8

CARTELS

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A. Introduction

8.01 **Definition**[1] In its simplest form, a cartel is an agreement between competitors aimed at raising the price of a product or service to a level higher than the one that would have prevailed under normal competitive conditions. Cartels may take the form of formal agreements between their members to adopt a given (anti-competitive) conduct in the market but may also consist of looser forms of coordination of each party's commercial behaviour. Such arrangements are commonly reached by informal means, often merely orally, because of their blatantly illegal nature and obviously adverse effect on customers. Intense efforts are

[1] The history of cartels and the origins of the term 'cartel' itself are not discussed in this chapter. There is an abundant literature on the subject, including: DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998); C Harding and J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003); PZ Grossman (ed), *How Cartels Endure and How they Fail—Studies of Industrial Collusion* (2004).

usually made to keep them secret. Apart from outright agreements on the prices to be charged to customers, cartels also typically involve collusion in respect of the commercial terms to be applied to transactions, as well as output levels, the allocation of market shares, specific customers or geographic areas, or other arrangements such as which competitor should win a given contract ('bid rigging'). Each of these elements will ultimately influence the price level of the products or services concerned.

8.02 In view of their complex and informal nature, as well as the large variety of collusive arrangements that they may comprise, it is difficult to formulate a clear and exhaustive definition of cartels. In its 1998 Recommendation Concerning Effective Action against Hard Core Cartels,[2] the OECD Council attempted to define a 'hard core' cartel as 'an anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by 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'. By referring to 'hard core' cartels, the OECD made it clear that this category 'does not include agreements, concerted practices or arrangements that i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or iii) are authorised in accordance with those laws'. 'Hard core cartels' are therefore those agreements or practices which are so intrinsically detrimental to the competitive process that they would never produce countervailing benefits and, thus, will never be held as lawful under competition law.[3]

8.03 **The *per se* prohibition of cartels by EC competition law** As the most restrictive forms of horizontal arrangements, hard core cartels have as their *object* the restriction of competition with a view to extracting supra competitive profits. As such, provided that they (at least potentially) affect trade between Member States, they fall under the prohibition of Article 81(1) EC[4] and amount to appreciable restrictions of competition *per se* irrespective of their effects in the market.[5]

[2] Recommendation of the OECD Council concerning Effective Action Against Hard Core Cartels, adopted by the Council at its 921st Session on 25 March 1998.

[3] Cartel behaviour has been described as 'a practice without defenders in the economic profession' (I Stelzer, quoted by JR Kinghorn and R Nielsen, 'A Practice without Defenders: The Price Effects of Cartelization', in PZ Grossman (ed), *How Cartels endure and How they Fail—Studies of Industrial Collusion* (2004).

[4] A similar prohibition was included in Art 65(1) ECSC (the ECSC Treaty expired in July 2002 and cartel conduct in the coal and steel sectors now falls under the general prohibition of Art 81(1) EC). It is also worth mentioning that special rules apply to certain agricultural products by virtue of Reg No 26 applying certain rules of competition to production of, and trade in, agricultural products [1962] OJ L30/993 (English special edition: Series I Chapter 1959–1962, 129). Thus, by way of exception, Art 81 EC is not applicable to certain restrictive practices pertaining to the Common Agricultural Policy (CAP).

[5] The CFI has held that a clear infringement of Art 81 EC such as price fixing, output limitation or market sharing 'precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law' and 'must be regarded as an infringement per se of the competition rules': see Case T-14/89 *Montedipe SpA v Commission* [1992] ECR II-1155, para 265. Also the CFI stated in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services v Commission* [1998] ECR II-3141, at para 136, that 'it must be borne in mind that in assessing an agreement under Article [81(1)] of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned [. . .], unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets [. . .]. In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article [81(3)] of the Treaty [. . .]'.

8.04 One may wonder, however, whether a cartel could, in spite of its restrictive object, be held as lawful under Article 81(3) EC. If one follows to the OECD definition of hard core cartels, this should never be the case, as the notion explicitly excludes agreements, concerted practices or arrangements which could be deemed lawful under competition law. This does not mean, however, that agreements tantamount to cartels could never be held to be compatible with EC competition law.[6] In the past, the Commission has occasionally allowed so-called 'crisis cartels', by exempting restructuring agreements between competitors that aimed to secure a concerted reduction of capacity in sectors hit by severe structural overcapacity.[7] Those exemptions were, however, subject to drastic conditions and dependent upon due notification to the Commission.[8] Today, such schemes would probably no longer be considered to fulfil the conditions of Article 81(3) EC, as illustrated by the Commission Guidelines on the application of Article 81(3) EC.[9] In this context, and for the purpose of this chapter, the term 'hard core cartels' is used in the sense of agreements or concerted practices which do not pursue any legitimate goal and thus cannot be considered lawful under Article 81(3) EC. In what follows, references to 'cartels' should be taken to mean 'hard core' cartels in this sense, unless the context clearly implies otherwise.[10]

8.05 **Harm caused by cartels** Cartels cause considerable economic damage and have been publicly described by regulators in terms as severe as 'cancers on the open market economy',[11] 'fraud upon consumers [. . .] equivalent of theft by well-dressed thieves',[12] or as the

[6] The CFI has ruled that 'in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article [81(3)] of the Treaty are satisfied and the practice in question has been properly notified to the Commission' (Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para 85).

[7] In principle, the Commission considers that it is for each undertaking to decide when overcapacity is no longer economically sustainable and to take the required restructuring measures. Nevertheless, the Commission has acknowledged that in cases of severe structural overcapacity, market forces may fail to bring about a restructuring process capable of ensuring, in the long run, a return to competitive structures. Whilst consumers would at first sight seem to benefit from an excess supply situation, they may ultimately have to bear the costs of the inefficiencies caused by structural overcapacity.

[8] See eg *Synthetic Fibres* [1984] OJ L212/1 and *Stichting Baksteen* [1994] OJ L131/15.

[9] [2004] OJ C101/97. The Commission states in the Guidelines that 'Article 81(3) does not exclude a priori certain types of agreements from its scope' and that 'as a matter of principle all restrictive agreements that fulfil the four conditions of Article 81(3) are covered by the exception rule'. However, it goes on to state that 'hard core' restrictions 'generally fail (at least) the two first conditions of Article 81(3). They neither create objective economic benefits nor do they benefit consumers. For example, a horizontal agreement to fix prices limits output leading to misallocation of resources. It also transfers value from consumers to producers, since it leads to higher prices without producing any countervailing value to consumers within the relevant market. Moreover, these types of agreements generally also fail the indispensability test under the third condition'. The Commission adds that '[a]ny claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded [. . .] The protection of fair conditions of competition is a task for the legislator in compliance with Community law obligations and not for undertakings to regulate themselves' (paras 46 and 47).

[10] In the maritime sector, restrictive agreements entered into by liner shipping conferences in the context of the related block exemption under Reg No 4056/86 [1986] OJ L378/4 long raised complex issues as to the compatibility of certain price-fixing practices with Art 81 EC. This is not dealt with in this chapter. Reg No 4056/86 has now been repealed by Reg 1419/06 [2006] OJ L269/1, which has simultaneously amended Regulation (EC) No 1/2003, in that the scope of the latter has been extended to include cabotage and international tramp services.

[11] M Monti (then European Commissioner in charge of competition), opening speech at the 3rd Nordic Competition Policy Conference, Stockholm, September 2000.

[12] JM Griffin (then Deputy Assistant Attorney General, Antitrust Division, US Department of Justice ('DOJ')), 3rd Nordic Competition Policy Conference, Stockholm, September 2000.

most intolerable form of abusive practice' whose 'long term eradication' is 'essential'.[13] Cartels go against the most fundamental principles of free market economics, according to which the levels of prices and output should be determined by competition, providing consumers with the highest quality goods at the lowest possible price, as well as resulting in a high level of innovation. By artificially reducing output and/or fixing prices, cartels mimic a monopoly situation, in which supra competitive profits are shared out between their members. They create an unjustified transfer of wealth to the exclusive benefit of their members and divert resources from their optimal use elsewhere in the economy. Cartels tend to align prices and commercial strategy with those of the least competitive of their members. This results in higher costs for customers, a slowdown in innovation and the artificial survival of 'lame ducks'. By eliminating the pressure that encourages companies to invent new products or services, to improve distribution and to reduce production costs, collusion results in both productive and allocative inefficiency. Cartels reduce both social welfare and the consumer surplus.[14]

8.06 From an EC perspective, cartels are all the more damaging since they frustrate the attainment of the Community's policies. Not only do they tend to reduce the benefits expected from the proper functioning of an open market economy but, through the artificial partitioning of their market, they also obstruct the development of a true single European market, intended to facilitate the attainment of the economic and political goals of European integration.[15] It is therefore essential to ensure that regulatory barriers to trade, which have been dismantled over past decades, are not replaced by invisible barriers set up by private operators. Success in fighting cartels is also particularly important in the context of the liberalisation of certain markets, as the intensification of competition may create further incentives to collude.

8.07 **Quantifying the harm** It is not easy to assess in economic terms the precise harm that cartels cause.[16] In its 2003 Report on cartels,[17] the OECD highlighted this difficulty, noting

[13] Neelie Kroes (European Commissioner in charge of competition) in her speech, 'The first hundred days', 7 April 2005. Ms Kroes added: 'I am an economist by training. My analytical experience tells me that it is rare in life that issues are either entirely one thing or another—or, if you like, purely black or white. But with cartels my judgement is clear-cut. Cartel behaviour is illegal, unjustified and unjustifiable—whatever the size, nature or scope of the business affected'. See on Commission's website: SPEECH/05/205.

[14] See Chapter 1 of this book.

[15] In Case T-241/01 *Scandinavian Airline System v Commission* [2005] ECR II-95, at para 85, the CFI stated that '[a]part from the serious distortion of competition that they entail, such agreements, by obliging the parties to respect distinct markets, often delimited by national frontiers, cause the isolation of those markets, thereby counteracting the EC Treaty's main objective of integrating the Community market'. The European Courts have also consistently held that it is relevant when setting the amount of the fines in a cartel case to 'ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community' (eg Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique diffusion française and others v Commission* [1983] ECR 1825, para 106).

[16] First, cartels have both price and non-price effects and the indirect loss of welfare (lower quality and choice, reduced innovation and marketing efforts) caused by the sheltering of the cartel from a truly competitive process is virtually impossible to estimate. Second, a reliable calculation of the excess price imposed by cartels would require comparison of the situation in the cartelised market to the one that would normally prevail. Such a comparison would be of dubious reliability in view of the complex interplay of factors that characterises the functioning of a market.

[17] OECD, *Hard Core Cartels, Recent progress and challenges ahead* (2003). See also the 2002 Report of the OECD Competition Committee on the nature and impact of hard core cartels and sanctions against cartels under national competition laws.

that competition regulators generally do not attempt to quantify the damage caused by cartels, since that is not usually a legal requirement. Although it had conducted a wide-ranging survey, the OECD acknowledged that estimating the harm resulting from cartels remained an elusive goal and that 'one can only conclude that the total harm from cartels is significant indeed, surely amounting to many billions dollars each year'.[18] There are nevertheless examples of attempts to quantify the damage caused by cartels. These indicate the considerable extent of the harm caused, which may correspond to between 15 and 20 per cent of the value of the affected trade[19] and to a median overcharge of 25 per cent.[20]

8.08 In spite of the difficulty of computing their negative effects with any precision, Commission decisions provide revealing examples of the great harm that cartels cause. In *Welded Steel Mesh*, the Commission noted that the agreement concerning the French market, which involved price fixing and limitation of imports, had enabled prices to rise spectacularly. In less than one year, prices had increased by 58 per cent, a rate much higher than in other Community producing countries.[21] In *Cartonboard*, according to the producers' own figures, the series of price initiatives between 1988 and 1991 boosted West European basic list prices by an average of 42 per cent in absolute terms.[22] In *Graphite Electrodes*, the Commission found that the relevant prices had increased by 50 per cent during the period of operation of the cartel.[23] The effects of a cartel are not restricted to prices alone. In other cases, cartels may for instance aim to slow down an anticipated price fall or to delay the introduction of a more efficient, but perhaps less lucrative process.[24] The result, however, is a net harm to customers.

8.09 **The intensification of the Commission's fight against hard core cartels** In view of the threat posed to the economy, it is essential for Community 'anti-cartel' policy to have a deterrent effect. With the adoption of Regulation 17 in 1962, the Commission was granted important powers enabling it to investigate cartels, to order them to cease and desist and, most importantly, to impose on each of the cartel members financial penalties representing up to 10 per cent of their annual turnover. The first fines were imposed as early as 1969,

[18] 2003 OECD Report on hard core cartels, p 9.

[19] ibid. The OECD stated that in 14 large cartel cases prosecuted during the survey period (1996–2000), estimates of harm expressed as a percentage of affected commerce could be calculated. These estimates ranged from a low of 3% to a high of 65% and the median was between 15 and 20%.

[20] JM Connor, *Price-Fixing Overcharges: Legal and Economic Evidence*, available at SSRN: <http://www.ssrn.com/abstract=787924>. In this paper, based on an extensive study of several hundred hard core cartels, Connor found that the median cartel overcharge for all types of cartels over all time periods is 25%. This median overcharge would be 32% for international cartels, making international cartels about 75% more effective in raising prices than domestic cartels. Connor states that his findings are generally consistent with the few previously published works that survey cartel overcharges.

[21] [1989] OJ L260/1, para 25.

[22] [1994] OJ L243/1, para 21. In real terms, the increase in announced prices during this period averaged 26% in Western Europe while actual prices went up 19% before dropping somewhat in the second half of 1991.

[23] [2002] OJ L100/1, para 70. This is confirmed in *Specialty Graphite* (Decision of 17 December 2002, full text of the decision available on DG COMP's web site), where the Commission reported at para 129 that during a top level cartel meeting in 1993, the chairman of a member of the cartel indicated that, thanks to the collaboration achieved in the market for graphite electrodes, the parties had succeeded in increasing prices by 50%. He encouraged members to cooperate in the business of specialty graphite as well, with a view to halting the price decline in that market.

[24] In *Graphite Electrodes* [2002] OJ L100/1, a cartel participant produced a type of electrode which, although smaller and cheaper than those produced by the other participants, could successfully compete with them. The cartel forced the undertaking concerned to cease manufacture of the cheaper product (see para 56).

in the *Quinine*[25] and *Dyestuff*[26] cases. In the 1970s, several cartels were prohibited by the Commission, but the imposition of fines remained sporadic, as some of these agreements had been notified, thus benefiting by law from a provisional immunity from fines.[27] As cartel participants became more aware of the illicit nature of their practices, as well as of the legal consequences of such behaviour, cartels went underground and the Commission had to focus on detection and punishment. From the early 1980s, fines were imposed systematically and their level increased progressively.

8.10 The intensity of the Commission's fight against cartels dramatically increased from the mid-1990s, when it became apparent, through the unearthing of very large and sophisticated international collusive schemes, such as the *Cartonboard*, *PVC* or *Cement* cartels, that such practices were widespread. The process of globalisation also increased awareness of the threat to consumer welfare posed by (worldwide) cartels. During the second half of the 1990s, the Commission took important steps to render its enforcement policy more effective. Its strategy consisted largely of a 'carrot and stick' policy. On the one hand, in 1996 the Commission adopted its first leniency programme,[28] aimed at encouraging cartel members voluntarily to disclose illegal practices in exchange for reductions in fines up to 100 per cent in certain cases. On the other hand, it adopted a tougher policy on fines with the publication in 1998 of guidelines on a new method for setting fines (the '1998 Guidelines'),[29] which resulted in levels of punishment with a greater deterrent value. The Commission's new strategy yielded tangible results, with the adoption, in 2001, of an unprecedented number of cartel decisions (10), resulting in the imposition of a total of over EUR 1,000 million in fines. The Commission has since confirmed its determination: over the period 2001–2006, the Commission adopted 39 cartel decisions and imposed over EUR 6,000 million in fines. In 2002, it adopted a renewed leniency programme aimed at providing greater incentives for companies to come forward. This programme was again modified in 2006, with a view to further improving its effectiveness.[30] In 2003, the Council granted the Commission increased investigatory powers to fight cartels with the adoption of Regulation 1/2003, and in 2006 the Commission adopted new guidelines for setting fines (the '2006 Guidelines')[31] which, it is expected, will again increase the level of the fines imposed on cartels.[32]

[25] [1969] OJ L192/5.

[26] [1969] OJ L195/11.

[27] The notification of outright violations of Art 81 EC was not uncommon in the early years of competition law enforcement. See eg *Cardboard Tubes Producers* [1970] L242/18; *Vereeniging van Cementhandelaren* [1972] OJ L13/34; *IFTRA rules for producers of virgin aluminium* [1975] OJ L228/3.

[28] Commission notice on the non-imposition or reduction of fines in cartel cases, [1996] OJ C207/4.

[29] Guidelines on the method of setting fines imposed pursuant to Art 15(2) of Reg No 17 and Art 65(5) of the ECSC Treaty, [1998] OJ C9/3.

[30] Commission notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17. See also IP/06/1705 and MEMO/06/469.

[31] IP/06/857.

[32] From an organisational point of view, the intensification of the Commission's fight against cartels was embodied by the setting-up of a dedicated 'Cartel' unit within the Commission's Directorate General for Competition on 1 December 1998. A further step was taken in 2005, with the creation within the same Directorate General of an entire 'Cartel' directorate, employing in 2006 approximately 50 dedicated case-handlers. Competition Commissioner, Neelie Kroes described this decision 'as a very concrete expression of the zero tolerance policy the European Commission is committed to implement in the face of this most damaging type of anti-competitive practice' ('Taking Competition Seriously—Anti-Trust Reform in Europe', speech at the IBA/European Commission Conference 'Anti-trust reform in Europe: a year in practice', Brussels, 10 March 2005).

8.11 **Incentives for firms to form cartels** According to the perfect competition model,[33] open market economies should produce an optimal outcome as long as there is more than one seller in the market. However, this model does not take into account the fact that the interaction between firms affects the result of the competitive process between market players. Indeed, undertakings are well aware that the profitability of their market strategies is often dependent on those pursued by competing firms, and take this into account in their business decisions. Non-cooperative game theory has shown however, through the so-called 'Nash equilibrium', as illustrated by the 'prisoners' dilemma', that despite firms having a shared interest in charging a price above the competitive level, they will normally end up charging the competitive price.[34]

8.12 In response to these factors, firms may be tempted to enter into agreements or less formal arrangements which, although not formally binding, may help them to suppress the uncertainty characterising the 'prisoner's dilemma', thus enabling them to reduce the effectiveness of the competitive process and to increase price above the competitive level. Through explicit collusion, that is voluntary coordination of their behaviour, cartel participants may eliminate competition between themselves and extract supra competitive profits.[35] Nevertheless, as game theory also shows, whilst there is an incentive for firms to engage in explicit collusion, there is also a temptation for them to cheat on the arrangements: once a high price has been agreed by the cartel, it may be extremely profitable for one of its members—provided that the others stick to the agreement—to 'free-ride' by undercutting the collusive price. However, if all cartel participants cheat, collusion fails to produce its expected results. Sustaining effective collusion will therefore be difficult: instability is inherent in cartels and the likelihood of obtaining 'positive' results will largely depend on the cartel's capacity to monitor compliance with the cartel agreement and to punish cheats effectively.

8.13 **Factors conducive to the setting up of cartels** Cartels can develop in almost any industry. Their occurrence may result from 'human' factors (collusive 'culture', bad habits of certain managers), but will also critically depend on 'objective' factors such as specific incentives to cooperate or to cheat or opportunities to monitor and enforce collusive arrangements. In this respect, some sectors may be more prone to collusion than others. Explicit collusion is easier in oligopolistic market structures, as the small number of players makes it easier to agree, monitor and enforce restrictive arrangements. Significant barriers to entry are also conducive to collusion, in that price increases will not immediately provoke entry into the market by potential competitors, which would in turn destabilise the cartel. Homogeneity of products also favours collusion, as it is easier to agree on the prices of products with common features.[36] It is therefore not surprising that cartels have traditionally flourished in commodity markets, basic industry and intermediary goods sectors. Cartels have, however, also been found in less 'traditional' sectors such as services or consumer goods. In recent years, cartels have been unearthed in sectors as varied as banking (*Austrian Banks*),[37] transport services (*Greek Ferries*,[38] *FETTCSA*,[39] *SAS/Maersk Air*),[40] agriculture (*French Beef*,[41] *Raw Tobacco Spain*[42] and *Raw Tobacco Italy*)[43] textiles and harberdashery (*Needles*,[44] *Thread*)[45] food and beverages (*Belgian Beer*,[46] *Luxembourg Brewers*)[47] or even the fine arts business (*Fine Arts Auction Houses*).[48]

[33] See Chapter 1 of this book, paras 1.54ff. Under the (theoretical) perfect competition model, companies hold no market power and are therefore price takers. The functioning of the market is characterised by a permanent equilibrium where the price exactly matches demand and market supply. At this point of equilibrium, the price charged by the seller equals its marginal cost and its total average cost, and no excess profit can be made. Sellers cannot charge above the competitive price, as the response of competitors would be immediate and result in losses. At this point of equilibrium, productive efficiency is attained, as all goods are being produced at the lowest possible cost, because an undertaking that did not produce at this lowest possible cost would immediately be forced out of the market. In such a situation, technical progress and innovation will always be sought and will spread immediately throughout the market, leading to a new equilibrium at a lower price.

[34] See Chapter 1 of this book, paras 1.80ff.

[35] See Chapter 1 of this book, paras 1.90ff.

B. Typology of Cartel Arrangements and Common Features of Collusion

(1) Typology of Cartel Arrangements

8.14 Cartels are usually complex schemes combining distinct restrictive practices in the pursuance of their overall goal, the achievement of supra competitive profits. Although cartel practices are generally closely intermingled, it is possible to classify them according to their nature.

(a) Direct or Indirect Fixing of Purchase or Selling Prices or any other Trading Conditions

8.15 Price-fixing arrangements can take many different forms. Although it is not easy to present a clear typology, it is nevertheless possible to distinguish a number of basic features pertaining to cartels, as described below, where they relate to the fixing of prices. In addition to fixing the *level* of prices, cartel members also frequently agree on the *timing* of their price increases, thereby depriving customers of bargaining power through coordinated price 'campaigns', as shown below. Cartels will often mix price-fixing techniques in a global, multi-faceted effort to eliminate competition. Most full-blown cartel cases will thus be characterised by a more or less sophisticated combination of price-fixing techniques, as illustrated by many Commission decisions.

8.16 **Uniform prices and price formulae** The joint fixing of prices can first take the form of common selling prices. In *Greek Ferries*,[49] the Commission found that seven ferry operators

[36] Similarly, where branding and marketing have a low impact, or where there is a low rate of product innovation, there will exist a more stable environment for competing firms to reach an understanding. In this respect, similar cost structures and the use of mature technologies are also relevant to collusive tendencies. Other factors may also be relevant, such as specific business values, and established communication channels between competitors, transparency of prices, the existence of a dominant firm acting as price leader, recession, or excess capacity.

[37] [2004] OJ L56/1.

[38] [1999] OJ L109/24.

[39] [2000] OJ L268/1.

[40] [2001] OJ L265/15.

[41] [2003] OJ L209/12.

[42] Decision of 20 October 2004, IP/04/1256 (full text of the decision available on DG COMP's web site).

[43] Decision of 20 October 2005, IP/05/1315 (full text of the decision available on DG COMP's web site).

[44] Decision of 26 October 2004, IP/04/1313 (full text of the decision available on DG COMP's web site).

[45] Decision of 4 September 2005, IP/05/1140 (full text of the decision available on DG COMP's web site).

[46] [2003] OJ L200/1.

[47] [2002] OJ L253/21.

[48] [2005] OJ L200/92 (full text of the decision available on DG COMP's web site).

[49] [1999] OJ L109/24.

had fixed prices for roll-on and roll-off services on all Greece–Italy routes over several years. Common prices were fixed for each line and for each type of vehicle. Similar practices can be found in many other cartel decisions.[50] Collusion on prices can also take the form of a common price calculation scheme. In *Roofing Felt*, the members of the trade association 'Belasco' had agreed on a common price system for their product (bituminous roofing felt).[51] In *Agreements between manufacturers of glass containers*,[52] European producers of glass containers had agreed, through so-called 'IFTRA[53] rules', upon a harmonisation of prices at common market level by applying a standard calculation scheme.[54] This method enabled its users to reach similar if not identical cost curves.[55] The Commission found that '[t]he implementation [. . .] of a common system of calculating costs in order to determine sales prices ha[d] [. . .] a direct effect on the process of determining price of each undertaking in question, since it enable[d] the latter to more easily compare their respective prices and thus to coordinate their action on the market'.[56] The rules also provided that export prices had to be fixed on the basis of the parties' domestic prices in the destination country.[57] In addition, the rules provided for a common delivered-price system and for the use of a common price calculation formula.[58] Another example of such practices can be found in *Electrical and Mechanical Carbon and Graphite Products*, where cartel participants also relied on a commonly agreed price formula to impose general price increases throughout Europe.[59]

8.17 **Minimum prices** Price-fixing can also take the form of minimum prices to be applied by all cartel participants, leaving upward deviations to the individual decisions of the cartel members. In *BNIC*,[60] the Commission condemned industry agreements by which producers, cooperatives, distillers and shippers of Cognac, represented through their professional and trade organisations within the 'BNIC',[61] fixed minimum selling prices. In *Raw Tobacco Spain*, the three Spanish unions of tobacco producers agreed on the average minimum price

[50] See eg *Quinine* [1969] OJ L192/5, para 22; *Flat Glass Benelux* [1984] OJ L212/13, paras 7–8 and 40–43) and *Methylglucamine* [2004] OJ L38/18, paras 83–87.

[51] [1986] OJ L232/15.

[52] [1974] OJ L160/1.

[53] International Fair Trade Practice Rules Administration.

[54] As differences in selling prices between producers and between national markets were caused by differences between methods of calculating costs, a single calculation method was established 'so that the progressive dismantling of customs barriers would not lead customers and wholesalers to take advantage of differences between national calculation methods to the detriment of producers'.

[55] It was 'to be used for sales pricing and not for purposes of internal management'. Companies could work out their costs according to the traditional method, but they had to compare them with costs established under the IFTRA method subsequently, in order to avoid 'serious mistakes' (paras 19–20).

[56] Para 46.

[57] This meant that all glass container producers agreed to align their prices with the domestic producers' prices, thereby eliminating price competition in each Member State.

[58] Paras 11–12.

[59] [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), paras 91–97. Such increases covered all products and countries covered by the cartel agreement (paras 102ff). The participants had devised a highly sophisticated method for the calculation of the price of the products with reference to a number of objective factors such as the price of raw materials, the size of the product or the number of components it included. This formula, called the 'barème', was intended to enable each cartel participant to calculate the price of its products in a way that guaranteed a perfect uniformity of the prices notwithstanding the differences in the specifications of the product.

[60] [1982] OJ L379/1.

[61] Bureau National Interprofessionnel du Cognac.

per producer and producer group that they would subsequently negotiate with the tobacco processors.[62] Collusion on minimum prices was also found in *Scottish Salmon Board*,[63] *French Beef*[64] and many other cartel decisions.[65] This often implies close coordination: in *Cast Iron and Steel Rolls*,[66] a large number of producers of industrial rolls had set up a sophisticated system of mutual prior consultations regarding quotations in respect of specific enquiries from customers.[67] In *Organic Peroxides*, the cartel, which lasted over 37 years, was initially based on a written contract, signed in 1971, stating *inter alia* that '[n]o party will give prices lower than any agreed minimum prices for any product to any new customer, or reduce prices for any product to existing customers without prior discussions with the other two parties'.[68]

8.18 'Target' prices are also a common feature of cartels. Participants agree on a common price objective to be achieved over a given period of time. Target prices may be set by category of product, or grade of product (as in *Polypropylene*),[69] but may also be set out in detail in respect of specific customers (as in *Food Flavour Enhancers*[70] or *Industrial Tubes*).[71] In *Vereeniging van Cementhandelaren*,[72] the ECJ ruled on appeal that the fixing of a target price 'affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors would be'.[73] In *Polypropylene*, the Commission stated that '[t]he setting of a particular price level which has been presented to the market as "the list price" or "the official price" meant that the opportunities for customers to negotiate with producers were already circumscribed and that they were deprived of many of the benefits which would otherwise be available from the free play of competition forces'.[74] On appeal, the CFI found that 'for the purposes of the application of Article [81(1) EC] the fixing of target prices constitutes direct or indirect fixing of selling prices as mentioned, by way of example, in point (a) of that provision. [. . .] The purpose of Article [81(1) EC], and in particular of point (a) thereof, is to prohibit undertakings

[62] Decision of 20 October 2004 (full text of the decision available on DG COMP's web site), para 68.

[63] [1992] OJ L246/37. Norwegian and Scottish producers of salmon had agreed on minimum prices applicable to their product, in order to impose discipline in the market and, ultimately, to raise prices.

[64] [2003] OJ L209/12. The Commission condemned an agreement between farmers' and slaughterers' federations fixing minimum sales (and purchase) prices regarding cows. The prices set were 10% to 15% above the prices existing before the entry into force of the agreement (paras 39–40).

[65] See eg *Sodium Gluconate* (para 88), *Industrial and Medical Gases* (paras 101, 343), *Thread* (para 282), and *Industrial Bags* (para 279).

[66] [1983] OJ L317/1.

[67] A trade association had been created for this purpose, and a neutral office located in Switzerland was responsible for notifying to all interested parties the price enquiry received by the respective producers. The competitors would contact each other to establish suitable prices, which could not be lower than those of the last similar transaction and had to respect the minimum price levels agreed.

[68] [2005] OJ L110/44 (full text of the decision available on DG COMP's web site), para 85.

[69] [1986] OJ L230/1.

[70] [2004] OJ L75/1, para 94. The target prices for production in 1990 were discussed on the basis of 'guidelines for pricing in the European market in 1990', which indicated different target prices based on the volume ordered by a customer (large, medium-sized, or small customer).

[71] [2004] OJ L125/50 (full text of the decision available on DG COMP's web site), para 100. Price increase targets were broken down by customer and by country.

[72] [1971] OJ L13/34.

[73] Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, para 21.

[74] [1986] OJ L230/1, para 90.

from distorting the normal formation of prices on the markets'.[75] This was confirmed by the CFI in its *PVC* judgment.[76]

8.19 **Recommended prices** agreed upon by competitors will also be considered restrictive. In *Welded Steel Mesh*, the price agreements entered into by the producers during cartel meetings were not 'binding', but the Commission found that they were no less contrary to Article 81(1) EC, as they replaced competition with a form of price cooperation.[77] In *SCK/FNK* (*'Dutch Cranes'*), members of FNK, the association of Dutch crane-hire companies, were obliged to charge 'reasonable' rates for the hiring of cranes. To this end, FNK published cost calculations and recommended rates based on them. The Commission established that 'jointly recommended prices, which may or may not have been observed in practice, make it possible to predict with reasonable certainty what the pricing policy of competitors would be'.[78] This was upheld by the CFI.[79] Likewise in *Fenex*, where an association of Dutch forwarding companies circulated recommended tariffs, the Commission stated that '[t]he circulation of recommended tariffs [. . .] is liable to prompt the relevant undertakings to align their tariffs, irrespective of their cost prices. Such a method dissuades undertakings whose cost prices are lower from lowering their prices and thus creates an artificial advantage for undertakings which have the least control over their production costs'.[80]

8.20 **Agreement on part of the price or on price supplements** Price-fixing may concern only an element of the final selling price. In *Building and Construction Industry in the Netherlands*, the Commission concluded that the mere fixing of a part of the price (through the systematic addition of uniform price increases to the price tenders of contractors) amounted to an infringement of Article 81(1) EC.[81] This was confirmed by the CFI on appeal.[82] Other types of agreement on part of the price can be found in *Eurocheque/Helsinki Agreement*[83] and in *Industrial Tubes*.[84] 'Price supplements', 'charges' or 'surcharges' may also be just another

[75] Case T-13/89 *ICI v Commission* [1992] ECR II-1021, paras 310–311.

[76] Joined cases T-305/94, T-306/94, 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 *LVM and others v Commission* [1999] ECR II-931 paras 739 and 745.

[77] [1989] OJ L260/1.

[78] [1995] OJ L312/79, para 20.

[79] Joined cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739.

[80] [1996] OJ L181/28, para 61.

[81] [1992] OJ L92/1. The Commission objected to a system of complex rules set up by the SPO, an association of contractors established in the Dutch building market, whose object was to 'promote and administer orderly competition, to prevent improper conduct in price tendering and to promote the formation of economically justified prices'. Among the rules objected to was one that provided for two types of price increase to be added uniformly to the price tenders of the various contractors, to be borne by the party awarding the contract, consisting first in the reimbursement of the costs of calculating the work estimates and secondly in contributions to the operating costs of the trade organisations (see para 31).

[82] Case T-29/92 *SPO and others v Commission* [1995] ECR II-289, para 146.

[83] [1992] OJ L95/50, paras 46–49. All French banks constituting the Groupement des Cartes Bancaires CB entered into an agreement on the principle of charging a commission to their customers and on the amount charged.

[84] [2004] OJ L125/50 (full text of the decision available on DG COMP's web site). In this market, the total price of the product resulted from the metal price element, based on the London Metal Exchange (LME) index, and a 'conversion price' corresponding to the value added by the manufacturing company. Within the cartel, price cooperation related to the 'conversion price', ie to the added value representing a percentage of the final product value. The Commission concluded that the agreement on part of the tubes price amounted to an agreement on the price of tubes.

form of price-fixing. In *Ferry operators—Currency surcharges*, the Commission condemned an agreement between several ferry operators concerning the amount (and the date of introduction) of a surcharge on freight shipments following the devaluation of the pound Sterling.[85] Similar agreements can be found in *Steel Beams*,[86] *Alloy surcharge*[87] and *Electrical and Mechanical Carbon and Graphite Products*.[88] On appeal in *Alloy Surcharge*, the CFI again confirmed that the prohibition of Article 81(1) EC extends to agreements relating to the fixing of a part of the final price.[89]

8.21 **Maximum rebates** Arrangements concerning rebates or discounts have also been condemned by the Commission. They may consist of rules imposed by associations of undertakings, or of specific agreements between cartel members. In *Agreements between manufacturers of glass containers*, the Commission found that the clauses relating to price discounts and terms of trade all had the similar object of suppressing normal competitive behaviour.[90] Similar conclusions about rebates were reached in *Fedetab*,[91] *Roofing Felt*[92] and *FETTSCA*.[93] The prohibition of rebates may target or exclude specific customers or categories of customers. In *Quinine*, the cartel members agreed on the rebates to be granted to each customer.[94] In *Citric acid*, the cartel participants agreed that no customer would be granted discounts. An exception was made for the five major purchasers since it was unrealistic to expect them to pay the published list price. Those customers could be offered a discount of up to 3 per cent off the list price.[95] In *Fine Art Auction Houses*, Christie's and

[85] [1997] OJ L26/23.

[86] [1994] OJ L116/1, paras 244–249. The Commission found that the cartel had agreed on the amount of so-called 'extras', ie price supplements charged in regard of specific quality or dimension criteria. It stated that such harmonisation agreements were agreements to fix prices contrary to Art 65(1) ECSC, since extras formed part of the ultimate price to be paid for the products in question.

[87] [1998] OJ L100/55. The Commission condemned an agreement between stainless steel producers on a formula calculating the price supplement ('alloy surcharge') applicable to the price of stainless steel products. The price supplement, which was based on the evolution of the price of the alloys used to obtain stainless steel, represented an important part of the price of the final product. The formula was considered to be a price recommendation restrictive of competition.

[88] Paras 111–114. Price supplements were agreed upon by the cartel members when price increases were too difficult to justify to customers. These price supplements were justified as packaging, transport or recycling costs.

[89] Joined cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni v Commission* [2001] ECR II-3757, para 15.

[90] This included a clause prohibiting special prices, discounts and other conditions, a clause prohibiting any secret departure from published offers or price lists and a clause which deemed it an unfair practice to depart, whether secretly or not, from price lists. See [1974] OJ L160/1, para 36.

[91] [1978] OJ L224/29, para 98(b). The Commission found that a recommendation by a trade association regarding the end-of-year rebates system effectively stifled all competition in this field. Indeed, the recommendation meant that the total rebate granted by each manufacturer was calculated by applying the appropriate rate to the customer's total turnover, regardless of the quantity of goods actually purchased each year from an individual manufacturer. There was no incentive for intermediaries to make greater competitive efforts with a view to obtaining improved benefits from manufacturers, or to take their custom exclusively to one manufacturer with a view to being rewarded with a larger rebate.

[92] [1986] OJ L232/15. The Commission found that an agreement between manufacturers of bituminous felt to set maximum discounts was intended to facilitate the imposition of minimum prices for the product.

[93] [2000] OJ L268/1. An agreement not to discount from published charges and surcharges applicable to basic ocean rates constituted an infringement of Art 81(1) as it restricted competition between liner shipping companies as regards the final price charge to shippers (para 134).

[94] [1969] OJ L192/5, para 22.

[95] [2002] OJ L239/18, para 83.

Sotheby's agreed to make their vendor's commissions non-negotiable, that is to exclude any rebates save permitted exceptions identified in so-called 'grandfather lists'.[96] In *Electrical and Mechanical Carbon and Graphite Products*, the cartel reached an agreement on the discounts to be granted to customers depending on the method of delivery.[97] The finding that agreements on maximum rebates amount to price-fixing has been upheld by the European Courts.[98]

8.22 **Agreements on other trade conditions** Cartels may involve arrangements on trading conditions other than price. Such restrictions will generally be considered as *per se* infringements, as they have a direct or indirect influence on the selling price.[99] In *Vereeniging van Cementhandelaren*,[100] the Commission condemned a series of agreements and decisions taken by the Dutch cement dealers' association concerning the sale of cement in the Netherlands which, *inter alia*, strictly limited the commercial benefits which might be granted to purchasers and prevented any services being provided for customers which fell outside the framework of what was regarded as 'normal'. In *Agreements between manufacturers of glass containers*,[101] the Commission found that the system of 'free delivered' price agreed upon[102] had the object of nullifying any competitive advantage which a producer of glass containers could gain from having greater proximity to its customers, and consequently distorted competition between these undertakings and between the users of glass containers.[103] In *Vimpoltu*,[104] the Commission condemned a decision by a Dutch association of importers of agricultural machinery laying down, *inter alia*, standard delivery and payment terms and rules on sales promotions. In *Fine Arts Auction Houses*, the two cartel members agreed on a wide array of trade terms.[105] Similar attempts to harmonise trading

96 [2005] OJ L200/92 (full text of the decision available on DG COMP's web site), paras 116–118. As they agreed to introduce new sliding scales, Christie's and Sotheby's had made it clear in their press releases that goods already consigned for future sales would not be affected by the new scale. These exceptions opened the door to cheating, as the two auction houses could not trust each other not to offer attractive terms in getting a particularly high profile sale on the basis that this followed from past obligations. In order to ensure that neither took on new business at the old rate or at no commission, the two CEOs exchanged lists of 'grandfathered' clients. These lists identified the customers with whom conditions had been agreed, prior to the announcement of the new scale.

97 [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), paras 115–117.

98 Joined cases 209 to 215 and 218/78 *van Landewyck and others v Commission* [1980] ECR 3125, paras 142–146; Joined Cases T-39/92 and T-40/92 *CB and Europay v Commission* [1994] ECR II-49, paras 84–86, and Case T-213/00 *CMA CGM and others v Commission* [2003] ECR II-913, para 175.

99 See eg Joined cases 209 to 215 and 218/78 *van Landewyck and others v Commission* [1980] ECR 3125, paras 147–156.

100 [1971] OJ L13/34.

101 [1974] OJ L160/1.

102 The price corresponded to the price of the goods plus average transport costs. Since users and retailers compare not only prices but also sales terms, this made it easier for manufacturers to sell products at a long distance since it precluded unfavourable comparisons of the low prices of nearby plants with the higher prices of distant plants.

103 Para 48.

104 [1983] OL L200/44.

105 [2005] OJ L200/9 (full text of the decision available on DG COMP's web site), para 76. The agreement included refusal to give vendors at auction guarantees as to the minimum price, refusal to make advances to vendors on single lots, the setting of minimum interest rates for loans, and the limitation of credit terms to trade buyers at 90 days.

conditions can be found in *Specialty graphites*,[106] *Electrical and Mechanical Carbon and Graphite Products*[107] and *Industrial Tubes*.[108]

8.23 **Agreement on the purchase price of raw materials** Cartel participants may also agree on the price of purchase of raw materials from their suppliers. In *German Scrap Iron*, the Commission found that agreements and concerted practices fell under the prohibition of Article 65 ECSC as they instituted a system of buying quotas which brought about a limitation of demand intended to reduce prices.[109] In *Belgian Agreement on Industrial Timber*, the Commission intervened against an agreement under which Belgian customers of industrial timber had agreed not to purchase the product above a given price.[110] In *Zinc Producer Group*, an agreement by an association of undertakings regarding the fixing of the price of purchase ('producer price') for their zinc metal requirements was condemned. The Commission stated that the agreement had the object and effect of restricting price competition within the European Community, by restricting the parties' freedom to negotiate their purchase prices with zinc mining companies and to set their selling prices for zinc metal to zinc metal purchasers to their own best commercial advantage.[111] In *Raw Tobacco Spain*[112] and *Raw Tobacco Italy*,[113] processors of raw tobacco agreed between themselves the maximum purchase price that they would pay to their suppliers, the tobacco producers. The objective was to ensure that prices paid to the suppliers would not rise above certain maximum levels.

8.24 **Co-ordinated price increase 'campaigns'** Apart from deciding on a price levels, cartel participants often endeavour to eliminate any uncertainty about their future commercial behaviour by agreeing on the rate, date and place of price increases. Such practices may be made systematic through the conduct of wide-ranging price increase 'campaigns' aimed at secretly depriving customers of their bargaining power. Such arrangements have been condemned by the Commission from its very first cartel decisions, in *Quinine*[114] and *Dyestuff*.[115]

106 Decision of 17 December 2002 (full text of the decision available on DG COMP's web site), para 100. There were agreements on premiums for non standard products, agreements on billing conditions, on discounts, as well as on 'standard' exchange rates.

107 [2004] OJ L125/45 (full text of the decision available on DG COMP's web site). The cartel agreed on payment terms and conditions. See paras 118–119.

108 [2004] OJ L125/50 (full text of the decision available on DG COMP's web site). The cartel participants agreed on commercial terms such as payment terms, delivery and consignment stock. See paras 102 and 195.

109 [1970] OJ L29/30. See also First Commission Report on Competition Policy (1971), para 10.

110 See Fifth Commission Report on Competition Policy (1975), para 37. The agreements were terminated without a formal decision having to be issued.

111 [1984] OJ L220/27, para 66. See also *Bitumen Netherlands*, Decision of 20 September 2006, IP/06/1179.

112 Decision of 20 October 2004 (full text of the decision available on DG COMP's web site), paras 67 and 74–76.

113 Decision of 20 October 2005 (full text of the decision available on DG COMP's web site), paras 115, 126–127 and 238.

114 [1969] OJ L192/5. The Commission found that the producers of quinine (a substance used for the production of medicines) had agreed on simultaneous and identical price increases, as well as on the level of the commissions and rebates granted to purchasers.

115 [1969] L195/11. In this case concerning colouring agents, the Commission found, following complaints by customers, that the implementation by the dyestuff industry of identical and simultaneous price increases in several Member States was the result of a concerted action. The Commission established that price increases for the same products were characterised by the same rates and had been instituted on the same dates. It also found that the memos sent out to the sales offices had been drafted in an almost identical way, following contacts between the producers.

In the latter case, the ECJ stated on appeal that the function of price competition is 'to keep prices down to the lowest possible level and to encourage the movement of goods between the member states, thereby permitting the most efficient possible distribution of activities in the matter of productivity and the capacity of undertakings to adapt themselves to change'.[116] It added that 'the fact that the increases were uniform and simultaneous has in particular served to maintain the status quo, ensuring that the undertakings would not lose custom, and has thus helped to keep the traditional national markets in those goods "cemented" to the detriment of any real form of movement of the products in question in the common market'.[117]

8.25 Price campaigns can take different forms: increases may be simultaneous, as in *Quinine*[118] or *Dyestuff*,[119] or carefully staggered, as in *Polypropylene*,[120] or in *Graphite Electrodes*.[121] They may be prepared down to the most specific detail in order to ensure success, and to avoid detection. In *PVC II*, customers were psychologically prepared through reports in the specialist trade press alluding to particular target levels.[122] The initiative in altering the price lists was not always taken by the same producer, and to avoid the risk of not being followed by its competitors, each producer took the precaution of checking, prior to an actual price increase, whether the others were prepared to follow suit.[123] In *Polypropylene*, price 'initiatives' were signalled by a press announcement that one producer was planning a price increase which the others were 'supporting' or 'following'.[124]

8.26 Price increase campaigns may not be aimed at imposing identical prices, but rather at maintaining the status quo between suppliers. In *Pre-insulated Pipes*, a cartel participant stated that the purpose of the agreement 'was to increase prices by approximately 30 to 35 per cent within a period of two years. It was expected that there would be gradual increases every quarter. The companies were not supposed to increase their prices by the same percentage at the same time. The usual practice was to have a 6 to 8 per cent increase per quarter [. . .]'.[125]

[116] Case 48-69 *ICI v Commission* [1972] ECR 619, para 115.
[117] ibid, para 123.
[118] [1969] OJ L192/5.
[119] [1969] OJ L195/11.
[120] [1986] OJ L230/1. Cartel participants agreed on concerted price 'initiatives' sometimes lasting for a period of several months and consisting of several separate 'step' increases. Tables or lists of target prices for each principal product grade were drawn up for each local market, in the relevant currency (para 21).
[121] [2002] OJ L100/1. Tables were circulated, indicating price increases in each country and currency, with the date on which they were supposed to take place (para 62). Increases came into effect on different dates in different countries. The cartel decided which undertaking would make the first move and the others agreed not to undercut the quoted price (para 66). There was a market leader in charge of taking the initiative of setting the price increase in each relevant region. As soon as the price increase announced by the market leaders was accepted by customers, the smaller producers would follow the major producers and apply the new prices (para 69(2)).
[122] [1994] OJ L239/14. An internal memo from a cartel member stated that the target prices in Europe were fairly well known through the industry and as such were 'posted levels'. The memorandum went on to state that '[. . .] these posted levels will not be achieved in a slack market [. . .] but the announcement does have a psychological effect upon the buyer. An analogy would be in car sales where the "List price" is set at such a level that the purchaser is satisfied, when he obtains his 10–15% discount, that he has struck a "good deal"' (para 19).
[123] ibid, paras 18–19.
[124] [1986] OJ L230/1, para 67.
[125] [1999] OJ L24/1, para 58.

In addition to the general objective of pushing prices upwards, concerted price increases may also respond to specific needs. In *Franco-Japanese Ball-Bearings Agreement*,[126] French and Japanese manufacturers of ball-bearings aimed to increase the prices of Japanese products imported into France and bring those prices in line with the domestic ones. In *Vegetable Parchment*, producers agreed on several general price increases applicable for 'export markets' where no cartel member was established.[127] In *Citric Acid*, the cartel paid great attention to the fluctuations in exchange rates in order to maintain prices at the same level in Europe and in the US, and its members made an explicit commitment not to allow prices to diverge substantially so as to prevent trans-shipments between the two areas.[128]

(b) Limitation or Control of Production, Markets, Technical Development or Investment

8.27 Since the price of a product is a function of output and demand, a restriction in output by producers will affect prices. It should come as no surprise, therefore, that parties to an agreement on prices sometimes also enter into an agreement to limit production in order to support their price objectives, or that on occasions an agreement solely aims to restrict output, in consideration of the (anticipated) effect on price.

8.28 **Production or sales quotas** Output restrictions are commonly achieved through production or sales quotas which, in most cases, consist of the cartel participants allocating between themselves a maximum permissible volume of production or deliveries. Quotas are often fixed according to the respective (agreed) market shares of the cartel members, as in *Italian Cast Glass*[129] and *Welded Steel Mesh*[130] and are seen as ancillary to the cartel's attempts to raise prices. In *Polypropylene*[131] and *Cartonboard*,[132] some permanent system of volume control was deemed necessary to the success of 'price initiatives'. In *Vitamins (A and E)*, the fundamental idea underlying the cartel was to freeze the quantities put on the market at the level of the year preceding the beginning of the cartel. The control of the volumes was ensured through so-called annual 'budgets'.[133] Further examples of sales quotas can be found, inter alia, in *Amino Acids*[134] or *Sodium Gluconate*.[135]

8.29 **Other types of joint limitation or control of production** may be resorted to with a view to restricting competition. In *Cimbel*[136] the Commission condemned an agreement which

[126] [1974] L343/19.
[127] [1978] OJ L70/54, paras 40–52.
[128] [2002] OJ L239/18, paras 93, 95.
[129] [1980] OJ L383/19. The three Italian producers of cast glass agreed on quotas for sales on the Italian market.
[130] [1989] OJ L260/1. The participants established delivery quotas for welded steel mesh for the French, German and Benelux markets.
[131] [1986] OJ L230/1. Volume targets in tonnes were set for each producer, and the quota system had as its ultimate objective the creation of artificial conditions of 'stability' favourable to price rises. Another measure taken by the cartel was the diversion of supplies as far as possible to deep sea markets so as to create a shortage in Western Europe conducive to a price increase (para 27).
[132] [1994] OJ L243/1. The 'price before tonnage' policy led to the strict control of volumes put on the market (see eg paras 51–60).
[133] [2003] OJ L6/1, paras 189–196.
[134] [2001] OJ L152/24, paras 211–223.
[135] Paras 83–87.
[136] [1972] OJ L303/24.

provided, among other things, that the building of new cement plants had to be subject to prior approval by all contracting parties. In *Zinc Producer Group*,[137] in order to support the common agreed price, the cartel members had agreed to curtail production and to notify investment projects to all the members of the group. In *French-West African shipowners' committees*, the agreement had as its object the control of the supply of transport services available to shippers wishing to import or export goods between France and the African States concerned.[138] In *Polypropylene*, an exchange of information took place regarding planned temporary plant closures which might be helpful in reducing overall supply.[139] In *Cartonboard*[140] several producers coordinated their downtime in order to restrict supply and keep prices up. This constituted an element of the so-called 'price before tonnage policy' strategy. On appeal, the CFI confirmed that the Commission had adequately established the existence of collusion on downtime and that this formed part of an anticompetitive strategy.[141] In *Graphite Electrodes*, one of the governing principles of the cartel was the freezing of production capacities. Moreover, a limitation on the transfer of technology outside the cartel was agreed, in order to prevent market entry by any third party.[142]

8.30 **The control or limitation of commercial investment** may also constitute methods of restricting competition. In *Belgian Beer*,[143] the cartel arrangements included agreements to limit advertising and other marketing activities (promotion campaigns and services to retailers) as well as investment in distribution. In *Electrical and Mechanical Carbon and Graphite Products*, cartel members agreed not to conduct publicity campaigns and to abstain from taking part in trade fairs.[144] In addition to explicit restrictions on investment, joint investment strategies in the context of a collusive scheme may also be considered restrictive. In *Roofing Felt*,[145] the cartel had agreed to defend the members' collective interests, by jointly agreeing to refrain from individual advertising. The Commission found that this was an objectionable part of an agreement which also provided for restrictions on prices and products and for quotas. As the products were largely standardised, individual advertising could (and should) have been a means whereby suppliers still competed with one another.[146] On appeal, the ECJ upheld the Commission's analysis, stating that '[...] joint advertising measures, such as use of [a common mark], restricted competition in so far as they presented a uniform image of products in a sector in which individual advertising may facilitate differentiation and therefore competition'.[147]

137 [1984] OJ L220/27.

138 [1992] OJ L134/1. Due to the freezing of market shares induced by cargo-sharing, members of the committees could not increase their supply of transport services over and above the quotas set by the committees. Any third country lines wishing to supply such services had no choice but to be co-opted by the members of the committees and limit their supply to the cargo quotas imposed by the committees, or otherwise to give up all activity in these trades, unless they were willing to run the risk of incurring penalties (see para 41).

139 [1986] OJ L230/1, para 27.

140 [1994] OJ L243/1.

141 See eg Case T-352/94 *Mo och Domsjö AB v Commission* [1998] ECR II-1989, paras 133 and 139.

142 [1999] OJ L24/1, paras 2, 110.

143 [2003] OJ L200/1.

144 [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), paras 152–153.

145 [1986] OL L232/15.

146 The Commission stated that there were reasons to believe that the joint advertising was intended to support the other restrictive features of the cartel agreement by fostering users' impression of a homogeneous product and so limiting the scope members ought to have had to compete by differentiating their products (para 73).

147 Case 246/86 *Belasco and others v Commission* [1989] ECR 2117, para 30.

8.31 **Collusive product specialisation** Arrangements whereby one party refrains from producing certain products in favour of the other party are also common in cartels and equally prohibited under Article 81(1) EC. In *Quinine*, the gentleman's agreements prohibited the production of a certain type of product by certain cartel participants, so that others could keep the (joint) monopoly on the product. The trade-off was that those undertakings refraining from production benefited from the protection of their domestic market for the products that they did continue to sell.[148] The Commission found that such agreements prevented the undertakings concerned from competing against each other. A similar practice was found in *Welded Steel Mesh*, where a gentleman's agreement between certain producers to mutually refrain from manufacturing the type of product manufactured by other party was regarded as a restriction of competition, in so far as each party had relinquished its right to manufacture and sell the product yielded to the other party through its own sales network.[149] The CFI upheld the Commission's finding.[150] In *SAS/Maersk Air*, the Commission found that similar arrangements had been put into practice in air transport: the two cartel members had agreed that each of them would cease to operate certain routes and so eliminated competition between them.[151]

8.32 **Channelling output** Elimination of competition may also be sought by channelling the cartel's output only through certain of its members. In *European Sugar Industry*,[152] the principle of mutual respect of domestic markets was implemented through the practice of limiting the sales of sugar to be sold outside the domestic sales zone to the direct or indirect channels of the competitors established in the destination market. Similar arrangements were condemned in *Vegetable Parchment*,[153] *Aluminium Imports from Easter Europe*[154] and *Seamless Steel Tubes*.[155] In *Food Flavour Enhancers*, part of the cartel arrangement consisted of so-called 'counterpurchasing agreements' according to which the Japanese producers were committed to purchasing product from the Koreans in exchange for which those producers agreed to limit their sales to certain markets as well as to certain customers.[156]

8.33 **Grant of reciprocal selling rights and joint sales arrangements** Agreements granting reciprocal selling rights between competitors or providing for joint sales constitute another means of eliminating competition at sales level by channelling output through a single route.

148 [1969] OJ L192/5, para 30.

149 [1989] OJ L260/1, para 172.

150 Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-797, para 97.

151 [2001] OJ L265/15, paras 24, 69.

152 [1973] OJ L140/17.

153 [1978] OJ L70/54. The Commission found that the European producers had engaged in a concerted practice whereby the French and German undertakings agreed, after a British competitor shut down its production plant, to supply the British undertaking with vegetable parchment for the British market on an exclusive basis. Continental European producers supplied this undertaking with the quantities which it required in order to meet British demand in full and refrained from supplying users directly.

154 [1992] OJ L92/1. The Commission condemned an agreement whereby all the primary producers of aluminium in the EC had agreed to purchase the entire supplies of aluminium offered by the State Trading agencies of the Eastern bloc countries, which in turn agreed to sell exclusively to the EC primary aluminium producers.

155 [2003] OJ L140/1. It was agreed as a cartel sub-agreement that British Steel, which ceased to produce tubes, would continue to supply the UK market through the purchase of these tubes from three other European cartel participants. The aim was the protection of the UK market as a 'national' market, and the exclusion of Japanese competitors from entry (paras 78–82).

156 [2004] OJ L75/1, para 64.

In *Siemens/Fanuc*,[157] the Commission condemned an agreement by which the two competitors had granted each other exclusive selling rights for numerical controls in Europe and Asia respectively. Thus, Siemens neutralised the direct impact of an important competitor in Europe and prevented all other undertakings in the common market from buying directly from Fanuc. In *Dutch Nitrogenous Fertilizers (CSV)*, the Commission condemned an agreement by which the two major Dutch producers had set up an organisation (CSV) aimed at handling joint sales of their products in the Netherlands and for export.[158] The Commission found that competition had been eliminated between the two producers and that parallel sales were also discouraged by their joint operation. In *Floral*,[159] the Commission prohibited an agreement by which French producers of fertiliser had set up a joint-sales organisation for the purpose of exporting to Germany and shared the profits through their equity holding.

8.34 **Standard setting** The setting of industry standards may also be used in various ways to eliminate competition or exclude potential competitors. In *Roofing Felt*[160] the Commission found that the agreement to promote the standardisation of the products was, in view of the restrictive nature of the overall cartel arrangement and of the way it was applied, at least partly intended to restrict members' freedom to differentiate their products. On appeal, the Court upheld the Commission's analysis, stating that '[t]he standardization measures were intended to prevent the members from differentiating their products and to obviate competition between members [. . .]'.[161] In *Pre-insulated Pipes*, the cartel brought pressure to bear on a member which had introduced a new industrial process allowing savings of 15 to 20 per cent of production costs and which tended to charge lower prices. Other producers arranged to limit the expansion of this new technology and to maintain the old standards.[162] In *Copper Plumbing Tubes*, the cartel's anti-competitive strategy included the joint use of a single trademark, and the participants agreed that copper plumbing tubes should not be put in the market under other trademarks.[163]

8.35 **Other practices limiting production or technological development** have also been condemned. In *Roofing Felt*, the cartel members took coordinated action with regard to an undertaking that went bankrupt in order to ensure that its production facilities would continue to be controlled by the cartel.[164] The Court upheld the Commission's finding and stated that

[157] [1985] OJ L376/29.

[158] [1978] OJ L242/15. CSV also provided for the exchange and joint discussion of detailed information concerning production, storage and sales forecasts and figures for each product and destination, including deliveries to other Member States.

[159] [1980] OJ L39/51.

[160] [1986] OJ L232/15.

[161] Case 246/86 *Belasco and others v Commission*, [1989] ECR 2117, para 30.

[162] [1999] OJ L24/1. The creation of a trade association officially aimed at promoting the exchange of technology within the industry was instrumental to this effort to discriminate against a technically superior product. The ringleader had stated in this respect that the new standard should not be accepted as resulting cost savings would mean a reduction of 10 to 15% in market volume and 'none of [the cartel participants] would become richer' (see paras 113–116).

[163] Decision of 3 September 2004 (full text of the decision available on DG COMP's web site), para 119.

[164] [1986] OJ L232/15. At a meeting with the regional economic authorities, the representatives of Belasco, the trade association under cover of which the cartel operated, urged against the undertaking being taken over by foreign interests lest this 'upset the already very precarious balance on the market'. They also expressed an interest in taking over the firm themselves (see para 64).

the applicants endeavoured to avoid the possibility of a takeover of [the insolvent undertaking], by one or more foreign undertakings because they were not members of the cartel. It must be acknowledged that that concerted action, which formed part of a campaign against other producers and importers, was intended to restrict competition or to strengthen the applicants' position on the market'.[165] In *Graphite Electrodes*, pressure was brought to bear on a cartel participant whose US subsidiary produced 28¾-inch electrodes. This product was competing with their 30-inch electrodes but its price was that of 28-inch electrodes. The cartel members asked the undertaking concerned to cease to produce this product, or to raise its price. In the end, the manufacture of the product was abandoned.[166]

(c) *Sharing of Markets, Customers or Sources of Supply*

8.36 Market sharing arrangements are often the corollary of price-fixing and output restrictions. However, they may also exist separately, as a means of influencing the overall price level, particularly where an agreement on price may be difficult to reach or control. In addition to the mere allocation of a given share of the market subject to collusion, such arrangements may involve the allocation of specific territories within those markets, or of customer groups or individual customers. Sources of supply may also be shared between cartel members, as a form of market sharing at the purchase level. Typically, the adherence of each party to its specified share will be monitored in order to detect possible cheats, in which case penalties may be imposed.

8.37 **Allocation of market shares** Market-sharing practices can take many different forms, as illustrated, *inter alia*, by *Quinine*,[167] *French-West African shipowners' committees*,[168] or *Flat Glass Benelux*.[169] Compliance with the allocated market shares is often closely monitored, as in *Cartonboard*[170] or *Graphite Electrodes*.[171] Market shares may be defined at a global (world) level, as in *Citric Acid*,[172] at a broad regional level, as in *Sodium Gluconate*,[173] at a

[165] Case 246/86 *Belasco and others v Commission* [1989] ECR 2117, para 28.

[166] [1999] OJ L24/1, para 56.

[167] [1969] OJ L192/5. In the first cartel condemned by the Commission, quotas were fixed on the basis of the total sales of all cartel participants. The sharing out of the sales thus compromised all markets.

[168] [1992] OJ L134/1. The committees had shared among their members the markets constituted by the cargoes carried by liner vessel between France and 11 African States.

[169] [1984] OJ L212/13. The Commission found that the two cartel members and their subsidiaries, and associated companies in the Benelux countries had shared out the market by predetermining the two groups' relative positions within a narrow band (between 60/40 and 62/38). The 60/40 ratio related to the two groups' installed capacity in the Benelux countries. The Commission stated that this 'meant that their respective capacities were operated at similar levels at any given time' and that this was 'an extremely serious restriction of competition which was designed to keep the parties' market shares stable and so largely insulate them from customer pressures'.

[170] [1994] OJ L243/1. The so-called 'price before tonnage' scheme was implemented through a 'freezing' of the market shares of the major producers on the basis of their respective positions in 1987 and through the constant monitoring and analysis in meetings of 'market share development' and fluctuations in the market shares of the major producers (see para 130).

[171] [2002] OJ L100/1. Specific market shares were attributed to each cartel member in 1992 and were meant to remain stable. At their subsequent 'Working Level' meetings, the participants reviewed their sales in the different markets and exchanged information in order to monitor observance of the allocated quotas.

[172] [2002] OJ L239/18. Each producer was assigned a worldwide market share expressed as a percentage of total sales by the trade association members in a given year. Quotas were initially set in terms of total tonnage but it was subsequently decided to express the quotas in terms of market share figures instead. Market share quotas for each company were set out in great detail and the figures included decimals (see para 97).

[173] Overall sales quotas were set at world level, but the world was divided into five 'regional' areas (US, Europe, Canada, Japan, rest of the world) in which each party was allocated a specific market share.

European level, as in *Zinc Phosphate*[174] or even at a national level.[175] The sharing-out of the market and subsequent freezing of market shares may be applied with particular rigour. In *Pre-insulated Pipes*, the principle underlying the quota system was that in future market share could only be 'bought'.[176] In many cases, the strict implementation of the sharing-out of the market implies that undertakings which have sold more than their respective quotas are obliged to compensate other cartel members, for instance by buying up quantities from their competitors, as in *Quinine*,[177] *Citric Acid*,[178] *Vitamins*[179] or *Organic Peroxides*.[180] 'Swap deals', that is *ad hoc* arrangements regarding the exchange of previously allocated quantities for reasons of convenience, are also a common feature in market sharing arrangements. In *Pre-insulated Pipes*,[181] producers whose market shares in specific countries were considered too low were encouraged or required to withdraw from those markets because their marginal commercial presence tended to push down price levels. In return for giving up this business, they received compensation in the form of an increase of their quota allocation in other markets in which they were already present.

8.38 **Allocation of territories or distribution channels** among cartel members is a frequent feature of cartels. The 'home market' rule, that is an arrangement whereby the stronghold of an undertaking in its domestic market is respected by the other competitors who agree not to enter or to refrain from increasing sales in that market, constitutes the most obvious means of territorial allocation. Since it runs directly counter to the establishment of a common market, one of the fundamental objectives of the Treaty, it has always been severely condemned by the Commission. In *Quinine*, the gentleman's agreement had as its object the protection of the German, French and Dutch markets to the benefit of the local producers, and exports to those markets by other members were prohibited.[182] In *European Sugar Industry*,

174 [2003] L153/1. Sales quotas were in principle allocated at the European level (para 66).
175 See eg *Carbonless Paper* [2004] OJ L115/1, paras 241–251, and *Industrial Bags*, decision of 3 May 2006, para 318.
176 [1999] OJ L24/1. The ringleader insisted on a 'deadlock' in the market, which meant that market shares were to be frozen. If a producer wanted to increase its overall market share, it could only do so through acquisition of a competitor.
177 [1969] OJ L192/5. The cartel agreement provided for such compensation in case of deviation from the agreed quotas.
178 [2002] OJ L239/18. It had been decided that if a company exceeded its assigned quota in any one year, it would be obliged to purchase product from the company or companies with sales below their quota during the following year (para 88). This led to several important transactions between companies, especially as one company tended to fall short of its quota, whilst another one tended to remain ahead of it (paras 102–111).
179 [2003] OJ L6/1. When a party exceeded its sales quota, it was obliged to 'slow down' its sales in order to allow other cartel participants to catch up. If at the end of the year a producer was substantially above its sales quota, it had to buy the product from others in order to compensate for the deficit they had suffered (see para 196).
180 [2005] OJ L110/44 (full text of the decision available on DG COMP's web site). The initial cartel agreement signed in 1971 read as follows: 'All future sales of initiators in the geographical area will be shared between the parties in accordance with a quota system. [. . .] The quota will be maintained by exchanging every quarter the uncertified sales figures of the past three months. [. . .] If the exchange of figures shows that the sales of a party in any country have exceeded the quota for any category then that party will modify its sales policy in succeeding months with the object of arriving eventually at a tonnage for the whole of the calendar year which does not exceed his percentage quota' (see para 85).
181 [1999] OJ L24/1.
182 [1969] OJ L192/5. Cartel members agreed not to make offers in the 'reserved markets', but measures were taken to conceal market partitioning. Sales in reserved markets could exceptionally be made, subject to quota compensations, in order to avoid suspicion.

a large market partitioning scheme had been set up by the Community sugar producers.[183] Whilst cross-border sales became necessary because of shortages in certain Member States, the cartel members ensured that this would not disrupt prices by devising a 'stay-at-home' policy and setting-up a complex scheme that guaranteed that imported sugar would be sold at the same price as domestic production.[184] The Commission's finding that this scheme was a blatant infringement of Article 81(1) EC was largely endorsed by the ECJ.[185] Similar schemes were condemned in *Vegetable Parchment*,[186] *Peroxygen Products*[187] and *Graphite Electrodes*[188] and *Cement*.[189] Examples of market partitioning in the transport sector include *CEWAL*[190] (maritime shipping lines) and *SAS/Maersk Air* (airline connections).[191] *Seamless Steel Tubes*[192] provides an example of how market-sharing can be organised at an inter-continental level. In that case, the cartel agreement included an arrangement concerning mutual self-restraint between European and Japanese producers.[193] Cartel members may also agree on the mutual allocation of distribution channels. In *Belgian Beer*, the cartel agreement between Interbrew and Danone included a general non-aggression pact and a sharing out of the 'on-trade' distribution channels in Belgium, notably through an agreement

183 [1973] OJ L140/17. As the Common Market replaced national market organisations, the producers endeavoured to restrict competition on their respective domestic markets.
184 Deliveries were subject to the consent of competitors established in the sales zone and the sales price was aligned to the domestic prices. Cross-border sales were also channelled through local producers, in order to ensure uniformity in price and sales conditions.
185 The Decision was however partly annulled on other grounds. See Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73 *Suiker Unie and others v Commision*, [1975] ECR 1663.
186 [1978] OJ L70/54. The producers agreed to share out markets where no producer was established, but there was an agreement to respect each other's domestic markets by refraining from exporting to those markets.
187 [1985] OJ L35/1. The cartel members conducted their commercial operations in the Community on the basis of an agreement or understanding that each national market was to be reserved for those producers who manufactured inside the territory in question (the 'home market rule'). Each producer limited its sales to end-users in those Member States where it possessed production facilities (see paras 9–10).
188 [2002] OJ L100/1. Non-domestic producers were supposed to refrain from competing aggressively with home producers. Ultimately, non-domestic producers were meant to withdraw from home markets (see para 50).
189 [1994] OJ L343/1. The *Cement* case is a good example of how markets may be shared out pursuant to complex and detailed rules: the European producers of cement agreed to ensure non-transhipment to home markets and to regulate cement transfers from one country to another. They had to refrain from selling outside their home market, or to comply with the price and sales conditions applied by local producers. Cartel members could claim priority in respect of certain markets if they had long term contracts. However, in case of failure to supply, they were obliged to share the supplies equitably with their competitors.
190 [1993] OJ L34/20. The members of three maritime conferences had agreed that the members of one conference would refrain from operating as an independent shipping company ('outsider') in the area of activity of the other two conferences. The Commission found that such trade-sharing agreements amounted to agreements between the members of these conferences not to compete with each other as outsiders in their respective areas of operation. They had the effect of partitioning off each group of shipping routes (paras 33, 37).
191 [2001] OJ L265/15. The two Nordic airline companies had entered into an overall market sharing agreement by which SAS undertook not to compete with Maersk Air as regards connections to and from Jutland, whilst Maersk Air undertook to refrain from competing with SAS on all international routes to or from Copenhagen. The parties had also colluded to share out 'inland connections' (see para 69).
192 [2003] OJ L140/1.
193 The Commission found that that European and Japanese producers of steel tubes used in the oil industry had entered into a market sharing agreement called the 'Europe-Japan Club'. According to the so-called 'fundamentals', ie the basic rules to be observed by the parties to the agreement, the producers had to respect each other's home market. Japanese producers could not deliver their products in Europe and vice versa. Within Europe, producers agreed to respect each other's domestic market and to submit price offers in tenders that would be between 8 and 10% above the price of the local producer (paras 62 to 68).

that the two companies would not 'steal' each other's traditional outlets.[194] In *French Beer*, Danone and Heineken agreed upon a temporary freeze on the acquisition of wholesalers and the establishment of equilibrium between their respective distribution networks in the French sector for 'on-trade' consumption of beer.[195]

8.39 **Allocation of customers and other customer-specific practices** Market sharing can also take the form of customer specific measures. This may consist of respecting each cartel member's 'traditional' customers. In *Roofing Felt*, several Belgian producers had agreed to supply only their own customers. Under the expression 'stability of clientèle', the members made it a principle that every producer should keep its own customers. One object of the agreement was to avoid a member's customers being approached by other members.[196] The 'established customer' principle was also applied, for example, in *Pre-insulated Pipes*,[197] *Luxembourg brewers*,[198] *Methylglucamine*[199] and *Food Flavour Enhancers*.[200]

8.40 The sharing out of non-'traditional', important customers is also a feature of many cartels. In *Polypropylene*, a system known as 'account management' (or in a later, more refined form, 'account leadership') had been set up to ensure the effective implementation of an agreed price increase by nominating one supplier (secretly) to coordinate their dealings with a particular customer.[201] In *Vitamins*, the producers of Vitamin C had set up a highly sophisticated system for the treatment of 'key' customers for which a detailed sales plan was determined. Each cartel participant was in charge of controlling a specific customer. The cartel participants agreed to share out the supplies to the largest global customers.[202] In *Electrical and*

[194] [2003] OJ L200/1 see eg paras 60, 73, 239, 243.
[195] *Kronenbourg/Heineken* ('*French Beer*'), [2005] OJ L184/57 (full text of the decision available on DG COMP's website).
[196] [1986] OJ L232/15, para 51.
[197] [1999] OJ L24/1. For most projects, the traditional supplier was designated the 'favourite' and the other producers had either to decline to bid or to give a higher 'protect' quote so as to ensure that the former received the contract. In the case of major projects, where several suppliers could be envisaged, the producers who traditionally supplied the customer were expected to bid and to share the contract between them (see para 68).
[198] [2002] L253/21. The brewers had entered into a market-sharing agreement having as its object the protection of each party's clientèle. By a written agreement signed in 1985, the parties agreed not to supply beer to any customer in the hospitality sector who was tied to another party by an exclusive purchasing agreement ('beer tie'). This beer tie guarantee extended to beer ties which were invalid or unenforceable in law, as well as to supply arrangements where a brewer simply invested in a drinks outlet but did not sign an exclusive purchasing contract. The beer tie guarantee was reinforced by a consultation mechanism obliging the parties to check with each other about the presence of a beer tie before supplying new customers, as well as by financial penalties for non-compliance.
[199] [2004] OJ L38/18. The cartel agreement was based on the mutual respect of each party's customers. Each party undertook to quote higher prices than its competitor to ensure that the customer would stay with its traditional supplier (see paras 98ff).
[200] [2004] OJ L75/1. An agreement existed between the cartel members not to sell to each other's respective 'traditional' European customers. In order to protect this agreement, cartel members also entered into a 'counter-purchasing' agreement whereby Japanese producers agreed to purchase product from their Korean competitors in exchange for which the respective competitors would limit their sales to the European customers.
[201] [1986] OJ L230/1. Later on, a more general adoption of the system was proposed, with an account leader named for each major customer who would 'guide, discuss and organize price moves'. Other producers who had regular dealings with the customer were known as 'contenders' and would cooperate with the account leader in quoting prices to the customer in question. To 'protect' the account leader and contenders, any other producers approached by the customer were to quote prices higher than the desired target. These producers were called 'non-contenders' (para 27).
[202] [2003] OJ L6/1, paras 402–414.

Mechanical Carbon and Graphite Products, a system of 'account leadership' was meant to overcome the difficulty of ensuring a uniformity of prices with regard to large customers enjoying buying power.[203] Other examples of the sharing out of customers can be found in *Seamless Steel Tubes*,[204] *Sodium Gluconate*[205] or *Industrial Tubes*.[206] Customer allocation may be organised using very sophisticated mechanisms. In *Industrial Tubes*, major customers were identified by number-codes.[207]

8.41 Agreement may also be reached on collusive practices specific to a certain category of customer. In *Flat Glass Benelux*,[208] the cartel members had classified their customers in several classes, each class qualifying for different rates in the confidential price-lists. In *Electrical and Mechanical Carbon and Graphite Products*, the cartel participants devised a pricing strategy specific to car equipment manufacturers. Since these customers were multinational companies, the cartel was afraid that they could benefit from the price differences between countries to source their entire needs from the cheapest country. To counteract this risk, cartel members set up a pricing policy that was specific to these customers and aimed at ensuring the uniformity of the prices quoted throughout Europe.[209]

8.42 **Bid rigging** is a specific form of customer allocation between suppliers and constitutes, as such, a blatant violation of Article 81(1) EC. Collusive behaviour in tendering procedures is all the more serious since the Community has endeavoured, through the adoption of successive Directives, to harmonise procedures for the award of public contracts and to ensure transparency so as to promote competition with regard to public tenders. The Commission's position on bid rigging was made clear as early as 1973 in its *European Sugar Industry* decision,

[203] [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), paras 128ff. For each of the main customers, the cartel member who was the most important supplier was appointed as the 'leader' of the account and meant to lead the price negotiation and to obtain the highest possible price, whilst competitors had to follow its instructions when quoting prices to the same customer.
[204] [2003] OJ L140/1. British Steel, a cartel participant which had ceased to produce steel tubes, agreed with the other European producers of the cartel that the supply of its needs would be shared out between them and that the Japanese producers would be excluded (see paras 78–82).
[205] A detailed sharing out of major customers was implemented. For instance, each cartel member was allocated a specific subsidiary of a large multinational customer (para 90). The allocation of specific customers was also used to enable cartel participants to adjust their sales to the agreed quotas.
[206] The cartel did not resort to general price increases as purchasers were big companies with which prices were individually negotiated once a year. Instead, cartel participants devised tables containing detailed indications as to volumes per producer and per customer and future prices to be achieved, as well as the sequence in which the producers were expected to submit price quotations to each customer (para 99).
[207] Each customer's identification number was first known only to its respective suppliers and the exchange of information took place on the basis of spreadsheets and handwritten statistics. Cartel participants attending to a certain customer knew each others' prices and volumes. The allocation of key customers and volumes was also monitored though so-called 'customer leadership rules'. One of the cartel members described the mechanism as follows: '[during the cartel meetings] a customer's identification number would be called. The manufacturers supplying that customer would answer the call and withdraw from the meeting in order to discuss how to proceed vis-à-vis the customer in terms of pricing, supply quantities and terms and conditions. If another manufacturer also wanted to supply the customer concerned, he would contact M. It was then up to the current supplier(s) whether to grant the manufacturer a supply share with respect to the said customer. In the event that several members simultaneously submitted an offer at the same price, the suppliers agreed that each manufacturer would tell the (usually major) customer that it was only able to deliver a limited quantity of tubes. The remaining quantities could then be supplied by the other manufacturers' (para 106).
[208] [1984] OJ L212/13.
[209] [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), paras 124–127.