

where it stated that '[i]n a system of tendering, competition is of the essence. If the tenders submitted by those taking part are not the result of individual economic calculation, but of knowledge of the tenders by other participants or of concertation with them, competition is prevented, or at least distorted or restricted'.²¹⁰ In *Building and construction in the Netherlands*,²¹¹ the Commission condemned the rules and regulations of the umbrella association of the federations of Dutch builders and contractors (SPO) which provided, among other things, for exchanges of information prior to tendering and for collusion on price tenders for building and construction contracts. Moreover, it shared the demand side of the market between members through the prior designation of successful tendering undertakings and the protection of entitled undertakings. The CFI, which rejected the appeal by the undertakings, stated that 'concertation by contractors regarding the manner in which they intend responding to an invitation for tender is incompatible with article 81(1) of the Treaty, even if the invitation sets unreasonable conditions. It is for each contractor to determine independently what it regards as reasonable or unreasonable and to conduct himself accordingly'.²¹² In *Pre-insulated pipes*, the members of the cartel had set up a system through which they could allocate individual projects between themselves by manipulating bidding procedures so that they could decide in advance which producer would be awarded the contract.²¹³ In *Raw Tobacco Italy*, the processors of tobacco coordinated their conduct in respect of the bids placed at public auctions organised for the purchase of tobacco by the Italian monopoly ATI.²¹⁴

8.43 Sharing sources of supply Cartel participants may also agree to share out their sources of supply. In *Raw Tobacco Spain*, the four Spanish processors of raw tobacco agreed each year on the quantities of each variety of raw tobacco that each of them would undertake to purchase from the group of producers.²¹⁵ In *Raw Tobacco Italy*, the tobacco processors also allocated to themselves suppliers and quantities to be purchased.²¹⁶

(d) Co-ordinated Boycotts, Bans on Imports, Concerted Refusal to Deal

8.44 Cartellists may also agree upon concerted action to prevent the entry of new competitors to the market or upon retaliatory measures against undertakings refusing to comply with their restrictive arrangements.

8.45 Keeping competitors away from the cartel's market In several cases, the Commission has condemned coordinated measures designed to keep competitors away from the market. In *Meldac*, a particularly serious dimension of the cartel was that it was aimed at protecting

the Dutch market by blocking imports of cheaper milk from Belgium and Germany, thereby having a clearly adverse effect on consumer interests and obstructing the achievement of one of the most fundamental objectives of the Treaty, the integration of the economies of the Member States.²¹⁷ A focus on import restrictions was also an important aspect of the cartel agreements in *Wildel Steel Mesh*. Here, a series of agreements between French producers and producers from Italy, Germany and Belgium who traditionally exported to France included terms setting quotas for imports into France. These restrictions on the volume of foreign deliveries to the French market made it possible to enter into a price agreement; the prices charged on the French market were set at a level far higher than the average in other Community countries, without this producing an increase in imports as would normally be expected.²¹⁸ In *Luxembourg Brewers*, the cartel agreement was intended to keep foreign brewers out of Luxembourg.²¹⁹ In *French Beef*, the Commission condemned an agreement entered into by farmers' and slaughterers' federations, which had as its object a temporary commitment to suspend all imports of beef.²²⁰

8.46 Placing certain competitors at a competitive disadvantage Agreements may also be reached in order to oblige other parties to adopt a given behaviour, or to place downstream operators at a competitive disadvantage. In *Fedétab*,²²¹ the Commission condemned the agreement between Belgian and Luxembourg producers of manufactured tobacco not to supply several large distribution firms which did not stock a minimum range of brands. In *Electrical and Mechanical Carbon and Graphite Products*, cartel participants sold 'rough' carbon blocks in addition to their finished products and found themselves in competition on the downstream market with 'cutters', who bought the rough carbon blocks from them and transformed them into finished products. In order to limit competition from these cutters, the cartel had agreed to keep the cutters in a position of competitive disadvantage by selling the carbon blocks to them at an artificially high price.²²²

8.47 Boycott of reluctant undertakings Action may also be taken to boycott undertakings showing reluctance to comply with the collusive arrangements. In *Cement*, cartel members agreed upon a collective response to what was perceived as the problem posed by the Greek producers, whose conduct was destabilising the cement industry. A 'stick and carrot' approach was devised in order to 'persuade' them to cooperate. The short term punitive actions considered, called 'stick actions', were aimed at defending European domestic markets.²²³

²¹⁷ [1986] OJ L348/50, para 82.

²¹⁸ [1989] OJ L260/1, para 159.

²¹⁹ [2002] OJ L253/21.

²²⁰ In this case, a common defensive mechanism was instituted whereby the parties agreed to consult each other first if a foreign brewer attempted to negotiate a supply contract with one of their tied outlets. Priority would then be allocated to one of the cartel participants, in an attempt to keep the outlet as a customer. If that party succeeded in negotiating a new contract with the outlet, it was obliged to compensate the party which had lost the outlet by transferring an equivalent outlet to him. Other clauses allowed for the exclusion from the cartel of any party which cooperated with a foreign brewer or distributed its beer.

²²¹ [1978] OJ L234/29.

²²² [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), paras 154–156.

²²³ [1994] OJ L343/1, para 25(4). The 'stick' actions consisted of resorting, *inter alia*, to: administrative obstacles; quality standards; action by associations; penalising of customers purchasing imported cement; attacks on the export markets of the producers who were destabilising the market by taking the place of those producers in various countries or by making Greek exports unprofitable; boycotts of shipping lines controlled by the producers who were destabilising the market; adoption of 'guerilla' tactics in the Greek market; and seeking the assistance of international banks to 'convince' the recalcitrant producers to cooperate.

²¹⁰ [1973] OJ L140/17, 28.

²¹¹ [1992] OJ L92/1.

²¹² Case T-29/92 *SPO and others v Commission* [1995] ECR II-289, para 119.

²¹³ [1999] OJ L24/1. The cartel members had agreed that the other producers would submit higher offers in the tendering procedure. In return, unsuccessful bidders would be granted the opportunity to participate in the project as subcontractors. There was also another 'compensation system' which corrected departures from the quota if the selected producer failed to win the bid. Likewise, a monitoring system was set up for the cases where a producer undercut the allocated 'favourite', and would be called to account and pressurised to withdraw its bid or to increase its price to allow the favourite win.

²¹⁴ Decision of 20 October 2005 (full text of the decision available on DG COMP's web site), paras 126, 150, 240.

²¹⁵ Decision of 20 October 2004 (full text of the decision available on DG COMP's web site), para 67.

²¹⁶ Decision of 20 October 2005 (full text of the decision available on DG COMP's web site), paras 240 and 246–249.

In *Pre-Insulated Pipes*, the Commission found that the cartel participants had devised and enforced a sophisticated strategy to eliminate a competitor who had refused to participate in their bid-rigging scheme. The award to this undertaking of the largest contract in Germany for ten years sparked off a particularly violent reaction, and a collective boycott of this undertaking was instigated. The cartel decided to cease any supply to this undertaking and its subcontractors.²²⁴

(e) Exchange of Commercially Sensitive Information

- 8.48** Under normal competitive conditions, information regarding, for example, capacity, use of capacity, production levels, customers, prices charged and conditions applied to customers, would not be exchanged between competitors. However, the exchange of such commercially sensitive information usually does take place within cartels, as a means to prepare, implement or monitor the restrictive agreement(s) or arrangements. The question is whether such exchanges of information, where they are connected to an identified infringement, are also separately caught by the prohibition of Article 81 EC, and therefore whether such exchanges are also caught when they take place in complete isolation, ie in the absence of any additional restrictive arrangements.

- 8.49** A constituent of the 'cartel offence' The exchange of commercially sensitive information is often ancillary to other *per se* violations of Article 81 EC, such as price fixing, or market-sharing. It is thus not generally considered separately by the Commission, in that evidence of the exchange of confidential information is used to provide additional proof of the overall cartel arrangements, and the Commission finds a single cartel infringement (implicitly) including the exchange of confidential business information. In such instances, the exchange of information is found to have taken place either by way of preparation and implementation or for the monitoring of the cartel arrangements, and with the same object as was identified for the main (*per se*) infringement. It is worth noting, however, that the Commission has in many cases singled out exchanges of information as a distinct part of the *per se* infringement, thereby considering them not merely as a 'facilitating' device but as a separate constitutive element of the 'cartel offence'.²²⁵
- 8.50** A 'cartel offence' in its own right? An important issue, however, is whether the exchange of business sensitive information may constitute an infringement of Article 81 EC on a stand-alone basis. On appeal in *Steel Beam*, the CFI concluded that, contrary to the Commission's contention during the Court proceedings, the 'information exchange systems' referred to in the decision had been considered by the Commission as separate infringements of Article 65(1) ECSC.²²⁶ The CFI subsequently considered that such systems

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for the exchange of (confidential) information could indeed be regarded having the restriction of competition as their object.²²⁷ This was confirmed on appeal by the ECJ.²²⁸ It seems that the Commission has now fully embraced the idea that information exchanges can be considered *per se* infringements. In *Plasterboard*, the Commission regarded the exchange of confidential information as the essential element of the 'cartel offence'. Its finding of a *per se* infringement of Article 81 EC was based mostly on the existence of several exchanges of confidential business information. The Commission concluded that there had existed between 1992 and 1998 at least in the four major European plasterboard markets a complex, continuous agreement having as its object the restriction of competition.²²⁹ Interestingly, the Commission pointed out that the parties had at certain times knowingly exchanged incorrect information, which confirmed that the exchange of information had had a restrictive object as it was actually used as a monitoring mechanism.²³⁰

Conclusion In answering the question of whether the concerted practice of information exchange can be illegal in itself, the first issue is therefore to see whether the exchange of information can be demonstrated to have as its *object* the restriction of competition.²³¹ If such an object cannot be demonstrated, then other relevant factors may need to be considered.

8.51

²²⁷ The CFI stated in particular that 'the information which the undertakings received under the arrangements in question was capable of appreciably influencing their conduct, by reason of the fact that each undertaking knew that it was being kept under close surveillance by its competitors and that it could, if necessary, react to the conduct of its competitors, on the basis of considerably more recent and accurate data than those available by other means' and that 'data, indicating the very recent market shares of participants and not publicly available, are by their very nature confidential data, as confirmed by the fact that interested undertakings could receive the data distributed by the secretariat only on a reciprocal basis' (para 403). The CFI concluded that the information exchange systems in question appreciably reduced the decision-making independence of the participating producers by substituting practical cooperation between them for the normal risks of competition' (para 406).

²²⁸ Case C-194/1999 P *Thyssen Stahl AG v Commission* [2003] ECR I-10821, paras 59-90.

²²⁹ [2005] OJ L166/8 (full text of the decision available on DG COM's web site), para 434. The Commission stated in particular at paras 449 and 450 that 'an information exchange constitutes *per se* an infringement of Article 81(1) EC if the requirement of independence according to which each trader must determine independently his conduct on the market is undermined as a result. This requirement of independence will without a doubt be affected if the exchange takes place in a highly concentrated market and if it reduces the risk of uncertainty for the trader. These two conditions are manifestly met in the present case inasmuch as the market is an oligopolistic one and the uncertainty has disappeared since the parties agreed [...] to put an end to the aggression reigning on the market, this wish being manifested, moreover, on a number of occasions on the relevant markets. The Commission considers therefore that the system constitutes an infringement of Article 81(1) EC.'

²³⁰ The Commission stated at para 452 that '[t]his body of evidence permits the Commission to assert that the [...] agreement concerning the exchange of information [...] was intended to enable participants therein to monitor the conduct of their competitors at least on the relevant markets and constitutes a manifestation of the common wish of the parties to restrict competition on the plasterboard market in the four major European markets. In so doing, the Commission characterises the agreement as restrictive of competition within the meaning of Article 81(1) EC, being a particular manifestation of the complex, continuous agreement having as its object the restriction of competition on the plasterboard market at least in the four major European markets.'

²³¹ In *Steel Beam* [1994] OJ L116/1, the Commission had described at length, in its decision, systems of exchange of confidential information, but claimed on appeal before the CFI that it had considered that the disputed information systems did not constitute a separate infringement of Art 65(1) ECSC but formed part of wider infringements consisting, in particular, in price-fixing and market-sharing agreements. The Commission argued that the exchange of information thus infringed Art 65(1) ECSC insofar as the exchange *v Commission* [2003] ECR I-10821 para 384.

²²⁴ [1999] OJ L24/1, paras 98-107.

²²⁵ This was the case, for instance, in *Carbonebon* [1994] OJ L243/1, para 61-64, 105-106 and 134; *Samlet Steel Tubes* [2003] OJ L140/1, para 153, third indent; *Belgian Beer* [2003] OJ L200/1, para 265; *Zinc Phosphate* [2003] OJ L153/1, para 215; *Methionine* [2003] OJ L55/1, para 214; *Methylglutamine* [2004] OJ L38/18, para 184; *Food Flavour Enhancers* [2004] OJ L75/1, para 172; *Thread*, (para 282) and *Industrial Bags* (paras 521-523).

²²⁶ Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paras 379-392. In *Steel Beam*, the Commission had described at length systems of exchange of confidential information, but claimed on appeal before the CFI that it had considered that the disputed information systems did not constitute a separate infringement of Art 65(1) ECSC but formed part of wider infringements consisting, in particular, of price-fixing and market-sharing agreements. The Commission argued that the exchange of information infringed Art 65(1) ECSC insofar as the exchange made it easier for those other infringements to be committed.

These are, *inter alia*: the nature of the information exchanged, the level of aggregation and the age of the data, and the concentration of the industry. The Commission has accepted that depending on an examination of the individual case, exchange of information schemes can be held to be lawful.²³² It may indeed be legitimate for companies to pool information about the market in which they operate, as a certain degree of transparency may lead to a more efficient functioning of the market. The CFI confirmed the validity of this approach in *John Deere v Commission*.²³³ That said, and as mentioned above, exchanges of information that create an artificial level of transparency and thus a reduction in the uncertainty about competitors' behaviour in the market are generally considered anti-competitive. For a detailed analysis of the compatibility of exchange of information schemes with EC competition law, see Chapter 7 of this book, at paras 7.355 and following.

(f) *The Problem of 'Tacit Collusion'*

8.52 Can economic evidence of the parallel conduct of certain undertakings in the market, in the absence of any proof of collusion, enable the Commission to determine the existence of a 'cartel' prohibited under Article 81?²³⁴

8.53 The theory of tacit collusion According to economic theory, it is possible for firms in an oligopolistic market to tend towards a monopoly-type price equilibrium in the absence of any kind of explicit collusion. Owing to the interdependence that characterises firms in an oligopolistic context, where each market operator takes into account the anticipated reaction of its competitors for the purpose of determining its own market strategy, firms may de facto find that they are coordinating their market behaviour without engaging in any form of consultation. What is thus described by economic literature as 'tacit collusion' consists of each undertaking aligning its commercial behaviour with the conduct of the price leader (or of the first mover) by imposing prices increases as soon as the latter does so.

8.54 Does tacit collusion amount to cartel behaviour? The question of whether tacit collusion amounts to cartel behaviour, ie whether it constitutes a *per se* infringement of Article 81 EC, raises complex issues that still remain somewhat unresolved today. The notion of 'concerted

practice' as defined by case law does indeed seem very close to the notion of 'tacit collusion', in that the fulfilment of the corresponding test ('conscious substitution of practical cooperation between undertakings for the risks of competition') does not seem to require much evidence of explicit coordination. However, it seems that a finding of concerted practices nevertheless requires an effective breach of the obligation for a firm to determine its market behaviour independently that must go beyond mere tacit collusion.

Indeed, the Court in *Suiker Unie*, having reiterated that each economic operator must independently determine the policy which it intends to adopt in the market, stated that 'this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors'. The Court went on to confirm that 'it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting in the market'.²³⁵ The reference to the term 'contact' (whether indirect or not) seems to rule out the possibility that the notion of concerted practice includes 'tacit collusion'.

In its *Wood Pulp II* judgment, the ECJ gave additional useful indications as to the value of economic evidence for the purpose of establishing cartel behaviour. In *Wood Pulp*,²³⁶ the Commission had found that several producers had engaged in unlawful behaviour which, the Commission submitted, was essentially established by the fact that the firms' quarterly price announcements were near-simultaneous and identical. On appeal, the Court annulled the Commission decision on the grounds that the latter had not established an infringement of Article 81 EC to the required legal standard.²³⁷ The Court stated on this occasion that parallel conduct could not be regarded as furnishing proof of concertation unless that collusion constituted the only plausible explanation for such conduct, recalling the right of economic operators to adapt themselves intelligently to the existing and anticipated conduct of their competitors.²³⁸

8.57 Conclusion In the light of the case law discussed above, it seems that tacit collusion cannot, as such, be regarded as cartel behaviour. The Community judiciary seems ready to accept, albeit under extremely strict conditions (which, it is submitted, are extremely difficult for the Commission to satisfy), that economic evidence may be resorted to in order to establish that prior concertation took place between competitors, in cases where that cannot

²³⁵ Joined Cases 40-48, 50, 54-56, 111 and 113-114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paras 173-174.

²³⁶ [1985] OJ L85/1.

²³⁷ Since the Commission had no documents which directly established the existence of collusion between the producers concerned, the Court stated that it was 'necessary to ascertain whether the system of quarterly price announcements, the simultaneity or near-simultaneity of the price announcements and the parallelism of price announcements [...] constitute[d] a firm, precise and consistent body of evidence of prior concertation' (Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Athlétiká Oudryphá and others v Commission* [1993] ECR I-1307, para 70).

²³⁸ To discharge the burden of proof of cartel conduct, the Commission was required to establish, 'taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question' that the alleged parallel conduct of the undertakings could 'not be explained otherwise than by concertation'. The Court found that the Commission had failed to do this (paras 71 and 72).

²³² *Steel Beams* [1994] OJ L116/1. The Commission has however chosen not to address these within the context of the Guidelines on horizontal cooperation agreements (see Commission Guidelines on the applicability of Art 81 of the EC Treaty to horizontal cooperation agreements, [2001] OJ C3/2, para 10). Interestingly, the Commission stated that the Guidelines are 'only concerned with those types of cooperation which potentially generate efficiency gains', implying that this is not the case for exchange of information schemes.

²³³ Case T-357/92 *John Deere v Commission* [1994] ECR II-957. The CFI found at para 51 that 'on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition between suppliers, since in such a situation, the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomized nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors' conduct.

²³⁴ This question is of a different nature from the question whether, in the absence of material evidence of an agreement that is restrictive in object or of a concerted practice, evidence of an anticompetitive intention can be deduced from economic evidence of parallel conduct in the market. The latter question relates to the burden of proof that the Commission must discharge to establish the existence of a common will to restrict competition. As to the former question, it raises the issue whether, in certain market conditions, it is possible for the Commission to conclude that undertakings have engaged in illegal behaviour in respect of their ability to jointly restrict competition, by tacitly colluding, ie by aligning their behaviour with their competitors by anticipating and/or following their behaviour.

be established through material evidence of actual contacts. But one should remain careful not to interpret the case law as implying that 'tacit collusion' can be legally qualified as a cartel behaviour. The *Wood Pulp II* judgment addresses the question of the standard of proof applicable to the demonstration of classical cartel behaviour, rather than the possibility of tacit collusion *per se* being caught under Article 81 EC. If the Commission is not able to establish to the required standard that contacts between competitors have taken place, it seems that parallel conduct in the market will not be deemed unlawful, as uncertainty about the future conduct of each undertaking in the market is preserved. This is so, even if economic theory might suggest that the conditions for tacit coordination do exist.

(2) Common Features of Collusion

8.58 Analysis of Commission decisions regarding cartels reveals that collusive schemes have many common operational features. Classic patterns of cartels concern their establishment, organisational aspects and the manner in which collusion is conducted on a day-to-day basis.

(a) Factors Conducive to the Establishment of Cartels

8.59 Cartels will often develop in markets which have a number of characteristics that are favourable to collusion. A specific event affecting the market will generally convince cartel instigators that concerted reaction is needed. In turn they will often convince others to engage in collusion, thereby acting as a catalyst.

8.60 Oligopolistic markets Collusion is made easier in oligopolistic markets. In *Italian Flat Glass II*, the Commission noted that the flat-glass market was dominated by a tight oligopoly.²³⁹ Similar features can be found in *Alloy Surcharge*,²⁴⁰ *Belgian Beer*²⁴¹ and *Zinc Phosphate*, where the five cartel members controlled, in spite of their small size, 90 per cent of the EEA market.²⁴² In *French Beer*, a non-aggression pact was made between the two main market players who agreed that neither of them should become dominant.²⁴³ Cartels have sometimes been formed after a process of intense concentration has taken place, as in *Carbonates Paper*²⁴⁴ or *Plasterboard*.²⁴⁵ They may nevertheless involve a relatively high number of players. This is workable in homogeneous product markets, in particular when strongly established trade associations are able to ensure adequate coordination, as in *Cartonboard*²⁴⁶ or *Cement*.²⁴⁷

8.61 Collusive business values and established communication channels Sector-specific values may result in operators looking upon the control of competition between them in a

²³⁹ [1989] OJ L33/44, para 12.

²⁴⁰ [1998] OJ L100/55. The stainless steel market was described as a highly concentrated market.

²⁴¹ [2003] OJ L140/1. The cartel was set up by the two main actors in the market, who together controlled over 70% of the entire market.

²⁴² [2003] OJ L153/1.

²⁴³ [2005] OJ L184/57 (full text of the decision available on DG COMP's web site).

²⁴⁴ [2004] OJ L115/1. The Commission observed that the production of carbonless papers in Europe had become increasingly dominated by a relatively small number of major producers as smaller suppliers had withdrawn from the market. At the time of the infringement, the cartel members controlled between 85 and 90% of the EEA market for carbonless papers, with the four biggest players controlling around 60% of the market (paras 14–16).

²⁴⁵ [2005] OJ L166/8 (full text of the decision available on DG COMP's web site), paras 48–51.

²⁴⁶ [1994] OJ L243/1.

²⁴⁷ [1994] OJ L343/1.

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positive way. Such values may be diffuse, but have been clearly exposed in certain cartel cases, such as *Agreements between manufacturers of glass containers*,²⁴⁸ or *Building and Construction Industry in the Netherlands*.²⁴⁹ The *Austrian Banks* cartel is probably one of the best illustrations of the influence of specific business values on cartel conduct. In a sector long characterised by a very high level of public ownership and considerable oversupply, market players saw cartel agreements (the 'Lombard club') as a welcome means to combat destructive, cut-throat competition, or free competition, as it might simply be termed.²⁵⁰ Established communication channels between competitors may also be conducive to cartel behaviour. This may result from the existence of long established and carefully structured trade associations (*Cartonboard*,²⁵¹ *Cement*),²⁵² from a (legitimate) regulatory framework providing opportunities for discussions between competitors (*Belgian Beer*),²⁵³ or simply from privileged personal contacts between individuals (*Fine Art Auction Houses*).²⁵⁴

Exogenous triggering events Cartels may simply arise from a desire to extract supra competitive profits but they are often triggered by an exogenous event resulting in concerted response from the industry. The *Quinine* cartel was formed when the suppliers of of considerable oversupply following the end of the Second World War.²⁵⁵ In *European Sugar Industry*,²⁵⁶ the cartel was set up as a concerted attempt to neutralise the effects of the creation of a European common market for sugar. In *BVTC*, the cartel of cognac producers was triggered by the severe imbalance of supply and demand resulting from the breaking out of the oil crisis in 1973, as 80 per cent of the sales of this luxury good were

²⁴⁸ [1974] OJ L160/1. The 'International Fair Trade Practice Rules Administration' (IFTRA) had established a considerable number of rules to be applied by European manufacturers of glass containers which qualified and prohibited as 'unfair practices' conduct that was really just competitive behaviour.

²⁴⁹ [1992] OJ L92/1. The trade association, SPO, which gathered 28 associations of undertakings representing over 4,000 members of the building sector in the Netherlands, had adopted a 'Code of Honour' and its object was to promote and administer orderly competition, to prevent improper conduct in price tendering and to promote the formation of economically-justified prices' (paras 3, 12, 47–48).

²⁵⁰ [2004] OJ L56/1. Episodes of more or less unrestricted competition used to be described by the banks as 'hyperactivity' and bank charges were seen in this context, not so much as a factor of competition, but more as a joint earnings opportunity, 'to the detriment of customers. Despite repeated warnings, before the accession of Austria to the EC, that the system would be deemed illegal, banks did not terminate their agreements banking and they therefore did not in the least intend to change this now simply because of the applicability of European antitrust law' (paras 6, 37).

²⁵¹ [1994] OJ L243/1.

²⁵² [1994] OJ L343/1.

²⁵³ [2003] OJ L140/1.

²⁵⁴ [2005] OJ L200/92 (full text of the decision available on DG COMP's web site). Such factors explain why recidivism is not rare. Several undertakings have been condemned repeatedly on the basis of the same type of facts. This may also explain the phenomenon of 'contamination' from one product market to a neighbouring one. Thus, links can be established between the *Graphite Electrodes*, *Specialty Graphite and Electrical and Mechanical Carbon* and *Graphite Products* cartels, between the *Amino Acid* and *Food Flavour Enhancers* cartels, and between the *Chitic Acid* [2002] OJ L239/18 and *Sodium Glucuronate* cartels.

²⁵⁵ [1969] OJ L192/5. New plantations of cinchona had been established in Africa and Asia, resulting in a strong rise in the supply of bark and the situation became even more critical when the US government decided to dispose, at auction, of very large stocks accumulated over the previous years. The producers reacted by agreeing on the price of bark, allocating between themselves purchases of the US stocks, protecting their respective domestic markets and sharing out others.

²⁵⁶ [1973] OJ L140/17.

destined for export.²⁵⁷ In *Steel Beams*, the cartel resulted partly from a desire to follow up on the anti-crisis measures initiated and operated by the Commission in the 1980s, which came to an end in 1988.²⁵⁸ In *Ferry Operators—Currency surcharges*,²⁵⁹ Channel ferry companies colluded in response to the devaluation of the pound in September 1992. Similar examples can be found in *Alloy Surcharges*,²⁶⁰ *French Beef*²⁶¹ and *Raw Tobacco Spain*.²⁶²

8.63 The determining role of instigators Particular instigators often play a determining role in the formation of cartels. In *Zinc Producer Group*, the Commission noted that 'the initiative [...] came from the Canadian and Anglo-Australian zinc companies, whilst the Continental European companies joined only after some hesitation'.²⁶³ In *PVC II*, the cartel originated in a collusive plan formulated at ICTs, and the discussions and consultations which followed.²⁶⁴ In *Pre-insulated Pipes*, the Commission found that ABB, viewing the price-cutting policies of its competitors as 'irresponsible' in view of the weak state of the market, initiated a series of meetings with competitors in order to find a 'solution'.²⁶⁵ *Amino Acids*²⁶⁶ is also illustrative of typical instigator behaviour. In 1989, ADM decided to start producing lysine when it became aware that two other undertakings were about to set up production facilities in North America. ADM's production facilities for lysine doubled the world's capacity and it was known that the company had strong financial means and access to cheap raw materials. ADM sent signals to the incumbent producers that, though it intended to be a big player in the lysine market, it would prefer coordination to price war. In order to convince the incumbent producers of the seriousness of its intentions and the penalties of not agreeing, ADM granted its competitors the opportunity to inspect its production plant, and commenced significant sales at low prices. This caused the incumbent producers to drastically lower their prices in an attempt to keep market shares. They finally agreed to cooperate with ADM.

²⁵⁷ [1982] OJ L379/1. The same phenomenon can be observed in *Fine Arts Auction Houses*, where the cartel was formed at a time when the international art market was undergoing a period of recession, in the context of the economic downturn of the early 1990s (see para 78).

²⁵⁸ [1994] OJ L116/1, para 308.

²⁵⁹ [1997] OJ L26/23.

²⁶⁰ [1998] OJ L100/55. The cartel was triggered by a surge in the price of nickel, an important component of stainless steel, at a time when the price for alloys and stainless had fallen sharply (see para 20).

²⁶¹ [2003] OJ L209/12. The defensive cartel was triggered by a sharp fall in the slaughterhouse entry prices that farmers were receiving for cattle, reaching levels that were even lower than during the second outbreak of the 'mad cow' crisis, despite the Community adjustment measures (see para 184).

²⁶² Decision of 20 October 2002 (full text of the decision available on DG COMP's web site). The agreement between the tobacco processors on maximum prices for the purchase of tobacco leaves resulted from the opening of this activity to competition. Until 1990, one public company had held a legal monopoly over the processing of raw tobacco in Spain and had negotiated the purchase price. In the mid-90s, three new players entered the market, triggering a rise in the average buying price and placing Spanish tobacco at a competitive disadvantage on export markets. The processors began discussions on the setting of a maximum purchase price 'to avoid price escalation' (see para 84).

²⁶³ [1984] OJ L220/27, para 15.

²⁶⁴ [1994] OJ L239/14. Two planning documents amounting to a blueprint for the cartel were found at ICT, the first proposing a new framework of meetings to administer a revised quota system and price fixing scheme, and the second recording the generally favourable reaction of other producers to the ICT proposals.

²⁶⁵ [1999] OJ L24/1, para 30.

²⁶⁶ [2001] OJ L152/24.

(b) Organisational Aspects of Cartels

As complex, often multinational, multilateral and secretive schemes, cartels are difficult to operate and considerable effort is frequently devoted to ensuring their success. Their intrinsic instability adds to the difficulty of maintaining their functionality. Cartel participants often have to make significant efforts to design the 'modus operandi' of their collusion. Cartels generally involve frequent meetings and delegation of specific coordinating roles to their members. In some cases these tasks are carried out by trade associations or fiduciary companies, which may in certain circumstances be set up exclusively for the purpose. Great efforts are also made to ensure the concealment of the collusive practices, as the participants are aware of the illegality of their behaviour.

(i) Regular Meetings

8.64 A key feature of most cartels is the need for regular contact and meetings to administer the collusive behaviour. Whilst the development of electronic communication tools might be expected to render physical gatherings less necessary, it nevertheless appears that the complexity of the objectives pursued, the multilateral dimension of collusion and the need for confidence-building all mean that physical meetings are still indispensable. Such gatherings are often convened in international hotels, where anonymity can be respected, or in other convenient places such as airports, where company representatives gather for this sole purpose before taking their plane home. Cartel meetings are often scheduled, for opportunistic reasons, before or after official gatherings of industry representatives, such as meetings of trade associations or international fairs. Of course, such meetings can later provide an apparently innocent explanation for having been present at a particular location at the same time as competitors.

8.65 From informal contacts to highly institutionalised schemes Certain cartels may only need sporadic, informal meetings between top executives or sales managers (*Belgian Beer*,²⁶⁷ *Zinc Phosphate*).²⁶⁸ However, in view of the technical complexity of implementing restrictive schemes, cartels may require the organisation of a large number of meetings at different levels, from the highest executive circles down to the level of sales managers in local areas. International cartels are often organised along sophisticated lines. The Commission's cartel decisions are full of vivid descriptions of sophisticated cartel structures.²⁶⁹ Although it

²⁶⁷ [2003] OJ L140/1.

²⁶⁸ [2003] OJ L153/1.

²⁶⁹ In *Carbohydrates* [1994] L243/1, the cartel was headed by a 'President Working Group' (PWG) of managing or commercial directors, which met five or six times a year. The PWG reported to a 'President conference' consisting of all producers. Below the PWG, a 'Joint Marketing Committee' (JMC) at marketing manager level also included nearly all producers. The JMC prepared and briefed the PWG and executed its directives. It met once a month. Besides the JMC, an Economic Committee also included most producers and reported to the 'President Conference' and the 'JMC' on the state of the market in various countries. In *Pre-insulated Pipes* [1999] OJ L24/1, the supervisory body was known as the 'directors' club', or the 'Elephant group' and consisted of the chairman and managing directors. As for the 'marketing' or 'contact' groups, they consisted of sales managers and administered the cartel arrangement under the supervision of the directors' club. They were set up in each country and their task was to assign individual projects and coordinate the collusive bidding procedure. In *Specialty graphite*, decision of 17 December 2002 (full text of the decision available on DG COMP's web site), there were four different levels of meeting: 'Top level meetings', attended by the top executives of the companies; 'International Working Level meetings' (or 'International meetings'), consisting of experts in the senior management; 'Regional (European) meetings and Local (national) meetings' which were meant to implement the principles agreed at the International meetings and were attended by local managers.

operated within a single Member State, the *Austrian Banks* cartel provides one of the most striking examples of the degree of institutionalisation reached by certain cartels. The Commission stated that 'the agreements were comprehensive as regards their contents, highly institutionalised and closely interconnected, and covered the entire country, "down to the smallest village" [...]. For every banking product there was a separate committee on which the competent employee at the second or third level of management sat'.²⁷⁰

- 8.67 Multiple working levels** Cartels are generally characterised by a ladder of several working levels. *Top level* meetings are usually convened once or twice a year. They act as the cartel 'board' and provide the highest, 'political level' input.²⁷¹ *High level technical meetings* normally include top ranking sales executives. They are aimed at administering the cartel arrangements, under the supervision of the top level (*Pre-insulated Pipes*),²⁷² by translating the broad objectives defined in operational goals and agreeing on the techniques to attain them.²⁷³ *Regional or local meetings* constitute the lowest end of the cartel and ensure their smooth day-to-day running.²⁷⁴

- 8.68 'Pre-meetings' and 'ad hoc meetings'** are also a frequent feature of cartels. They are generally used to agree in advance upon common positions between undertakings sharing the same kind of interests, or as follow-up to 'plenary' meetings. In *Polypropylene*, the so-called

²⁷⁰ [2004] OJ L56/1. The cartel structure included the Lombard Club, specialist committees, special committees and regional committees. The top-level body (Lombard Club) met every month and was composed of senior representatives of the largest Austrian banks. In addition to matters of general interest that were clearly neutral from a competition point of view, [tho] discussed changes in interest rates, advertising measures, etc. One level down consisted of product-based specialist committees. The most important of these were the Lending Rates Committee and the Deposit Rates Committee, which, as their names suggest, dealt with lending and deposit interest rates and were convened either separately or jointly. There was a constant flow of information between these committees, in particular with the Lombard Club at the top. Both the Lombard Club and the Vienna Lending and Deposit Rates Committees sent out signals to the diverse and numerous 'regional committees', which held regular meetings in every province of Austria. In some provinces even the hierarchical structure of 'Lombard' and specialist committees was replicated. The views expressed in the provinces flowed in the opposite direction back to meetings of the Federal Lending and/or Deposit Rates Committees, in which bank representatives from Vienna met with their opposite numbers from the provinces and whose decisions were in principle valid for the whole of Austria.

²⁷¹ They ensure adherence to the collusive scheme (*Vitaminis*) and take major strategic decisions as regards the cartel (*Carbamid*). Top meetings are also aimed at ensuring the stability of the cartel by resolving internal conflicts (*Electrical and Mechanical Carbon and Graphite Products*). They define the main principles of collaboration for subsequent implementation at lower managerial level (*Specialty Graphite*) and agree on quotas at a global level. They may sometimes go as far as allocating individual market shares in the national markets or agreeing overall price increases (*Pre-insulated Pipes*). Conversely, Summit meetings may also serve to take notice of agreed price levels and other decisions taken in technical meetings (*Electrical and Mechanical Carbon and Graphite Products*).

²⁷² [1999] OJ L24/1.

²⁷³ In *Specialty Graphite*, 'International Working Level meetings' consisted of experts in the senior management, who discussed at this level the classification of the products in different categories or groups and established European minimum prices for each group. In *Vitaminis*, 'Marketing directors' meetings took place at three different levels from the worldwide level to the regional level. Their role was to take operational decisions regarding implementation of the agreement, to monitor sales, to ensure respect of the quotas and to implement price increases.

²⁷⁴ In *Specialty Graphite*, 'Local meetings' were meant to implement the principles agreed at international technical meetings and were attended by local managers. In *Electrical and Mechanical Carbon and Graphite Products* [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), local meetings were organised on an 'ad hoc' basis in each country and dealt with the implementation of the cartel decisions in each country and discussed local customers' accounts (see paras 74-77).

big four' met in restricted session the day before each 'bosses' meeting'. These so-called pre-meetings' provided a forum in which the four major producers could agree a position between themselves prior to the full meeting. The idea was that the four major producers, with some 50 per cent of the market in their hands, could, by adopting a united approach, encourage moves towards price stability.²⁷⁵ Similar practices have been identified in *Seamless Steel Tubes*,²⁷⁶ *Graphite Electrodes*²⁷⁷ and *Girth Acid*.²⁷⁸ Commission decisions also highlight numerous examples of bilateral meetings aimed at sorting out specific problems regarding, for instance, compliance with agreed quotas or the mutual allocation of specific customers. Bilateral meetings are also often used to prepare for negotiations in multilateral meetings and to secure the support of 'allied' undertakings.²⁷⁹

(ii) *The Role of Trade Associations and Fiduciary Companies*

Many Commission decisions show that trade associations or fiduciary companies play a central role in the establishment and, in certain cases, the management of cartels. In nearly all cases, the activities of a trade association or of a fiduciary organisation processing market data on behalf of competitors in a given market are part of the general context in which the collusive trade associations or fiduciary companies operate.

8.70

Liability of trade associations Cartel decisions adopted in the early years of enforcement reveal that, at that time, trade associations were often directly involved in anticompetitive activities, if not created exclusively for anticompetitive purposes. However, the Commission did not always work on the basis that the associations themselves should be held personally responsible for the infringements found, as illustrated in *Vegetable Parchment*,²⁸⁰ *Cast Iron and Steel Rolls*²⁸¹ or *Zinc Producer Group*.²⁸² It soon became the

²⁷⁵ [1986] OJ L230/1, para 68.

²⁷⁶ [2003] OJ L140/1. European producers used to coordinate their positions during preparatory meetings, before taking part in the general meetings (see para 59).

²⁷⁷ [2002] OJ L100/1. 'European meetings' were convened in the absence of the Japanese cartel members.

²⁷⁸ [2002] OJ L239/18. Representatives from the two US undertakings met on at least on 10 separate occasions to prepare positions prior to multilateral meetings (para 86).

²⁷⁹ In *Food Flavour Enhancers* [2004] OJ L95/1, the Commission noted that 'bilateral meetings were also used to influence the outcome of the general competitors meetings. For example, two undertakings met the day before the multilateral meeting because one of them wanted to secure the support of the other in relation to a price increase to be applied to a customer' (para 135).

²⁸⁰ [1978] OJ L70/54. Nearly all cartel participants were members of a trade association named the 'Genuine Vegetable Parchment Association' (GYVA), which played a central role in the cartel. The GYVA secretariat collected all invoices for export sales issued by its members and established statistical tables setting out the tonnages exported by each producer. It also received the price schedules established by manufacturers during the general assembly, such as the rates of increase and the dates on which the new prices were to become applicable and sent them to the other members. However, the Commission addressed the prohibition decision only to the GYVA members (paras 36-40).

²⁸¹ [1983] OJ L317/1. The creation of the 'International Rolls Manufacturers Association' (IRMA) was purely instrumental in the implementation of the cartel agreement. Cartel members agreed to set up a more elaborate organisation for the purpose of coordinating the notification of individual enquiries and the fixing of quotation prices. IRMA was at the core of the cartel and all strategic decisions were taken within the framework of the association's meetings. However, the Commission did not include IRMA among the addressees of the prohibition decisions, only its members.

²⁸² [1984] OJ L220/27. The establishment of the cartel could not be dissociated from the creation of the 'Zinc Producer Group' (ZPG), an institutionalised organisation which ran the cartel in practice for 13 years. It is worth noting that the Commission did not address the prohibition decision to ZPG, but only to undertakings which were members of the ZPG and active in the Community. The Commission stated that '[t]he

Commission's practice, however, to hold trade associations directly responsible for cartel infringements alongside its members. In *Belgian Wallpaper*, the trade association, whose 'internal regulation' was held to be a factor in the infringement, was an addressee of the decision although no fine was imposed on it.²⁸³ The same approach was followed in *Fedatrab*²⁸⁴ and in *Italian Flat Glass I*.²⁸⁵ In *Steel Beams*, trade association Eurofer had facilitated the implementation of infringements of Article 65 ECSC by its members by organising an exchange of some of the necessary information. The Commission stated that although Article 65(5) provided only for fines against undertakings, an infringement committed by an association would expose the undertakings which belonged to it to the risk of a fine.²⁸⁶ With *BNIC*,²⁸⁷ the Commission started to impose fines on trade associations themselves. Trade association BNIC, which played a central role in the cartel, was deemed to be an association of undertakings and was held directly responsible for the infringement. It was the addressee of the prohibition decision and the fine was imposed on it (and not directly on its members). In *Roofing Felt*, the Commission found that trade association 'Belasco' was not involved in all aspects of the cartel's operation, but in one of its most serious aspects, namely the system of quotas. The Commission found that although Belasco's members were also members of the cartel, the association itself had to be held responsible, independently of its members, for its involvement in operating the cartel.²⁸⁸ A fine was imposed on Belasco and the Commission decision was upheld on appeal.²⁸⁹ As a further example, the *Cement* case provides a particularly clear illustration of how directly trade associations can be involved in cartels.²⁹¹

ZPG must be seen as a worldwide cartel whose centre of gravity was always outside the European Community. As well as the firms with which this Decision is concerned, a large number of other firms were involved in it which did not, and do not, have any registered office or subsidiary in the Community and did not operate to any significant extent or only sporadically in the Community. For the ZPG, which controlled about 80% of the world zinc market, the European Community was only one of several regional markets [...]. The initiative to form the ZPG and the driving force which carried it along came from non-Community firms. A report [...] written [...] on the foundation of the ZPG [...] speaks of a "diktat" by the British, Australian and Canadian companies. However, the situation of the zinc market was such that, even in the absence of the restrictive agreements, these third-country companies would not have made any significant contribution to improving competitive conditions in the Community, so that their participation in the ZPG had only indirect effects on the Community'. It was therefore appropriate to consider Art 81 EC as applying only to the undertakings which were indirectly involved in the manipulation of competition within the Community.

²⁸³ [1974] OJ L237/3.

²⁸⁴ [1978] OJ L224/29.

²⁸⁵ [1981] OJ L326/32.

The Commission found that three associations of Italian glass producers had been directly involved in the cartel as their internal regulations, which were binding on their members, were at the heart of the restrictive arrangements. These associations were addressees of the Commission's prohibition decisions, together with their members, but no fine was imposed in recognition of the short duration of the infringement.

²⁸⁶ [1994] OJ L116/1 para 317. No additional fines were imposed however, since individual undertakings were already being fined.

²⁸⁷ [1982] OJ L379/1.

²⁸⁸ Bureau National Interprofessionnel du Cognac.

²⁸⁹ [1986] OJ L232/15, paras 114, 115.

²⁹⁰ Case 246/86 *Belasco and others v Commission* [1989] ECR 2117.

²⁹¹ [1994] OJ L343/1. In addition to fining individual undertakings, the prohibition decisions imposed heavy fines on the European Cement Association (Cembureau) and eight national cement associations. Although officially entrusted with fully legitimate goals, Cembureau was at the core of the cartel agreements. Through the collection and dispatch of information and the organisation of regular meetings between 'head

Over time, cartels have drawn lessons from the Commission's practice and trade associations are today less overtly involved in anti-competitive activities. However, recent decisions show that cartels continue to originate in the contacts developed within the context of trade associations and that trade associations continue to be used as legitimate covers for illegal activities, as shown in *Amino acids*,²⁹² *Citric Acid*²⁹³ or *Carbonless paper*.²⁹⁴ In *Industrial Tubes*, the Commission noted that towards the late 1980s, the producers, organised within the trade association Cuproclima, extended the scope of their cooperation to competition issues. Cuproclima meetings were held twice a year, and provided a regular opportunity to discuss and fix prices and other commercial conditions for industrial tubes once the official agenda of the meetings had been concluded.²⁹⁵

The role played by certain fiduciary companies in facilitating collusion The collection and processing of (individual) market data to obtain a reliable picture of the size and evolution of the market is an entirely legitimate activity provided that it does not lead to the disclosure of individualised figures to competitors (see Chapter 7 of this book, paras 7.355 and following). However, undertakings may be tempted to go beyond what is allowed, exchanging individual figures in order to set up and monitor collusion. In certain cases, cartel members organise the collection and exchange of data themselves.²⁹⁶ However, the Commission's decisions over the years show that in other cases the cartel delegates this activity to a fiduciary company or a notary's office. In such cases, the fiduciary often carries out an entirely legitimate activity, whereas the cartel participants exchange individual figures between themselves.²⁹⁷

delegates' (the representatives of the member undertakings). Cembureau organised the collusion on prices and established what was known as the 'Cembureau agreement or principle of non transshipping to internal European markets', in the implementation of which it actively participated. In addition to the heavy fines imposed on its members, Cembureau itself incurred a fine of EUR 100,000. This fine was however subsequently annulled by the CFI.

²⁹² [2001] OJ L152/24. In order to avoid arousing suspicion over the meetings they attended, the cartel members created an 'amino acid working group' of the wholly legitimate European Feed Additives Association, whose sole purpose was to provide a perfect cover for their price-fixing meetings. See JM Griffin, 'An inside look at a cartel at work: Common characteristics of international cartels', in Konkurrentensverket/Swedish Competition Authority (ed), *Fighting Cartels—why and how?* (2001) p 43.

²⁹³ [2002] OJ L239/18. Cartel members used the cover of the legitimate meetings of the Brussels-based trade association ECAMA to hold their meetings, which would typically take place the evening prior to the official ECAMA meeting (see para 87).

²⁹⁴ [2004] OJ L115/1. General cartel meetings were convened under cover of the official meeting of the trade association AEMCP. Cartel discussions first took place during the trade association meetings, but it was subsequently decided that official and collusive activities should be separate. Cartel meetings were then held before or after official meetings (see paras 83–86).

²⁹⁵ The Commission noted that '[d]iscussions concerning prices, customers, individual sales volumes and market shares mostly took place on the second day of the Cuproclima meeting session after the official agenda had been discussed' (paras 78 and 82).

²⁹⁶ See eg *Methylglucamine* [2004] OJ L38/18, paras 76–82), *Choline Chloride* [2005] OJ L190/22 (full text of the decision available on DG COM's web site), para 52.

²⁹⁷ In *Peroygen Products* [1985] OJ L35/1, the three cartel participants which supplied the French market exchanged detailed information on their respective production and sales. This was effected every month through a body known as the 'Chambre Syndicale de l'Eau Oxygénée et des Persels'. This body collected statistics from each of the producers and issued them with composite figures for the whole French market. In addition to the monthly statistics issued by the 'Chambre Syndicale', the producers exchanged further and more detailed information on matters not covered by the 'official' exchange. The data available through the 'Chambre Syndicale' did not include details of sales to individual customers. However, the individual producers exchanged the data with each other (see para 30). See also, eg *Sodium Gluconate and Zinc Phosphate* [2003] OJ L153/1.

However, there are a number of examples where the fiduciary companies actively take part in the illegal exchange of detailed competitor data. In *Italian Car Glass*, a fiduciary company was entrusted by the cartel members with the task of supervising the proper implementation of the cartel agreement at issue.²⁹⁸ In *Car From and Steel Roll*, the cartel agreement contained an obligation to pass on all customer enquiries immediately to a neutral office in Zurich (Switzerland). It was that office's responsibility to notify all interested parties of the other producers who had received the enquiry. The competitors would then contact each other to establish suitable prices.²⁹⁹ In *Cartonboard*, the cartel also used the services of a fiduciary company located in Zurich. This company provided the secretariat for the Paperboard product board and was present at all cartel meetings.³⁰⁰

8.73 Towards a systematic sanctioning of fiduciary companies' direct involvement For a long time, the Commission had tended not to hold fiduciary companies responsible for the cartel infringement to which they contributed. However, in *Italian Car Glass*, evidence of the fiduciary involvement was so strong that the Commission considered that the fiduciary company had been a party to the anti-competitive agreement and addressed the decision to it.³⁰¹ No fines were imposed, however. Nevertheless, it appears that the Commission's attitude towards cartel facilitators is no longer so lenient. In *Organic Peroxides*, the Commission imposed a symbolic fine on a Zurich-based fiduciary for its blatant involvement in the implementation of cartel activity, thus signalling that such behaviour is at risk of being severely punished in the future.³⁰²

²⁹⁸ [1980] OJ L383/19. The fiduciary company had to draw up monthly summaries of shipments, containing information on average prices for each product and each undertaking, and to carry out on their premises verifications of the information provided, including verification of the quantities dispatched and of their consistency with the store accounts and with the general accounts. If it deemed it appropriate, the fiduciary could request additional information and even carry out random checks on the physical quantities compared with the accounting quantities indicated or appearing in the store accounts.

²⁹⁹ [1983] OJ L317/1. The Commission decision contains considerable evidence of the office's direct involvement in the cartel, which took detailed minutes of the cartel arrangements made at the cartel meetings and implemented concealment measures (see paras 10, 31).

³⁰⁰ [1994] OJ L243/1. The Commission noted with scepticism, however, that the fiduciary's claims that it had not kept any record of the cartel working groups, contrary to what its practice had been for the other committees. In that case, the fiduciary was entrusted with the task of running a very sophisticated statistical system which was used to assist in the determination and monitoring of individual market shares and in the analysis of capacity utilisation.

³⁰¹ [1980] OJ L383/19. The Commission stated that '[i]n assessing whether the agreements concluded between [the cartel members] on the one hand and Fides on the other were liable to restrict competition on the market in car glass, despite the fact that the first three companies are manufacturing undertakings and Fides a service undertaking, it must be borne in mind that Fides enabled and consciously assisted the implementation of the restrictions of competition which were the very purpose of the agreements, and consequently it is jointly responsible for the resulting restrictive effects' (see point II.A.4 of the decision).

³⁰² [2003] OJ L6/1 (full text of the decision available on DG COMP's web site). See also IP/03/1700. In this case, the Commission found, *inter alia*, that the fiduciary had reimbursed the initial cartel agreement in a safe, organised the meetings of the cartel members, taken charge of reimbursing the travel expenses of the participants in order to avoid traces of the cartel meetings in the undertakings' accounts, produced, distributed and collected the so-called 'pink' and 'red' papers with the agreed market shares which were, because of their colour, easily distinguishable from other meeting documents and which were not allowed to be taken outside the fiduciary's premises; acted as a moderator in case of tensions within the cartel; and even instructed all participants on the legal dangers of the meetings and of measures to take to avoid detection (see paras 91–105).

(iii) Concealment Measures

In view of the blatant illegality of their behaviour and the severe penalties incurred if they are discovered, cartels generally deploy considerable efforts to avoid detection. Concealment measures of all types can be found in cartel decisions.

8.75 Covering the cartel's tracks A basic security measure is to ensure that cartel meetings and the matters discussed at them, remain secret. To that end, many cartel meetings have been convened in hotels in large international cities, and reservations for meeting rooms and accommodation made under false names. In *Amino Acids*,³⁰³ the cartel members took care to stagger their arrival and departure times for the cartel meetings so as not to arouse suspicion by having the entire group enter and leave the room at the same time. In *Food Flavour Enhancers*, cartel meetings were sometimes limited to just a few undertakings who acted on behalf of the other competitors in order to limit the risk of detection.³⁰⁴ In many cases, cartel meetings have been organised just before or after official meetings of a legitimate trade association meeting, or during a trade fair.

8.76 Paperless policy Cartel members also often endeavour to refrain from taking written notes during cartel meetings or from taking such notes away from the meeting room, or they ensure subsequent destruction of any minutes or notes. In *Cartonboard*, the Commission noted that there were, surprisingly, no notes of certain working groups whilst other more innocent meetings were documented in great detail.³⁰⁵ There are many examples of instructions to destroy all notes after the end of the meeting.³⁰⁶ In *SAS/Mærsk*, several measures were taken to avoid keeping a full written record of the points on which the cartel members had agreed.³⁰⁷ In *Industrial Tubes*, the unofficial meetings were conducted without documentary support, implying that normally no minutes or agenda were drafted. The Commission found evidence of a cartel document specifying the security rules as 'no paper, no document, only with diskette'. In *Organic Peroxides*, a fiduciary company produced and distributed data on agreed market shares in the form of 'pink' and 'red' papers which were easily distinguishable from other papers and were collected up at the end of the meetings.³⁰⁸

8.77 Storing cartel documents in private homes The use of private homes as places of storage of cartel documents, or as 'safe' mailboxes for the exchange of sensitive information, is also

³⁰³ [2001] OJ L152/24.

³⁰⁴ [2004] OJ L75/1. The Commission reports that in one high level meeting, a Japanese company represented all other Japanese members. This company stated that 'it would look suspicious if the Japanese producers all went to a Korean resort together'. In *Organic Peroxides* [2005] OJ L110/44 (full text of the decision available on DG COMP's web site), a Swiss-based fiduciary company reimbursed travel expenses to avoid leaving traces in the cartel members' accounts and in *Graphite Electrodes* [2002] OJ L100/1, expenses for meetings were paid in cash with no explicit reference to those meetings.

³⁰⁵ See, for example, *Graphite Electrodes* [2002] OJ L100/1. In *Copper Plumbing Tubes* (decision of 3 September 2004, full text of the decision available on DG COMP's web site), the Commission noted that if any-one sent notes to one of the cartel participants, this person was reminded by phone to destroy the paper (see para 129).
³⁰⁶ Thus, in *SAS/Mærsk* [2001] OJ L265/15, the Commission uncovered a cartel document reading: '[t]he parts of the documents that infringe Article [81(1)], although they cannot be agreed upon and cannot be put on paper, we presume that because some people will not be present (in the future), these parts will have to be written anyway and be put in the offices of lawyers from both sides' (see para 89). All material on price agreements, market-sharing agreements and the like had to be destroyed after the meetings and any controversial material on PCs had to be deleted.
³⁰⁸ [2003] OJ L6/1 (full text of the decision available on DG COMP's web site).

a classic feature of hard core cartels. In *SAS/Maersk*, the Commission found the minutes of an internal meeting of Maersk reporting a statement from a company's representative that 'all material on price agreements, market-sharing agreements and the like had to be destroyed before going home today. Anything that might be needed had to be taken home'.³⁰⁹ In *Graphite Electrodes*, for the specific purpose of keeping these contacts secret, a sales manager had a special dedicated telephone installed at his home with a fax machine.³¹⁰ In *Vitamins*, the cartel members made great efforts to keep track of incriminating documents and destroy them, including the conduct of international audits to verify that such documents no longer existed.³¹¹

8.78 Using code names The use of code names to designate cartel members is also a frequent feature of cartel documents. For example, in *Cast Iron and Steel Rolls*, the Commission notes that the cartel decided, as a precaution in case of cartel investigations, to use a code in place of the abbreviations of members' names previously used by the fiduciary company. In *Graphite Electrodes*, a sophisticated system of code names was used to conceal the real identity of both undertakings and individuals.³¹² In *Belgian Beer*, the cartel agreements were referred to by cryptic names such as 'project Green' or 'Université de Lille'.³¹³ In *Industrial Tubes*, a coding system was used to hide the identity of the producers in the cartel documents and in spreadsheets concerning target prices.

8.79 Other measures may also be taken to hide specific cartel implementation measures. In *Food Flavour Enhancers*, the so-called 'counter-purchases' between competitors, which were part of the collusive scheme, were made under sophisticated covers: a cartel member purchased the product of another cartel member through the distributor of a third one.³¹⁴ Emergency measures may also be taken in view of a growing danger of discovery. In *Graphite Electrodes*, one of the cartel leaders warned all other cartel participants that on-the-spot investigations from the Commission could be expected. With that in mind, all relevant files were reviewed and incriminating documents were destroyed or kept in safe places, such as private homes.³¹⁵ In *Vitamins*, as the result of a recent criminal investigation in the US involving ADM, the cartel members agreed on a principle of 'complete security'. Direct contact with the subsidiaries in the US would be suspended and contact would be made with the headquarters.³¹⁶

³⁰⁹ [2001] OJ L265/15, para 89. In *Electrical and Mechanical Carbon and Graphite Products* [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), there were instructions not to keep any cartel document in the undertakings' premises or even at home but to destroy them after use. In the first years of the cartel, communication was conducted through 'mailboxes' and there were instructions to use the telephone rather than faxes.

³¹⁰ [2002] OJ L100/1. In the same cartel decision, the Commission notes that telephone conversations regarding prices were made from a mobile phone registered in Switzerland (see para 59).

³¹¹ [2003] OJ L6/1. Certain documents that had to be kept were copied onto computer disks and hidden in the caves of one employee's grandmother's house. See 2003 OECD Report on Hard Core Cartels.

³¹² [2002] OJ L100/1. SGL was named 'BMW', UCAR got the name of 'Pino' and the group of Japanese companies were dubbed 'Cold', a derivation from the first letters of their individual code names 'Chivas', 'Ocean', 'Lawn' and 'Dry'. VAW Carbon was known as 'Wave'. Individuals were also given code names, such as 'Artemis', 'Moustrade' and 'Taurus' (see para 59).

³¹³ [2003] OJ L140/1.

³¹⁴ [2004] OJ L75/1, para 83.

³¹⁵ [2002] OJ L100/1, para 33.

³¹⁶ [2003] OJ L6/1, see para 452.

In *Electrical and Mechanical Carbon and Graphite Products* a 'security committee' was even created in 1998, after the opening in Europe of an investigation into other activities of the cartel members.³¹⁷

(c) Running the Business of Collusion

8.80 Besides purely organisational aspects, it is worth describing the common features of the management of collusive activities. The elimination or reduction of competition can be a complex task requiring a particular form of management. In spite of their joint intention to collaborate, a degree of rivalry and distrust will always remain between cartel members. The uncertainty of distrust in cartels means that they require a certain degree of leadership and coordination. Devising sophisticated cartel management tools is often necessary. In spite of such measures, cartels nevertheless appear to be characterised by an inherent instability.

(4) Managing the Elimination of Competition

8.81 Getting other market operators on board Efforts are often made by large cartel members to convince unruly players to join the cartel. In *Vitamins*, the Commission noted several examples of efforts used by the ringleaders to convince other participants to enter into the restrictive agreements. In the Vitamin B5 cartel, a representative of Roche travelled to Tokyo to convince Daiichi to limit its exports to other markets as this was pushing down the price. Since Daiichi doubted that the cartel would succeed without BASF, Roche promised to invite BASF to a trilateral meeting convened to promote a collusive scheme regarding vitamin B5.³¹⁸ In *Industrial Tubes*, the Commission quoted a cartel participant as stating that small participants were invited to join cartel meetings 'to have better control, because with a fairly small market share these companies still had a big impact on prices'.³¹⁹

8.82 Achieving comparability of the products An acceptable degree of comparability of the products sold by each member appears to be relevant to most cartels. Significant efforts may be dedicated to this. In *Sodium Glucuronate*, discussions concerned the proper way to define the product and the opportunity to include in the calculation of market shares a partial substitute, as certain producers of that product were suspected of free riding on the other cartel members.³²⁰ In *Specialty Graphite*, in order to be able to fix prices according to equivalent categories of products, the parties established a complex 'Product Grouping Standard'. This classification of grades was devised in accordance with the product applications.³²¹ In *Electrical and Mechanical Carbon and Graphite Products*, cartel 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.³²²

³¹⁷ [2004] OJ L125/45 (full text of the decision available on DG COMP's web site), paras 81–86.

³¹⁸ [2003] OJ L6/1, para 297.

³¹⁹ [2004] OJ L125/50, para 89.

³²⁰ Paras 111, 135.

³²¹ Decision of 17 December 2002 (full text of the decision available on DG COMP's web site), para 99.

³²² [2004] OJ L125/45 (full text of the decision available on DG COMP's web site). This formula, called the 'barème', was meant 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. This effort towards a total harmonisation of the prices was the subject of many technical meetings of the cartel (see paras 91–97).

8.83 Collection of data and circulation of detailed implementation documents. The day-to-day management of cartels often involves a sophisticated exchange of important quantities of data such as sales volumes, price lists, tables of market shares or annual 'budgets', either for planning fresh agreements or monitoring existing ones. Cartels often rely on the legitimate statistical activities of a trade association to obtain the basic data on which they rely to exchange further information and to make their decisions (*Sodium Gluconate, Zinc Phosphate*).³²³ However, the collection and processing of data may be done by the cartel members themselves, with a view to saving costs and/or minimising the risks of detection.³²⁴ Such cartel documents may be very sophisticated, as illustrated by numerous cartel decisions.³²⁵ In *Vitamins*, extremely detailed documents were maintained and circulated. All three major European producers supplied to the Commission tables and spreadsheets created and used for the purposes of calculating, reviewing and agreeing the sales quotas of vitamins A and E for each regional and national market.³²⁶

8.84 'Coordinators' and 'market leaders'. Cartels often show a high degree of coordination and contact within the network. Specific coordination measures may also be taken. In *Pre-insulated Pipes*, a retired business executive with close personal connections to the ringleader of the cartel was engaged as a consultant to act as the 'coordinator' of the cartel.³²⁷ A 'contact group' also played a fundamental role in the coordination of the cartel. The Commission noted that this 'complex mechanism enabled the German contact group to monitor some 1,400 to 1,500 projects per year which were over a DEM 50,000 threshold'.³²⁸

8.85 The appointment of market leaders of particular regional or national markets often serves to ensure the coordination of cartel measures, such as collective price initiatives. The market leaders are supposed to take a 'first mover' role in any price movement in the markets for which they have been designated. In *Vegetable Parchment*,³²⁹ the cartel members fixed prices for 'free export markets', that is countries in which no member manufacturer was established. Once the cartel members had fixed the date and rate of the price increase, price-leaders in each market sent to the trade association secretariat, for circulation to the other members, the applicable price schedules.³³⁰ In *Graphite Electrodes*, the 'home producer' was

³²³ [2003] OJ L153/1.

³²⁴ In *Sodium Gluconate*, the cartel participants had ceased to resort to a Swiss fiduciary but resumed discussions on this point as annual suspicion of cheating was growing (paras 119, 195, 196). In *Citric Acid* [2002] OJ L239/18, each participant reported the tonnage sold in each region to the secretariat of the (joint) president of the trade association, which assembled the data and reported them back to the members by telephone, broken down by firm and by region (para 100).

³²⁵ See eg. in *Citric Acid* [2002] OJ L239/18, the description of certain cartel documents at para 101. Very detailed market share and price increase tables were circulated in *Graphite Electrodes* [2002] OJ L180/4, and *Carbons Black* [2004] OJ L151/1.

³²⁶ [2003] OJ L6/1. The Commission described these documents as 'workbooks or support documents used to fix the annual budget for each producer on a country-by-country basis and charts comparing the actual sales of each producer with their respective 'budgeted volumes', ie their quotas for each regional and national market both on an annual basis and for interim periods. (see paras 190–191).

³²⁷ [1999] OJ L24/1, para 33.

³²⁸ Para 72.

³²⁹ [1978] OJ L70/54.

³³⁰ Para 40.

B. Typology of Cartel Arrangements and Common Features of Collusion

made responsible for fixing the price on its domestic territory, and the other cartel members were expected to follow its price initiatives.³³¹ Similar practices are described in *Sodium Gluconate*³³² and *Industrial Tides*.³³³

(ii) Enforcing Cartel Arrangements between the Participants

As regards the risk of 'free riding' inherent in any collusion schemes, the enforcement of the restrictive arrangements by the members is generally a major source of concern for companies involved in cartels. Monitoring schemes aimed at ensuring compliance are therefore frequently set up, and deviations from the agreements are often subject to peer pressure or even penalties.

8.87 Monitoring schemes. The monitoring of compliance with the cartel agreements may simply take the form of an informal agreement between cartel members to provide each other with evidence of the implementation of the measures taken.³³⁴ However, in many cases, the monitoring takes a more structured form. Compliance is often verified by cross-checking the individual data supplied by cartel members with global market data processed by a coordinator.³³⁵ The monitoring of compliance may even take the form of more intrusive methods and may lead to coercive measures. In *Preverend Methyroms*, cartel members had agreed that on request, each party would allow the other to check sales, production and dispatch documents; a joint accounting organisation would also be appointed to collect such data for the common information of the parties.³³⁶ In *Italian Car Glass*,³³⁷ a fiduciary company

³³¹ [2002] OJ L100/1. One undertaking was appointed as the market leader for the US and certain parts of Europe, whilst another was responsible for the rest of Europe. Japanese producers were market leaders in the Far East (see para 50).

³³² A market leader was appointed in each country and was in charge of setting the target price. The market leader was chosen on the basis of its thorough knowledge of the country and of its influence in the said country (see para 89).

³³³ [2004] OJ L125/50. 'Market leaders' were appointed, who were responsible for certain Member States. The market leader was the member of the cartel with the highest sales in a given country. Market leaders were in charge of monitoring customer visits, of gathering information in their respective territory and deciding upon target price changes. A cartel participant stated that the mission of the cartel leader [was] to protect the interests of each member as agreed. He had to be informed of all visits to customers and to be immediately informed of the negotiations. Only the market leader [could] change the targets if necessary and [had to] inform immediately all the companies involved. [...] In case of disagreement between a member and a market leader, the market leader would take the final decision. (see para 108).

³³⁴ In *Carbons Black*, the monitoring of compliance with the price-fixing agreements was conducted through the exchange of the standard letters announcing price increases to customers. The Commission found in the premises of one undertaking a bundle of standard letters from a competitor to its customers, together with a card sent 'with the compliments of another competitor' (paras 102–103). In *Industrial Tides*, compliance was monitored through exchanges of detailed information between members on deliveries, market shares, customer and prices, primarily within the framework of the cartel meetings, as well as by fax, e-mail and telephone.

³³⁵ In *Specialty Graphite* (decision of 17 December 2002, full text of the decision available on DG COMP's web site), the frequent exchanges of shipment records among competitors allowed a detailed monitoring of sales and the detection of possible deviations from the cartel instructions. A trade association or a fiduciary company may be entrusted with the task of collecting and aggregating individual sales data. Monitoring may also be carried out by a cartel member. In *Sodium Gluconate*, sales monitoring was initially conducted on the basis of the statistics supplied by a Swiss fiduciary, but to save costs, one undertaking was put in charge of collecting sales data a few days before the multilateral cartel meetings instead (paras 92–93). Similar schemes were identified in *Citric Acid* [2002] OJ L239/18 (paras 100–101) and *Ammonia Acid* [2001] OJ L152/24 (paras 22–24–227).

³³⁶ [1975] OJ L29/26, para 4(d).

³³⁷ [1980] OJ L383/19.

was entrusted by the cartel members with the task of drawing up monthly summaries of shipments and carrying out, in the premises of the undertaking, verification of the information provided. The fiduciary could even carry out random checks on the physical quantities compared with the accounting quantities indicated or appearing in the store accounts. In *Roefing Felt*, an accountant was appointed and was in charge of monitoring compliance with quotas and prices.³³⁸ In *French Beef*, the Commission found that three farmers' federations had used physical force to set up mechanisms to verify that the agreement was being applied, such as illegal 'inspections' to establish the place of origin of meat.³³⁹

8.88 Penalties and compensation measures Cartels frequently agree on compensation measures or even penalties to be applied to members who have not complied with the restrictive agreements. In *Roefing Felt*, a member in breach of its obligations could be ordered to pay a standard penalty into a common fund, failing which the sum could be deducted from the security the member had lodged in the guarantee fund.³⁴⁰ In *Pre-insulated Pipes*, the performance of each producer against quota was ascertained and discrepancies would be regularised either in the allocation of the following year's quotas or by payment of compensation.³⁴¹ In *Citric acid*,³⁴² a compensation scheme was agreed as a corollary to the quota agreements, in order to penalise those companies selling above their assigned sales quotas and at the same time compensate those that did not reach theirs.

8.89 Threats, boycotts and coordinated attacks on competitors In addition to the enforcement of compliance schemes 'voluntarily' agreed upon by the members, it is not uncommon for cartels to take steps aimed at forcing reluctant market players to align their commercial behaviour, so that the anticipated results of the cartel are not undermined. In *Roefing Felt*, the cartel members took or planned concerted action against other manufacturers and importers to discourage them from pursuing a price-cutting policy, and to take customers away from them.³⁴³ In *Electrical and Mechanical Carbon and Graphite Products*, cartel members exchanged information on their competitors and engaged in concerted actions in order to persuade or force them to cooperate.³⁴⁴ In *Carbolites Paper*, threats were

³³⁸ [1986] OJ L232/15. To facilitate monitoring of quotas, members were required to make monthly returns to the accountant stating their purchases and movements of stocks of raw materials and finished products and their exports. They also had to keep numbered invoices on both sales and purchases and to keep full accounts, with supporting documents, for regular or extraordinary inspection. The accountant also administered the arrangements for penalising those who exceeded their quotas and acted as secretary to the general meetings (see para 20).

³³⁹ [2003] OJ L209/12, paras 30, 38, 80, 126, 133, 173.

³⁴⁰ [1986] OJ L232/15, para 21.

³⁴¹ [1999] OJ L24/1, para 65.

³⁴² [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. According to the Commission, 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 (see paras 88 and 102–111).

³⁴³ [1986] OJ L232/15, para 59.

³⁴⁴ [2004] OJ L125/45 (full text of the decision available on DG COMP's web site). On several occasions small local producers were persuaded to take part in local cartel meetings. In other instances, competitors were forced to withdraw from the market, or were even taken over by the cartel members, who subsequently ensured that their subsidiary complied with the cartel rules (see para 167).

made against recalcitrant competitors. A representative of the ringleader stated that he would 'personally take care' of those who would not play by the rules. The company in question, which enjoyed market power, threatened to destroy any competitor that adopted a competitive attitude. It was reported to have executed this threat with regard to an Italian competitor.³⁴⁵ Measures to 'convince' companies to cooperate may even take the form of (threats to take) initiatives aimed at having their behaviour sanctioned by public authorities. In *French-West African Shipowners' Committees*, the committees deployed efforts to ensure that the African public authorities adopted rules protecting their activities and providing for penalties on members exceeding their quotas and on independent lines operating without the approval of the committees.³⁴⁶ In *Amino Acids*,³⁴⁷ and *Citric Acid*, recalcitrant third-country producers were threatened with anti-dumping actions.³⁴⁸ Targeted concerted actions against competitors may also be taken. In *Pre-insulated Pipes*,³⁴⁹ considerable efforts were devoted to taking a small but active competitor out of the market. In *Citric Acid*, the increasing availability of Chinese production in the European market and the need for a more forceful stance by the cartel members to maintain their level of sales were the subject of discussion at the cartel meetings. A price war against the Chinese competition was decided upon, at whatever price was necessary.³⁵⁰

(iii) *The Instability of Collusive Schemes*

Cartels are unstable by nature. They are subject to the economic cycles of the markets in which they operate, all the more so because they often occur in sectors with a high degree of cyclicality, such as commodity markets, where surges in demand result in massive expansion in capacity which ineluctably trigger crises of overcapacity. Instability is also inherent in collusive schemes, where supra-competitive profits may only be attained through collective discipline, but where the temptation to poach customers by undercutting collusive prices is high, as this may result in even higher benefits for the individual firm. Despite the efforts deployed to ensure mutual control, tensions within cartels are therefore frequent, and mutual grievances often result from the eagerness or the lack of discipline of certain members.³⁵¹

8.90 Claims for higher quotas Cartel participants may threaten the other participants by adopting competitive behaviour in order to obtain more favourable treatment within the cartel. In *Sodium Gluconate*, a previous cartel had collapsed because a participant had decided to

³⁴⁵ [2004] OJ L115/1, paras 104–106.

³⁴⁶ [1992] OJ L134/1, para 25.

³⁴⁷ [2001] OJ L152/24. The two ringleaders envisaged economic sanctions against a Korean producer who did not comply with the cartel agreement. In particular they threatened it with an anti-dumping action in Europe if it did not limit sales quantities in this area. The Korean producer subsequently agreed to comply with the cartel agreement (see paras 88, 330).

³⁴⁸ [2002] OJ L239/18. With regard to the growing competition from Chinese producers, the cartel members decided that on forthcoming trips by representatives of the cartel members to China, the local producers were to be threatened with an anti-dumping complaint (see para 122).

³⁴⁹ [1999] OJ L24/1.

³⁵⁰ [2002] OJ L239/18. Target customers were allocated to each cartel member. This catalogue of target customers came to be known as the 'Serbia List' and was the subject of regular monitoring and discussion.

³⁵¹ On the inherent instability of cartels and the determining factors of their stability, see PZ Grossman (ed), *How Cartels Endure and How they Fail—Studies of Industrial Collusion* (2004). See also MC Levenstein and VY Suslow 'What determines Cartel Success?' (2002), available at SSRN: <<http://ssrn.com/abstract=299415>>.

expand its production capacity by constructing new plant. After a period of intense price war, the cartel was reformed after the undertaking which had led to the collapse managed to obtain a higher quota which took into account its expanded capacity. In *Vitamin*, Takeda's entry into the cartel arrangements for vitamin B2 provoked intense negotiations regarding annual quotas, with Takeda alleging that Roche had made a mistake in the calculation of market shares and demanding a higher allocation. The Commission noted that 'Takeda's volume aspirations were clearly a cause of irritation for Roche'.³⁵² In *Citric Acid*, disputes also arose because certain undertakings were unhappy with the quotas that had been allocated to them.³⁵³

8.92 Mutual suspicion of cheating Grievances frequently result from suspicions that certain cartel members are not complying with their obligations. In *Sodium Gluconate*³⁵⁴ and *Citric Acid*,³⁵⁵ for instance, tensions arose regarding the monitoring of sales data, as certain cartel participants were accused of cheating. *Food Flavour Enhancers* provides numerous examples of tensions between cartel participants. For instance, one participant would no longer agree to cooperate on pricing unless another participant agreed to buy certain quantities of the product from it.³⁵⁶ Grievances regarding alleged non compliance were also numerous.³⁵⁷ Similar episodes can be found in *Carbonless Paper*³⁵⁸ and *Austrian Banks*,³⁵⁹

8.93 Leniency programmes as an additional factor of instability On top of the natural instability of cartels, the adoption of leniency programmes by a large number of competition enforcement authorities has added an additional and significant source of distrust between cartel members. In the EU, the chance of obtaining full immunity in exchange for reporting an unknown cartel to the Commission has considerably increased the incentive for cartel members to denounce their peers before another participant does so. It is likely that the facts that will be set out in future cartel decisions will illustrate this new and important source of tension within collusive schemes.

³⁵² [2003] OJ L6/1, para 280.
³⁵³ [2002] OJ L239/18, para 97.

³⁵⁴ Para 93.

³⁵⁵ Jungbunzlauer was seen to be 'causing problems' in the group because it did not strictly adhere to the agreement at all times and was perceived to be 'ill-disciplined' by the other cartel participants (para 117).

³⁵⁶ [2004] OJ L75/1, para 102.

³⁵⁷ Paras 114, 116.

³⁵⁸ [2004] OJ L115/1. The Commission reports that a cartel participant who doubted the accuracy of the figures submitted by another asked for, and obtained, the right to directly verify the figures in question at the premises of that undertaking (see para 106).

³⁵⁹ [2004] OJ L56/1. The case of one bank cutting interest 'without prior notice' prompted strong and immediate reactions from the other cartel members, who immediately convened the relevant cartel committee. The Commission reports that '[f]eelings ran high at the meeting and the undertaking in question, which had already not complied with other cartel measures and which had not provided appropriate information to competitors on the measures taken, was fiercely attacked by the other banks. It was 'the unanimous opinion' that there was "no justification" for the measure taken and that it "contradicted the stated objective of all the relevant committee meetings" i.e. "not to go along with" any cuts in interest rates on loans. Any such senseless competition" was downright dangerous' (see para 172).

C. Investigating Hardcore Cartels

(1) The Initiation of a Case: Information Sources

The information that may prompt the Commission to start an investigation can come from a variety of sources. It is widely known that a prime case-generator is the Commission's Leniency Notice.³⁶⁰ Under the Leniency Notice, undertakings that self-report a cartel infringement and provide sufficient evidence to the Commission can receive immunity from fines.³⁶¹ The Commission also has other means of tracing cartels: an investigation may result from the Commission's own monitoring of markets, from information transmitted to the Commission by Member State authorities or by third country agencies; it may also originate from submissions by complainants (private customers or industrial clients), or from whistleblowers (for instance (ex-)employees who wish to report wrongdoing). Each of these possibilities is discussed in greater detail below. Given the important place of the Commission's Leniency Notice as an investigative tool in cartel proceedings, a full in-depth section is dedicated to a discussion of all aspects of its functioning.³⁶²

(a) Market Monitoring and Information from Other Investigations

The Commission may put itself on the track of collusive behaviour through so-called 'market monitoring'. The term relates to the informal gathering of information and finding of possible illegal behaviour in a given market, based on indications, first and foremost of an economic nature, through an analysis of structural, behavioural and performance indicators. The Commission may search for particular occurrences or trends that go against the expected economic development of those markets, such as a sudden (upward) swing in the movement of prices or strong price differentials between geographic markets. Furthermore, the Commission can examine the mechanisms by which particular markets operate and as a result of which (price) transparency is achieved.

Unless a market monitoring exercise leads to the actual acquisition of evidence of a hardcore cartel (which is relatively unlikely), the results may still provide the Commission with a sufficient basis for issuing requests for information. The question, however, is whether the Commission will be able to obtain sufficient information through market monitoring to enable it actually to carry out (surprise) inspections.³⁶³ In any case, it is difficult to see how the Commission can obtain sufficient leads without actually requesting information from

³⁶⁰ The Commission stated in 2004: 'In recent years, most cartels have been detected by the European Commission after one cartel member confessed and asked for leniency [...]'. See the brochure *EU competition policy and the consumer*, European Commission, 2004, available at <http://www.publications.eu.int>. (It should be noted that the Leniency Notice does not require a specific confession (as the brochure states) by the undertaking requesting immunity or a reduction of fines. On the specifics of the Leniency Notice, see further para 8.104.)

³⁶¹ If the Commission issues a final prohibition Decision with fines after the conclusion of its investigation, the undertakings whose (conditional) immunity is confirmed in that Decision will nevertheless be named in it, with all relevant facts about their participation. Also, a fine will be calculated for it, from which it is then granted immunity.

³⁶² See paras 8.105–8.257, below.

³⁶³ It should be noted that the mere fact that an industry appears not to be performing in a competitive manner, cannot, by itself, constitute proof of an infringement, unless—according to *Wagdy*³⁶⁴—there exists no other explanation for the malfunctioning of the market than an agreement or a concerted practice between competitors.