. The ensuing retail price increase was apparently based upon this decision. As the Federation was a trade association as defined in Section 2(2) of the Antimonopoly Act, it effectively restricted competition in the regular gasoline retail market except for large users in the Hiroshima area by deciding to raise the retail price of regular gasoline supplied by the members. Thus, the practice violated the provision of Section 8(1)(i) of the Antimonopoly Act.

3.5.2 Outline of indirect evidence and fact-finding

In this case, little material or oral evidence was found which directly attested to an agreement among entrepreneurs, i.e. the decision by the Federation's Executive Working Group to raise members' retail price by four yen, effective from 1 September 1992. In its decision, however, the JFTC found that the executives, members and secretariat personnel had been systematically instructed not to keep any potential evidence of wrongdoing such as a memorandum on price, for fear of detection by the JFTC. In particular, the secretariat personnel in charge of clerical work for the Federation were strictly required to follow the instruction. They were actually discouraged against telling the truth, and were asked to pretend that they knew nothing if interviewed by a JFTC investigator. Under these circumstances, it was natural that no direct evidence could be found. The decision went on to recognise the existence of a cartel, as it inferred from relevant evidence that the Executive Working Group meeting on 18 August had indeed decided to raise the retail price by four yen and instructed each member to follow suit. The JFTC based its decision on the following indirect evidence:

- The timing and extent of price-raising by the Federation members in the Hiroshima area were uniform and therefore suspicious.

  The wholesale price increase by suppliers differed somewhat in timing and extent, which resulted in considerable differences in the timing and extent of retail price increases in other prefectures as well as in other parts of Hiroshima Prefecture. In view of this, it was highly unique and unusual that in the Hiroshima area alone, the retail price had risen almost across the board by four yen on 1 September. Thus, it was natural to suspect that someone had orchestrated the price increase.

- The Federation had been involved ten times in price-fixing, including decisions to raise or lower members' retail price.

  The Federation adopted the policy of linking its members' retail price to the wholesale price of suppliers ("up when up, down when down"). Under this policy, the Federation (or the Branch Federation, its predecessor) held 10 consultation meetings from May 1989 through April 1992 to decide on adjusting the retail price to the fluctuation of the wholesale price, a decision to be followed by each member. Retail prices were also monitored at the level of service stations, to ensure that those decisions were actually implemented. Thus, individual members were virtually

forced to raise or lower their retail price in accordance with the policy of the Federation or the ex-Branch Federation.

- The Executive Working Group meeting on 18 August was not a simple annual luncheon.

  With regard to the Executive Working Group meeting on 18 August, during which the retail price-raising was decided upon, the Federation contended: "Although it is true that the executives of the Federation got together in the meeting room of the Cooperative's office, that was only for a luncheon meeting regularly held at that time of the year in recognition of executives' services. No consultation or decision was to be made on any particular topic." However, the "Executive Working Group," composed of the chairman, vice-chairman and branch directors of the Federation, was a consultative organ distinct from the Executive Board, the Federation's formal governing body. It was also recognised as such among the parties concerned. Moreover, it was found that the Executive Working Group meeting (i.e. meeting among the chairman, vice-chairman and branch directors) on 18 August had actually been an emergency meeting convened at 11:00 am in the Cooperative's office, and secretariat personnel had notified the Working Group members to that effect by telephone. The members were also aware that an emergency meeting would be held on that day, to be followed by an annual luncheon in a restaurant. Clearly, the Executive Working Group members were not convened in the Cooperative's office at 11:00 am on 18 August simply to wait for an annual luncheon to begin.

- Measures were taken to avoid detection by the JFTC.

  It was apparent that from the autumn of 1991, both the Federation and the Hiroshima Prefecture Petroleum Retailers' Cooperative, in response to the so-called enhanced implementation of the Antimonopoly Act, had systematically directed the parties concerned, particularly secretariat personnel, to pay great attention not to keep any memorandum or other records that might provide potential evidence of wrongdoing for the JFTC. It was also found that both the Federation and the Cooperative had systematically attempted to avoid detection by the JFTC by discouraging those interviewed by an investigator from telling the truth.

- A note attested to the fact that the Executive Working Group on 18 August had discussed the necessity of passing a cumulative increase in the wholesale price on to the retail price.

  The following entry was found in a note by a secretariat clerk of the Federation dated 18 August and entitled "Executive Working Group:" "The market price is on the rise nationwide. Now is the time to move toward a more favorable condition in Hiroshima." The Federation claimed that it was a private memorandum of a secretariat clerk and did not necessarily indicate that such a statement had actually been made in the meeting. However, the wording had a striking similarity with some expressions found in other notes by the same clerk regarding statements made in other Cooperative meetings which he had attended. Since those notes were preserved as an integral part of the minutes of plenary Executive Board meetings, it may be presumed that the note in question accurately reflected a statement made in the Executive Working Group meeting on 18 August. Moreover, the expression "to move toward a more favorable condition" is frequently used in industry journals and newsletters to signify preparation for a retail price increase and efforts to ensure its effectiveness. Thus, the above statement – "The retail price is on the rise nationwide. Now is the time to move toward a more favorable condition in Hiroshima." – may be construed to mean that, as the retail price is expected to follow an uptrend at the national level, now is the time to cooperate in building favorable condition for implements, a price increase,

followed by an effort to ensure its effectiveness. This was, without a doubt, the meaning of the note.

4. Conclusion

Even if no direct evidence is found to prove the existence of an agreement in a cartel case, indirect evidence may enable a reasonable assumption that the "liaison of intention" existed for a cartel. Accumulation of small pieces of evidence such as the existence of a prior exchange of information and opinions may still prove to be instrumental in establishing key facts of a basic agreement. In light of this, strenuous and persistent investigation is necessary even when there is no direct evidence. We consider that strict measures must be taken against flagrant violations of the Antimonopoly Act, using indirect evidence as proof of even the most cunning cartels that leave no direct evidence of agreement.

KOREA

1. Introduction

Since the enactment of Monopoly Regulation and Fair Trade Act (MRFTA) in 1980, the KFTC has recognised cartels as 'the biggest enemy to the market economy' and worked aggressively to eradicate them.

Especially, last year, the KFTC imposed the largest amount in surcharge in history on telecom operators for forming collusion and pulled off a remarkable achievement such as creating a cartel investigation team and successfully holding ICN Cartel Workshops.

However, the stricter the legal enforcement on cartels by the competition authorities get, the harder enterprisers try to conceal evidence of an agreement and conduct cartels in secret. Most of cartel cases dealt by the KFTC were those where an agreement was proven with circumstantial evidence without an explicit written agreement.

This contribution is to describe how the KFTC corrects cartels without direct evidence of an agreement through past cartel cases and provisions on cartel in Monopoly Regulation and Fair Trade Act (MRFTA).

2. Provisions on cartels in Monopoly Regulation and Fair Trade Act (MRFTA)

2.1 Definition of Cartel Agreement

Para.1 of Article 19 of the MRFTA prohibits the following improper concerted acts.

Article 19 Prohibition of Improper Concerted Acts

① No enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means to jointly engage in an act, or let others do this kind of activities, falling under any of the following subparagraphs1,[1] that unfairly restricts competition (hereafter referred to as "unfair collaborative acts").

1

1. An act fixing, maintaining, or changing prices;
2. An act determining terms and conditions for transactions of goods or services, or payment of prices thereof;
3. An act restricting production, delivery, transportation, or transaction of goods or services;
4. An act limiting the territory of trade or customers;
5. An act preventing or restricting the establishment or extension of facilities or the installation of equipment necessary for the production of goods or the rendering of services;
6. An act restricting the types or specifications of goods or services in producing or transacting goods or services;

That is, according to the provision above, an agreement where ① two or more enterprisers (parties to the agreement), ② through contract, agreement, resolution, or any other means (means of an agreement), ③ jointly determine, maintain, or change prices and conduct other activities stipulated in Para.1 of Article 19 of the MRFTA (subject of an agreement) is defined as a cartel and banned by the KFTC.

Moreover, such an agreement includes both an explicit agreement such as contracts and agreements and a tacit agreement such as mutual understanding among enterprisers.[2]

2.2 Circumstantial Evidence of Cartel Agreement

However, as cartel regulations are strengthened, enterprisers try to reach an agreement in secret and not to leave any explicit evidence, so it is not an easy task to prove the existence of an agreement. Therefore, when there is no direct evidence of an agreement, the KFTC proves a cartel case based on circumstantial evidence. The followings are examples of such circumstantial evidence listed in 'Guidelines for Collaborative Acts,' the KFTC's internal guidelines.

When there is evidence of direct or indirect communications or information exchanges

- < Example 1> When suspected enterprisers' internal documents mention identical price increase, output reduction, etc.
- < Example 2> When suspected enterprisers show identical conduct after having secret meetings
- < Example 3> When suspected enterprisers agree to exchange information on price or output, or have regular meetings to this end.
- < Example 4> When a specific company implements price increase or output reduction after observing its competitors' responses to the company's announcement of such actions.

When a conduct is in the interest of actors only when acting jointly, while it would harm the interest of each actor when acting unilaterally

- <Example1> When actors increase their price identically despite oversupply or decline in demand and the absence of factors triggering cost increase.
- < Example 2> When there are simultaneous price increases despite mounting inventory.

When parallel behaviours of enterprisers in question cannot be explained by market forces

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7. An act of jointly carrying out and managing the main parts of a business, or establishing a company, etc. to jointly carry out and manage the main parts of a business; or
8. Any practice that substantially lessens competition on a particular business area by means, other than those under Subparagraph 1 to 7, of interfering with or restricting the activities or contents of business.

2 The KFTC's「Guidelines for Improper Concerted Acts

- <Example 1> When price is identical or remains rigid despite changes in supply & demand, differences among suppliers of raw materials, and geographic distance between suppliers and consumers.

- <Example 2> When price changes are identical even when production costs vary due to differences in raw material costs, production processes, wage increases, and bill discounting rates.

- <Example 3> When large price increases cannot occur in a short period of time without collaborative actions, given market conditions

When parallelism in actions among enterprisers is almost impossible without an agreement, considering structure of the industry in question

- <Example1> When prices of each enterpriser are identical, even with significant degrees of product differentiation.

- <Example2> When suppliers show identical actions, even when it is hard for them to do so. For example, in markets with few transactions or those for sophisticated customers.

2.3 Presumption of Cartel Agreement

The 'Presumption of an Agreement' system is stipulated in Para. 5, Article 19 of the Act, and, pursuant to the system, a cartel agreement can be presumed even with the absence of an explicit agreement if there is ⅰ) "conformity of outward conduct" and ⅱ) "competition-restrictiveness."

> Article 19 (Prohibition of Unfair Collaborative Acts) ⑤ Where two or more enterprisers are committing any acts listed in the subparagraphs of paragraph (1) that practically restrict competition in a particular business area, they shall be presumed to have committed an unfair collaborative act despite the absence of an explicit agreement to engage in such act.

However, to prevent enterprisers from being wrongfully accused, the KFTC presumes a cartel agreement if there is ⅰ) "uniformity of outward conduct" and ⅱ) "competition-restrictiveness" and ⅲ) circumstantial evidence listed in 「Guidelines for Collaborative Acts」 supports the suspected cartel case.

3. Cartel Cases without Direct Evidence of Agreement

The KFTC has dealt with many cartel cases without direct evidence of an agreement using circumstantial evidence.

The following two cases illustrate where the KFTC and courts stand regarding what circumstantial evidence suffices to presume a cartel agreement and in what cases such presumption can be rebutted when there is no direct evidence of an agreement for several parallel price adjustments among enterprisers in oligopoly markets that can't be readily explained by usual market forces.

3.1 Case where a cartel agreement was proven: Toilet Roll

3.1.1 Fact

Four toilet roll manufacturers accounted for 85% of the domestic market share. Originally, their producer sale prices were a bit different as a result of competition in the market.

In 1995, as price of raw material for toilet rolls declined dramatically, the government issued an administrative guidance to these companies to cut price. In according to this, in 1996, company A and B, the two biggest manufactures in the market, internally determined to set their producer sale prices at 8,261 and 8,448 won respectively after consulting with the government. After that, company C and company D, the third and fourth largest in the market, set their prices at 8,448 won. Then, on 1st, Jun, 1996, the four manufactures implemented the decreased price. (The first price reduction)

And nine months later, on 1st, Mar, 1997, company B increased its price to 8,668 won with launch of new products. Then, company C also increased the price of its existing products to 8,668 won and Company D also increased its price to 8,668 won after launching new products in May, 1997. (The first price increase)

Then, on 16th, Jul, 1996, Company A increased its price to 9,306 won and on 1st, Aug, 1997, the rest also increased their price to 9,306 won simultaneously. (The second price increase)

Four months later, on 28th, Nov, 1997, company A internally determined to set their price at 10,494 won and implemented this price increase on 24th, Dec, 1997. Then, the rest three companies also had their own deliberations on 15th and 16th, Dec, 1997 to raise their price to 10,494 won and implemented this price adjustments on 23rd, Dec, 1997. (The third price increase).

Table1. The four toiler roll manufactures' price increases

	Company A	Company B	Company C	Company D
Market share	27.5%	28.4%	17.3%	14.8%
Original Producer sale price	8,679	8,855	8,679	8,855
First price cut	1996.6.1	1996.6.1	1996.6.1 (Product launch)	1996.6.1
(Internal deliberation)	(1996.5.14)	(1996.5.21)	(1996.5.17)	(1996.5.21)
Producer sale price	8,261	8,448	8,448	8,448
First price increase	1996.1.1 (Product launch)	1997.3.1 (Product launch)	1997.5.1 (Price increase)	1997.5.10 (Product launch)
(Internal deliberation)	(1996.12.13)	(1997.2.13)	(1997.4.8)	(1997.4.28)
Producer sale price	8,668	8,866	8,866	8,866
Second price increase	1997.7.16	1997.8.1	1997.8.1	1997.8.1.
(Internal deliberation)	(1997.6.16)	(1997.7.20)	(1997.7.22)	(1997.7.28)
Producer sale price	9,306	9,306	9,306	9,306
Third price increase	1997.12.24	1997.12.23	1997.12.23	1997.12.23
(Internal deliberation)	(1997.11.28)	(1997.12.15)	(1997.12.16)	(1997.12.16)
Producer sale price	10,494	10,494	10,494	10,494

(Unit: won)

3.1.2 Resolution of the KFTC[3]

Based on i) "uniformity of outward conduct" and ii) "practical competition-restrictiveness," iii) "circumstantial evidence", the KFTC presumed a cartel agreement by company A, B and C in the first price reduction & increase. Furthermore, in the second & third increase, the KFTC presumed an agreement

[3] The KFTC's resolution 98-63, 1998. 4. 10.

by four manufacturers. In this case, the KFTC imposed surcharges of a total of 1.8 billion won on the four toilet roll manufacturers for the cartel agreement.

Here is circumstantial evidence uncovered by the KFTC.

- The four manufactures increased their prices of their toilet rolls to the same price even though each company had different manufacturing costs and compositions of them, management status, marketing strategies, and pricing strategies.

- They increased standard prices to the same level by the same rate simultaneously or around the same time even though there was neither dramatic change in supply and demand in the toilet roll market nor any factor to trigger the identical price increase.

- They had the knowledge of and indirectly exchanged information on their competitors' future policies to increase prices as they notified such policies to retailers & wholesales orally or in a written form in advance.

- Executives of the four companies testified that there were discussions on reigning in excessive price competition in the market during meetings of "the Association for Trade Order in the Toilet Paper market" in Apr, Jun, and Nov, 1997.

- With the launch of the KFTC's investigation into the case in Jan, 1998, the four companies' producer sale price has diverged since Feb, 1998.

3.1.3 Decision of the Courts

3.1.3.1 Decision of the High Court

Against the resolution of the KFTC, the four manufacturers appealed to the High Court arguing that the parallel pricing of company C and D were little more than unilateral acts pursuing best response to price increases or reductions by company A and B that had price leadership in the market.

The High Court ruled that the four parallel price adjustments of those enterprisers were presumed to be the result of a cartel agreement considering that price adjustments were implemented simultaneously or around the same time, that it would have been impossible for Company B, C and D to maintain the same price for 20 months without a collusion in advance, and that manufacturers had discussion on the restraint of excessive price competition. The Court merely pointed out some problems with the KFTC's calculation of the surcharges on these companies.[4]

3.1.3.2 Decision of the Supreme Court

The defendants again appealed the decision to the Supreme Court, and it issued a ruling a bit different from decisions by the KFTC and the High Court. That is, in this case, for "the first price increase" and "the first price reduction," the presumption of an agreement is overturned. More specifically speaking, the Supreme Court ruled that presumption of an agreement can be overturned in the following situations.

"The presumption of an agreement stipulated in Para. 5 of Article 19 is overturned if a market dominant company with a large market share in oligopoly market structure determines price based on its own judgment and other companies adjust their price according to the leader's new price, then, as long as

[4] The Seoul High Court decision of 1.20. 2000, 98 nu 10822

there are no special situations such as the market leader determining its price having predicted that, considering market conditions and existing practices, other companies would adjust their price accordingly.

Pursuant to this, the Court ruled that the "first price reduction" was the result of a unilateral price imitation, not a collusive agreement, because, even though the three companies' prices were identical, market leaders company A and B internally set their prices at 8,261won and 8,448 won respectively after consultations with the government in response to the government's administrative guidance to cut price and, then, company C and D just imitated the two market leaders' price.

The Court said that the presumption of an agreement is rebutted in the "first price increase" as well, because company C and D seemed to have increased their prices unilaterally two months after the price hike of market leader company B.

However, it found that price adjustments in the "second price increase" and "third increase" were not likely the result of unilateral price imitation as the three companies showed signs of more serious price synchronisation than they did in the first price cut & increase, such as having internal deliberations on price hikes around the same time and implementing the new price on the same date[5].

3.1.4 Significance of the Case

Regarding several cases of parallel price hikes or reductions among enterprisers without direct evidence of an agreement, the KFTC presumed an agreement based on various economic evidence and communications evidence, and it was successful in proving an agreement in the second and third price hikes. However, the presumption of an agreement was rebutted for the first price cut & increase as the Court found the weaker firms just set their price imitating the market leaders unilaterally.

However, there still remains room for discussions about whether it is possible, in oligopoly markets, to clearly distinguish unilateral price imitation from parallel price increases & reductions where market dominant firms first implement price increases or reductions predicting that the rest would follow suit and then the rest actually did. Furthermore, if such distinction is possible, it is still debatable what criteria would be considered valid.

3.2 Case where a cartel agreement was proven: Coffee

3.2.1 Fact

Company A and B shared the domestic coffee market. The price of two makers' products was originally a bit different. But, from 1st, Jul, 1997, company B continued increasing its product price to the same product price of company A as shown in the Table 2.

Table 2. The two coffee makers' price increase for instant coffee products

	Prior to increase	97.6.2	97.7.1	97.8.18	97.10.7	97.12.15	97.12.19	98.1.12
Company A	5 181	5 445		5 720		6 446		7 150
Company B	5 258		5 445		5 720		6 446	7 150

(Unit: won)

5 The Korean Supreme Court decision of 5.28.2002, 2000 du 1386

3.2.2 Resolution of the KFTC

In this case, there is no direct evidence of an agreement. But, the KFTC presumed an agreement based on i) uniformity of outward conduct, ii) practical competition restrictiveness, and iii) the circumstantial evidence, and it imposed surcharges of about 3 billion won on the concerned enterprisers.

Here is circumstantial evidence uncovered by authority.

- The two coffee manufacturers adopted the same price starting from 1st, Jul, 1997 despite differences in the two major price increase-triggering factors - foreign exchange rates and coffee bean prices they applied – and the composition of costs.

- They also exchanged information about its own plan of price increase.

  – On 9th, Jan, 1998, the branch office of company A faxed the plan of price increase on 12th, Jan, 1998 to the branch of company B on 9th, Jan, 1998, and then the latter faxed it to their main office.

  – The two examinees notified scheduled price increase to each other prior to actual price increases. For example, on 12th, Aug, 1997, the very next day of company A's price increase, company B's branch offices notified company B's scheduled price hike to company A's branch offices.

- Their sales and operating profit rates increased significantly after the price hikes in 1997 as compared with the previous year.

3.2.3 Decision of the Courts

3.2.3.1 Decision of the High Court

Against the resolution of the KFTC, the two coffee manufacturers appealed to the High Court arguing that the parallel price adjustments of company A and B was just the result of company B's imitating the price change of company A, not a collusive agreement between them.

The High Court ruled that the four times of parallel pricing of the two companies were presumed to be the result of a price agreement, considering that they adopted the same price despite differences in the costs, that company B failed to present internal documents and other evidences to prove that its price changes were just unilateral actions, and that the two companies frequently exchanged their price information through branch offices. And then, the Court merely pointed out some problems with the KFTC's calculation of surcharges imposed on these two companies.

3.2.3.2 Decision of the Supreme Court

However, the Supreme Court issued a ruling that overturned the decisions of the High Court and the KFTC rebutting the presumption of an agreement for the following reasons.

- In oligopoly markets, similar or same price of each company's product alone is not sufficient proof of a cartel agreement. Enterprisers can independently change their prices without an explicit agreement or a tacit one among them as the result of independent decision-making that imitating competitors' prices are in their interest.

- Company B seems to have imitated Company A's price increase given the peculiar circumstances of the domestic coffee market at that time where cheap products was considered as low-grade products and did not sell well.

- Though sales representatives of two companies' branch offices faxed to each other documents containing information on price increases,

  – enterprisers had decided on the price increase at different period, and those documents were written for the purpose of notifying such price changes to their distributors, not exchanging information prior to a price collusion.

  – It is not natural to believe that the enterprisers ordered employees at their branch offices, not employees at the headquarters, to exchange information to form a price collusion.

3.2.4 Significance of the case

This case is very alike to the case of toiler roll, in that, in oligopoly market, the concerned enterprisers adjusted their prices to the same price several times at the same or similar time. Also, in these two cases, the timing of price adjustments became similar and similar over time, and that, finally, they adjusted price on the same date.

However, the conclusions for the two cases are different due to peculiar circumstances of the domestic coffee market where expensive products sell better than cheap ones. In case of toilet roll, the parallel pricing by enterprisers – the second and third price hikes – were judged collusive action under significant degrees of price synchronisation. On the while, in case of coffee, a series of parallel pricing by manufacturers was judged unilateral price imitation.

But, there still remains a question whether circumstantial evidence such as the peculiar circumstances of the coffee market alone is valid and sufficient enough to judge the above series of parallel pricing purely price imitation. Also we can consider the way to equate price information exchange between branch offices with that between the headquarters, as branch offices are also part of a company.

4. Conclusion

Cartel is little more than stealing cash from consumers' pockets.

Therefore, the current MRFTA stipulates that, regardless of existence of direct evidence of an agreement, cartels can be subject to surcharges of up to 10 % of related sales and that concerned parties can be prosecuted and subject to either three year's prison term or fines of not exceeding 200 million won. Such sanctions are stronger than those against abuse of market dominance or unfair trade activities that impose surcharges of 3% and 2% of related sales respectively.

However, cartels are often formed in secret without direct evidence of an agreement, in reality, it is not easy to identify them. Therefore, what matters most in regulating cartels whose direct evidence of an agreement is not found or does not exist is determining what amount and quality of circumstantial evidence is sufficient to prove an agreement. On this, the KFTC has proved an agreement by employing communications between suspected cartel operators, market conditions, market structure, etc.

Cartels continue to be forthcoming among enterprisers who want to avoid competition despite strong sanctions against cartels. To better respond to this and prove a cartel agreement successfully, competition

law enforcers need to thoroughly analyse evidence of communications and economic evidence to aggressively present circumstantial evidence of an agreement.

LITHUANIA

1. Information on the cartel agreement on prices concluded by undertakings providing taxi services in the local market of the city of Vilnius

1.1 Problem in brief

On 3 February 2005, the Competition Council of the Republic of Lithuania (further – the Competition Council) passed Resolution No. 2S-3 whereby the authority sanctioned the group of taxi companies for the conclusion of the anti-competitive cartel agreement.

The present case of the establishment of the cartel agreement should be attributed to the category of investigations where the cartel was proven (which, as could be noted in advance, has also been confirmed by the First instance court) virtually in the absence of any direct evidence.

The cartel under consideration has the following characteristics:

- First, the scope of the cartel agreement is not extensive, covering only the local market of the city of Vilnius. Therefore, it falls outside the scope of Art. 81(1) of the Treaty establishing the European Community and was assessed under the national competition law.

- Second, the prohibited agreement was involving over 10 market participants who were lead by the Association uniting the taxi companies and one of the taxi company, – a market participant was at the same time the founder of the Association.

1.2 The relevant market

2. The market of the product concerned is the market for the passenger carriage by call taxis

One of several undertakings cannot have a significant impact on the prevailing conditions of sale, such as prices if the customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. The product under consideration does not have a substitute in the public transportation area as a taxi passenger may easily reach any destination as opposed to the services provided by other public transportation means that run in accordance with the predefined route and schedule. Furthermore, the price of this service is significantly higher than the rates of other public transportation services.

The geographical market is the area defined by the Municipality of Vilnius as the administrative boundaries of the city of Vilnius, wherein the companies providing taxi services are obligated to charge identical rates of the service effective within the municipal territory of Vilnius.

1.3 The origin of the cartel agreement

Within the period under consideration (2H of 2004) there were 43 taxi companies legally operating in the city of Vilnius (population about 600.000) being holders of over 1400 license cards. In view of fierce competition in the market the rates of the call taxi services in Vilnius have remained unchanged for some 4-5 years already and where fixed at one of the lowest levels among capitals of the European Union Member States (on the average 0,23 - 0,29 EUR, plus the boarding fee up to 0,38 EUR). No separate

charge was placed for the call by telephone. Despite the surging fuel prices during the year 2004, until October of the year the prices remained stable. Such low price level was maintained due to the minimum wages paid to the taxi drivers, the outworn taxi fleet (quite a number of taxi companies operating in the city were hiring drivers with their own vehicles), as well as quite fierce competition in the service market concerned.

Over the several recent years the taxi company UAB"Martono taksi" (further – MARTONAS) operating over 100 vehicles was the most solid taxi company in the city with its vehicles servicing the approaches of the airport, prestigious hotels and other sites. But it was not able to dictate the price levels to other taxi companies, as the number of vehicles operated thereby accounted for as little as 8 percent within the total in the city. In late June 2004 the Taxi service providers Association was founded at the initiative of MARTONAS.

Approximately a month following the founding of the Association, the business news section of a major Lithuanian TV channels released a commentary in which the President of the Association (as discovered during the investigation –MARTONAS's major shareholder) and the executive director of the company publicly announced that the taxi service rates in Vilnius are unreasonably low and needed to be increased. Several days later the appendix to of the major national dailies was quoting the statements of the same persons to the effect that the taxi companies representing the major share of the Vilnius city taxi services market *intended to make an agreement* before the year end concerning the increase of the prices by one third. Responding to the statements the Competition Council warned the companies referred to in the articles that such agreement would constitute a violation of the requirements of the Law on Competition of the Republic of Lithuania (further – the Law on Competition).

Nevertheless, members of the Association increased the service rates simultaneously to be in effect as of 1 October 2005. The Competition Council, suspecting an infringement of the Law immediately initiated an investigation. Having obtained the judicial warrant inspections were conducted in the premises of the undertaking suspected of the infringement. Over 80 percent of the market participants (total 39 natural persons) were interviewed during the investigation. Some market participants explained that they had been instigated to join the Association and increase the service prices.

The investigation established that the undertakings providing taxi services in the city of Vilnius had concluded the agreement prohibited by the Law on Competition in the form of concerted actions. The rates were also discussed at the Association meeting held a week preceding the price increase. This implies that the taxi companies had not merely come into contact, but that it was a restrictive contact eventually resulting in the pricing changes, – the price jump as of 1 October 2004. The causality between the preceding contact and the resulting price increase is absolutely obvious. In accordance with Art. 5(1)(1) of the Law on Competition agreements to directly or indirectly fix prices of certain goods or other conditions of sale or purchase are prohibited. Such agreement concluded by competitors in all cases shall be considered restrictive in respect of competition (Art. 5(2) of the Law on Competition).

Although no direct evidence has been established (most taxi companies do not use PCs), except a note in the calendar of the manager of one of the competing companies with the date of the meeting of the Association and the effective date of the new price, the contents of the minutes of the Association's meeting and the course of the further developments showed the consistent preparations for the simultaneous rate. Besides, in their explanations several Association members claimed that the service rates were discussed at the meetings of the Association. Representatives of some non-member companies indicated that they had been instigated to follow the Association and the fix of the minimum price as proposed by the Association.

Also the investigation concluded that some participants of the cartel agreement (8 Association members) virtually simultaneously (end of September) applied to the company adjusting and installing the taximeters with a request to enter the modified rates in the taximeters (prior to establishing any new service rates taxi companies need to adjust their taximeters).

At the proceedings of the first instance court, representatives of the companies involved in the infringement attempted to prove that their behaviour in the market was caused by the leader regime and the growth of operating costs. The investigation, however, arrived at an opposite conclusion, - the costs incurred by individual taxi companies are different depending on quite a range of factors, – some are using drivers‘ own cars, others run the leased vehicles, wages of the employees come in different ranges too, as well as the vehicle repair costs and types of fuels; furthermore the fuel prices were increasing on a gradual basis, and in the course of the action coordination between the companies prices of some types of fuels had been even alleviating, etc.

Although orders issued by some companies concerning the increase had been signed in the course of September, i.e., on different dates, according to the opinion of the first instance court this fact cannot be regarded as a proof of the absence of agreement. The Court concluded that the undertakings had been coordinating the rates (comparison and discussions about the rates), and orders of virtually all companies were enforced simultaneously, on 1 October 2004, or a couple of days earlier.

The Court also noted that the provisions of Art. 5 of the Law on Competition are equivalent to those of Art. 81 of the Treaty prohibiting agreements between undertakings and concerted actions, however, the Treaty establishes the rules governing trade between Member States. Although the scope of the object of the present case is limited to the local market, for the purpose of the interpretation of the said Article of the Law on Competition account was taken of the explanations of the concepts and the rules in the cases of application of Art. 81 of the Treaty (Art. 1(3) of the Law on Competition). The European Court of Justice had defined the concept of concerted actions (concerted practice) as any cooperation leading to anticompetitive behaviour without concluding an agreement or an action plan (Cimenteries case No. 8/66; Gerhard Zuchner/Bayerische Verrensbank AG case C-172/80). In conclusion, for the purpose of application of Art. 5(1)(1) it is important to prove that the concerted practice by the undertakings has taken place, which requires the establishment of the bilateral contact and the following concerted practice.

In the course of the judicial proceedings, the taxi companies did not deny the fact of contacts, although claiming that the subject matter of their discussion was not the rates but rather the fair calculation of costs. The Court concluded this to constitute the agreement to indirectly fix the price of the product since the calculation of costs should normally be the internal issue of each individual company. Whether or not the costs (revenues) are being calculated fairly or correctly is established by appropriate public authorities rather than the Association of the undertakings. There, as was the case, the meeting of the Association involved contacts and instructions on the correct procedure for cost calculation which eventually results in nearly all companies increasing their rates almost at the same time. The Court had noted that the evidence collected by the Competition Council provides the proof that the issue of the rates had been discussed, and part of the taxi companies acknowledged that a company could not increase the rates on an individual basis as this would result in its bankruptcy or severally impede position of the company in the market. In the opinion of the Court, this shows that competition in the market is heavy and testifies to the fact that such agreement was necessary to the companies in order to be able to maintain in the market, and of special value and benefit this agreement was to MARTONAS, since the company is using good condition vehicles and more expensive fuels, therefore it is forced to maintain higher rates which makes competing difficult.

It is obvious that fixing of the service rate and the increase in the price affects adversely the customer who is forced to pay the same (fixed) price regardless of whether he is riding a new and comfortable or an

old vehicle. The undertakings concerned submitted the information on the new and coordinated rates to the administration of the Municipality which shows that the companies had assumed an obligation to adhere to the fixed rates, since in the opposite case a company deviating from the agreement could be appealed to the municipality by its competitors. Such concerted actions of the taxi companies deprive the customer of a possibility to choose the quality of the service. Thus damage is incurred to the customer not only due to the higher rates but also through depriving him of the possibility to choose a better quality service for a higher rate. This is exactly what constitutes the negative consequence of the restriction of competition that is subject to the provisions of the Law prohibiting to restrict competition even by concerted actions. Having regard to the above considerations the Court concluded there to be no grounds to annul Resolution No. 2S-3 of 3 February 2005 of the Competition Council as unlawful.

The Competition Council imposed pecuniary sanctions to the companies concerned for the infringement of Art. 5 of the Law on Competition. Having regard to the economic status of the infringing companies, they were subjected to the lower rate of LTL 5 000 (with an exception of the initiator of the violation that was subjected to a pecuniary fine in the amount of LTL 50 000). The undertakings appealed to court the decision also in respect of the amounts of the fines claiming them to be excessive. Having investigated the case the first instance court reduced the amount of the fines.

2. Principal evidence of the agreement prohibited by the Law on Competition concluded by undertakings providing taxi services

- The evidence of the coordination of the rates of taxi services have been recorded in the protocols of explanation of the undertakings concerned:

  – UAB „Kablasta“, one of the founders of the Association, - a representative claims that in the meetings of the Association of 2004-09-24 opinions of carriers concerning the taxi service rates were different, - some said that 70 cnt/km is sufficient, and another participant said that the rate should be 90 cnt/km, another one said that it should be as high as LTL 5, etc.“;

  – UAB „Litvega“, - a representative claims that at the meeting of 2004-09-24, R.Brazys, President of the Association and R.Kriukovas, Director of UAB „Martono taksi“ suggested that the „rates are adjusted“ and indicated the notes on the board: 1 km rate – not less than LTL 1, boarding fee – not less than LTL 2. Also indicated that on 2004-10-14, R.Brazys called <...> concerning the submission of information about rates. He wanted some information about the rates and inquired why the rates were lower than they should be“;

  – UAB „Kabrioletas“, - a representative claimed that the rates needed to be increased by 1 October up to LTL 1, and the boarding fee– up to LTL 2 <...>“. He also mentioned that UAB „Martono taksi“ „had invited several firms, that had not increased their rates „on the carpet“;

  – UAB „Ritaksa“- a representative indicated that „R.Brazys on the phone was inviting others to support the Association concerning raising of the rates up to 1LTL/km and the boarding fee up to LTL“;

  – UAB „Kobla“, one of the founders of the Association, - a representative claims that in the meeting of 2004-09-24 the participants were discussing the need to „<...> increase the rates because of the increase in the fuel prices <...>“;

  – UAB „Ekipažas“, - representative indicated that he had been invited to participate in the meeting of the Association and that the Association invited him to join the Association and proposed to „<...> restructure the rates“;

- UAB „Taksodromas“, - a representative indicated that in the meeting of the Association R.Kriukovas, the General Manager of UAB „Martono taksi“ said he would like to see the rates increased;

- UAB „Merselita“, – a representative indicated that in the meeting of the Association of September 2004 the participants acknowledged that one of the objectives of the Association is to readjust the tariffs, and that in other States the rates are equivalent to the price of one liter of the gasoline;

- UAB „Greitvila“, one of the founders of the Association, - representative indicated that the meeting of the Association discussed the issue of raising the taxi services rates. He also indicated that the Association proposed to calculate the costs of 1 km ride;

- UAB „Aimagrė“, – a representative indicated that the meeting of the Association of September 2004 had indicated that the „rates are too low“ <...>“;

- R.Brazys, the President of the Taxi services providers Association indicated that the companies providing taxi services had calculated the cost of carriage of passengers and that the data had been discussed during the meeting.

- Statements of R. Kriukovas, the General Manager of UAB “Martono taksi” and managers of some other entities in the press and in interviews to news agencies on the forthcoming increase in the rates;

- Public statements in the press and to the news agencies of R.Brazys, the President of the Taxi services providers Association (a shareholder of UAB “Martono taksi“) on the planned increase of rates of the taxi services and the prognosticated prices;

- It has been established that some of the entities involved in the coordination of taxi services rates (in the second half of 2004) had appealed to the company adjusting the taximeters with a request to adjust the taximeters to the modifies rates.

- Following the coordination of taxi services rates significant changes took places in the pricing of the companies providing such services – starting from 1 October the rate per 1 km was increased from - 60-90 cnt. to LTL 1, and in some companies – up to LTL 1,30, the boarding fee – from LTL 1,30 to LTL 2.

- Order of the companies concerning the increase of the rates:

  - indicated the same date for the increase of the rates – starting from 2004-10-01;

  - established virtually identical rates for the boarding and a ride of one kilometer (such rates have been coordinated in the course of bilateral contacts).

- It has been established that the increase of the service rates could not have been caused by economic conditions them being very different:

  - some entities are using new vehicles acquired on leasing terms, and others drive old vehicles, or rent the vehicles from their drivers;

- entities providing taxi services use fuels of different types, – part of the vehicles use gasoline and gas, others use diesel fuels;

- entities providing taxi services employ different numbers of employees and the salaries paid to such employees is also different;

- costs incurred by undertakings are of different level, they report different revenues and profits, etc.

ROMANIA

Romanian Competition Council has at present legislative instruments which allow it dealing with competition issues similar with the competition authorities from European Union, the Romanian antitrust legislation being in line with the provisions of the communitarian one.

The enforcing of the Competition Law and secondary legislation in this field is a major objective of the Competition Council; to achieve it, the Council has focused its resources principally on the most serious distortions of competition. As any competition authority, Romanian Competition Council applies oneself to discovering and stopping the agreement for fixing prices, output, for sharing the markets or clients, big-rigging or such like practices realised by competitors.

Cartels are forbidden by the Romanian Competition Law no.21/1996. Without an evident definition of "the cartel", Art. 5 par. (1) of the Law (which is similar with the Art. 81 of the EU Treaty) provides a non-exhaustive list of the most severe violation of the competition, such as:

> […] Any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at:

- Concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, markups, as well as any other terms of trading;
- Limiting or controlling production, distribution, technological development or investments;
- Allocating distribution markets or supply sources according to territorial criteria, sales-and purchase volume or other criteria;

  […]

- Participating, in a concerted manner, with bids rigged in auctions or any other forms of competitive tendering.

An indirect definition is done also through establishing a lower "de minimis" threshold for agreements between competitors (the total market share < 5% comparative with 10% for non-competitors' agreements) and through the provision according to which in the case of the agreements regarding prices, sharing the markets and the procurements, the "minimis" condition is not applied.

The distinction between the agreements which have as their object and those which have as their effect the restriction of the competition is very important, taking into consideration the probative evidences which the prosecutor must discover/constitute. If it is found that the agreement has as its object the restriction of competition, meaning that it is an agreement prohibited "per se", it is not necessary to prove the concrete harmful economic effects, knowing already that this conduct is leading to an inefficient repartition of the resources, rising in prices and to prejudices for consumers.

This principle is not provided for in the Law's text but by the secondary legislation, and until now the Courts have hold the Competition Council decisions, meaning that the anticompetitive effects of such agreements on competition should not be demonstrated.

Regarding the type of the agreement, which leads or may lead to a restriction or elimination of the competition on a market, this can be an express one – a document which reflects very clearly the purposes of the subscribers – or a tacit one. The evidence of the parties' intention to restrict competition is an important element but does not represent a necessary condition in sanctioning a cartel, in the case of the Romanian legislation. In spite that, the indirect evidence of an agreement, such as correspondence between competitors, telephone logs, together with any other evidence of a meeting between cartel operators, which must be very carefully connected with economic analysis of the market (the evolution of the prices in a certain period, characteristics of the market, similar comportments of the competitors) can constitute evidence for prosecuting a tacit cartel. These indirect evidences should be enough consistent to cover the lack of the document or the explicit prove.

The experience of the Competition Council in the field of hard core cartels emphasises that, for the most part of the cases, a document which was describing very clearly the intention of the subscriber to act concerted and to distort competition on the market was the basis for prosecuting. Nevertheless, there were situations when these kinds of practices were incriminated only with indirect evidences.

In this manner, in the case of the tendering organised by the Minister of Home Affairs of Romania for the procurement of laser equipment for surgery, three firms were sanctioned for participation, in a concerted manner, with rigged bids. The evidences of the prosecutor were the following:

- For all 5 auctions organised by the Minister, in the same year, only one firm won – Wilhelm;
- The Minister asked for offers from Wilhelm, Temco and a National Institute of research, receiving offers only from Wilhelm and other 2 companies which had not been asked for an offer, Ducatex and Master; these two companies sent the biddings following the information received from Wilhelm;
- The offers of the two companies, Ducatex and Master, were realised on the Wilhelm's type and even sent from the Wilhelm's fax;
- The offer of Master was signed by an associate of Wilhelm;
- The activities of the two firms did not have any connection with the medical field not with laser equipments; the firms did not have the special notice from the Ministry of Health necessary for commercialisation of medical equipment;
- The representatives of Ducatex and Master sustained the fact that they sent the offers for promoting but they could not prove the connection with the medical field both prior to the auction and afterwards;
- On the Romanian market of the laser equipment were present many undertakings, in special importers.

The conclusion of the investigative team was: Wilhelm contacted the two firms informing them about the intention of the organiser to purchase medical equipment and the other details regarding the auction especially to eliminate the competition; the two firms participated in the tender without any intention to obtain the order from the Minister but for permitting Wilhelm to win. The sanctions applied were low

having in view that the maximum threshold provided by Law at that time was ROL 250 million (trough modification of the law in 2003 the maximum amount of the sanction became 10% of the total turnover of each undertaking). The decisions of the Competition Council through which the three firms were sanctioned have not been appealed before the Court.

Regarding the objective to prosecute hard-core cartels as aggressively as possible, the fact that it does not exist or it have not been funded an explicit agreement between the competitors on a certain market, instead existing many other evidences which proves the behaviour of those in the direction of eliminating the competition between them, this fact should not represent an impediment for meeting the goal.

On the other part, it is theoretically possible that an in-depth economic analysis might reveal the fact that a price fixing cartel, for example, had no considerable effect on prices despite the explicit intent of the participants. Since this will be rather exceptional in practice because these kinds of practices have always or almost always a negative effect on competition, it can be justified by limiting the costs of proceedings and saving up the resources which should have been used in the case of analysing the effect of the cartel on the consumers.

Having regard that until now it has not been made a profile of the market characteristic for secret agreements but it has been marked out some features, as the existence of a high concentration or the existence of homogenous products, prove that it can not exist a standard in persecuting the cartels but only some directive lines.

Besides, the studies on negative effects of hard core cartels show the difficulties in calculating the effective prejudice, in most cases being required the use of various proxies and assumption.

The Romanian legislation in the competition field provides high sanctions in the case of discovering some “cartels”. These can amount up to 10% of the total turnover for each cartel operator. Both Romanian and European legislation operate against undertakings not individuals, so the sanctions are applied only to undertakings part of the cartel. These are culpable of committing a contravention.

However, there are situations which permit the sanctioning of an individual, when participates with fraudulent intent and in a decisive way to the conceiving, the organisation or the realisation of any of the practices prohibited under Art.5 (1). These individuals are culpable of committing a criminal offence being convicted to jail from 6 months to 4 years or fined.

The criminal action starts following the Competition Council's notification.

Through the guidelines issued by Competition Council on individualisation of the offences it is made a clearly distinction between vertical restrictions – deeds of minor and medium gravity – and horizontal restrictions as cartels – very serious infringements. More, in establishing the amount of the sanction both the duration and the aggravating circumstances or attenuating circumstances are taking into account. However, the guidelines and the sanctions do not make a distinction between cartel cases in which there is direct evidence and those in which direct evidence is lacking, the infringement being proved on the basis of indirect proves and economic analysis.

In the year 2004, Romanian Competition Council adopted the *Guidelines regarding the conditions and application criteria of a leniency policy,* which give complete amnesty to the first conspirator to come forward and reveal the inner workings of the cartel, permitting to the Competition Council to initiate proceedings. Having in view the experience of other countries which implemented this program before, this policy can help fight the most egregious competition law violation.

RUSSIAN FEDERATION

1. The Recent Russian Experience in Prosecuting Cartels without Direct Evidence of Agreement: Methodological Considerations and Practical Cases

While preparing its presentation for the Roundtable on prosecuting cartels without direct evidence of agreement the Federal Antimonopoly Service of the Russian Federation (FAS Russia) appreciated the approach contained in the Guidelines for country contributions, specifically its core question on circumstances enabling an antitrust authority to prove the existence of a cartel without direct evidence of agreement. The further explanation of the issue as provided in the Guidelines (whether a country in fact differentiates between hard core cartels and other types of anticompetitive horizontal activity; whether there exists an explicit or implicit definition of hard core cartel conduct; whether one element of that definition is the existence of an explicit agreement among competitors) also presents a good framework for a country specific analysis. Therefore, the FAS Russia' presentation of the issue will start from an analysis of the acting Russian Law "On Competition and Limitation of Monopolistic Activity in Commodities markets" from these positions as well as from review of the relevant parts of the draft Law "On Protection of Competition" currently being prepared and intended to upgrade the effective legislation.

In fact, the Russian antitrust legislation does differentiate between hard core cartels and other types of anticompetitive horizontal activity since they are defined separately in the sections 1 and 2 of Article 6 of the Law, though listed by comma: "contracts, other transactions, agreements … or concerted practices, concluded between economic entities operating on the same commodity market" (Article 6, Section 1), "the conclusion of contracts or concerted practices between economic entities being active on the market of the same commodity (substitutes) that lead or may lead to the prevention, restraint or elimination of competition (Article 6, Section 2)." Thus, the Russian Law contains a definition of hard core cartel conduct, however, the existence of an explicit agreement among competitors is not considered as the only possible evidence of the cartel. In other words, if such evidence is found it would be sufficient for proving the cartel conduct, i.e. a *per se* violation according to the Russian legislation. However, this legislation also leaves a possibility to prove cartel conduct basing on other types of evidence by use of the notion of "concerted practices," i.e. cartel conduct that may not be necessarily based on the relevant documents or even revealed oral agreements between competitors. Thus, proving intentional, conscious, though implicit market sharing or price fixing can be sufficient for proving the cartel conduct, at least in theory. Regardless the presence of the direct evidence of the cartel agreement, the Russian legislation provides for the same sanctions, unless the court declines the economic evidence presented by FAS Russia as sufficient for proving cartel conduct. (The alleged cartel participants should challenge the relevant FAS Russia decision in the court in this case.)

The new version of the Law currently being prepared leaves this possibility, as well. Its preparation goes in parallel with the adoption of the amendments to the Russian Federation Code on Administrative Violations aimed to increase sanctions against cartels, i.e. to subject their participants to higher fines than these foreseen for other types of antitrust violations. It will be combined with the introduction of corporate and individual leniency program for cartel "whistle blowers." As such organisation of a cartel is civil and not criminal violation in Russia, though it can be considered as a criminal one in case the individuals involved combine it with actions leading to damage to property, coercion to participate in the cartel and similar activities considered as criminal ones. Failure to service an administrative penalty (fines) may lead to arrest of corporate and/or individual property and other measures aimed to enforce the relevant FAS Russia or court decision.

Therefore, in its enforcement efforts the FAS Russia uses both "smoking gun" and economic evidence for prosecuting cartels. Though, the Russian courts may not be always in a position to consider the latter as sufficient as it happened about one year ago when the court refrained from recognising a cartel in the Russian steel industry basing on purely economic and behavioural evidence.

In some core Russian industries like oil, steel, chemicals production and others the supply side of the market can be characterised as tight oligopoly with high concentration ratios and possibility of control over prices and strategies of development of the market by a limited number of dominant companies. The concerted market behaviour of these companies is facilitated by extensive information exchange between the major actors in the course of numerous seminars, "experience exchange" workshops and other similar events. These meetings are rooted in the Soviet tradition of periodical seminars and meetings between representatives of enterprises of the same industry formerly governed by the same ministry, like ex-Soviet Ministry of Steelmaking, Ministry of Chemical Industry, Ministry of Fertiliser Production etc. Under the conditions of limited investments and slow technological change in these industries company managers especially these with Soviet experience of working in the industry are quite well aware of the competitors' production facilities, spare capacities, competitive advantages and cost functions. Combined with detailed knowledge of the demand side of the market, it provides them with possibility of cartel behaviour even without explicit agreements, though the later are quite likely but yard to reveal.

The literature on cartels, including that produced by the OECD, urges that hard core cartels, because of their especially harmful effects, be prosecuted as aggressively as possible and punished by the most severe sanctions available. In our view, this goal is rather furthered than weakened by evidentiary rules that permit cartel prosecutions without evidence of explicit agreement. However, we cannot agree that proving the cartel behaviour basing on economic and behavioural evidence only is a "more lenient evidentiary standard" compared with generating direct evidence of explicit agreement between the cartel participants (see question 7 of the Guidelines for Contributors). Moreover, we believe that the ability of a national antitrust enforcement body to prove the cartel conduct basing on the economic and behavioural evidence and aptitude of courts to consider this type of evidence should be regarded as a sign of maturity of the country's antitrust system since it is much more complicated than establishing cartel behaviour as a *per se* violation basing on documents, records and other types of the direct evidence.

In 2005 FAS Russia has successfully addressed several cartel cases basing on economic and behavioural evidence. Below some examples of these are presented.

On June 1, 2005 Krasnodar regional office of FAS Russia established a case against Lukoil-Yougnefteproduct, Rosneft' – Kuban'nefteproduct and Rosneft' – Tuapsenefteproduct prosecuting them for violation of Sections 1 and 2 of Article 6 of the Law "On Competition…" by means of fixing wholesale prices for Ai-92 and Ai-95 petrol (analogues of regular and premium types of petrol in the EU) in the territory of Krasnodar region. The case was initiated basing on the analysis of prices for these products for the first 5 months of 2005. The Krasnodar regional office issued a cease and desist order to these companies to cancel price fixing till July 11, 2005 and transfer the illegally received incomes to the Federal Budget. The order was not challenged in the court.

On February 8, 2005 the Rostov regional office of FAS Russia received a claim from the Ministry of Industry, Energy and Natural Resources of the Rostov Region and established a case against Rostov subsidiary of Lukoil-Nizhnevolzhsknefteproduct, Interneft' and Megapolis Plus prosecuting them for a violation of Section 1 of Article 6 of the Law "On Competition…" These companies were accused of price fixing basing on the analysis of their costs and prices for Ai-92 petrol in Rostov-on-Don. While facing different costs these companies established the same price level for petrol with a minor deviation of less than 0,2% that exceeded the average prices for petrol for the same period. The companies were proscribed

to transfer the illegally received incomes to the Federal Budget. Lukoil-Nizhnevolzhsknefteproduct challenged the decision of Rostov regional office of FAS Russia in the local court of arbitration.

On May 11, 2005 Khanty-Mansiysk regional office of FAS Russia established the price fixing case against three airline companies: Aeroflot – Russian Airlines, Sibir' and UTAir basing on the claim "Nizhnevartovskoye Aviapredpriyatie" federal government company. The case was based on the analysis of prices and costs for flight Nizhnevartovsk – Moscow – Nizhnevartovsk performed by the companies under consideration. In November-December all three companies established their tariffs for this direction at the same level exceeding the tariff as of May 2005 almost by twice. Meanwhile, these companies face different costs while servicing Nizhnevartowsk – Moscow direction because they use different types of aircrafts and different Moscow airports that lead to different costs per hour of flight and airport service. Additional argument considered by Khanty-Mansiysk regional office of FAS Russia division was that these companies established different tariffs while servicing other directions. Moreover, in the session of the Regional office's commission the representatives of the companies confirmed that their tariff setting depended on the tariff suggestion of the competitors. The commission decided that the tariff setting of the three companies was concerted and contradicted to Section 1 of Article 6 of the Law "On Competition…," therefore. The Regional office issued the cease and desist order to the companies that challenged it in the court of arbitration.

Basing on the considerations and cases presented above we can suggest a general conclusion that in the absence of the direct evidence of the cartel conduct the properly provided economic and behavioural evidence should be considered as a sufficient proof of this most dangerous type of antitrust violation. Both antitrust agencies and courts should have sufficient skills for presenting and considering it. Moreover, the mere possibility of revealing the cartel conduct basing on economic evidence can preclude companies from it and have a significant prophylactic effect, therefore.

SWITZERLAND

1. Introduction

The existing law on cartels and other restraints of competition came into force in 1996. It rests not on the principle of prohibition but on that of abuse, implying that a cartel agreement is not unlawful in itself, but only when the effects it has on competition are taken into account. It follows that, where cartel agreements are concerned, proof has to relate both to the existence of an agreement and to its effect. Originally, the law sanctioned firms not for behaviour that breached it, but only for re-offending.

Under an amendment to this law, which came into force on 1 April 2004, it is possible to sanction illegal agreements directly, and this also applies to abusive behaviour. The amendment also contains a leniency mechanism whereby a firm denouncing a cartel to which it belongs can be exempted from any sanction. Lastly, firms have the opportunity to check with the competition authorities whether certain of their projects might not be liable to sanctions.

2. Generalities concerning Swiss law

Switzerland is acquainted with the abuse system. It follows from it, in particular, that a cartel agreement is not illegal (or therefore null and void) in itself, but only if it constitutes an abuse by virtue of its object.

Swiss law contains standards for countering agreements in the field of competition and abuses of dominant position and for controlling business concentration.

Where agreements in the field of competition are concerned, both horizontal and vertical agreements are covered.

The rule is that cartel agreements, which in themselves are legal, can become illegal if they significantly restrict competition, are not justified for reasons of economic efficiency or eliminate effective competition.

Hard core cartels are assumed to eliminate effective competition on the market. Hard core cartels are either horizontal agreements which directly or indirectly set prices; restrict the quantities of goods and services to be produced, purchased or supplied or which divide markets up geographically, or they are vertical agreements which impose a minimum or fixed sale price, or else they are agreements for allocating customers geographically.

The LCart does not therefore really have a "per se rule" – either for horizontal or vertical agreements – but an amended "per se" rule for Arts. 5 §3 and 4, in the sense that there is only a presumption of illegality, which may prove unfounded.

3. Proof required for measures to combat cartels

3.1 Object of proof

As noted above, an agreement is considered to be illegal only if it eliminates competition or affects it significantly without being warranted for reasons of economic efficiency.

The first thing, therefore, is to prove the existence of an agreement and then prove that it has an effect on competition. Presumption of the elimination of competition, as provided for in the case of hard core cartels, does not reverse the burden of proof, it being up to the competition authorities to show that the presumption cannot be reversed. The parties involved are nevertheless required to help in establishing the facts.

Prior to the amendment to the law and the introduction of direct sanctions, agreements could be described as naïve in the sense that they were often known to the public so that it was not hard to prove their existence (e.g. Internet publication of price recommendations by trade associations). Even so, the effect of such agreements had still to be proven. Since the amendment to the law came into force, agreements have become less easy to detect, whence the introduction of a leniency programme which encourages exposure.

3.2 Type of proof

As mentioned above, direct proof of the existence of a cartel is not in itself sufficient to justify sanctions. It still has to be proved that the agreement eliminates effective competition or significantly restricts it, without being warranted on grounds of economic efficiency.

Proof that a competition-related agreement has negative effects is usually provided by economic analysis. This involves drawing up statistics on, for example, the prices applied on a market, the frequency with which such prices are applied, the frequency of application by non-cartel firms, etc. The object of the analysis will be to make the existence of an agreement's significant impact on competition highly probable. Such economic analysis is usually carried out on the basis of information obtained by means of a questionnaire sent to firms active in the industry under investigation, or else by means of surveys.

Proof can also be furnished by an extremely diverse set of indices, as the following case shows.

3.3 Case of the National Library bidding cartel

In March 1999, the Federal Construction and Logistics Office called for tenders for work on renovating the façade of the National Library. A selection procedure was put in place and four companies were invited to submit bids. This resulted in the receipt of bids totalling SF 2 222 916.--, SF 2 029 380.--, SF 2 000 040.-- and SF 1 911 472.--. However, an independent expert had put the cost of the work at SF 900 000.--. A new call for tenders sent to another company resulted in a bid worth SF 1 294 039.--, i.e. SF 617 422.-- less than the lowest bid submitted previously. The case was brought to the attention of the competition authorities since there was some doubt as to whether the first four companies might have colluded when drafting their tenders. In the meanwhile, the Federal Office cancelled the selective bidding procedure and awarded the contract by mutual agreement to the last-mentioned company.

The first four companies denied during the enquiry that they had colluded on prices. The competition authorities presented them with a draft amicable agreement which stated that a price agreement had been concluded. The representative of one of the companies agreed to sign, but the other three companies proposed a counter amicable agreement in which the existence of a price agreement was denied. In the end, the fourth company rejected the competition authorities' draft and rallied behind that of the other companies.

In the end, the Competition Commission handed down a decision in which it concluded that the four companies had set up a bidding cartel. Its conclusion rested on the following pieces of evidence:

- There was a big difference in price between the expert's estimate, the bid put in by the company selected and those submitted by the first four companies.

- Notwithstanding the above point, the difference between the highest and lowest bids tendered by the four companies was small.

- None of the four companies attacked the decision to cancel the selective bidding procedure.

- One of the four companies had previously agreed to the amicable agreement, whereas it was expressly stated that an illegal agreement had been concluded.

- The four companies had learnt of each other's existence when reconnoitring the site.

The decision was initially rescinded by the Appeals Board for reasons of form. In addition, the decision of the Appeals Board mentioned that the evidence was sufficient to prove indirectly that there had been an agreement, but it had not in this case been sufficiently well established. The Federal Tribunal, for its part, sided with the Competition Commission where the formal aspect was concerned, but did not comment on the Appeals Board's observations. The judgement was referred back to the Appeals Board for a fresh decision.

4. Conclusion

Where cartels are concerned, the competition authorities have first of all to prove the existence of an agreement between companies. Proof of the existence of a cartel agreement can derive from a series of pieces of evidence that make it likely. This can, however, be difficult to establish.

Secondly, proof has still to be provided as to the effect of the agreement. This usually stems from economic analysis of the case in question, which is carried out by means of questionnaires or surveys.

CHINESE TAIPEI

1. Introduction

The term "hard core cartel" is not defined in Chinese Taipei's Fair Trade Act, regulations or guidelines, but the concept is certainly well-understood. The Fair Trade Act has regulated general cartels, other restraints on competition and unfair competition practices since it came into force in 1992. The term "concerted action (or cartel)," as defined in Article 7 of the Fair Trade Act, refers to the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby restrict each other's business activities. It further qualifies "concerted action" as being limited to horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, the trade in goods or the supply of and demand for services. Also, the term "any other form of mutual understanding", as referred to here, means other than by contract or agreement, a meeting of minds whether legally binding or not which would, in effect, lead to joint actions.

Important here is that Article 7 of the Fair Trade Act only covers horizontal arrangements. Suppose the involved enterprises are not at the same level of production and/or marketing; in other words, suppose they are not competing enterprises. Under this scenario, they could never be considered to be in violation of the Act which prohibits concerted actions. There are, therefore, other provisions (Articles 18 and 19) in the Fair Trade Act to deal with the vertical arrangements, such as resale price maintenance, tying, exclusive dealing, territorial restraints, and so on. To determine whether the enterprises involved are at the same level of production and/or marketing or are competing firms, the Fair Trade Commission (FTC) makes its decisions on a case-by-case basis. Thus, in cases where there is some inability to obtain direct, unambiguous evidence of an agreement on concerted actions, the FTC does not dispose of the case on the grounds of insufficient evidence, but rather, it may investigate the issue from the angle of Article 19.

In addition to enterprises, the prohibition of concerted actions is applied to trade associations because of the extreme ease with which trade associations can engage in restricting the activities of enterprises either through their charter, a resolution of a general meeting of members, or a board meeting of directors or supervisors, or other means (Paragraph 4, Article 7 of the Fair Trade Act). The FTC takes the position that the decision made by a trade association to establish a cartel is sufficient to affect the market functions, even if the scale of the trade association is not so large. Added to this, a trade association is often the planner, or initiator of concerted actions, signifying that the concerted actions on the part of a trade association that affect market competition should be subject to punishment. In cases where self-discipline among members of trade associations affects market competition, the Fair Trade Act does indeed apply. To maximise the understanding of and adherence to the Act and to serve as a source of reference, the FTC issued the Policy Statement on Trade Associations under the Fair Trade Act in 1993.

There are many different types of concerted actions, and their effects on markets vary. In principle, to have concerted actions is to limit competition, to impede the adjustment of prices and to harm consumer interests. For these very reasons, the Fair Trade Act makes it a point to impose tight scrutiny. On the other side of the coin, some concerted actions are actually beneficial to the economy as a whole and are in the public interest, too; therefore, in order to be legal, intended actions must be approved by the FTC.

Article 14 of the Fair Trade Act provides several exceptions for firms to be able to engage in concerted actions; for these exceptions to apply, a concerted action must satisfy one of the circumstances listed below:

- unifying the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency;
- joint research and development on goods or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency;
- each developing a separate and specialised area for the purpose of rationalising operations;
- entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports (so-called export cartels);
- joint acts in regards to the importation of foreign goods for the purpose of strengthening trade (so-called import cartels);
- joint acts limiting the quantity of production and sales, equipment, or prices for the purpose of meeting the demand orderly, while in economic downturn, the market price of products is lower than the average production costs so that the enterprises in a particular industry have difficulty to maintain their business or encounter a situation of overproduction (so-called recession cartels); or
- joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small and medium sized enterprises.

The commonly granted exemptions are for import cartels. Some of the larger users of wheat, soybean and corn, for instance, need to import such goods in bulk from abroad. They claim that they need to conduct joint purchases of such goods from abroad and joint acquisition of shipping services in order to reduce the risks and extra costs that would arise if individual firms were to procure large amounts of these goods on their own. Considering the advantage of the reduced costs, and thus, that it is beneficial to the economy as a whole and in the public interest, the FTC decided to grant approval for such companies provided that they observe certain specified conditions.

The FTC grants exemptions in a very strict manner. For instance, although the FTC was allowed to grant exemptions to recession cartels under Subparagraph 6 of Article 14, it rejected applications filed by certain man-made fibber industries under such a provision. Its reason to reject those applications was that despite an economic downturn at that time, the markets were still able to function and the inventory on hand was not extraordinarily high.

When granting an exemption to firms to conduct concerted actions, the FTC is always allowed to impose terms, qualifications or conditions. The period to conduct concerted actions shall not exceed three years unless such period has been extended prior to the expiration of the said exemption. The FTC can always terminate such exemptions in cases where there is a change of circumstance or a violation of the terms or conditions set forth in the approval.

Article 14 of the Fair Trade Act specifically exempts concerted actions where the intent is to improve operational efficiency or strengthen the competitiveness of small and medium sized enterprises on the condition that these actions are beneficial to the economy as a whole, are in the public interest and have had prior approval. Considering that the number of small and medium sized enterprises is about 98% of all enterprises in Chinese Taipei and that it is necessary to prevent such enterprises from abusing the

exemption provisions, a strict procedure has been established for the review of applications for exemptions for joint price fixing by small and medium sized enterprises.

The FTC received an application for joint price fixing from tire repair operators, and as part of the rationale behind its decision to approve it, the FTC took into consideration that the explosion of tires is only an occasional and accidental occurrence and that the time and location of receiving necessary repairs are not fixed. Aside from this, repair procedures are quite simple, consistent and of low transactional value. In the case at hand, joint price fixing could reduce the transaction costs of conducting an inquiry, provide an impetus for product or service providers to compete and could prevent obvious unfair opportunistic behaviour when operators are dealing with consumers' problems or urgency. The FTC found joint price fixing in this case was beneficial to the economy as a whole and in the public interest, and consequently, it granted its approval.

Before the amendments of 2002, during which time the Fair Trade Act did not specifically provide for direct exclusions, many concerted actions were inherently completely legal -- for example, those involving joint research and development for the purpose of technological upgrading or the concerted actions of two small shops, or in cases where there were possibly slight effects on market functions; in these cases, the drawbacks of such activities were far outweighed by their benefits to the economy as a whole and in the public interest. However, if they had been carried out without prior approval, such actions would have faced the threat of illegality. Because of a lack of regulatory necessity coupled with society's tendency to complain about over-control, Article 7 of the Fair Trade Act was amended to limit concerted actions to horizontal concerted action which could affect the market functions of production, the trade in goods or the supply of and demand for services.

2. Effects of Concerted Actions

Article 14 of the Fair Trade Act prohibits enterprises from engaging in concerted actions, save for specific conduct that is listed among the exceptions and is beneficial to the economy as a whole and in the interests of the public at large. The legislation seems to apply the "per se" illegal rule, under which no analysis on the effects of market competition is required. If we look at the definition of concerted action under Paragraph 1, Article 7 of the Fair Trade Act, it seems that whether there is a contract, agreement or any other form of mutual understanding between or among competitors, and if their joint decision on price, quantity, etc. is to restrict each other's business activities, then it should be considered that they are engaging in a concerted action. Also, for Paragraph 2, Article 7 of the Fair Trade Act to apply, it requires that the concerted action would affect the market functions of production or trade in goods, or supply of and demand for services. It seems that the "rule of reason" should be applied.

In practice, the FTC applies the "rule of reason" to most forms of horizontal arrangements and thus, the effect on the relevant market must be examined. Yet it is sometimes very difficult to decide whether the market would be affected in fact. In certain cases, there are some differences in opinion as to the definition of a relevant geographical market, and this could result in the different affected portion in fact.

Paragraph 2, Article 7 of the Fair Trade Act requires that joint actions be capable of affecting market functions. In other words, merely a potential effect would be enough. A real effect on the functions of a relevant market is not necessary. Thus, if a concerted action is capable of affecting the market, the provisions regulating concerted actions can be applied without regard to the length of time the concerted action has been in existence and without regard to whether the agreement was in fact still being carried out after the conclusion of the agreement.

Although the FTC has not explicitly stated that it applies the "per se" rule in certain types of cases, in practice, it does use the "per se" principle in some limited situations. For instance, prior to the putting into

force of the Government Procurement Act, bid-rigging activities were subject to the regulations on concerted actions in the Fair Trade Act. The FTC made quite a number of decisions against bid-rigging activities without entering into a substantive analysis of the effects from such activities on the relevant market. It was considered a *de facto* application of the "per se" rule. It should be noted that current bid-rigging activities are subject to criminal punishment under the Government Procurement Act.

Cases in violation of Article 14 of the Fair Trade Act, which prohibits concerted actions, have accounted for the largest percentage of all fines imposed since the Fair Trade Act came into force in 1992. The total fines for concerted actions imposed during the 14-year period from 1992 to 2005 reached approximately 46% of total fines for all actions covered by the Fair Trade Act. Worth noting is that during the same period, the value of all fines imposed for horizontal agreements was particularly steep in 2003 when it reached NTD 352 million. This was primarily because in 2003, 30 enterprises operating cylinder-filling plants, which were in a competitive relationship with each other, established organisations to reach an agreement to raise the installation fees and delivery rates by their downstream distributors and subsequently imposed restrictions on competition among enterprises as well as restricted the trading counterparts of their distributors. These acts were enough to disrupt the supply and demand functions in retail pricing plus the installation and delivery of cylinder-packaged gas in certain regions, hence violating Article 14 of the Fair Trade Act prohibiting concerted actions. As a punitive measure, an administrative fine of over NTD 300 million was imposed.

3. Forms of Agreements

In Chinese Taipei, whenever the FTC is unable to obtain direct concrete evidence of a cartel agreement, it makes every attempt to get indirect evidence to substantiate the notion of a "mutual understanding of a cartel" among competitors. Such evidence is based on the FTC's observations of competitors with the same or similar conduct which might substantiate a "meeting of minds". The most common types of cartel among enterprises involve price fixing, output restrictions, technology restrictions, division of customers, and division of territories. For example, competitors in question have a "meeting of minds" by jointly participating in trade associations, get-togethers, and other informal meetings, which enable them to engage in concerted action; clearly, there is parallel behaviour among such firms after such meetings or occasions. During its investigations, the FTC further makes inferences from its observations of the "inducement, economic benefits, the timing of such similar action, the possibility of substituting different actions, the frequency and the duration of the acts which are deemed harmful to market order, the concentration and concordant degree of the conduct, etc." And such testimony has been made by respondents when they have presented themselves before the FTC. To be sure, the FTC has applied such circumstantial evidence in the past to support its decisions against some accused parties.

4. Case Study: Petroleum Products Market

Since the FTC was established, it has usually investigated and found cartel agreements based on direct evidence. Until now, the administrative courts have almost supported the FTC's decisions on cartel cases when appellants have appealed competition litigation. In 2003, the FTC dealt with a cartel agreement where there was no direct evidence, and this was in the petroleum products market. In this case, the two disposed parties appealed litigation to the Taipei high administrative court. This case is currently on appeal. Detailed information about the case is presented in the following.

The FTC opened an investigation against the only two gasoline suppliers in Chinese Taipei, and this was to examine their pattern of simultaneously adjusting their wholesale prices of 92 and 95 unleaded gas and premium diesel oil. Chinese Petroleum Corp. ("CPC") had long been the monopoly provider. Formosa Petrochemical Corp. ("FPCC") later entered the market in September 2000. (Esso also entered the market,

but it soon exited after less than two years.) CPC and FPCC account for about 70% and 30%, respectively, of the market for gasoline and diesel fuels.

CPC and FPCC simultaneously adjusted wholesale prices within the same range at least 20 times from April 2002 to September 2004. Typically, the initiating party would announce its decision to change prices in the media. Whenever one of them made such an announcement, its rival would follow; then the two competitors would make the same changes at the same time. If the rival announced it would not, then the initiating party would withdraw or amend its earlier announcement.

The FTC contended (among other things) that this public exchange of views and intentions was more than parallel action and, in fact, constituted a "meeting of minds"; as such, it was deemed a prohibited "concerted action." The FTC argued that disclosing sensitive market information, exchanging business strategies or directly communicating business intelligence can be construed as reaching a "meeting of minds." This was inferred from indirect evidence based on what the FTC described as inducement, economic benefits, the timing or the amounts of the price increases, the possibility of substituting different actions, the frequency, duration and concentration of the actions and the unanimity. The FTC admitted that simple uniform pricing would not necessarily have been unlawful. But it contended that the two enterprises here did not just reach the same price levels, but rather, they communicated their intent in advance and their actions led to simultaneous moves, which retail operators typically followed too.

The FTC sent a letter to the two firms warning them not to use advance announcements to change wholesale prices simultaneously and demanded that they make price decisions in accordance with their own individual operating conditions instead. On account of their having disregarded the warning and on account of their concerted action in violation of Article 14(1), in October 2004, the FTC imposed an administrative fine of TWD 6.5 million on each firm. The parties appealed, and the matter was returned to the FTC for it to justify the fines. In July 2005, the FTC again imposed the exact same fines, reciting the considerations that are set out in its sentencing guides, namely motive, objective, expected improper benefits, degree of damage to trading order, duration, benefits obtained, scale of business, business operations, revenue and market position, previous correction of or warning about the conduct, type and number of previous violations, interval of violations, punishments incurred, conduct after the violation, cooperation during the investigation and other factors. Once again, the decision is on appeal.

5. Conclusions

After 14 years of implementing the rules on cartels, the FTC has found more than 114 violations of Article 14 of the Fair Trade Act. The FTC was not very vigorous in applying the provisions against concerted actions prior to the amendments to the Fair Trade Act in 1999, due to the fact that there was an immediate criminal punishment against such violations. Since the 1999 amendments, the FTC has been able to apply Article 14 and has imposed administrative fines in a more active manner. It can be expected that the FTC will continue to adhere to its strict position when carrying out its law enforcement against concerted actions.

Given the difficulty in obtaining substantive evidence of concerted actions, it has become increasingly more prevalent among competition law authorities to adopt leniency programs. With these, conspirators who voluntarily reveal to the competition law authorities or judicial organisations such collusive agreements and assist in the investigation may receive immunity or reductions in their administrative and criminal liability. While the contents of leniency programs vary across countries, generally speaking, conspirators should voluntarily reveal or assist before the authorities learn of the agreement or obtain adequate evidence; alternatively, they are required to provide concrete evidence in the investigation process that enables the authorities to successfully complete their investigation. Such a program can save on investigative costs, prevent the spread of injury, deter hard-core cartels and contribute to preventing and

discouraging enterprises from being so inclined. In light of the potential benefits derived from leniency programs, the FTC has researched the designs and the methods of enforcement of such programs in other countries. The findings will serve as important references for the adoption and introduction of such a program to Chinese Taipei.

As mentioned above, it is often very difficult for the FTC to collect information to prove the existence of anti-competitive activities. The FTC has entered into agreements with competition authorities in New Zealand, Australia and France under which there are provisions for cooperation between the enforcement agencies in the respective jurisdictions. However, there has not been an agreement entered by the FTC with those enforcement agencies of the foreign jurisdictions under which the FTC has been able to obtain useful confidential information to correct illegal activities. The FTC is exploring the possibility of entering into cooperation arrangements with its other counterparts in other countries to ensure that enforcement activities can be undertaken in an even more effective manner and to improve the enforcement of competition law to combat cross-border anticompetitive practices and international cartels.

TURKEY

1. Does your competition law, either as written or as enforced, have a special definition for hard core cartels? If so, what is it? Does the definition require, as one element, that there be an explicit agreement among competitors, or does it also provide for the possibility of implicit agreements, perhaps through consciously parallel conduct "plus" one or more facilitating practices?

The Law on the Protection of Competition No 4054 (the Law) does not have a special definition for hard core cartels. It has a general prohibition for agreements, concerted practices and decisions limiting competition with a non-exhaustive list of examples such as price fixing, market sharing, controlling supply and demand, and complicating the activities of competing undertakings, excluding firms in the market via boycotts, discrimination and tying. The prohibition does not require the existence of an explicit agreement. Rather, the Law overtly says that in cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice (concerted practice presumption). Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.

2. Apart from the definitional issues, do cartels have special status under your law? In particular, are they?

- prosecuted criminally;
- subject to a per se rule;
- subject to harsher sanctions, particularly higher fines, than other violations of the law?

3. What effect do these special attributes, if any, have on the evidentiary burden that the cartel prosecutor must meet?

The agreements limiting competition are not prosecuted criminally under the Law. Fines imposed to undertakings party to an agreement limiting competition are administrative in nature. The agreements fixing prices are cited among the most severe cases in competition law. An agreement itself or at least its clauses distorting competition are subject to a per se rule and as a result there is no need to prove their effects if it is obvious that the objective is to limit competition. Being a party to an agreement limiting competition is prohibited according to the Law even effects of the agreement have not been realised. Because of this per se rule and the existence of concerted practice presumption, it can be said that the standard of proof is loosened. Agreements that fix prices or share markets may be subject to higher fines because they are generally more harmful than other anticompetitive conducts.

4. Is it possible to prove a cartel agreement in your country without direct evidence? If so, what evidence is sufficient? In particular, what combination of type's ii-iv evidence (i- direct evidence of agreement; ii- indirect evidence of agreement, iii- practices that facilitate

cartels, or make it easier for competitors to reach or sustain agreement iv– economic evidence) can suffice?

In *Cement* decision (2.12.2004; 04-77/1108-277), parallel price increases among four cement producers operating in Aegean region were the subject of the investigation. At the end of the investigation, an overt text of an agreement showing that undertakings violated the Law could not be found. However, there were many findings demonstrating existence of infringements of competition in the market. In this case, in line with the concerted practice presumption, cement prices in Aegean region were analysed and as a result parallel and high price increases were observed. The possibility that costs that might explain such increases was discarded as a result of cost-price comparisons proving that costs during the relevant year followed a stable course. Therefore, it was seen that price increases have been realised independent of costs.

To give a brief account of the analyses carried out during investigation in general, for instance, in 2002, despite price falls in bagged cement in January-April, prices charged by some cement producers doubled in a short period of four months beginning from April. Increase in inflation and exchange rate in this period was around 20% whereas costs incurred by the cement producers remain unchanged. To be more specific, prices increase by some cement producers was 100% whereas inflation rate was 21% and exchange rate was 23% in April-October in İzmir, the largest city in the Aegean region.[1] Moreover, in 2003 although there was no change in costs, a sudden increase in prices began in June when inflation rate was around 2% and exchange rate decreased by 2%. To give a more specific example for 2003, the increase in price of bagged cement in June-December in the Aegean region around 50% despite the inflation rate was around %2, 20 and increase in exchange rate was minus. Price comparisons with other regions demonstrated that price of the same product was up to 65% higher in Aegean region than for instance that in Ankara although changes in costs between the two regions were minimal.

Moreover, two documents found during on the spot inspections were regarded as signs of coordination among competitors in the sense that the competitors held a meeting to realise price fixing practice. In one these documents, it was written that one of the cement producers was appointed as the secretariat to organise the "business". To summarise, business was defined as to prevent unfair competition, unnecessary practices, price decreases, discounts and dumpings; preparing regional plans regarding production-consumption. The other document showed that the cement producers held meetings in certain cities and those cement producers operating in a certain city attended the relevant meeting. However, it must be said that these two documents were supporting documents indicating coordination among competitors and they were not the main element that the decision was based on. On the contrary, concerted practice presumption based on price increases is at the heart of the decision and the use of the presumption does not require the existence of such supporting documents.

The undertakings subject to investigation could not produce rational and economic facts such as increase in demand as the cause of price increase.

Without employing concerted practice presumption, it could be impossible to prove a cartel agreement of a secret nature in sectors in which competition law and instruments of proof are known and cement industry is such an industry and has experienced two investigations before.

As a result this case is a good example of use of economic evidence (type iv) that is evidence of price increases that can not be justified.

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[1] The decision also includes price analyses in other cities such as Aydın, Manisa and counties such as Ayvalık, Burhaniye, Edremit. Because İzmir is the largest city of the region, it is selected here as example.

5. Is there a difference in the sanctions that are applied to cases in which there is direct evidence of agreement and those in which direct evidence is lacking?

Imposition of sanctions does not depend on the existence of direct evidence of agreement. The concerted practice presumption is a good example that there is no difference in sanctions that are applied when direct evidence is missing vis-à-vis sanctions applied when direct evidence is available. While imposing fines, the Law just says that the Competition Board takes into account factors such as the existence of intent, the severity of fault, the market power of the undertaking or undertakings upon which a penalty is imposed, and the severity of potential damage.

6. The literature on cartels, including that produced by the OECD, urges that hard core cartels, because of their especially harmful effects, be prosecuted as aggressively as possible and punished by the most severe sanctions available. In your view, is this goal furthered or weakened by evidentiary rules that permit cartel prosecutions without evidence of explicit agreement?

7. Developing countries and those with little or no experience in prosecuting cartels will almost certainly find it difficult, at least initially, to generate direct evidence of explicit agreement in cartel cases. Should these countries employ a more lenient evidentiary standard? If so, should it become stricter over time?

The reasoning of concerted presumption is granted as "In a legal system in which agreements limiting competition are prohibited, such agreements are made secretly and proving their existence becomes very hard and sometimes impossible. Therefore, in cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, a presumption that undertakings are in concerted practice has been adopted. As a result, the burden of proving that they are not in concerted practice has been shifted to the relevant undertakings and it has been aimed that the Law does not become inoperative due to difficulty of proof." Consequently, strength of the Law has been consolidated against anticompetitive conduct in case it is hard to find an explicit agreement although the conditions in the market are similar to those where competition is prevented, distorted or restricted.

Although it may be hard for a country with little or no experience to draw a clear line to distinguish a secret cartel from parallel behaviours that have economic and rational causes, this presumption can be valuable to deal with anticompetitive conduct where it is hard to find a smoking gun provided that the presumption is used cautiously.

UNITED STATES

The United States' position on the importance of an effective anti-cartel enforcement program has long been clear. Detection and prosecution of hard core cartels has always been, and remains, a primary law enforcement priority.[1] There is a broad consensus that hard core cartels – whether in the form of price-fixing, output restrictions, bid rigging, or market division – are the most egregious of antitrust law violations; in the words of our Supreme Court, these acts of collusion are the "supreme evil of antitrust."

The term "hard core cartel" is not defined in US law, regulations, or guidelines, but the concept is well-understood. As stated in the antitrust offences section of the United States Sentencing Commission Guidelines,[2] there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market- allocation, can cause serious economic harm. ... The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognised as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual anticompetitive effect.

In the US, cartel conduct is treated as *per se* illegal. A *per se* rule for evaluating hard-core cartel conduct focuses solely on the conduct. This approach does not require any proof of harm to competition and does not allow parties to claim an efficiency justification. Hard core agreements, because of their pernicious effect on competition and lack of redeeming economic value, are conclusively presumed to be unreasonable and therefore illegal, without elaborate inquiry as to the precise harm they have caused. Moreover, under a *per se* analysis, companies are not entitled to attempt to demonstrate the alleged reasonableness or necessity of the challenged conduct. For example, price fixing cannot be justified by arguing that it was necessary to avoid cutthroat competition, or that it resulted only in reasonable prices. The *per se* approach provides certainty with respect to the legality of specific conduct.

In the US, cartels are prosecuted as criminal offences under the Sherman Act. Section One of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Criminal violations of the Sherman Act are punishable by fines of up to $100 million for corporate defendants and $1 million for individuals. Fines may also be set at double the gross amount gained by the defendants or lost by the victim. Criminal violations by individuals of the Sherman Act are also punishable by up to ten years' imprisonment. If a private civil suit follows a government action under the Sherman Act in which the defendant has been found liable, the plaintiff may use the earlier judgment as *prima facie* evidence of a violation. Private parties can obtain injunctive relief and are generally entitled to treble damages, as well as recovery of reasonable attorneys' fees, for violations of the antitrust laws. The

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1 When a matter is before the Federal Trade Commission (FTC) and it determines that the facts may warrant criminal action against the parties involved, the FTC notifies the DOJ and makes available to the DOJ the files of the investigation. If the DOJ determines that a matter should be referred to a grand jury for criminal prosecution, it will request that the FTC transfer the matter to it. If, on the other hand, the DOJ decides not to pursue the matter with a grand jury, then the FTC may proceed with its own civil investigation. In addition, for some *per se* horizontal offences which could be prosecuted criminally, the agencies may decide on rare occasions, based on particular factual circumstances suggesting that criminal prosecution would not be appropriate, to proceed instead by means of civil proceedings.

2 United States Sentencing Commission, *Guidelines Manual,* §2R1.1 Commentary (Nov. 2005).

US Government can also sue for treble damages to recover for injury to its business or property resulting from an antitrust violation.

To prove concerted action, "there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.,* 465 US 752, 768 (1984). Furthermore, "it is generally believed ... that an agreement involving actual, verbalised communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act." *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 654 (7th Cir. 2002)(Posner, J.).

The DOJ usually proceeds with prosecution only when there is direct evidence of an unlawful agreement. In cases where a defendant does not plead guilty, the direct evidence offered most often takes the form of testimony from a cartel participant, who may be a leniency applicant, cooperating witness, or immunised co-conspirator, but can also include video- or audiotapes or documents providing direct evidence of the unlawful agreement.

Only in unusual circumstances will the DOJ proceed with a criminal prosecution when direct evidence is lacking. One such case, *United States v. Champion International Corporation,* 557 F.2d 1270 (9th Cir. 1977), involved bid rigging by firms purchasing timber at auctions held by the US Forest Service. Before the period covered by the indictment, the firms engaged in "intensely competitive bidding." The trial court found that at a certain point this competitive process ended when one defendant found no competing bidders against him in a small auction and decided "to experiment" later that day by not bidding on another sale. "The trial court agreed with the defendants that a new bidding pattern had thus developed by 'normal economic forces', presumably in a non collusive evolution." *Id.* at 1273. From these "innocent beginnings," representatives of the defendants began to meet and discuss future sales and their relative desirability to each firm. "Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants 'had an understanding' about bidding." *Id.* The Court of Appeals upheld the trial court's finding that circumstantial evidence proved the existence of the agreement, even though the DOJ was unable to introduce direct evidence of an express agreement.

Fuelled by the prospect of treble damages, allegations of hard core conduct are frequently litigated between private parties in US courts, and are often based on circumstantial evidence.

Because price fixing is a *per se* violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs. In the absence of such an admission, the plaintiff must present evidence from which the existence of such an agreement can be inferred.... The evidence upon which a plaintiff will rely will usually be ... of two types – economic evidence suggesting that the defendants were not in fact competing, and non economic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types ... : evidence that the structure of the market was such as to make secret price fixing feasible (almost any market can be cartelised if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies); and evidence that the market behaved in a non competitive manner. Neither form of economic evidence is strictly necessary, since price-fixing agreements are illegal even if the parties were completely unrealistic in supposing they could influence the market price. *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 654-55.

There have been and continue to be many private cases seeking damages based on allegations of unlawful cartel agreements. In the absence of direct evidence of an agreement, courts have considered a wide range of economic evidence that might support a finding that a market is conducive to price-fixing.

Judge Richard Posner, a leading antitrust scholar, lists the following possible indicia, all of which can be subject to ambiguous inferences and are highly fact dependent:[3]

- the market is concentrated on the selling side;
- there is no fringe of small sellers;
- demand at the competitive price is inelastic;
- entry takes a long time;
- the buying side of the market is unconcentrated;
- the product is standardised (not customised);
- the principal firms sell at the same level in the chain of distribution;
- price competition is more important than other forms of competition;
- there is a high ratio of fixed to variable costs;
- there are similar cost structures and production processes;
- demand is static or declining over time;
- prices can be changed quickly;
- the market operates with sealed bids;
- the market is local;
- competing firms cooperate legally on other matters;
- the industry has a history of cartel behaviour.

He lists other types of economic evidence that can demonstrate "the existence of collusive pricing even though no overt acts of collusion are detected":[4]

- fixed relative market shares
- market wide price discrimination
- exchanges of price information
- regional price variations
- identical bids

3 Posner, Richard A., Antitrust Law (2d. ed.), University of Chicago Press (2001), pp. 69-79.

4 Id. at 79-93.

- price, output, and capacity changes at the formation of the cartel
- industry wide resale price maintenance
- declining market shares of leaders
- amplitude and fluctuation of price changes
- demand elastic at the market price
- level and pattern of profits
- market price inversely correlated with number of firms or elasticity of demand
- basing-point pricing
- existence of exclusionary practices

One leading antitrust treatise describes the use of circumstantial evidence in private cases as follows:[5]

> [L]ower court decisions consistently have held that conscious parallelism, by itself, will not support a finding of concerted action. While some decisions have suggested that parallelism is a factor 'to be weighed, and generally to be weighed heavily,' other facts and circumstances, often referred to as 'plus factors,' typically must be combined with evidence of conscious parallelism to support an inference of concerted action. The courts emphasise that these plus factors should not be viewed in a vacuum but should be considered as a whole against the entire background in which the alleged behaviour takes place.
>
> Courts generally have not articulated a specific hierarchy of plus factors. Nonetheless it is possible to identify some broad patterns from the relevant decisions. Among the most important plus factors are those that tend to show that the conduct would be in the parties' self-interest if all agreed to act in the same way but would be contrary to their self-interest if they acted alone. Evidence satisfying this requirement has included artificial standardisation of products and raising prices in time of oversupply. Giving pretextual reasons for action also has been considered a strong plus factor. Conversely, where each defendant has legitimate business reasons that rationally would lead it to engage independently in the challenged conduct, an inference of conspiracy based solely on that conduct is improper. Similarly, when the defendants would have little motive to engage in the alleged conspiracy, the courts will require the plaintiff to introduce additional evidence before permitting the fact finder to infer concerted action.
>
> Less determinative in the hierarchy of proof is evidence that indicates an opportunity for collusion. This plus factor includes evidence of correspondence, meetings, or other communications among the alleged conspirators, especially when quickly followed by simultaneous identical actions. This plus factor also includes similarity of language, terms, and conditions used by alleged conspirators where ... such similarity is improbable absent collusion. ... [S]everal courts have held that meetings or other communications among conspirators, which show no more than a 'mere opportunity to conspire,' are insufficient, by themselves, to support an inference of conspiracy, at least where the defendants offer plausible, legitimate business justifications for the communications.

[5] ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), pp. 10-15.

Some Thoughts on an Effective Anti-Cartel Program

A *per se* rule prohibiting hard core cartels is efficient and predictable, and greatly simplifies the investigation and prosecution of the most harmful antitrust offences. It properly focuses the inquiry on the existence of an unlawful agreement, and runs no risk of deterring beneficial business conduct. As stated by Judge Bork,[6]

Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market. There is no unfairness in applying the *per se* rule to parties whose agreement was useless, since their intent was wrongful. This consideration bears more properly on prosecutorial discretion in bringing such cases and on judicial discretion in imposing penalties. The *per se* rule against naked price-fixing and market-division agreements is thus justified not only on economic grounds but also because of the rule's clarity and ease of enforcement.

Agencies should focus their enforcement efforts on cases where direct evidence is available, and on obtaining the necessary investigatory tools to uncover this evidence. An effective leniency program is the best tool for acquiring such evidence, along with physical evidence obtained from searches and testimony from direct participants testifying under a grant of immunity or pursuant to a plea agreement.

In our experience, prosecutions that depend on complex, indirect economic evidence should be a much lower priority for agencies. The types of circumstantial evidence described above that are used in private cases in the US tend to be ambiguous, and require detailed and highly fact- specific expert testimony to provide context. For this reason our Supreme Court has properly imposed a high standard for plaintiffs in these cases: "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of §1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 US 574, 588 (1986)(citations omitted).

[6] Bork, Robert H., The Antitrust Paradox, The Free Press (1978), p. 269.

ZAMBIA

1. Introduction

In recent years, there has been heightened discussions, research and literature on hardcore cartels. While the average person in the street may not understand why a cartel is wrong and meriting criminal sanctions, the anti-cartel enforcer knows that "hardcore cartels are the equivalent of theft" and should be met with unequivocal public condemnation. In Zambia, cartels in the fertiliser, grain and oil procurement and marketing, are projected to cost hundreds of millions of US $ annually. However, due to a low level of the competition culture, these matters have not received the attention they deserve to warrant public expenditure on investigations and prosecution of individuals. However, there have been several instances reported in the national press alleging collusive tendering in the oil procurement, grain and fertiliser procurement. These activities, hitherto unquantified, have had a telling effect on the State treasury and on the competitiveness of industries dependent on these products in Zambia. Unfortunately, the Competition and Fair Trading Act of Zambia does not apply to activities where the Government of the Republic of Zambia is a party.

While about five cartels have been investigated by the Zambia Competition Commission in Zambia between 1998 and 2004, it is estimated that in only 20 cartel cases investigated in the United States in the 1990s, the annual worldwide turnover in the affected products exceeded US $30 billion.[1] In as far back as 1997, the World Trade Organisation (WTO) also highlighted the growing significance of international cartels for policy makers, noting that these cartels undermine international integration and decrease the benefits of liberalisation to consumers.[2] It is undoubted that aggressive prosecution of cartels should be enhanced, but the sustainability of such a fight is possible only where there are effective means to gather evidence and put a stop to hardcore cartel activity.

While Zambia's cartel provisions under Section 7 and Section 9 of the Competition and Fair Trading Act prohibit cartels outright and prefer criminal sanctions of imprisonment, the enforcement of the provisions have been ineffective due to various reasons that shall be explained later in this paper. Section 9 of the Act specifically addresses the following practices and declares them prohibited offences:

- Price Fixing.
- Collusive tendering.
- Market or customer allocation agreements.
- Sales and production quotas.
- Collective action to enforce arrangements.
- Concerted refusals to supply goods and services to potential purchasers; or

1 Simon J. Evenett (the World Bank), Margaret C. Levenstein (University of Massachusetts), and Valerie Y. Suslow (University of Michigan Business School) *International Cartel Enforcement: Lessons from the 1990s*,

2 World Trade Organisation, 1997 Annual Report

- Collective denials of access to an arrangement or association which is crucial to competition.

Due to lack of a precedent prosecution, there is no sufficient deterrent effect to cartel activity in Zambia. The word "cartel" in Zambia, like in many developing countries, does not usually connote any punishable offence to the reasonable person. This makes the Competition Authority in such countries to be the lone voice in cartel investigation and prosecution. While cartels are "theft" and distort both domestic and international trade and create market power for a few companies and their agents, it yet remains to be proven as to how much Court sympathy that cartel cases would receive.

To experts, students and victims of cartels, cartels bring about waste and inefficiency in industries whose markets would otherwise be competitive without the cartels, such as the aforesaid grain, fertiliser and oil sectors in Zambia. Great attention to cartels in Zambia has otherwise been connected to the public transport system where public outcry has largely been towards the concerted price increases under the now disbanded United Transport and Taxis Association (UTTA) – a notorious organisation for road passenger operators. Similar outcries have been heard in recent years in the oil sector. In 2001, the Zambia Competition Commission and the Energy Regulation Board (ERB) agreed to jointly prosecute Oil Marketing Companies for price fixing. Details of the case are explained later in this paper.

While cartel activity continues to be sophisticated, complex and perhaps undetectable, the problem with the matter would also be eluded to the high resources and man hours required to fully investigate a so called "hardcore cartel", especially by developing and under developed competition authorities. At international level, there is a recognised difficult in getting evidence, interviewing and even extraditing defendants. This calls for international cooperation with allied anti-cartel enforcement agencies. While at global competition enforcement level evidence gathering is more successfully conducted by more resourceful regulators, such regulators do not and cannot operate in a global vacuum and need the assistance of other regulators.

Cartels naturally operate secretly and gathering of evidence is a critical process in establishing such conduct. Evidence gathering is a primary function of any law enforcement agency, and its scope and usefulness is relative to the powers of the law enforcer. Evidence gathering in cartel cases includes any relevant documents, statements, other electronic or non-electronic records, eyewitness accounts and whistle-blower confessions. The complexity of hardcore cartel cases entails that where prosecution is planned, the Courts would likewise require hardcore evidence, in the case of Zambia, beyond reasonable doubt. This is because cartel activity is an offence attracting criminal sanctions. While some countries have legislations regarding evidence e.g. the UK and Ireland, some countries would rely on common law principles of evidence e.g. most Commonwealth Countries, including Zambia, Zimbabwe, Canada and Australia.

2. Obtaining evidence

The Commission is given wide ranging powers under Section 14 of the Competition and Fair Trading Act to obtain evidence. These include (after obtaining a Court warrant): authority to enter any premises; and access to, or production of, any books, accounts or other documents relating to the trade or business of any person and the taking of copies of any such books, accounts or other documents: Provided that any books, accounts or other documents produced shall be returned forthwith if they are found to be irrelevant.

In the exercise of the above powers, the Commission officers may be accompanied or assisted by any such police officers as are necessary to assist in entering into or upon any premises.

Further, under Section 16 of the Competition and Fair Trading Act, it is a criminal offence to fail to comply with any provisions of the Act or any regulations made under it, or any directive or order lawfully

given, or any requirement lawfully imposed under this Act or any regulations made under it. Therefore, to refuse or omit to furnish or produce any information or documents when required by the Commission to do so; or to knowingly furnish any false information to the Commission attracts a fine of US$2,000 or imprisonment for a term not exceeding five years or to both.

Under Section 6 of the Act, the Commission can commence investigations on its own initiative or upon receiving a complaint. It is clear that the Commission has sufficient mandate and powers to institute investigations and obtain evidence.

However, whether evidence obtained is relevant to the prosecution of a cartel is another thing. The fact that prices in a relevant market are the same and that they increase almost at the same time, is not enough to establish the existence of an agreement, or even coordination of prices through some practice such as leadership. This has largely been the case in oil procurement and marketing in Zambia. Similar price increments may be attributed to firms having the same monopoly or oligopolistic suppliers of key raw materials upstream. In Zambia, the sole State Owned importer and refiner of crude petroleum, from whom all the oil marketing companies source their supplies, pegs the wholesale price in conjunction with the Energy Regulation Board. It is likely then, that the retail price is going to be substantially similar, especially in view of the oligopolistic nature of the industry. To obtain cartel evidence would entail going beyond the monitoring of prices.

Generally, evidence gathering in critical anti-trust cases has to go many steps further, to include any evidence that two or more sellers of a particular product have agreed to price their products in a certain way, to produce or sell only certain amounts of their products, or to sell only in certain areas or to certain customers; large price changes by a number of sellers of very similar products, particularly if the price changes are of similar amount and occur at about the same time; and a statement by a firm that it cannot sell to you because of an agreement with another firm that only the latter can supply you.

In *grain procurement and marketing* in Zambia, the Commission observed the seemingly concerted price movements of maize-meal during the months of March to June 2004. The major maize milling companies appeared to increase prices at the same time. Their defence was that the price of the raw commodity, maize, was increased by the main buyer, Food Reserve Agency (a Government agency which manages the strategic food reserves). Further, a seemingly understandable defence was advanced that the price of petroleum had increased, hence increasing the logistical costs because the main procurement sources were in the rural towns and villages. Therefore, while analysis of price movements over time may be useful in detecting and establishing a prima-facie case of price-fixing, it would not stand in the Zambian courts where the evidence has to be beyond reasonable doubt. Such evidence will have to include a written agreement or at least a confession from one of the parties so involved.

While presently a number of Competition Authorities appear to follow the whistle-blower leniency program direction in the enforcement of cartels, the effective use of such programs would depend on the level of competition culture in a particular country. It has been noted that in February 2002, the European Commission published revised leniency guidelines and plans to expand its enforcement tools by strengthening its information gathering powers. The new powers include searching company executives' homes in the process of evidence gathering[3]. The UK government also announced ground breaking set of reforms to combat cartels. As eluded above, the Zambian Act confers powers to search premises or conduct a "dawn raid". These powers have not been used as yet.

[3] Anthony Rosen (McDermont, Will & Emery, London), Enhanced Cartel Enforcement Rules Target Executives' Homes, Spring 2003.

In Zambia, we have a procedure similar to a leniency program. The Constitution of Zambia empowers the Director of Public Prosecutions to turn an accused person into a State witness with a promise to spare him from prosecution, if he cooperated fully by providing vital evidence to the prosecution. As stated earlier, the Courts in Zambia for instance are yet to be tested as to their consideration of a cartel offence. Section 16 of the Competition and Fair Trading Act prescribes penalties applicable *"... upon conviction to a fine not exceeding ten million Kwacha or imprisonment for a term not exceeding five years or to both*". The financial penalty (about US$2,000!) and jail term of not more than five years may only be awarded concurrently at the Judge's discretion. It is likely that the parties to a cartel may escape with a fine of a maximum of US$ 2,000 and a "stern warning" and suspended jail term. In this regard, the criminal sanction remains an effective deterrent compared to a fine.

The Law provides for relatively strong sanctions against hardcore cartels which include a fine and a criminal sanction of imprisonment. The fine has proved to be very low to achieve deterrence against future activity of that kind. The law provides for sanctions against persons for their participation in the conspiracy. The prospect of individual liability can add an important level of deterrence, and individual sanctions also have another beneficial effect – they create an incentive for culpable individual store defect from the cartel and cooperate with investigations, in order to avoid punishment. In this regard, **Section 16 of the Act** is directed against company officials.

3. Cartel investigation in the Oil Marketing Sector in Zambia

In Zambia, the Commission investigated a cartel in the oil marketing sector, principally involving BP, Caltex and Total. Following the fire incident at Indeni Petroleum Refinery (Zambia's principal oil refinery) in May 1999, the Government issued a Statutory Instrument (S.I.) No.119 of 1999 that reduced the customs duty on imported and finished petroleum products from 25% to 5%. This was a temporal measure to allow for private companies to import petroleum products and thus mitigate the envisaged shortages.

Consequently, Energy Regulation Board (ERB) issued import licences for petroleum products to nine (9) Oil Marketing Companies (OMCs), namely BP, Caltex, Mobil, Agip, Total, Jovenna, Engen, Ody's and Agro-fuel. Upon resumption of production at Indeni, the Government issued SI No. 54 of 2001 that reinstated the 25% import duty on all petroleum products effective 18th May, 2001.

On 29th May 2001, the ERB received a joint written complaint from the OMCs about the effects of the S.I No. 54 on their operations. ERB brought the complaint by OMCs to the attention of Government through the Ministry of Energy and Water Development, who promised to consider the matter. However, while Government was in the process of holding consultations with all stakeholders, the OMCs concertedly increased the prices of petroleum products on 30th May 2001.

On 31st May 2001, ERB wrote to all OMCs individually directing them to revert to the old prices. With Caltex acting as a secretariat, the OMCs responded by asking for a meeting with ERB on 1st June 2001. After the meeting with ERB, the OMCs responded (through a joint letter to ERB) that new prices would remain in effect for four to six weeks, thereby continuing to defy the directive given by the ERB. The ERB then responded to the joint letter individually stating that the directive remained in force. The ERB Board Chairman further reiterated this during a press conference on 1st June 2002, at which he warned the OMCs that they risked having their licenses revoked or suspended if they continued to defy the ERB directive of reducing fuel prices. By Monday 4th June 2001 none of the OMCs had complied with the ERB order. In order to address this act of defiance from the OMCs, the ERB held consultations with ZCC.

Upon reviewing the conduct by OMCs, it was proposed that the conduct by OMCs was in breach of Section 7 of the Competition and Fair Trading Act. Further, Section 6(1)(c) of the Energy Regulation Act provides for concurrent jurisdiction in the energy sector with ZCC: " *In conjunction with the Zambia*

Competition Commission established by the Competition and Fair Trading Act, monitor the levels and structures of competition within the energy sector with a view to promoting competition and accessibility to any company or individual who meets the basic requirements for operating as a business in Zambia"

3.1 Evidence gathering in the case

The Commission was assisted by evidence of price-fixing, which was received from the disgruntled ex-workers of the OMCs. This led to the discovery of various incriminating correspondence between the OMCs and the ERB. Both the companies and the ERB did not realise that an offence was being made in the competition legislation. There were further interviews with the Chief Executive Officers and senior officers of the oil marketing companies, who cooperated with the verification of the incriminating correspondence.

While the ZCC under Section 14 has powers to conduct searches on premises, in this case the Commission did not exercise this power as sufficient evidence was already obtained from the ERB and the OMCs themselves.

4. Conclusions

2. Investigations established, prima facie, that:

- There was an agreement on price increases by OMCs;
- There was an agreement on a standard formula according to which prices were to be computed;
- There was an agreement to adhere to published prices;
- There was an agreement to use a uniform price as a starting point for negotiations;
- There was an agreement not to sell unless agreed-on price terms were met; and
- The conduct of the OMCs appeared to be in contravention of Sections 7 and 9 of the Competition and Fair Trading Act as their joint conduct had the object of preventing price competition to an appreciable extent in Zambia.

4.1 The Commission decision

On the basis of the foregoing, the Board of Commissioners of the Zambia Competition Commission determined that all the OMCs, in particular BP, Caltex and Total, should be prosecuted under the Competition and Fair Trading Act for price fixing. The Board also resolved that the OMC trade association, serviced by Caltex, should be abolished as it was providing a forum for cartel activities.

4.2 Succeeding events

Despite the overwhelming evidence against the OMCs and the evident breach against Section 7 and Section 9 of the Competition and Fair Trading Act, the prosecution did not take off. There were seemingly some legal technicalities more especially the role of Government in the procurement of fuel and the pricing of the commodity. It was observed that the Government was equally at fault and hence, provided a strong defence to the oil marketing companies if the Commission had opted to prosecute. Further, at the time, there was serious lack of financial and human resource at the Commission to carry out the prosecution. It

was considered that the best way forward would be to intensify advocacy activities in the sector and suspend the prosecution.

The Commission considered that an administrative action be taken as follows:

- A stern warning be issued to the OMCs;
- A report was made to Government
- Negotiations are instituted with OMCs to ensure that they did not engage in conduct that prevents, restricts or distorts competition. To this effect, undertakings from the OMCs were to be sought;
- The Commission should review the mandate of OMCs and formulate the new mandate for the association.

4.3 Lessons for Zambia Competition Commission

It was evident during the investigations that the parent companies of the OMCs were not forthcoming in cooperating in the investigations. Although the Commission managed to establish a prima facie case, it was doubtful whether the evidence located abroad could be easily made available.

While cooperation in cartel investigation is resounded at international fora and levels, the Commission's experience shows that cooperation with various allied and interested institutions at the national level is also cardinal to a successful anti-cartel drive. Where key institutions do not and are perhaps not even obliged to cooperate, as in the case of ERB, it would render anti-cartel enforcement ineffective.

In view of the above, it would appear a competition specific leniency programme may not necessarily be the panacea to effective cartel investigation and prosecution in the Zambian setting and perhaps, other countries at this level of development.

4.4 Modalities for Cooperation

The exchange of information and assistance rendered between competition authorities is an important feature of deepening cooperation. In our COMESA region, cooperation in cartel investigations is increasingly growing. In most cases, this takes the form of informal cooperation among heads of the competition authorities and/or case handlers. This is a result of regional seminars by UNCTAD, which have exposed case handlers in the region to develop close working relationships overtime.

Zambia has also established through the Joint Trade Protocol a formal cooperation agreement with its neighbour, Zimbabwe for the exchange of information in competition cases. As a result, there has been substantial 'case-specific' cooperation through exchange of information involving specific cases or investigations. Further, the incidence of cross-border mergers in the COMESA region has increased informal and formal cooperation. This was the case in the assessment of mergers/takeovers involving Cadbury Schweppes and Coca-Cola, Lafarge in the cement industry, British American Tobacco and Rothmans of Pall Mall, etc.

As regards institutional cooperation, Zambia and the other countries in the region have benefited from UNCTAD, OECD and the WTO in building working relationships among competition enforcement officials and between national competition agencies. We have also benefited in building consensus on best

practices in competition law enforcement. A growing phenomenon in regional cooperation in competition law enforcement is the proposed enactment of the regional COMESA Competition Law and Policy, and the establishment of the Southern and Eastern Africa Competition Authorities Forum. The organisation provides for exchange of information, for coordination and investigations and proceedings, for positive comity and for consultations.

It is possible that at international level, countries with different approaches to cartel enforcement may find it difficult to cooperate successfully. In South Africa for example, most of the information is under the cover of confidentiality and a foreign authority requesting for credible information to combat similar cartel activities in its territory may receive information that is inherently not useful to the cause, despite convergence of the laws. Countries with differing levels of development may also have difficulties in cooperation. While a developed country may have the resources to locate and collect credible evidential information, a less developed country may not reciprocate with similar information due to resource and expertise constraints.

Notwithstanding the above, cooperation in combating cartel activity is a relevant starting point to effective enforcement as cartels become more secretive and complex. It is incumbent upon developed competition authorities and multilateral organisations to assist developing competition authorities with appropriate technical expertise and other means for them to effectively attend to the cartel problem both domestically and in the context of international cartel cooperation.

BIAC

BIAC welcomes the opportunity to provide the views of the business community to the sixth meeting of the Global Forum on Competition on the issue of prosecuting cartels without direct evidence of agreement.

The goal of efficient and effective prosecution of hard core cartels is embraced by the business community. Not only are hard core cartels, when they occur, a form of fraud, deception, and theft, but the most usual victims of bid rigging and price fixing cartels are businesses and governments. A significant percentage of cartel cases involve firms whose primary customers are business entities.

A failure to effectively enforce competition laws against cartels can often result in direct harm to the business community at several levels, extending to downstream business purchasers. In short, it is the business community as consumers that the antitrust enforcers are often seeking to protect. The business community appreciates and supports these enforcement efforts.

On the other hand, the business community can be an unintended victim of misdirected cartel prosecutions. There is also a substantial cost associated with defending an investigation into alleged conspiratorial action. In a typical governmental or agency investigation, parties will spend hundreds of thousands or millions of dollars in legal and administrative fees, and incur enormous expense of human resources – including senior business executives – in order to sort out the facts and comply with requests for information. These are resources which, if spent on innovation or investment, could result in a higher use and greater level of consumer welfare.

For every clear-cut cartel case, there are cases in which the evidence of an agreement is unclear. Business arrangements can be complex and their purpose and effect often must be inferred from an array of circumstantial evidence.

Given the substantial penalties and fines that can be levied on businesses during cartel prosecutions, BIAC believes that antitrust agencies should be very conservative in pursuing cartels absent direct evidence. Companies can also face great damage to their reputations during a cartel investigation. For a leading public company to be prosecuted by a regulatory authority comes close to "scandal" proportions and can make a very bad impression on investors which can then lead to a substantial fall in stock price. This then punishes the innocent investor. This sort of reputational damage should not be inflicted without very good grounds and a case which is solidly based on reliable evidence.

A crucial distinction must be drawn between the presence of parallel conduct in a market and the presence of collusion in a market. In the vast majority of markets, especially those involving undifferentiated products, the presence of parallel conduct is a sign of vigorous competition rather than collusion. This would be observed, for example, where competitors match every price discount of their competitors in order to maximise their sales opportunities. In such a situation, identical prices reflect the competitive process rather than the lack of competitive process.

The difficulty is that competitive parallel conduct can appear to be conspiratorial conduct. Therefore, it is vital that investigations of potential collusion not be based solely on parallel conduct in a market and

that substantial evidence of actual collusion be adduced before forcing companies to endure such expenses, disruption and reputational damage.

The best form of substantial evidence of cartel behaviour will take the form of direct evidence of agreement between the parties. In the majority of cartel prosecutions, the agencies have had access to one or more of the participants in the conspiracy. The evolution of leniency programs in the North America, Europe and elsewhere has not only helped to uncover cartels that otherwise would have gone undetected, but also has helped to ensure that cartel prosecutions and investigations are based on direct evidence.

Direct evidence can take the form of either documentary evidence or testimonial evidence. Direct documentary evidence need not take the form of a formal contract or agreement, but may also properly include evidence of an understanding or mode of cooperation or conspiracy short of a formal agreement. BIAC would agree that such evidence should be deemed "direct" evidence sufficient to form the basis of a prosecution.

Direct testimonial evidence necessitates the cooperation of a participant or immediate witness to the conspiracy. Testimony of a current or former company employee that was not directly involved in the alleged cartel should be recognised as indirect evidence. While such testimony may have probative value and may, if corroborated, add to the cumulative amount of information on which a cartel prosecution is based, it should not be used as the sole basis for prosecuting a cartel. As US courts have recognised, "a conviction may not be based solely on circumstantial evidence from which a trier of fact could infer facts tending to prove a defendant's guilt, or facts tending to prove his innocence."[1] Under Canadian law, proof of an agreement is a required element of the offence of conspiracy. While the Competition Act provides that the court may infer the existence of an agreement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties, the courts have been reluctant to find an agreement based on evidence of parallel conduct even where there has been communication about the conduct between parties unless it can be proven that the parties did in fact act in concert (*i.e.*, did not make independent business decisions).

Indirect evidence will usually take one of two forms: economic evidence suggesting that the defendants were not in fact competing; and non-economic evidence suggesting that the parties had agreed not to compete. Both forms of indirect evidence should be seen as necessary preconditions to form the basis of a cartel prosecution, but independently inadequate to form the basis of a cartel prosecution.

Economic evidence often is used to demonstrate that the structure of the market was conducive to making covert price fixing feasible. Typically, this involves analysis concluding that terms of agreement are easy to reach, detecting deviations from the agreement is possible, and punishing those deviations is rapid and meaningful. Economic evidence may also include analysis of the dynamics of the market intended to show that the market behaved in a non-competitive manner.[2]

Indirect non-economic evidence will often consist of documents or statements that are not conclusive on their face, but which could be interpreted to suggest that an illegal agreement may be present. These documents are frequently ambiguous and require additional testimonial or circumstantial evidence in order to properly interpret. Moreover, there is a risk that these documents will be used selectively, choosing to consider those which may suggest an illegal agreement while failing to credit those which suggest a competitive environment.

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1 *United States v. General Elec. Co.*, 869 F. Supp. 1285, 1290 (S.D. Ohio 1994) (citing *United States v. Leon*, 534 F.2d 667, 676-77 (6th Cir. 1976)).

2 *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002).

The most probative indirect evidence is that which suggests that an explicit agreement exists. Indirect evidence that suggests only the possibility of a tacit agreement is of particularly dubious value.

Indeed, basic game theory suggests that a company will anticipate the next move of its competitor and act in anticipation of that next move. Therefore, for example, documents projecting competitors' future actions and reflecting an effort to act similarly are forms of indirect evidence that could easily (but wrongly) be used as a basis for assuming an illegal agreement, but in fact may reflect aggressive competition.

In Europe, the Commission has acknowledged that the use of indirect evidence in European investigations has now become indispensable, as direct evidence becomes increasingly elusive from investigators' grasp. With the changing character of international cartels, which now are well aware of antitrust risks posed by their activities and so take increasingly sophisticated means to avoid leaving a paper trail, the Commission now generally relies on a combination of direct and indirect evidence in its antitrust decisions.

BIAC understands that indirect evidence may be used in cartel analysis but submits that it is imperative that such evidence only be used where there is also direct evidence of an agreement. Indirect evidence should not be relied upon in and of itself as proof of an agreement under Article 81 EC, Sherman Act §1, or similar regulations. The Commission must sustain its burden of producing sufficiently precise and consistent evidence to support its finding of an agreement and the existence of an agreement.

An interesting development in recent years in European cartel enforcement has been the move by the Commission to accept "oral only" leniency statements by companies – *i.e.*, statements offered by the corporate entity itself rather than by an individual employee or witness. BIAC recognises that the increasing dearth of "smoking-gun" cartel documents, and a greater need to rely on corporate statements and indirect evidence to prove a cartel, not to mention fears over potential discovery in US civil actions, may mean that the European Commission has to be able to accept corporate statements as evidence. However, unlike the US Section 1 offence, an Article 81 EC infringement is not a *per se* violation and cannot be evidenced alone by an admission of an agreement by a corporation's employees. Moreover, corporate statements to the DOJ, as such, are not admissible evidence. If the case were to go to trial, the personnel giving statements may be required to testify on oath in court.

The European Court has urged caution in relying on corporate statements and has identified relevant factors that may influence their probative value as direct evidence of an agreement, given as they often are in furtherance of the company's application for potentially significant reduction or immunity from fines and given maybe years after the fact. Yet even within these parameters the Commission has relaxed its evidential standards and gone so far as to accept such un-sworn statements as proof of an agreement itself, rather than limiting them merely to triggers for further in-depth investigation and unannounced raids.

It is, in the view of BIAC, an unwelcome development that international cartels in Europe are increasingly being proved by corporate statements which, although technically "direct" evidence, still warrant the same corroboration by additional evidence that "indirect" evidence would, as a matter of course, require. Corporate statements are not put to test: the European Commission procedure is administrative, not judicial, and there is no mechanism for the Commission or other parties to cross-examine witnesses on statements given in furtherance of a leniency application. In BIAC's opinion, such statements should not be accepted, without verification of individual witnesses and corroboration of other evidence, ideally contemporaneous and direct evidence of cartel activities.

Finally, there should be a direct correlation drawn between the ability of a company to provide direct evidence of conspiracy and the willingness of the Commission to offer leniency. The Commission's

current Leniency Notice[3] is still in relative infancy: it takes a number of years from when a company first starts to cooperate with the Commission to when the final decision is taken, so parties are only just starting to see decisions under the present leniency program. Only time, and the experience of judicial review by the Courts in Luxembourg, will show how circumstantial evidence will be accepted as a basis for leniency decisions and as a means to prosecution of cartels. Any imbalance between the Commission's reliance on circumstantial evidence on the one hand, and credit given for companies providing such evidence, would be undesirable and could have the effect of chilling the Commission's leniency program.

The lack of transparency of the Commission's leniency program means that parties are more or less unaware of the Commission's evidence, not to mention wholly unable to gauge whether any indirect evidence that they produce will be sufficient to corroborate other direct evidence (whatever it may be) of an infringement.

In the US, the courts have held that mere interdependent parallelism does not establish the contract, combination or conspiracy required by Sherman Act §1.[4] The courts have gone on to hold that even obviously interdependent parallel pricing alone does not infer conspiracy absent certain "plus factors,"[5] or "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amount to a conspiracy."[6]

The leading US treatise notes that parallelism, including interdependent parallelism or "tacit collusion" should not be used as the basis for a finding of conspiracy.[7] It is well accepted that mere parallelism, including parallel pricing, cannot form the basis for demonstrating a violation of Section 1 of the Sherman Act. Indirect evidence could be just as consistent with competition as with conspiracy, and if indirect evidence is used to prosecute a cartel and is interpreted incorrectly, it could harm competition, prohibiting practices which are pro-competitive. Instead, courts require proof of "plus factors" designed to demonstrate that express collusion is more than a mere possibility. Importantly, however, the treatise recognises that while the absence of these plus factors tends to weigh against an inference of conspiracy, the presence of plus factors is not sufficient to allow an inference of conspiracy.[8]

BIAC would also like to note the essential difference between cartel proceedings in the US and elsewhere which is that in the US the case is determined by a Court operating under criminal standards of evidence with a higher burden of proof whilst in most other jurisdictions the proceedings are administrative with an ultimate right, albeit very difficult in EU cases, of appeal to a Court on a relatively narrow basis. In such administrative proceedings, it is even more important that reliance on "circumstantial" evidence should not be relied upon unduly given the relative lack of rigour of such administrative processes.

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3 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ [2002] C 45/3.

4 *Brooke Group Ltd. v. Brown & Williams Tobacco Corp.,* 509 US 209, 227 (1993) ("conscious parallelism . . . [is] not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.")

5 *Baby Food Antitrust Litig.,* 166 F.3d 112, 123 (3r Cir. 1999) ("Because the evidence of conscious parallelism is circumstantial in nature, courts are concerned that they do not punish unilateral, independent conduct of competitors. They therefore require that evidence of a defendant's parallel pricing be supplemented with 'plus factors.' . . . They are necessary conditions for the conspiracy inference.")

6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1433(e) (2d ed. 2003).

7 *Id.* ¶ 1434.

8 *Id.* ¶ 1433-4.

While BIAC recognises the important adjunct role that indirect evidence plays in the proof of cartels, it is equally concerned about reliance on indirect evidence alone as a means of prosecution of cartel cases. While a substantial amount of indirect evidence may, in certain cases, justify the further investigation of facts to determine whether direct evidence exists, the prosecution of cartels in the absence of direct evidence of conspiracy creates a substantial risk of chilling pro-competitive, welfare-enhancing activity. This is particularly true in jurisdictions that allow for fines based on agency prosecution alone without recourse to full judicial process prior to the imposition of fines.

SUMMARY OF THE DISCUSSION

The Chairman, Daniel Goldberg of Brazil, invited the Secretariat to summarise the background paper that it prepared for the roundtable.

The subject is more complex that it might first appear to be. Competition laws apply both to explicit agreements and to agreements of a less formal kind, such as "concerted actions," "understandings" and so forth. Moreover, proving cartel agreements can pose special challenges, as cartel participants usually do not willingly co-operate with investigators. The competition agency will seek to acquire all types of relevant evidence, including "direct" and "indirect," or "circumstantial" evidence.

Direct evidence includes "smoking gun" documents or emails, and statements by cartel participants describing the agreement. Circumstantial evidence can be classified into two types: 1) "communication" evidence, or evidence that the suspected cartel participants did communicate about the subject of their agreement, and 2) "economic" evidence. Economic evidence can be further classified as a) "conduct" evidence and b) "structural" evidence. Conduct evidence includes such things as parallel pricing or other parallel behaviour and practices that facilitate a cartel agreement (e.g., price signalling). Structural evidence includes such factors as high market concentration and homogeneous products. Of the two types of economic evidence, conduct evidence is the more important.

The discipline of economics can provide valuable insights into how to evaluate economic evidence. In general, the conduct must be inconsistent with that which would occur if the enterprises were acting unilaterally. The paper describes various economic models in which competitors make decisions based upon their judgments on what their rivals are doing. Only one of these is considered to be a cartel and unlawful, and economics provides guidelines on how to make that judgment.

The paper discusses how different treatment of cartels across countries – prosecuted as crimes or as administrative violations, for example – can affect how circumstantial evidence is employed. The paper also notes two general points: 1) all types of evidence – direct and circumstantial – can be used together; and 2) circumstantial evidence should be considered holistically – that is, cumulatively, and not item by item.

The paper relies heavily on case descriptions as an effective way to illustrate the use of circumstantial evidence in cartel cases.

Definition of agreement and the applicable legal standard

The Chairman indicated that the discussion would be divided into blocks, or subtopics. The first would deal with the type of agreement that can arise in a cartel case – for example, explicit or tacit agreements – and standards that apply to proving these different types of agreements. He noted that the EU Treaty specifically identified two concepts: agreement and concerted action, and he asked the delegate from the European Commission whether there were different standards of proof that applied to these concepts, and specifically whether circumstantial evidence was more important in proving one than the other.

The EC delegate stated that the two concepts are indeed different. An agreement embodies a communion of will – an agreement that the parties will adopt a certain practice or behaviour. A concerted practice is less formal, and may simply be the observed result of a set of communications. In either case,

however, the standard of proof is the same, and circumstantial evidence can be equally relevant in both. Admittedly, the exclusive use of circumstantial evidence is more risky, as it is necessary to exclude other plausible explanations for the conduct that is observed.

The Chairman noted that Chinese Taipei's competition law also employed the term "concerted action," and also that the competition agency sometimes, but not always, applies a per se rule to cartels. Did the application of the per se rule depend on whether direct or circumstantial evidence was predominant?

The Chinese Taipei delegate noted that its agency employed a kind of minimum standard when evaluating cartel cases, and it would decline to prosecute conduct that had a truly *de minimus* effect. The applicable standard of proof, however, is not dependant on the type of evidence that is available.

The difficult distinction between direct and circumstantial evidence

The Chairman moved to the second sub-topic, the sometimes difficult distinction between direct and circumstantial evidence. He noted that BIAC's written submission urged that cartel cases should not be based solely on indirect evidence. The paper also criticised the EC's policy of using corporate statements, which technically are direct evidence. He asked for an elaboration of BIAC's position on these points, and particularly how BIAC would differentiate between direct and indirect evidence.

BIAC expressed its support for vigorous prosecution of cartel conduct. It noted, however, that such prosecutions result in significant pecuniary and reputational harm to businesses that are found liable, and it urges, therefore, that cartel cases not be based solely on circumstantial evidence. Direct evidence can take the form either of documents or of testimony by individuals who were involved in the cartel activity. The latter is becoming increasingly available by means of leniency programmes. Other types of communication evidence are relevant, but sometimes they are ambiguous. Economic evidence, such as parallel pricing, is even more ambiguous, and it should not be sufficient by itself in a cartel case.

Regarding the Chair's question about the use of corporate statements in Europe, these are technically direct evidence, but they cannot be adequately tested because the European Commission procedure is administrative not judicial and there is no mechanism for either the Commission or the parties to cross examine witnesses on statements given in furtherance of a leniency application.

Communication evidence

The Chairman then turned to the subject of communication evidence – evidence that the parties communicated about the subject of their alleged agreement, but not containing the substance of an agreement itself. The Chair noted that the *Toshiba* case in Japan set forth an apparently precise standard for the use of circumstantial communication evidence. Must the evidence always meet this standard in Japan?

The delegate from Japan replied that if the evidence satisfies the test set out in the *Toshiba* decision it is sufficient to prove a cartel agreement, but it is not required that this test always be met. The Toshiba court understood that direct evidence of a cartel case can be difficult to obtain and that circumstantial evidence could be sufficient in appropriate circumstances. The court took a holistic approach toward circumstantial evidence, and using the three elements described in its decision it found that the evidence was sufficient. While these elements need not be satisfied in every case, it is important that there be some form of communication evidence presented.

The Chairman noted that Korea's competition law creates a "presumption of agreement" in the absence of direct evidence when there is "conformity of outward conduct" and "competition restrictiveness." The KFTC has also created a set of internal guidelines that provide standards for proving agreements in the absence of direct evidence. Is it necessary that the evidence always include some form of communication evidence?

The Korean competition law is somewhat unique in that it specifically provides for a presumption of agreement when the two elements noted by the Chairman are present. Strictly speaking, an agreement could be proved in the absence of communication evidence, but in practice this would be difficult. The KFTC always strives to acquire communication evidence, but if it is not present, it would be possible to prove agreement using a sufficient amount of economic evidence.

The Chairman referred to the submission of the Czech Republic, which described a case in which some interesting and unusual circumstantial evidence was generated. He asked the Czech delegation to describe this evidence for the delegates.

There were three important pieces of evidence in this case, which involved a cartel among bread producers in the Czech Republic. First, there was very suspicious parallel conduct, in which the producers announced identical price increases in parallel fashion. Second, the Antimonopoly Office obtained email messages between several of the cartel operators discussing customer allocations. One of these messages ended with "I am deleting this message now because the Antimonopoly Office and the Devil never sleep." Third, the investigators obtained some unusual photographic evidence: they photographed the automobiles of the cartel operators parked outside a pub, where they were meeting to discuss the operation of the cartel.

Quasi-Communication: facilitating practices

The Chairman moved to the subject of "quasi-communication" evidence, which includes facilitating practices. He referred to a successful case from Argentina, involving a cement cartel and which resulted in the imposition of record fines. The circumstantial evidence in the case was quite strong, and included regular exchanges of sensitive information, regular audits to confirm the operation of the cartel and one instance of predatory conduct serving as punishment of one member for cheating. Did the evidence also include evidence of parallel conduct and other economic evidence?

The delegate from Argentina explained that there was not much evidence of parallel conduct because cement markets in Argentina are local. The terms of the conspiracy mostly involved customer/market allocation. The circumstantial evidence of that agreement was strong, however.

Economic evidence

A second type of circumstantial evidence is economic evidence. The Chairman noted that economic evidence should be evaluated as to whether or not the conduct would be rational but for the existence of an agreement. The Chair noted that Turkey's competition law creates a rebuffable presumption of agreement when the observed conduct is inconsistent with competition. The Turkish submission described a cement case in which the price increases apparently were not justified by cost factors. The evidence also included, however, two documents that were considered as "plus factors." Would the economic evidence in this case have been sufficient without these two documents?

The delegate from Turkey explained that while transportation costs are a significant factor in the price of cement, the cartel operators seemed to be willing to supply some customers more distant from their plants and unwilling to supply others located more close by. This evidence would have been enough to invoke the statutory presumption, but a successful case based on economic evidence usually requires more than just the presumption itself.

The Chairman turned to France, which had described a case involving public transportation in its submission. The case seemed to involve both direct and indirect evidence, and the Chair asked how the French authorities used both types of evidence and how they reinforced each other.

The French case involved urban public passenger transport. There were three providers of this service, and the evidence disclosed that they had allocated various local contracts among themselves. Thus, while the effects of the agreement were local, the cartel was national in scope. The *Conseil* de la Concurrence applied the "classic" technique**,** establishing the existence of the cartel from indirect evidence that was serious, specific and corroborative. The circumstantial evidence indicated that the customer allocation was both stable and persistent. The technique of evaluating circumstantial evidence is not unlike that of an impressionist painting, in which many small points make up a complete picture. The technique in this case permitted a finding of an agreement.

The Chairman asked Brazil to describe how it uses economic evidence as a screening device in the many complaints that it receives regarding retail prices of petrol.

The Brazilian agencies must consider all complaints that they receive. In order to avoid spending too many resources on the many complaints of price fixing in petrol that it receives, it evaluates them preliminarily using economic evidence. Profit margins in the market in question are analysed according to several criteria as to whether they are increasing, and if so whether the increases are consistent with a hypothesis of collusion. If not, the complaint is dismissed. If further inquiry is indicated, the prices in the market in question are compared with prices at the state level, on the hypothesis that the local agreement, if any, might not exist in a broader geographic area. If after passing through these filters the possibility of collusion cannot be dismissed, a more detailed inquiry is begun.

The Chairman noted that in some cases the fact that competitors' prices are the same even though their costs differ is evidence of collusion. But isn't this situation also consistent with a competitive market? The taxi operators case from Lithuania appeared to have this situation of identical prices and differing costs.

The delegate from Lithuania stated that Article 5 of the Lithuanian competition law resembles and is intended to be interpreted similarly to Article 81 of the EC Treaty. In the taxi case there did exist this apparent disparity between costs and prices, but it was not a major factor in the case. There existed a substantial body of other evidence indicating that the abrupt, simultaneous and identical change in prices charged by the taxi operators was the result of an agreement.

The Chairman observed that in the Russian Federation many markets are highly concentrated and susceptible to collusion. Moreover, it is difficult for the Russian competition authority to acquire direct evidence of agreement in these circumstances. The Russian submission notes that it is important that the competition agency be able to prove the existence of cartel agreements by means of circumstantial evidence. In this regard, how do the Russian authorities use economic evidence to distinguish oligopolistic interdependence from collusion?

A new draft competition law is being prepared in Russia that will address these issues, among others. In general, the Russian authorities take a holistic approach when evaluating economic evidence. They consider market concentration, parallel conduct, facilitating practices, capacity reductions, information exchanges, and so forth. The authorities are also giving increased emphasis to the concept of collective dominance in dealing with this issue.

The Chairman turned to Switzerland, whose law seemingly requires that there be proved some harmful economic effect. Does this mean that in every case there is some economic analysis that must be provided?

The Swiss delegate explained that economic effects can come into play in two ways: first, in the proof of an anticompetitive act, and second, in the case of an attempt by the parties to show that the conduct, even if facially anticompetitive, is justified on the grounds of economic efficiency. In the case of cartels, however, the efficiency defence is not available, as it is considered that cartels are always harmful. Further, if a cartel agreement is proved, the harmful economic effects are presumed, unless the parties rebut this presumption through economic evidence, in which case a more complete economic analysis of the conduct is necessary.

Criminal vs. administrative or civil prosecution and the treatment of circumstantial evidence

The Chairman turned to the issue of different treatment of cartels across countries, notably the fact that in some countries they are prosecuted as crimes, while in others – the majority – they are considered as administrative or civil violations. The question is whether these differences have an effect on the way that circumstantial evidence is used. The Chair noted that the United States has long been known for its aggressive use of the criminal process to fight cartels. The US states that it almost always bases its cases on direct evidence, often acquired through its leniency programme. But what advice would the US have for countries that are just beginning to prosecute cartels as crimes, or considering doing so, and in particular, is there a place for circumstantial evidence in these cases?

The delegate from the United States reviewed his country's procedures in investigating and prosecuting cartels, and acknowledged that the US' leniency programme has a critical function in developing the necessary direct evidence to permit the criminal prosecution of this conduct. He noted that it is important to avoid errors in this process, particularly those that would result in the prosecution of conduct that is not a cartel. Heavy use of circumstantial evidence could result in such errors, and while one could not completely rule out using circumstantial evidence in cartel cases, it is preferable to use direct evidence, and this means developing an effective leniency programme.

The Chairman noted that cartels can be prosecuted in Romania either administratively or criminally, and he asked whether the decision to use either process was based on the nature of the evidence.

In Romania, administrative fines cannot be imposed upon individuals. Individuals can be prosecuted criminally for cartel conduct if it can be shown that they participated in a cartel with fraudulent intent and in a decisive way. In this way the administrative and criminal processes in Romania are complementary. It is possible to use evidence developed in the administrative process in a criminal prosecution.

Sanctions

The Chairman observed that it is accepted everywhere that cartels should be sanctioned heavily, most often with high fines, so as to deter future conduct of that kind. The issue presented here is whether in order to justify such high fines it becomes more necessary to develop direct evidence of the unlawful agreement. The Chair noted that the European Commission is now imposing very large fines in its cartel cases, and he noted also the standard of proof that the Commission must meet is also high – not much different than that which exists in criminal cases. Is this standard related to the fact that large fines are now common, and in particular, does it mean that the Commission must rely more heavily on direct evidence in its cases?

The delegate from the Commission responded that the high standard of proof confronting it results from the close scrutiny that the European courts give to Commission decisions. Regarding circumstantial

evidence it means that the evidence must be credible, and that the only plausible explanation for the conduct is that of an agreement. On the other hand, there is no direct link between the type of evidence in a case and the level of fines. All cartels are considered as very serious infringements and all must be sanctioned accordingly.

The submission by Chile described a case involving a cartel of milk processors, in which the evidence was apparently entirely circumstantial. It took a period of nine years to complete the case, after which the sanctions applied were minimal. The Chairman inquired of Chile whether the mild sanctions were a result of there being no direct evidence of agreement in the case.

The Chilean delegate stated that the case was the first under a new system in which a Competition Court would decide appeals from decisions of the competition agency. The court decided in fact that the evidence, which was entirely circumstantial, was not sufficient to prove a cartel agreement. Therefore the court did not impose any significant sanctions. The result has highlighted for the competition agency the importance of acquiring direct evidence when possible. In this regard the agency is considering adopting a leniency programme.

Countries beginning anti-cartel enforcement

The Chairman noted that a few countries that provided submissions for the discussion had not previously been actively prosecuting cartels. It would be useful to hear from these countries as to issues facing them at this first stage, including their use of both direct and indirect evidence in their investigations.

Croatia has not yet completed a cartel case, though it currently has one investigation underway. It is difficult to acquire direct evidence in these cases, especially after the competition law has been in effect for a period of time, because businesses learn to conceal evidence of their wrongdoing. In an economy as small as Croatia's even circumstantial evidence may not exist, as it is easy for enterprises to monitor one another's conduct and to act in parallel fashion. In the current investigation the competition agency is studying various contract clauses employed by the parties for a pattern that may suggest collusion.

In Zambia cartels are prosecuted as crimes, and the higher burden of proof associated with criminal cases is proving difficult to satisfy for the Zambian competition agency. Zambia does not have a leniency programme in place, for example, and circumstantial evidence is usually not sufficient by itself. There is growing momentum in the country for changing the classification of this conduct to an administrative violation. Another constraint facing the agency is a lack of effective investigative skills. Zambia urges that there be more effective international co-operation in cartel matters. It is having some success in informal co-operation with its neighbouring developing countries. Zambia also finds useful the seminars on developing investigational skills sponsored by UNCTAD in its region twice each year.

Jamaica's written submission contained a candid assessment of the JFTC's current inactivity in cartel prosecution. The problems include inadequate investigative tools and inadequate sanctions, insufficient resources for the Commission and a lack of competition culture in the country. The submission noted that competition advocacy was an important tool in remedying these shortcomings. The Jamaican delegate agreed that specific cases can be useful in competition advocacy, and that it was currently engaged in an investigation in the banking sector that might be appropriate for this purpose. The Commission may also focus on government procurement in another effort toward raising public consciousness about cartels.

The Chairman observed that several of the written submissions described cases involving collusion in the wholesale and retail petrol sector. It seems that cases in this sector are especially common across countries, and many of them are constructed with mostly circumstantial evidence. Japan described such a

case in its submission, and the Chairman asked their delegation to discuss its use of circumstantial evidence in the case.

The Japanese case included the usual episodes of parallel pricing, but there were also two items of communication evidence that proved to be important. One was evidence of an "emergency" meeting of petrol retailers called by their trade association. It was clear that this was not a routine meeting of the association. Second, while records of the meeting did not describe the terms of an agreement, they did disclose that the members were instructed not to keep notes of the meeting in order to keep knowledge of it from the JFTC. This evidence, taken together with the economic evidence produced in the case, was sufficient for the JFTC to find that an agreement had been reached.

The Chairman invited the European Commission to comment further on point raised by BIAC regarding the Commission's use of corporate statements submitted under its leniency programme.

The corporate statements themselves are not necessarily direct evidence, as that term is commonly used. They may be of two types: 1) a general story, which must be corroborated by evidence developed in traditional ways, and 2) a more detailed specific disclosure accompanied by strong evidence.

Open discussion

The Chairman declared that the floor was open for discussion.

Competition Committee Chairman Frederic Jenny described two cases recently decided by the French *Conseil* de la Concurrence that involved issues of circumstantial evidence and agreement. The first was a petrol case, involving petrol stations on the French *autoroutes*. Each morning the several concessionaires along a route would exchange by telephone their current prices. This information was analysed by the individual networks, forming the basis for their prices the following day. The *Conseil* found that the conduct was an anticompetitive facilitating practice. The appeals court ruled, however, that while there had been an exchange of information, the evidence did not prove that the parties had reached an agreement. A second case was in fertiliser, in which the parties had adopted most favoured nation and meeting competition clauses, the result of which was a tendency not to reduce prices. Again, the decision was that an unlawful agreement had not been reached. These cases present the difficult question of what one means by an agreement under competition laws.

Indonesia described its experience in early cases prosecuted by the competition agency, in which it applied the rule of reason to cases in which there was circumstantial evidence. The agency had difficulty convincing the courts to accept its decisions in these cases. As time progressed the agency had more success in the courts, but the Indonesian delegate expressed interest in learning from other countries how they dealt with this issue of educating courts in competition analysis.

Israel, which prosecutes cartels criminally, finds it difficult to succeed in a case in which there is no direct evidence. The agency often finds, however, that circumstantial evidence, for example parallel pricing, provides a good basis for initiating an investigation, in the course of which direct evidence may later be developed. The Israeli delegate also responded to a comment that had been made earlier that countries new to anti-cartel enforcement may find it more necessary to build cases on circumstantial evidence, because they have not yet developed effective tools for acquiring direct evidence. Israel's experience was the opposite, because there existed many "naïve cartels" – cartels in which the members are unaware that their conduct is unlawful and who do not conceal their activity – when these prosecutions first began. Later, cartel operators became more sophisticated, and acquiring direct evidence became more difficult.

Australia currently prosecutes cartels civilly, although a criminal regime is due to start soon. Even under the civil process, however, the competition agency's burden of proof is high – "quasi-criminal" – because the respondents are subject to very high fines. In this context the ACCC has encountered two problems in proving cases on the basis of circumstantial evidence. The first is the courts' receptivity to the "passive recipient defence," in which a party claims merely to have received in some way an invitation to raise price and then, without any affirmative response, merely does so. A second is the reluctance of courts to accept "inferential evidence." Such evidence might consist of, for example, a series of phone calls, perhaps hundreds, which correspond in time to parallel changes in price. Australian courts have required something more – that a particular communication be specifically linked to subsequent action by one or more parties. Both of these issues are under appeal in the Australian courts system, but a final resolution may be some time in the future.

The United States referred to the intervention by Frederic Jenny, in which he described cases involving facilitating practices but lacking evidence of a specific agreement among the parties. In the US two lines of cases have developed, one involving traditional cartel agreements and a second involving only the facilitating practice itself. Perhaps the most famous facilitating practice case was the *Container* case in the 1960s, which involved an extensive pattern of price verification among manufacturers of cardboard containers. This conduct was held in a civil case to be unlawful in itself, without there having been an explicit agreement on prices. The beneficial effect of the decision was later revealed in a document obtained from an oil company, in which the *Container* case was cited as causing businesses in the oil industry to cease similar practices, the result of which, in the words of the document, was to make it easier for "disturbers in the marketplace to discount without a commitment to verify prices."

The delegate from Italy described a case from that country in which insurance companies had engaged in regular, detailed exchanges of pricing information. It was argued that transparency in prices can be procompetitive, which it can be, but it can also have anticompetitive effects. The Italian authorities considered the arguments on this issue and concluded in this case that the conduct was anticompetitive, and ordered that it be stopped. Contributing to their decision was the fact that prices in this sector in Italy were the highest in Europe. The Italian delegate provided another observation about evidence of this kind, which is that when it becomes necessary to fashion an effective remedial order against a cartel it is important to forbid these kinds of practices. One cannot merely forbid parallel pricing; one must prevent specific conduct which makes the parallel pricing possible.

The delegate from the United Kingdom expressed his agreement with the point made by the United States, that competition agencies should focus on cases in which there is direct evidence. Too much emphasis on circumstantial evidence could waste resources and could jeopardise long-run success in the fight against cartels. Having recently come from the private sector, the delegate noted that direct evidence of cartel conduct does exist; it is up to the investigators to find it. The delegate also expressed his disagreement with BIAC's position on corporate statements in European cases, saying that there is a place for such statements in these cases, especially when they are corroborated by other evidence.

The United States noted the importance of educating both the public and the courts about the nature of cartels and of the need to sanction them severely. In this regard, the quality of the cases initiated by the competition agency is important. A straightforward price fixing or market allocation case, proved by direct evidence, is the most effective for this purpose.

The delegate from Finland described that country's experience in its initial efforts against cartels. When its competition law was first enacted 50 years ago cartels were subject to criminal sanctions, but because such conduct was not generally thought of as a crime and because the standards of proof were high, there were few successful cases. In 1992 the law was changed to provide for an administrative process, and enforcement has become more vigorous. Criminalising the conduct might be more successful

today. The lesson is that available sanctions and legal tool kits must be tailored to each country's situation, including whether there exists a strong competition culture. A second point regarding circumstantial evidence is that a case may resemble a jigsaw puzzle, in which the evidence must be considered as a whole. An important part of the puzzle can be evidence supplied by customers, or those affected by a cartel.

The Chairman asked Chinese Taipei about a case described in its presentation, in which it appeared to apply game theory in its evaluation of economic evidence.

The case was another in the petrol sector, in which there was a duopoly. The leading firm was a former state owned enterprise, with a 70% market share. The evidence was entirely circumstantial. It consisted of a pattern of simultaneous prices increases by the two sellers, many of them preceded by announcements in the newspapers. The parties also employed a facilitating practice – meeting competition clauses. The competition agency considered the evidence in a holistic fashion and concluded that it was sufficient to prove an agreement. It was acknowledged that the evidence was not particularly strong, however. The competition agency did not use game theory in the course of making its decision, but subsequently the case has been analysed using game theory in scholarly journals.

Conclusion

The Chairman thanked the delegates for their participation in this highly useful discussion. He noted that prosecuting cartels is becoming ever more difficult, as cartel operators react to the threat of increasing sanctions by being more secretive. In this environment, circumstantial evidence may become more important to the competition agency. It can help in differentiating between, on the one hand a mere facilitating practice, and on the other a full blown, hard core cartel agreement.

RÉSUMÉ DE LA DISCUSSION

Le président, Daniel Goldberg du Brésil, invite le Secrétariat à résumer le document d'information qu'il a préparé pour la table ronde.

Le sujet est plus complexe qu'il n'y paraît. Les lois sur la concurrence s'appliquent à la fois aux accords explicites et aux accords de nature moins formelle, comme les « actions concertées », les « arrangements » et ainsi de suite. Il peut être également difficile d'établir la preuve des ententes car les participants ne se montrent généralement pas très coopératifs avec les enquêteurs. L'autorité chargée de la concurrence cherchera à réunir tous les types de preuves pertinentes, y compris les preuves « directes » et « indirectes » ou « circonstancielles ».

Les preuves directes sont notamment les documents ou courriers électroniques de « flagrant délit » et les descriptions que les participants donnent des ententes. Les preuves indirectes appartiennent à deux catégories : 1) les preuves de « communication » ou preuves que des personnes soupçonnées de participer à une entente en ont parlé entre elles et 2) les preuves « économiques ». Les preuves économiques se divisent à nouveau en a) preuves de comportement et b) preuves d'ordre structurel. Les preuves de comportement comprennent notamment le parallélisme des prix ou autres comportements et pratiques parallèles de nature à faciliter une entente (p. ex., la signalisation des prix). Des facteurs comme la forte concentration du marché et les produits homogènes font partie des preuves d'ordre structurel. Des deux types de preuves économiques, celles de comportement sont les plus importantes.

Le raisonnement économique peut apporter des éclairages très utiles sur l'évaluation possible des preuves économiques. En général, le comportement doit être incompatible avec ce qu'il serait si les entreprises agissaient de façon unilatérale. Le document contient une explication des divers modèles économiques dans lesquels les concurrents prennent des décisions en fonction des agissements perçus de leurs rivaux. Un seul est considéré comme une entente et donc illégal, et l'économie offre des principes directeurs sur la façon de porter ce jugement.

Le document contient une analyse de la façon dont le traitement différent des ententes selon les pays – poursuites pénales ou infractions administratives, par exemple – peut influer sur l'utilisation des preuves indirectes. On note également deux aspects de nature générale : 1) tous les types de preuves – directes et indirectes – peuvent être utilisés ensemble et 2) les preuves indirectes doivent être appréhendées globalement – c'est-à-dire de façon cumulative et non isolée.

Le document repose largement sur des descriptions de cas pour illustrer l'utilisation des preuves indirectes dans les affaires d'ententes.

Définition de l'entente et normes juridiques applicables

Le président indique que la discussion sera divisée en blocs ou sujets secondaires. Le premier portera sur le type d'accord possible dans une affaire d'entente – par exemple, accords explicites ou tacites – et les normes qui s'appliquent pour prouver ces différents types d'ententes. Il fait remarquer que le Traité de l'UE définit précisément deux concepts, celui d'accord et celui d'action concertée, et demande au délégué de la Commission européenne s'il existe différentes normes de preuve pouvant s'appliquer à ces concepts et plus précisément si les preuves indirectes sont plus importantes pour prouver l'une plutôt que l'autre.

Le délégué de la CE déclare que les deux concepts sont très différents. Un accord implique une volonté commune – les parties s'accordent pour adopter une certaine pratique ou un certain comportement. La pratique concertée est moins formelle et peut être simplement le résultat observé d'un ensemble de communications. Mais dans les deux cas, la norme de preuve est la même, et les preuves indirectes sont aussi pertinentes pour l'un comme pour l'autre. Le recours exclusif aux preuves indirectes est sans doute plus risqué, car il faut alors exclure d'autres explications plausibles du comportement observé.

Le président fait remarquer que dans le droit de la concurrence du Taipei chinois, on utilise également le terme « action concertée » et que l'autorité chargée de la concurrence applique parfois, mais pas toujours, la règle de l'illégalité intrinsèque aux ententes. L'application de la règle de l'illégalité intrinsèque dépend-elle de la prédominance ou non de preuves directes ou indirectes ?

Le délégué du Taipei chinois fait remarquer que l'autorité qu'il représente a eu recours à une norme minimum pour évaluer des cas d'ententes et qu'elle refuserait d'entamer des poursuites pour un comportement qui n'aurait réellement qu'un effet *de minimus*. Mais la norme de preuve applicable ne dépend pas du type de preuve dont on dispose.

La distinction délicate entre preuves directes et indirectes

Le président passe au deuxième sujet secondaire, la distinction parfois difficile à établir entre les preuves directes et indirectes. Il fait remarquer que dans la soumission du BIAC, on demande instamment que les affaires d'entente ne soient pas jugées uniquement sur des preuves indirectes. Le document critique également la politique de la CE consistant à se servir des déclarations des sociétés, qui sont techniquement des preuves directes. Il demande que le BIAC approfondisse sa position sur ces points et plus particulièrement qu'il explique comment il fait la distinction entre preuves directes et preuves indirectes.

Le représentant du BIAC se dit favorable à des poursuites vigoureuses des ententes, mais fait remarquer que ces poursuites portent un tort considérable aux entreprises jugées responsables, tant sur le plan financier que pour leur réputation, et demande donc instamment que les affaires d'ententes ne soient pas jugées uniquement sur des preuves indirectes. Les preuves directes sont des documents ou des témoignages de personnes qui ont participé à une entente et sont de plus en plus faciles à obtenir dans le cadre des programmes de clémence. D'autres types de preuves de communication sont utiles, bien que parfois ambiguës. Les preuves économiques, comme le parallélisme des prix, sont encore plus ambiguës. On ne devrait donc pas les utiliser seules dans les cas d'ententes.

En ce qui concerne la question du président au sujet de l'utilisation des déclarations des sociétés en Europe, il s'agit techniquement de preuves directes, mais qui sont difficiles à vérifier car la procédure de la Commission européenne est de nature administrative et non judiciaire et il n'existe aucun mécanisme permettant à la Commission ou aux parties de procéder à un contre-interrogatoire des témoins sur les déclarations fournies dans le cadre d'une demande de clémence.

Preuves de communication

Le président passe ensuite à la question des preuves de communication, des preuves qui montrent que les parties ont communiqué au sujet de leur entente alléguée, mais qui ne portent pas sur le fond de l'entente proprement dite. Le président fait remarquer que l'affaire *Toshiba a*u Japon a permis d'établir une norme apparemment précise pour utiliser les preuves de communication indirectes. Les preuves doivent-elles toujours répondre à cette norme au Japon ?

Le délégué du Japon répond que si les preuves satisfont aux critères établis dans la décision *Toshiba,* elles suffisent pour prouver une entente, mais il n'est pas nécessaire que ce critère soit toujours satisfait. Dans l'affaire Toshiba, le tribunal a compris qu'il pouvait être difficile d'obtenir des preuves directes

d'une entente et que des preuves indirectes pouvaient suffire dans certaines circonstances. Le tribunal a adopté une approche globale à l'égard des preuves indirectes et à partir des trois éléments énoncés dans sa décision, a établi qu'elles étaient suffisantes. Ces éléments n'ont pas besoin d'être satisfaits dans tous les cas, mais il est important qu'une forme quelconque de preuve de communication soit présentée.

Le président souligne que la législation coréenne sur la concurrence crée une « présomption d'entente » en l'absence de preuves directes dans les cas de « comportement parallèle » et de « restriction à la concurrence ». La KFTC a également élaboré un ensemble de lignes directrices internes contenant des normes qui permettent de prouver une entente en l'absence de preuves directes. Les preuves doivent-elles toujours comprendre une forme de preuve de communication ?

La singularité de la législation coréenne sur la concurrence vient du fait qu'elle prévoit spécifiquement une présomption d'entente lorsque les deux éléments mentionnés par le président sont réunis. A vrai dire, on peut prouver l'existence d'un accord en l'absence de preuves de communication, mais ce serait difficile dans la pratique. La KFTC cherche toujours à acquérir des preuves de communication, mais si elles n'existent pas, on peut prouver l'entente à condition de disposer d'un nombre suffisant de preuves économiques.

Le président renvoie à la soumission de la République tchèque, dans laquelle il est question d'une affaire où certaines preuves indirectes intéressantes et inhabituelles ont été produites. Il demande aux représentants tchèques de décrire ces preuves à l'intention des délégués.

Trois éléments de preuve importants étaient présents dans cette affaire impliquant une entente entre des fabricants de pain de la République tchèque. Premièrement, un soupçon très grave de comportement parallèle puisque les fabricants avaient annoncé en même temps des hausses de prix identiques. Deuxièmement, le Bureau anti-monopole a obtenu des courriers électroniques envoyés entre plusieurs des opérateurs de l'entente dans lesquels il était question de partage de la clientèle. Un de ces messages se terminait ainsi : « Je supprime ce message maintenant car le Bureau anti-monopole et le Diable ne dorment jamais. » Troisièmement, les enquêteurs ont obtenu quelques preuves photographiques inhabituelles : ils ont photographié les voitures des participants garées à l'extérieur d'un pub où ils se réunissaient pour parler du fonctionnement de l'entente.

Quasi-communication : pratiques de nature à faciliter une entente

Le président passe au sujet des preuves de « quasi-communication », qui comprennent les pratiques de nature à faciliter une entente. Il mentionne une affaire impliquant une entente dans le secteur du ciment qui a abouti à l'imposition d'amendes sans précédent. Les preuves indirectes étaient plutôt solides, notamment des échanges réguliers de renseignements sensibles, des audits réguliers pour confirmer les activités de l'entente et un cas de comportement abusif pour punir un membre d'avoir triché. Les preuves comprenaient-elles également des indices de comportement parallèle et d'autres indices économiques ?

Le délégué de l'Argentine explique qu'il n'y avait pas beaucoup de preuves de comportement parallèle car en Argentine, le marché du ciment est local. Il s'agissait plutôt d'un accord de partage de la clientèle et du marché. Mais les preuves indirectes de l'entente étaient solides.

Preuves économiques

Les preuves économiques font également partie des preuves indirectes. Le président fait remarquer que les preuves économiques doivent permettre d'évaluer si le comportement serait rationnel si aucun accord n'existait. Le président fait remarquer que la législation turque sur la concurrence crée une présomption réfutable d'accord lorsque le comportement observé est incompatible avec la concurrence. La

soumission de la Turquie décrit une affaire dans le secteur du ciment dans laquelle les hausses de prix n'étaient pas réellement justifiées par des facteurs de coûts. Mais il y avait également deux documents considérés comme des « plus ». Dans ce cas, les preuves économiques auraient-elles été suffisantes sans ces deux documents ?

Le délégué de la Turquie explique que les coûts de transport sont un facteur important dans le prix du ciment, mais les opérateurs de l'entente semblaient prêts à approvisionner certains clients plus éloignés de l'usine et pas d'autres situés plus près. Ces preuves auraient été suffisantes pour invoquer une présomption de nature légale, mais une affaire gagnée sur des preuves économiques exige souvent plus que la seule présomption.

Le président se tourne vers la France, dont la soumission fait état d'une affaire impliquant les transports publics. Cette affaire faisait apparemment intervenir à la fois des preuves directes et indirectes, et le président demande comment les autorités françaises ont utilisé les deux types de preuves et comment celles-ci se sont renforcées mutuellement.

L'affaire française concernait les transports publics urbains. Trois prestataires assuraient ce service, et les preuves ont révélé qu'ils s'étaient partagés des contrats locaux, de sorte que même si l'entente était locale, elle avait une portée nationale. Le Conseil de la Concurrence a appliqué la technique classique consistant à établir l'existence d'une entente à partir de preuves indirectes sérieuses, spécifiques et corroborantes.

Les preuves indirectes ont indiqué que l'accord de partage de la clientèle était stable et durable. La technique d'évaluation des preuves indirectes ressemble un peu à une peinture impressionniste réalisée au moyen de nombreuses petites touches. Cette technique a permis dans ce cas de mettre à jour une entente.

Le président demande au Brésil d'indiquer comment il utilise les preuves économiques pour faire un examen préalable des nombreuses plaintes reçues au sujet des prix de détail de l'essence.

L'autorité brésilienne doit étudier toutes les plaintes qu'elle reçoit. Pour éviter de consacrer trop de ressources aux nombreuses plaintes concernant la fixation des prix de l'essence, elle en fait une évaluation préliminaire à l'aide de preuves économiques. Les marges bénéficiaires sur le marché en question sont analysées selon plusieurs critères pour voir si elles augmentent et si oui, si les hausses sont compatibles avec l'hypothèse d'une collusion. Sinon, la plainte est rejetée. Si une enquête plus approfondie est justifiée, les prix sur le marché en question sont comparés aux prix au niveau de l'État, en partant de l'hypothèse que l'entente locale, le cas échéant, n'existe peut-être pas à l'échelle d'une région plus étendue. Si après être passé par ces filtres, il existe toujours une possibilité de collusion, une enquête plus approfondie est lancée.

Le président fait remarquer que dans certains cas, le simple fait que les prix des concurrents sont les mêmes, alors que leurs coûts sont différents, est une preuve de collusion. Mais cela n'est-il pas également vrai dans un marché concurrentiel ? L'affaire des exploitants de taxis de Lituanie se caractérise elle aussi par des prix identiques et des coûts différents.

Le délégué de la Lituanie déclare que l'article 5 de la loi sur la concurrence lituanienne comporte des similitudes avec l'article 81 du Traité de la CE et doit interprété de la même façon. Dans l'affaire des taxis, cette disparité apparente entre les coûts et les prix existait bel et bien, mais il ne s'agissait pas d'un facteur important en l'espèce. De nombreuses autres preuves indiquaient que le changement de prix soudain, simultané et identique imposé par les exploitants de taxis était le résultat d'une entente.

Le président fait observer que dans la Fédération de Russie**,** de nombreux marchés sont très concentrés et susceptibles de collusion. Il est en outre difficile pour les autorités de la concurrence russes

d'acquérir des preuves directes d'ententes dans ces conditions. La soumission russe indique qu'il est important pour l'autorité chargée de la concurrence d'être en mesure de prouver l'existence d'ententes au moyen de preuves indirectes. A cet égard, comment les autorités russes utilisent-elles les preuves économiques pour faire la distinction entre l'interdépendance oligopolistique et la collusion ?

Un nouveau projet de loi sur la concurrence, qui est en préparation en Russie, abordera entre autre ces questions. En général, les autorités russes adoptent une approche globale lorsqu'elles évaluent les preuves économiques. Elles tiennent compte de la concentration du marché, des comportements parallèles, des pratiques de nature à faciliter une entente, des réductions de capacité, des échanges d'informations, etc. Les autorités accordent également plus d'attention au concept de domination collective.

Le président passe à la Suisse, dont la législation exige apparemment la preuve de certains effets économiques préjudiciables. Cela implique-t-il qu'il faut effectuer systématiquement une analyse économique ?

Le délégué suisse explique que les effets économiques peuvent entrer en jeu de deux façons : premièrement, dans la preuve d'une action anticoncurrentielle et deuxièmement, dans le cas d'une tentative des parties de montrer que le comportement, même s'il semble anticoncurrentiel, est justifié pour des raisons d'efficience économique. Or, dans le cas des ententes, l'argument de l'efficience est impossible puisqu'on estime que les ententes sont toujours préjudiciables. D'autre part, en cas de preuve d'entente, les effets économiques préjudiciables sont supposés, à moins que les parties réfutent cette présomption par des preuves économiques, auquel cas une analyse économique plus poussée du comportement sera nécessaire.

Poursuites pénales, administratives ou civiles et traitement des preuves indirectes

Le président en vient à la question du traitement différent des ententes selon les pays, en particulier le fait que dans certains pays, elles sont poursuivies au pénal, alors que dans d'autres – la majorité – elles sont considérées comme des infractions administratives ou civiles. La question est de savoir si ces différences ont un effet sur l'utilisation des preuves indirectes. Le président note que les États-Unis sont connus depuis longtemps pour recourir largement aux procédures pénales pour lutter contre les ententes. Les E.-U. affirment qu'ils fondent presque toujours leurs poursuites sur des preuves directes, souvent acquises dans le cadre de leur programme de clémence. Mais quels conseils les E.-U. pourraient-ils donner aux pays qui commencent tout juste à entamer des poursuites pénales contre des ententes, ou envisagent de le faire, et en particulier, y a-t-il une place pour les preuves indirectes dans ces cas-là ?

Le délégué des États-Unis passe en revue les procédures de son pays concernant les enquêtes et les poursuites et reconnaît que le programme de clémence joue un rôle essentiel dans l'obtention des preuves directes nécessaires pour entamer des poursuites pénales dans les cas d'entente. Il fait remarquer qu'il est important d'éviter les erreurs dans ce type de processus, en particulier celles qui se traduiraient par des poursuites pour un comportement qui ne serait pas une entente. Un recours trop fréquent aux preuves indirectes pourrait être une source d'erreurs de ce genre. Même sans rejeter complètement les preuves indirectes dans les cas d'ententes, il est préférable d'utiliser des preuves directes, ce qui implique de créer un programme de clémence efficace.

Le président fait remarquer qu'en Roumanie, les ententes peuvent faire l'objet de poursuites sur le plan administratif ou pénal et demande si la décision d'utiliser l'un ou l'autre des processus se fonde sur la nature des preuves.

En Roumanie, on ne peut pas infliger d'amendes administratives à des particuliers. Les particuliers font l'objet de poursuites pénales pour des ententes si on peut prouver que leur participation était déterminante et animée par des intentions frauduleuses. Par conséquent, la procédure administrative et la

procédure pénale sont complémentaires. Il est possible d'utiliser les preuves acquises dans le cadre d'une procédure administrative pour une poursuite pénale.

Sanctions

Le président fait observer que tous s'accordent pour sanctionner sévèrement les ententes, le plus souvent au moyen de lourdes amendes, de façon à dissuader les comportements futurs de ce genre. La question est de savoir si pour justifier des amendes aussi élevées, il devient nécessaire d'acquérir des preuves directes de l'entente illicite. Le président ajoute que la Commission européenne impose désormais des amendes très élevées dans les cas d'entente et ajoute que la norme de preuve qu'elle utilise est également rigoureuse – sans grande différence avec ce qui existe dans les affaires pénales. Cette norme est-elle liée au fait que les lourdes amendes sont aujourd'hui courantes, et en particulier, cela signifie-t-il que la Commission doit s'appuyer davantage sur les preuves directes ?

Le délégué de la Commission répond que la norme de preuve rigoureuse est le résultat de l'examen attentif que font les tribunaux européens des décisions de la Commission. En ce qui concerne les preuves indirectes, cela veut dire que les preuves doivent être crédibles et que la seule explication plausible du comportement est qu'il s'agit d'une entente. En revanche, il n'existe pas de lien direct entre le type de preuve et le niveau des amendes. Toutes les ententes sont considérées comme des infractions très graves et doivent être toutes sanctionnées en conséquence.

Dans la soumission du Chili, il est question d'une affaire impliquant une entente de transformateurs de lait dans laquelle les preuves étaient apparemment entièrement indirectes. Il a fallu neuf ans pour mener à bien l'affaire, qui s'est soldée par des sanctions minimes. Le président demande au représentant du Chili si l'application de sanctions légères s'explique par le manque de preuves directes d'une entente.

Le délégué chilien répond que l'affaire était la première traitée dans le cadre d'un nouveau système. Le tribunal de la concurrence devait se prononcer sur des appels de décisions de l'autorité chargée de la concurrence. Le tribunal a décidé que les preuves, qui étaient toutes indirectes, n'étaient pas suffisantes pour prouver une entente et a donc renoncé à de lourdes sanctions. Cette décision a fait comprendre à l'autorité chargée de la concurrence l'importance d'acquérir des preuves directes dans la mesure du possible, et elle envisage d'ailleurs d'adopter un programme de clémence.

Pays qui commencent à adopter des mesures contre les ententes

Le président souligne que quelques pays ayant présenté des soumissions aux fins de cette discussion n'avaient pas l'habitude jusqu'ici de poursuivre les ententes. Il serait utile que ces pays expliquent les difficultés qu'ils rencontrent au début, y compris leur utilisation des preuves directes et indirectes dans leurs enquêtes.

La Croatie n'a pas encore traité d'affaire d'entente, bien qu'elle mène actuellement une enquête. Il est difficile d'acquérir des preuves directes dans ces affaires, surtout lorsque la loi sur la concurrence est en vigueur depuis un certain temps, car les entreprises apprennent à cacher les preuves de leurs méfaits. Dans une économie aussi petite que celle de la Croatie, même les preuves indirectes sont parfois inexistantes car il est facile aux entreprises de surveiller leurs concurrentes et de calquer leur comportement sur le leur. Dans le cadre de l'enquête en cours, l'autorité chargée de la concurrence étudie diverses dispositions de contrats utilisées par les parties qui pourraient suggérer une collusion.

En Zambie, les ententes font l'objet de poursuites pénales et l'autorité chargée de la concurrence a des difficultés à assumer le lourd fardeau de la preuve associé aux affaires pénales. La Zambie n'a pas de programme de clémence, par exemple, et les preuves indirectes ne sont généralement pas suffisantes. Il est de plus en plus question de modifier la classification de ce comportement pour en faire une infraction

administrative. L'autre contrainte est le manque de compétences pour enquêter efficacement. La Zambie demande avec insistance une meilleure coopération internationale sur les questions d'ententes. Le pays connaît un certain succès dans sa coopération informelle avec ses voisins. La Zambie juge également utiles les séminaires organisés deux fois par an dans sa région sous le parrainage de la CNUCED sur l'acquisition de compétences d'investigation.

La soumission écrite présentée par la Jamaïque contient une évaluation franche de l'inactivité actuelle de la JFTC en matière de poursuites des ententes. Au nombre des problèmes figurent l'insuffisance des outils d'investigation et des sanctions, le manque de ressources de la Commission et le manque de culture de concurrence dans le pays. Le document souligne que la promotion de la concurrence est un outil important pour remédier à ces carences. Le délégué de la Jamaïque convient que certains cas précis peuvent contribuer à la promotion de la concurrence et précise que le pays mène une enquête dans le secteur bancaire qui pourrait être utile à cette fin. La Commission pourrait également se concentrer sur les marchés publics pour tenter de sensibiliser la population aux ententes.

Le président fait observer que plusieurs soumissions écrites font état de cas de collusion dans le secteur de l'essence de gros et de détail. Il semble que les cas soient particulièrement fréquents dans ce secteur et que pour bon nombre d'entre eux, les poursuites soient principalement fondées sur des preuves indirectes. Le Japon fait état d'une affaire de ce genre dans sa soumission, et le président demande à sa délégation de parler de l'utilisation des preuves indirectes dans ce cas.

Le cas japonais comprenait les épisodes habituels de fixation des prix parallèle, mais également deux éléments de preuves de communication qui se sont révélés importants. Le premier était une preuve de réunion d'urgence de détaillants convoquée par leur association professionnelle. Il était évident qu'il ne s'agissait pas d'une réunion de routine de l'association. Deuxièmement, alors que le compte rendu de la réunion ne décrivait pas les conditions d'une entente, il mentionnait bien que l'on avait demandé aux membres de ne pas prendre de notes afin que la JFTC n'en soit pas informée. Ces preuves, combinées aux preuves économiques, ont été suffisantes pour que la JFTC conclue qu'une entente avait été établie.

Le président invite la Commission européenne à répondre aux remarques du BIAC concernant l'utilisation par la Commission des déclarations présentées dans le cadre de son programme de clémence.

Les déclarations par elles-mêmes ne sont pas nécessairement des preuves directes, tel qu'on l'entend communément. Elles peuvent être de deux ordres : 1) une narration de nature générale, devant être corroborée par des preuves acquises de façon traditionnelle, et 2) une divulgation détaillée spécifique accompagnée de preuves convaincantes.

Discussion libre

Le président ouvre la discussion.

Le président du comité, Frederic Jenny**,** mentionne deux affaires sur lesquelles le Conseil de la Concurrence français s'est récemment prononcé et qui soulèvent des questions de preuves indirectes et d'entente. La première est une affaire impliquant des stations d'essence sur les autoroutes françaises. Tous les matins, les concessionnaires le long d'un itinéraire échangeaient leurs prix par téléphone. Ces renseignements étaient analysés par chacun des réseaux pour établir les prix du lendemain. Le Conseil a conclu que ce comportement était une pratique de nature à faciliter une entente anticoncurrentielle, mais la Cour d'appel a décidé que malgré l'échange de renseignements, les preuves ne montraient pas que les parties avaient conclu une entente. La deuxième affaire concerne le secteur des engrais. Les parties avaient adopté les clauses de la nation la plus favorisée et de l'alignement sur la concurrence, ce qui avait pour effet d'empêcher toute baisse des prix. Encore une fois, le tribunal n'a pas conclu à l'existence d'une entente illicite. Ces cas posent la question difficile de ce que l'on entend par accord dans les législations sur la concurrence.

L'Indonésie décrit son expérience des premières affaires ayant fait l'objet de poursuites de la part de l'autorité chargée de la concurrence et auxquelles on a appliqué la règle de bon sens lorsqu'il existait des preuves indirectes. L'autorité a eu du mal à convaincre les tribunaux d'accepter ses décisions. Avec le temps, elle a obtenu davantage de succès, mais le délégué indonésien souhaiterait savoir comment d'autres pays ont traité cette question de la sensibilisation des tribunaux à l'analyse de la concurrence.

Israël, qui poursuit les cas d'ententes au pénal, estime qu'il est difficile de gagner une cause en l'absence de preuves directes. Mais l'autorité estime que les preuves indirectes, par exemple le parallélisme des prix, sont souvent un bon point de départ pour lancer une enquête qui permettra éventuellement de trouver des preuves directes. Le délégué israélien répond à une observation faite auparavant sur le fait que les pays qui commencent à appliquer les lois contre les ententes peuvent être amenés à s'appuyer davantage sur des preuves indirectes, du fait qu'ils n'ont pas encore d'outils efficaces pour acquérir des preuves directes. L'expérience d'Israël va dans le sens inverse car au début, les ententes étaient souvent « naïves » en ce sens que leurs membres n'étaient pas conscients de l'illégalité de leur comportement et ne se cachaient pas. Les opérateurs d'entente se sont montrés plus prudents par la suite, et il est devenu plus difficile de réunir des preuves directes.

L'Australie poursuit actuellement les ententes au civil, mais un régime pénal devrait entrer en vigueur bientôt. Mais même sous le régime civil, le fardeau de la preuve de l'autorité chargée de la concurrence est lourd – « quasi-pénal » – car les défendeurs sont passibles d'amendes très sévères. Dans ce contexte, l'ACCC a rencontré deux problèmes pour constituer des dossiers sur des preuves indirectes. Le premier est la réceptivité des tribunaux à la « défense passive du bénéficiaire », selon laquelle une partie prétend qu'elle a simplement reçu une invitation à majorer ses prix et, sans réponse affirmative, l'a fait. Le deuxième est la réticence des tribunaux à accepter les « preuves par déduction », par exemple, une série d'appels téléphoniques, peut-être des centaines, qui correspondent à des modifications parallèles des prix. Les tribunaux australiens ont exigé davantage – qu'une communication soit spécifiquement liée à une action ultérieure d'une ou de plusieurs parties. Ces deux affaires ont été portées en appel devant les tribunaux australiens, mais la décision définitive pourrait prendre un certain temps.

Les États-Unis reviennent sur l'intervention de Frédéric Jenny, dans laquelle il a parlé de cas impliquant des pratiques de nature à faciliter une entente, mais sans que l'on ait les preuves d'une entente entre les parties. Aux États-Unis**,** on a développé deux catégories de cas, une pour les ententes traditionnelles et l'autre pour les pratiques de nature à faciliter une entente proprement dite. L'affaire de

pratique de nature à faciliter une entente sans doute la plus connue est celle dite *Container* dans les années 60, qui concernait un système généralisé de vérification des prix entre fabricants de conteneurs en carton. Un tribunal civil a conclu que ce comportement était illégal en soi, même sans entente explicite sur les prix. L'effet positif de cette décision s'est manifesté ultérieurement dans un document obtenu d'une compagnie pétrolière, qui indiquait que l'affaire *Container* avait incité les entreprises de l'industrie pétrolière à mettre fin à ce genre de pratiques. Selon le document, il est ensuite devenu plus facile « pour les perturbateurs sur le marché de faire des rabais sans s'engager à vérifier les prix. »

Le délégué de l'Italie évoque une affaire dans laquelle des compagnies d'assurance italiennes avaient régulièrement échangé des renseignements détaillés sur les prix. On a fait valoir que la transparence des prix peut être favorable à la concurrence, ce qui est vrai, mais elle peut aussi avoir des effets anti-concurrentiels. Les autorités italiennes ont étudié les arguments et ont conclu que dans ce cas, le comportement était anti-concurrentiel et ont ordonné qu'il y soit mis fin. Le fait que les prix dans ce secteur en Italie étaient les plus élevés d'Europe a certainement contribué à cette décision. Le délégué italien fait également observer à ce sujet que s'il devient nécessaire d'émettre une ordonnance correctrice efficace à l'encontre d'une entente, il est important d'interdire ce genre de pratiques. On ne peut pas se contenter d'interdire le parallélisme des prix, il faut également prévenir le comportement qui le rend possible.

Le délégué du Royaume-Uni se dit en accord avec les États-Unis sur le fait que les autorités chargées de la concurrence devraient se concentrer sur les preuves directes. En donnant trop d'importance aux preuves indirectes, on risque de gaspiller des ressources et de compromettre les résultats à long terme de la lutte contre les ententes. Ayant récemment quitté le secteur privé, le délégué fait remarquer qu'il existe bel et bien des preuves directes d'ententes et que c'est aux enquêteurs de les trouver. Le délégué dit également être en désaccord avec la position du BIAC sur les déclarations des sociétés en Europe, car selon lui, de telles déclarations ont leur rôle dans ces affaires, en particulier lorsqu'elles sont corroborées par d'autres preuves.

Les États-Unis soulignent l'importance de sensibiliser le public et les tribunaux à la nature des ententes et de la nécessité de les sanctionner sévèrement. A cet égard, la qualité des procédures engagées par l'autorité chargée de la concurrence est importante. Un cas simple de fixation des prix ou de partage du marché, appuyé par des preuves directes, est ce qu'il y a de plus efficace à cette fin.

Le délégué de Finlande parle de l'expérience de son pays lors de ses premiers efforts de lutte contre les ententes. Lorsque sa législation sur la concurrence a été adoptée il y a 50 ans, les ententes faisaient l'objet de sanctions pénales, mais du fait que ce genre de comportement n'était généralement pas considéré comme un crime et que les critères de preuve étaient sévères, peu de causes étaient remportées. En 1992, la loi ayant été modifiée pour introduire une procédure administrative, son application est devenue plus vigoureuse. Il serait sans doute plus facile aujourd'hui de pénaliser ce comportement. La leçon à retenir est que les sanctions et les outils juridiques dont on dispose doivent être adaptés à chaque pays, notamment en fonction de l'existence d'une forte culture de concurrence. En ce qui concerne les preuves indirectes, chaque cas ressemble à un puzzle où les preuves doivent être considérées globalement. Les preuves fournies par les clients ou par les victimes d'une entente peuvent constituer une partie importante du puzzle.

Le président pose une question au délégué du Taipei chinois au sujet d'une affaire qu'il a évoquée dans sa présentation et dans laquelle on a, semble-t-il, appliqué la théorie des jeux pour évaluer les preuves économiques.

L'affaire concernait un duopole, de nouveau dans le secteur de l'essence. L'entreprise dominante, ancienne entreprise d'État, détenait 70 % du marché. Les preuves étaient exclusivement indirectes,

notamment des hausses des prix simultanées de la part des deux vendeurs, souvent précédées d'annonces dans les journaux. Les parties avaient également employé une pratique de nature à faciliter une entente, la clause de l'alignement sur la concurrence. L'autorité chargée de la concurrence a réalisé une étude globale des preuves et a conclu qu'elles étaient suffisantes pour établir l'existence d'une entente tout en reconnaissant qu'elles n'étaient pas particulièrement concluantes. L'autorité chargée de la concurrence n'a pas utilisé la théorie des jeux pour prendre sa décision, mais l'affaire a ensuite été analysée dans cette optique dans des revues spécialisées.

Conclusion

Le président remercie les délégués de leur participation à cette discussion très utile. Il constate qu'il devient de plus en plus difficile d'agir contre les ententes car les opérateurs réagissent à la menace de sanctions croissantes en agissant dans le secret. Dans ce contexte, les preuves indirectes peuvent s'avérer très utiles à l'autorité chargée de la concurrence. Elles permettraient de faire la distinction entre, d'une part, la simple pratique de nature à faciliter une entente et, d'autre part, l'entente à part entière.