Agreements concerted practices and decisions of associations of undertakings

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The big picture (1)

- Article 101(1) TFUE outlaws : « all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market »;

- *Ratio legis* – To ensure an optimal degree of competition, firms must behave independently on the market. Collusion – the coordination of commercial policies – leads to anticompetitive outcomes, which arguably represent, price increases by 10%/year (*source*: US DoJ). Cartels lead typically to an overcharge of 25% (J. Connor, 2009 but disputed).

The big picture (2)

- The finding of an infringement to Article 101(1) TFUE involves three distinct components:
  - # 1. A legal component – A form of cooperation between several undertakings
  - #2. An economic component – A restriction of competition
  - #3. A jurisdictional component – An effect on trade within the common market
- The EU courts and the Commission have devised an interpretation of these concepts which maximizes the scope of # 1
  - The provision literally refers to formal cooperation => but need to cover non institutionalized arrangements, whereby firms use subtle collusive techniques (secret meetings, signalling, price leadership, etc.)
  - The provision must also encompass cooperations which are, prima facie, unproblematic (vertical agreements, JVs, R&D agreements, etc.)

The big picture (3)

- **Agreements which have as their « *OBJECT* »the restriction of competition (cartels, RPM, bans on // imports, etc.)**

  1. Those that by their very nature, are likely and « objectively capable to restrict competition », on the basis of economic theory and decisional experience (object is not akin to purpose)

  2. Presumption of anticompetitive effects regardless of concrete market effects (Commission can prosecute without proving anticompetitive effects)

  3. Infringement to 101(1) is presumed (with possibility of rebuttal); availability of 101(3) is possible in theory (but presumed excluded, quasi *per se* prohibition)

  4. Give rise to heavy fines

  5. Commission priority

- **Agreements which have as their « *EFFECT* »the restriction of competition (JVs, distribution agreements, etc.)**

  1. All other agreements

  2. No presumption of anticompetitive effects, need to assess infringement of Article 101(1) on a case-by-case basis

  3. Article 101(3) defense is in principle available

  4. Do not normally give rise to fines

  5. Commission do not prosecute, matter for Courts and NCAs

The big picture (4)

- Purpose of the present lecture:
  - Provide a clear description of the concepts of agreement, concerted practice and decision of association of undertakings
  - Ascertain what requirements must be fulfilled by a competition authority (or a court) to bring evidence of #1;
- Please do not hesitate to ask questions.

Outline

I. Two or more independent undertakings

II. « *A concurrence of wils* »

   1. An agreement
   2. A concerted practice
   3. A decision of association of undertakings

I. Two or more independent undertakings

The Principle

- Article 101 EC refers to an agreement or a concerted action «between undertaking**s** »;
- The involvement of at least two undertakings, acting in concert, is thus required;
- This condition, which is often overlooked, entails four significant consequences in practice.

1st consequence – Relations between firms and their end-consumers

- A contract between a firm and a consumer (or a group of consumers) is not caught by Article 101 EC;
- *Ratio legis*: a consumer is not an undertaking, as it does not carry out an « *economic activity* » in the meaning of the case-law (i.e. « the activity consisting in offering goods and services on a given market », CFI, *FENIN*, §36).
- Problem: contracts concluded with consumers may contain clauses which raise competition concerns.

Relations between firms and consumers – an example

- Contracts with consumers often include « English clauses », whereby a seller commits to match any competitive offer, in return for the consumer's commitment to report any better offer:
  - Oligopolists are immediatly informed of deviations from a tacitly collusive equilibria (and can retaliate promptly);
  - Allows a firm with market power to deter competitive entry.

- Darty's « Contrat de confiance » in the oligopolistic household appliance market in France;

2nd consequence – Intra-firm relations

- According to the EC Courts, a contract between a mother company and its subsidary – which are two legally separate entities – may fall short of Article 101 TFUE;
- *Ratio legis*? A subsidiary does not necessarily determine autonomously its conduct on the market but sometimes applies instructions received from the mother company. In such cases, mother and subsidiary constitute a « single economic unit » for competition law purposes;
- Practical importance: mother-subsidiary relationships are often governed by traditional supply conventions.

The *Viho* case

- Parker Pen, a producer of pens, pencils and ink cartridges, had established a distribution network in which national subsidiary companies distributed its products in the various Member States. Parker Pen detained 100% of the subsidiaries. Parker Pen directed their sales and marketing activities.
- Viho, a Dutch reseller of office equipment, sought to obtain deliveries from the German subsidiary of Parker. In Germany, where prices were lower than in the Netherlands. Parker Germany refused to sell the goods, and sent Viho back to Parker Netherlands. Viho complained to the Commission that Parker's distribution policy, whereby it required its subsidiaries to restrict the distribution of Parker products to their allocated territories constituted an infringement of Article 101 TFUE.

The *Viho* ruling

- CJ – The relevant criteria is whether the subsidiary has « *real autonomy in determining [its] course of action on the market* »:
  - The existence of a single economic unit shall be presumed where the mother company holds 100% of its subsidiaries;
  - Below 100%, a case-by-case assessment is required: The relevant question is whether the mother enjoy a « decisive influence over the subsidiary »: does the mother appoint the board of directors? Is the mother consulted over strategic commercial decisions? etc.)?

3rd consequence – Agency contracts

- Agency contracts are agreements whereby a specialized legal or natural person (« the agent ») is empowered by another person (« the principal ») to negotiate and conclude contracts on his behalf;
- Arcelor/Mittal uses agents to sell steel on emerging markets (e.g., in South-America)
  - As far as the principal is concerned, agency contracts are « light » distribution structures, which may prove useful to penetrate new markets;
  - As far as the agent is concerned, the costs of the agency agreement are lower than those arising from classic distribution schemes (where the distributor purchases the goods from the supplier). Under an agency contract, the agent does not bear any commercial/financial risks in relation to the activities for which it has been appointed.

The EU courts case-law

- As a matter of principle, the Courts rule that « true » or « genuine » agency contracts fall short of Article 81 EC;
- In *Confederacion Española de Estaciones de Servicio*, the CJ ruled that a « *genuine* » agency agreement is constituted where:
  - (i) « the agent does not bear any of the risk resulting from the contracts negotiated on behalf of the principal »; and
  - (ii) « the agent operates as an auxiliary organ forming an integral part of the principal's undertaking ».
- *Ratio legis*: If the above conditions are fullfilled, the agent does not enjoy any commercial autonomy. The agent thus forms an « economic unit » with the principal (ECJ, *Suiker Unie*);
- Importantly: in « *genuine* » agency contracts, only the clauses governing the relationship with customers are excluded from the scope of Article 101 TFUE. The clauses governing the relationship between the principal and the agent fall within the purview of Article 101 TFUE

4th consequence – Firm-employee relations

- Firm-employee relations are not covered by Article 101 TFUE. Employees act on behalf of the undertaking that employs them. Therefore, they cannot constitute independent undertakings themselves;
- However, Article 101 TFUE is applicable where, in parallel to carrying out of his normal duties, an employee pursues his own economic interests;
- A scientist develops a patent in the context of research undertaken in his own lab., and subsequently grants a license to its regular employer.

II. « A concurrence of wils »

The background

- « *Agreements* », « *decisions by associations of undertakings*» *and* « *concerted practices* ». The language used in Article 101 TFUE is very broad;
- Haunted by the memories of the Rhur « kartells », as well as influenced by US antitrust experts, the founding fathers sought to ensure that, in order to enforce their anti-cartel policy, the competition authorities would not be faced with formal obstacles. Most collusive arrangements do not take the form of full-fledged conventions, in the meaning of civil law;
- The ECJ and the Commission have promoted an extensive interpretation of the concepts referred to in Article 101 EC. We deal with them in turn.

1. Agreement (1) - definition

Under the EU courts' case-law, an agreement encompasses anything which encapsulates the « faithful expression of the joint intention of the parties » (*Boehringer Mannheim GmbH v Commission*), irrespective of its form (*Bayer vs. Commission*)

- A formal contract, signed or unsigned;
- A non-binding gentleman's agreements;
- An oral understanding;
- A protocol which reflects a consensus;
- A set of guidelines issued by one undertaking and adhered to by another undertaking;

Agreement (2) - precisions

- The requirement of a « *faithful* expression » has given rise to difficulties:
  - Companies have sought to exculpate themselves from the existence of an agreement by arguing that they were forced to sign/participate to meetings (or reluctant « to agree »);
  - The EU Courts consider that a firm which is subject to threats, pressures, etc. should complain to the competent antitrust authorities rather than engaging into the agreement (*Tréfileurop vs. Commission*);
  - Yet, such threats are taken into account at a latter stage, when the Commission deals with the sanction of the illicit agreement.

Agreement (3) – limits

- The EC Courts have nonetheless circumscribed the scope of the concept of an agreement, in the meaning of Article 101 TFUE:
  - Where the agreement results from State-sponsored measures;
  - Where the course of conduct is unilateral.

Agreement (4) – The “State compulsion doctrine”

- Article 101 TFUE does not apply if the anticompetitive agreement is « *required of undertakings by national legislation or results from a legal framework which eliminates any possibility of competitive activity on their part* » (*Commission vs. Bayer*);
- *Ratio legis*: the undertakings have not **freely** accepted to participate to an agreement;
- The State compulsion doctrine is narrowly construed: simple government encouragements, State support to agreements, tax increases limiting the scope of price competition, State approval of previously adopted independent measures are not sufficient. **True compulsion** (the Courts require the legislation to have a « *decisive influence* » over the firms’ conduct) is required;

Agreement (5) – The “State compulsion doctrine”

ECJ, *Arow/BNIC*: the Commission condemned agreements fixing the price of Cognac, despite the fact that the agreements had been extended and made compulsory by a ministerial order. Yet, at the time of the conclusion of the agreements, the ministerial order was not in force. The parties thus had entered into the agreement freely. The ministerial order was only adopted subsequently.

Agreement (6) – The “State compulsion doctrine”

- Unresolved issue: how to eradicate state-sponsored anticompetitive measures?
  - Reliance on Article 4§3 TUE (duty of sincere cooperation) and 101 TFUE : Member States shall not adopt measures frustrating the “*effet utile*” of Article 101 TFUE. Commission only used this legal construct once (*Commission vs. Italy*).
  - Advocacy;
  - Reliance on National Competition Authorities (“NCAs”): in the *CIF* judgment, the CJ held that NCAs had the duty to declare inapplicable public measures contrary to Article 101 TFUE. In practice:
    - before the NCA decision setting aside the measure, the parties to an agreement cannot be the subject of Article 101 TFUE proceedings;
    - After the NCA decision setting aside the measure, the parties to an agreement are fully subject to Article 101 TFUE.

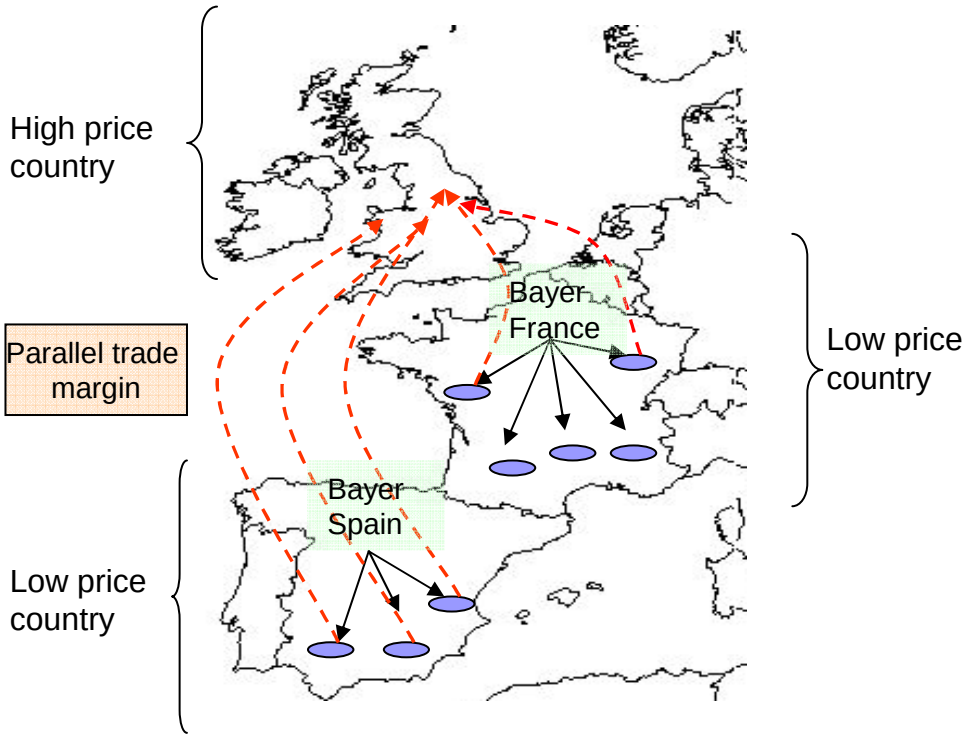
Agreement (7) – Unilateral course of conduct

- In the 1970-1990, under the impetus of the Commission, Article 101 TFUE has been applied to conduct which appeared unilateral, and where the « *joint intention* » seemed to be missing:
  - *AEG Telefunken*: a producer's refusal to admit a distributor to a distribution network was considered an agreement between the supplier and its established distributors. Neither the established distributors, nor the supplier, had any interest to the admission of a new competitor within the network (« community of interest » criterion);
  - *Ford II*: a car manufacturer's decision to unilateraly limit its supplies of a certain car model to its dealers was considered an agreement. In choosing to enter the manufacturer's distribution network, the dealers had implicitly accepted its future policy regarding the range of cars to be supplied (« contractual framework » criterion).

Agreement (8) – Unilateral course of conduct

- In recent years, the CFI has revisited the issue, and been far less prone to find agreements, where evidence of "joint intention" was not conclusive;
- Leading judgments are *Bayer vs. Commission* (often referred to as the "Adalat case") and *VW Germany vs. Commission* (often referred to as the *Volkswagen II* case).

Agreement (9) – The *Adalat* Case



In 1996, the Commission sanctioned Bayer for operating an export ban. To curb parallel imports of Adalat to the UK. Bayer reduced supplies to Spanish and French wholesalers which exported products to the UK. There is no evidence that the wholesalers had agreed to Bayer's ban. Yet, the Commission applied the "*contractual framework*" criterion to find an agreement.

Agreement (10) – The *Adalat* Case

- On close examination, the facts reveal that although Bayer clearly intended to restrict parallel imports, its wholesalers did not have the same intent. On the contrary, the wholesalers had sought to continue their export activities, requested additional quantities to Bayer, and tried to purchase Adalat through other channels;
- The GC and the CJ consider that there is no "*concurrence of wils*" in the present case. More importantly, the EU Courts elaborate on the concept of a an agreement:
  - A unilateral invitation may constitute an agreement when it is expressly or tacitly accepted by the other party;
  - When the other party "reacts against" a unilateral course of conduct, no agreement can be deemed to be constituted.

Agreement (11) – The *Volkswagen II* Case

Volkswagen had called upon its German dealers not to sell the new Passat below a recommended selling price and to limit, or even not grant, discounts to customers.

Under established competition law, this practice is akin to “resale price maintenance”, and is prohibited where formalized into an agreement. The Commission held that the purpose of the measure was to eliminate competition among the dealers. It fined Volkswagen 30.96 million € for anticompetitive agreement under Article 101 TFUE.

Agreement (12) – The *Volkswagen II* Case

- The legal issue: The Commission had not considered necessary to prove actual acquiescence of the dealers to Volkswagen's calls. According to the Commission, a dealer who had signed a dealership agreement was deemed to have accepted in advance a later unlawful variation of that contract.
- The Court's ruling:
  - The Commission may not decide that unilateral conduct by a manufacturer is akin to an anticompetitive agreement unless it establishes express or implied acquiescence by the retailers;
  - The signature of the dealership agreement by Volkswagen's dealers could not be regarded as implied acceptance, given in advance, of Volkswagen's anticompetitive initiatives;
  - To prove acquiescence, it is necessary to examine the actual conduct of the other party on the market.

Agreement (13) - Conclusions

- Unilateral conduct may form the basis for an agreement but only where accepted, expressly or tacitly;
- Tacit acquiescence occurs where the conduct of the addressee reveals support to the unilateral course of conduct;
- Gap? – Harmful conduct not covered under EU rules. Article 102 TFUE (refusal to deal of dominant firms? CJ, *Sot. Lelos Sia EE v. Glaxo*: dominant firm can not refuse to honour reasonable orders that are in line with previous purchases)
- *Pros* and *cons* of the rule – market integration concern vs. the "*dogma*" of parallel trade.

2. Concerted practice

- The definition of what is a concerted practice has long been one of the most contentious issue under Article 101 TFUE. It is now well-settled;
- Yet, to most antitrust practitioners, the concept of concerted practice remains shrouded in mystery.

2. Concerted practice – the nebulous case-law definition

- In the 1969 *Dyestuffs* case, the ECJ formulated for the first time a definition of the concept:

  « A form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition »

- In *Commission vs. ANIC*, the ECJ shed light on the differences between an agreement and a concerted practice:

  « from the subjective point of view, they are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves »

Concerted Practice – *Ratio legis?*

- The Court seems concerned that, in the course of their enforcement activities, competition authorities struggle to find direct « smoking gun » evidence of illicit agreements on price/quantities;
- The concept of concerted practice apparently allows the sanction of certain illicit collective action, on the basis of indirect evidentiary elements;
- But the crux of the matter lies in defining the content of such collective action and the conditions required for the Commission to identify a concerted practice.

The content: agreement vs. concerted practice

- The difference between an agreement and a concerted practice has been well captured by G. Monti:
  - If two competitors enter into a contract to set the same price for their goods, this is an unlawful agreement;
  - If two competitors meet and exchange information about their intended commercial policy, this is a concerted practice only when the parties take this information into consideration into account in devising their future commercial policy.

The conditions required for the proof of a concerted practice (1)

- To bring a « concerted practice » case, the Commission has to adduce evidence of three elements:
  - Contacts between competitors;
  - A meeting of the minds or consensus between the parties to cooperate rather than to compete;
  - A subsequent course of conduct on the market, and a causal link between the contacts and the course of conduct

The conditions required for the proof of a concerted practice (2)

1. Contacts:
   - Direct evidence: telephone conversations, email exchanges, minutes of joint meetings, etc.;
   - Indirect evidence: travel tickets, agenda records, etc.;
   - Mere signalling through press announcements is not sufficient (airline companies following 9/11).
2. Meeting of the minds or consensus:
   - Where the contacts/information exchanged concerns commercial practices, the EU Courts presume that it is likely to give rise to a consensus. Unavoidably, the "recipient of the information cannot fail to take that information into account when formulating its policy on the market";
   - Firms may also exchange unreliable information ("*cheap talk*")
3. Subsequent conduct and causal link:
   - In *Hüls*, the Court held that it was not necessary to prove that the contacts had resulted into actual anticompetitive effects;
   - The Commission needs only prove that the coordination pursued these objectives.

The conditions required for the proof of a concerted practice (3)

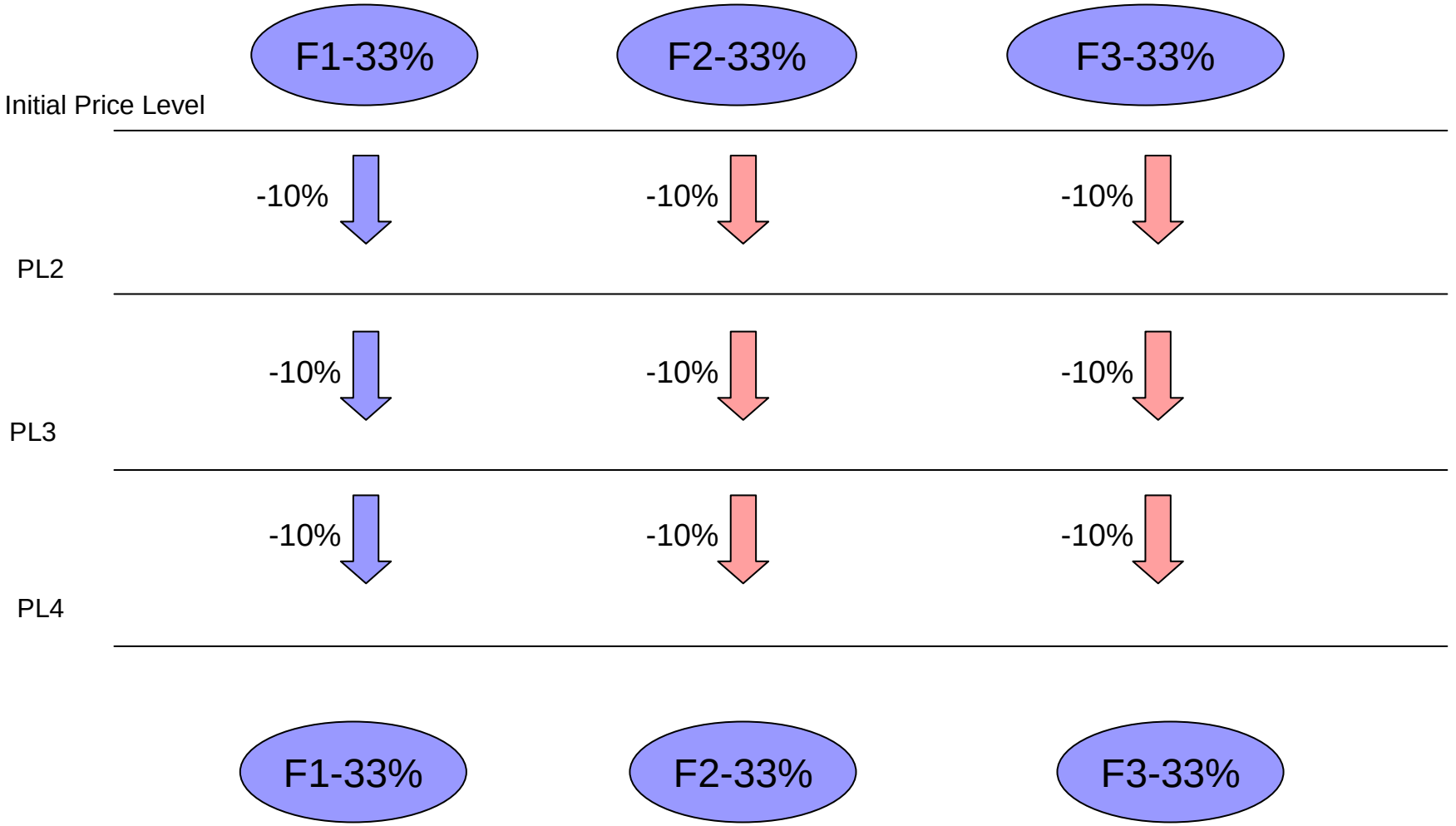
- The case-law is apparently very lax with respect to the conditions required to prove a concerted practice (many presumptions);
- However, proving the two first conditions is a daunting task: as explained by J. Joshua, a former DG COMP official, cartel participants ingenuously participate to “secret meetings in the smoked-filled rooms of luxury swiss hotels”, “falsify travel records”, “use sobriquets”, etc.;
- This, in turn, explains why the Commission has sought to rely on other forms of evidence, to adduce proof of illicit “concerted practices”.

Concerted practices and conscious parallelism

- In a string of controversial cases, the Commission has sought to rely only on market evidence of parallel behaviour to infer concerted practices;
- In so doing, the Commission has created a risk that legitimate oligopolistic behaviour be caught under Article 101 TFUE

Oligopolistic tacit collusion – a reminder

- *Scope*: oligopolistic markets *i.e*. markets with a few sellers. Examples: mobile telephony, tire manufacturers, oil distribution, handset manufacturers, soda, etc.;
- *Theory* (E. Chamberlin): In certain transparent oligopolistic markets, the initiation of a price cut by one operator triggers immediate alignment from the others. As a result of this interaction, prices fall and the respective market shares of the competitors remain the same. Each oligopolist thus individually comes to the conclusion that it is useless to cut prices. Rather, prices remain stable on the market as oligopolists mimic each others' pricing decisions on the market.



After four interactions on the market, the price drops by 30% and the oligopolists' MS remain stable: price competition is a loss-making strategy

Oligopolistic tacit collusion – a reminder

- In certain oligopolistic markets, firms are rationally induced to align their pricing decisions;
- Tacit collusion (or conscious parallelism) is a rational choice, dictated, *inter alia*, by market structure;
- Sanctioning firms for unlawful collusion under the antitrust laws is akin to punishing purely rationale strategies (TURNER);
- The application of the antitrust laws lead to order the firms to behave irrationally (TURNER).

The Commission's attempts to infer concerted practices from observable parallel conduct

- In a few decisions, the Commission relied on empirical evidence of parallel conduct alone to infer concerted practices;
- The most notorious example is the *Woodpulp* decision: In 1984, the Commission sanctioned woodpulp producers for illicit concerted practice. It relied on evidence that the major woodpulp producers had anounced price increases almost simultaneously, and subsequently raised prices in parallel.

The *Woodpulp* ruling – The rise of the *oligopoly defense* under Article 101 (1)

- Wary that the Commission's innovative approach would lead to the prohibition of rational tacit collusion, the CJ strictly circumscribed the reliance on parallel conduct to infer a concerted practice:
  - Article 101 does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (see also ECJ, *Suiker Unie*);
  - Parallel conduct can only be regarded as furnishing proof of an infringement to Article 101 if express concertation is the **only** plausible explanation for such conduct;
  - Thus, any alternative explanation, for instance, that the market is prone to tacit collusion, rules out the application of Article 101 EC.

Background: Judge R. JOLIET, an eminent scholar close to the ideas of TURNER/RAHL, was the reporting judge in the case.

A reality check against the Commission's recent practice

- Study over a sample of 28 decisions between 2001 and 2007:
  - Commission has brought no stand-alone concerted practice case;
  - Only « double qualification » cases: the Commission persistently refers to an « agreement *and/or* a concerted practice » (The ECJ has confirmed that it is not necessary to characterise an arrangement as either an agreement or a concerted practice)
  - Typical factual setting: following a period of intense competition, marked by price decreases, several firms initiate informal contacts with their competitors (which are qualified as « concerted practices »). After a round of informal contacts, the firms eventually enter into a formal agreement to fix prices, limit output, partition markets or allocate quotas (which are qualified as « agreements »). Firms subsequently meet to monitor and police the functioning of the agreement

Practical implications

- The concept of « concerted practice » encompasses the preparatory steps for an agreement, as well as the actions taken for the execution of the agreement;
- The Commission is unlikely to pursue stand-alone « concerted practices » cases (discovery of an agreement is necessary);
- The Commission does not use the concept of « concerted practice » as a surrogate for an unproven anticompetitive agreement, as may have been wrongly interpreted by early commentators (and as defined under EC case-law);
- The concept of « concerted practice » allows the Commission to identify long duration infringements, which are candidate for hefty fines (aggravating circumstance).

3. Decisions of Associations of Undertakings

CMTA
CHRISTIAN MUSIC TRADE ASSOCIATION

GSM ASSOCIATION

ifpi
representing the recording industry worldwide

TOY RETAILERS ASSOCIATION

C.I.T.A
Construction Industry Trade Alliance

The economic rationale

- Undertakings may act jointly in the context of more institutionalized frameworks, in particular, through the intermediary of an association;
- In most of markets with a large number of operators, cartels are operated by a trade association. Indeed, the monitoring (and adaptation of collusion to changing market dynamics) is to difficult to be simply left to the cartel participants;
- Economic studies show that a trade association is often set-up where the number of participants to a cartel exceeds 10.

Associations of undertakings

- Albeit not defined by the Treaty, the CJ has construed the concept of association of undertakings extensively: any body which represents the interest of its members is eligible for the qualification as an association of undertakings. The public law status of an association is irrelevant for the purposes of EU competiition law;
- In practice, it covers not only trade associations but also a myriad of bodies with statutory, disciplinary, regulatory and executive duties:
  - General Council of the Dutch Bar (*Wouters*);
  - Belgian Architects Professional Order;
  - Customs' agents associations (*Commission vs. Italy*);
  - Agricultural cooperative (*Milk Mark*).

Decision

- A decision must be understood as any initiative, irrespective of its form, which is taken by the association and which has the object or effect of influencing the commercial behaviour of its members:
  - Recommendations;
  - Guidelines;
  - Resolutions;
  - Ruling of administrative body (disciplinary);
  - Statutory rules, articles of incorporation, by-laws;
  - Oral exhortation;

Conclusions – What you should keep in mind

1. Two elements are required to bring proof of the first "component" of Article 101: (i) a plurality of undertakings; and (ii) a concurrence of wils;
2. EU courts and Commission have traditionally promoted a broad interpretation of the concept of a "*concurrence of wills*" pursuant to Article 101(1), with a view to ensure that no collective restriction of competition fell short of Article 101(1);
3. Lately, EU courts and the Commission have sought to limit the scope of Article 101(1). This includes:
   - Limiting the scope of Article 101(1) to real cases of concerted action and setting aside action against pure unilateral practices;
   - Omitting to act against stand-alone concerted practices absent evidence of an agreement.
4. Tacit collusion falls short of Article 101(1), and in particular, of the concept of concerted practice. The Commission must rely on other provisions to challenge oligopolistic parallel conduct.

Suggested readings

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Gracias!