

SINGLE CONTINUOUS INFRINGEMENT OF ARTICLE 81 EC: HAS THE COMMISSION STRETCHED THE CONCEPT BEYOND THE LIMIT OF ITS LOGIC? *

* The author, a partner in Howrey LLP in Brussels, was an official of DG Competition for 27 years and introduced the concept into EC cartel analysis in a series of decisions from the mid-1980s until 2000.

Recent application in a number of EC cartel cases of the concept of the “continuing infringement” exemplifies what the great American jurist Cardozo called “the tendency of a principle to expand itself to the limit of its logic”.¹ Designed to capture the dynamic of one and the same cartel under Article 81 EC, the concept has increasingly been invoked by the Commission with varying degrees of analysis to roll up what often look like different cartels into one infringement, with potentially serious consequences for the addressees in terms of leniency, the calculation of the fine and follow-on exposure to civil damages.² But the theory has not been consistently applied: diametrically opposite conclusions have been reached in decisions presenting similar fact patterns. With “billion euro” fines now an enforcement reality, the Commission and courts must be sensitive to the need to ensure that the growth of the concept of the continuing infringement is shaped (as Cardozo put it) by the principle of consistency not only with its own history but also with some “indwelling and creative principle.”

First appearing in the Polypropylene decision in 1986,³ the concept adopted a radical new approach to EC cartel analysis. The successful dawn raids in October 1983 at a dozen petrochemical producers gave the Commission for the first time “fly on the wall” knowledge of a cartel’s inner workings. Instead of the Commission attempting as before to apply the conventional static definitions of “agreement or concerted practice” to observed parallel price increases, the concept of agreement in what is now Article 81 (1) EC was “operationalised”⁴ so as to capture the whole dynamic of a cartel over its lifetime as disclosed by the evidence. Deriving its rationale from the temporal dimension of the common law conspiracy as “an

¹ B N Cardozo, *The Nature of the Judicial Process, Lecture II. The Methods of History, Tradition and Sociology* (New Haven, Yale University Press, 1921), 51.

² For the important consequences of the classification of cartel conduct as one infringement or separate infringements see J Faull and A Nikpay (eds), *The EC Law of Competition*, (Oxford University Press, 2nd edn, 2007), Chapter 8, Cartels, 8.498 and accompanying footnotes ; see also K Seifert, “Single Complex and Continuous infringement ; “Effet” Utilitarianism?” (2008) 29 *European Competition Law Review* 546, 552-553. Rewards under the “Leniency Notice” are granted on a “per infringement” basis. Depending on whether there are one or separate infringements, a company that came in first with only part of the story could get full immunity for all the offending conduct or only in part, with a later applicant getting the “first in” position and a zero fine for the undisclosed behaviour. Under the new Fining Guidelines of 2006, the basic amount is fixed by reference to the particular undertaking’s turnover in the cartelised products, so that if a company is active on only one of several product markets rolled into one infringement, its fine will not be affected by the infringements of other companies in the products it does not sell, but it could be held jointly and severally liable in damages for their conduct in civil proceedings.

³ Re *Polypropylene* [1986] OJ L230/1.

⁴ The fortunate turn of phrase employed by J B Baker, “Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem and Contemporary Economic Theory” (1993) 38 *Antitrust Bulletin* 143, 178-179. See J Joshua and S Jordan, “Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law” (2004) 24 *Northwestern Journal of International Law & Business* 647, 661 describing how the approach came to be adopted in EC competition law.

agreement with a continuance in time”,⁵ the continuing infringement concept was also intended, by focusing on bad conduct as

much as on the element of consensus, to capture and translate to an EC context the “offensiveness” implicit in the criminal conspiracy. To all intents and purposes a conspiracy to fix prices, it has been dubbed the “single complex and continuous infringement” (“SCCI” for short).⁶ Although the Commission shies away from the term, it could equally be called the “cartel offence”.⁷

This common law import into Community law was endorsed with enthusiasm by the Community judiciary.⁸ It has provided the model for every Commission decision in a cartel case over the past twenty years.⁹ While along with the dawn raid and later the institution of leniency, it has given the Commission the weapons to tackle a hundred or more suspected hard core cartels, there was no special magic in the concept: it aimed to connect more efficiently and in a practical fashion the legal prohibition of Article 81 with the reality of cartel conduct. It was not intended to provide a short cut to proof or a substitute for focused legal analysis. And it certainly was not intended as a device to render illegal conduct that was not already an infringement of Article 81 or to provide some plausibility for avoiding the application of the rules on limitation.

After recalling the origins of the “continuing infringement” concept in the common law of conspiracy, the present article addresses one of the most important areas in EC practice where its application has been decisive and controversial: whether the collusive arrangements constitute one infringement or a number of separate ones. The controversy mirrors the “single versus multiple conspiracies” debate in United States case law. In an extension of the concept and the case law, complex offending conduct that appears to involve several separate cartels - whether successive or simultaneous- is bundled in the decision into a “single infringement”. At the other extreme, the Commission has in some cases found discrete “national” cartels, despite itself highlighting a close interrelation arguing at first sight in favour of a single over-arching

⁵ See *US v Kissel* 218 US 601 (1910): “But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one.”

⁶ The omnibus phrase now appears as a formulaic recitation in most Commission cartel decisions. At least up to *Pre-Insulated Pipes*, the decision referred to a “complex infringement” or a “single continuous infringement”. In *Copper Plumbing Tubes*, <http://ec.europa.eu/competition/antitrust/cases/decisions/38069/en.pdf> accessed on 6 May 2009, the Commission at recital 459 for two of the participants (Wieland and KME) characterised the cartel as a “single, complex and multiform infringement”, a term which it explained as intended to designate an infringement consisting of “separate but [...] interconnected manifestations”. Since in addition there were two different products and three separate fora, for collusion, the formulation potentially begs the question that lies at the heart of the discussion.

⁷ The author and Professor Harding refer to the “cartel as a whole” approach as equalling a “cartel offence” although not overtly named as such. The term “infringement” is always carefully used in the judgments. C Harding and J Joshua, *Regulating Cartels in Europe - A Study of Legal Control of Corporate Delinquency* (Oxford University Press, 2003), 154-155.

⁸ The first occasion being in the CFI judgment relating to the Polypropylene cartel: see Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR I-867. The ECJ gave its approval in Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, upholding the judgment of the CFI in Case T-6/89 *Enichem Anic v Commission* [1991] ECR II-1623.

⁹ Substantial tracts of the reasoning in today’s decisions are lifted verbatim from *PVC II* and *Cartonboard*.

scheme. This is no scholastic quiddity: the implications in terms of substantive and procedural law, due process and the operation of the leniency notice of “getting it wrong” can be far reaching. The consistent application of principle is difficult to discern in the decisions, and if the Court of First Instance’s ad hoc approach to review usually militates against the articulation of a rule of general application, its judgment in *BASF and UCB v Commission*¹⁰ represents the “single best attempt of the EC Courts to sort out the concept.”¹¹ Drawing on the lessons provided by U. S. Sherman Act experience, which provided the inspiration and conceptual model for the single continuous infringement,¹² this article suggests a uniform approach to provide a fair and workable solution to the problem.

NECESSITY IS THE MOTHER OF INVENTION

The Commission’s reputation in recent years as a scourge of price fixers has been won in unlikely circumstances: it is not a law enforcement agency; it has jurisdiction only over companies and not individuals, and the legal instruments at its disposal are by no means focused on turpitude.¹³ The magnitude of the fines now routinely imposed tends to obscure the fact that Article 85 EEC (as it originally was) was not specifically intended as a repressive instrument to catch secret cartels or punish morally bad behaviour, having instead an economic rationale: bringing under the ambit of administrative surveillance the broadest range of commercial arrangements so that the Commission could evaluate their compatibility with the Rome Treaty’s goals of breaking down barriers to trade.¹⁴ Since for many years the Commission viewed its exclusive power to grant exemptions as its most potent tool for developing competition policy, it meant that Article 81 (1) was interpreted broadly to catch restrictions on competition a long way from a hard core cartel.¹⁵

To be sure, Article 81’s prohibition of “all agreements between undertakings...and concerted practices” that may affect trade between member states and which have the object or effect of preventing, restricting or distorting competition in the common market has a distinct echo of the Sherman Act. It may lack the alliterative ring of Section One’s condemnation of “every contract, combination...or conspiracy in restraint of trade or commerce among the several states” but at first sight, it seems to provide the Commission with a well-focused legal instrument to punish secret cartels. The similarity is deceptive. The two provisions have fundamentally different positions in the spectrum of normative responses to cartel organization.¹⁶ While Section One is a federal statute enforced criminally and civilly by the courts as the law of the land, Article 81 was originally conceived as part of a system of administrative control operated by the Commission which had no criminal law powers and no jurisdiction over individuals. Though its threshold of application was low, the prohibition is not an absolute one. As its structure suggests, Article 81, with its equal emphasis on the exemption that used to be the Commission’s exclusive domain, has to be viewed holistically. Long after the

¹⁰ Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* [2007] ECR II-4949.

¹¹ EU Law Blog, <http://eulaw.typepad.com/eulawblog/2008/01/index.html> accessed on 6 May 2009.

¹² The genesis is described in Joshua and Jordan, *supra* n 4.

¹³ Joshua and Jordan, *supra* n 4, 648-650.

¹⁴ For a discussion of the history, see D Goyder, *EC Competition Law* (Oxford, Clarendon Press, 3rd edn, 1998) chs 3,4.

¹⁵ I Forrester and C Norall, “The Laicisation of Community law, Self-help and the Rule of Reason” (1984) 21 *Common Market Law Review* 11.

¹⁶ Joshua and Jordan, *supra* n 4, 649. for a concise comparison of EU competition law and US antitrust law, see S P Reynolds, “International Antitrust Compliance for a Company with Multilateral Observations” (1996) 8 *International Quarterly* 76.

holistically. Long after the emergence of what looks like a cartel offence, a process in which it played a not unimportant role, the Court of First Instance still went out of its way to insist that there are no per se violations of Article 81.17 Even without proceeding to Article 81 (3), there is nothing in the bare text of Article 81 that encapsulates the furtive and conspiratorial mindset of the participants or the constant evolution of its manifestations over its lifetime that make a hardcore cartel so pernicious: what the author and Professor Harding have identified as the “spiral of delinquency”.18 Indeed, as one of the leading text books observes, “the essential feature of Article 81 is that its application in any given case depends on the economic aims or effects of transactions entered into between undertakings.”19

If secreted somewhere in the interstices of Article 81 there is the essence of a cartel offence, delineating its amorphous form defies easy definition, and the task has been further complicated by the historical legacy. Under the prevailing analysis of the sixties and seventies, the category of “agreement” was reserved for formal commercial contracts.20 On that view, an un-notified cartel could only be caught as a concerted practice, but whatever evidence of collusion, critics still insisted on explaining away parallel pricing under oligopoly theory.21 Practitioners with experience only of today’s unrelentingly cartel-hostile climate would be bemused by the two flagship cases of the sixties, *Quinine*22 and *Dyestuffs*23 There is no sense of awareness in the decisions, the judgments or any of the voluminous commentary of the time,24 of any turpitude; legal debate centred on the boundaries between collusion and pure coincidence, the evidence was sparse and the fines imposed would have pleased a parking offender.25 Cartel analysis, such as it was, was preoccupied with finding the line between conscious parallelism (permitted) and concerted practice

17 Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, para 85. See generally C Harding, “Business Cartels as a Criminal Activity: Reconciling North American and European Models of Regulation” (2002) 9 *Maastricht Journal of European and Comparative Law* 393.

18 Harding and Joshua, *supra* n 7, 51.

19 P Roth (ed) *Bellamy and Child, European Community Law of Competition* (Oxford University Press, 6th edn, 2007), p13.

20 The argument was still being made by the defence lawyers of the chemical producers in *Polypropylene* in the early 1990s.

21 A number of critics read the *Dyestuffs* judgment (wrongly) as basing a finding of collusion on the mere fact of simultaneous price announcements. In fact the Court had been careful to state that on its own parallel pricing was by itself insufficient evidence of collusion. For a broadside against the Court of Justice, see F A Mann, “The *Dyestuffs* Case in the Court of Justice of the European Communities” (1973) 22 *International and Comparative Law Quarterly*, 35.

22 *Quinine* [1969] JO L192/5; Case 41/69 *ACF Chemiefarma* [1970] ECR 661, Case 44/69 *Buchler v Commission* [1970] ECR 733, Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769.

23 *Dyestuffs* [1969] OJ L195/11. Case 48/69 *ICI v Commission* [1972] ECR 619.

24 One of the most severe academic critics of the judgment of the Court in *Dyestuffs* was the late Professor Rene Joliet, subsequently Juge Rapporteur in the *Woodpulp* case: R Joliet, “La notion de pratique concertée et l’arrêt ICI dans une perspective comparative” (1974) 15 *Cahiers de Droit Européen* 251. For an account of the strange imbroglio and devastating demolition of the Commission in that case, see Harding and Joshua, *supra* n 7, 155-159.

25 The fines in *Quinine* ranged from 10,000 to 210,000 units of account. In *Dyestuffs* most of the fines were in the region of 50,000 u.a, leading Advocate General Mayras to describe them as “moderate.” By today’s standards that description would apply to a fine a hundred even a thousand times that order.

practice (unlawful) in cases where there were few plus factors.²⁶

CAPTURING THE CONSPIRACY

The pervasiveness, high level involvement and sophisticated organisation of the petrochemical cartels - now seen as the “hallmark” of the hardcore cartel - was as complete a surprise to the officials handling the case as the dawn raids were to the target companies.²⁷ To capture the whole entrenched scheme of conspiratorial behaviour that was uncovered in the petrochemicals industry, and later in other sectors,²⁸ the concept of the single continuous infringement was developed and made its first appearance in the Polypropylene decision in 1986. In its essence, it treats the continuum of collective activity of a cartel as an agreement in terms of Article 81:

“A complex cartel may properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of article 81 (1) of the Treaty.”²⁹

The inspiration for the shift was provided by the notion of “agreement” peculiar to the common law of conspiracy and adopted in the Sherman Act. Criminal conspiracy is basically an agreement to commit an unlawful act, usually a criminal offence.³⁰ But though “agreement is the primary element of conspiracy”,³¹ it is a special type of agreement. Indeed, courts have sometimes used language that comes close to dispensing with the necessity to infer a definite agreement at all.³² Yet if the law is in reality punishing conduct of which it disapproves, it still has to make the link to an agreement of some kind, an exercise which calls for a certain judicial agility.³³ Agreement shades into execution.³⁴ First year students know that at

²⁶ For a thoughtful exposition of the legal issues, see the scholarly evaluation of Advocate General Mayras.

²⁷ A virtually full set of handwritten minutes of the regular cartel meetings, together with the complicated calculations and accounting of the quota system, was found on a radiator in the office of a managerial level employee of one of the companies who was absent on holiday.

²⁸ The almost identical structures, organisation and modus operandi of scores of cartels uncovered over the last twenty years have led some enforcers to suspect the existence of a “cartel university” located in a jurisdiction that until a few years ago was regarded as a safe haven for price fixers.

²⁹ The formulation used in *Graphite Electrodes* [2002] OJ L100/1, recital 103 and a series of later cases.

³⁰ In the normal criminal law context conspiracy is thus an inchoate offence. Section One Sherman Act was an example of the type of statutory conspiracy where neither the underlying end nor the means adopted were in themselves unlawful. Rather the enacting statute creates the “initial” illegality.

³¹ *US v Varelli* 407 F.2d 735, 741 (7th Cir. 1969).

³² See e.g. *Interstate Circuit v US* 306 US 208, 226 (1939) (“... such agreement for the imposition of the restrictions ... was not a prerequisite to an unlawful conspiracy”). The language notwithstanding, the Court seems to have meant that a *prior* agreement is not necessary but a conspiracy may arise as the individuals join the scheme seriatim. An agreement may be based on a tacit understanding created by a long course of conduct: *Direct Sales Co v US* 319 US 703, 714 (1943).

³³ In *Knüller v DPP*, 546 Cr App R 633, 672 (1973), Lord Diplock, one of England’s most distinguished judges, excoriated as “the height of sophistry” the view expressed in *R v Hammersley*, 42 Cr App R 207 (1958), that “[t]he agreement, and nothing but the agreement, is what the law is intended to punish”. For Lord Diplock the law was using agreement as a fiction to punish conduct of which it disapproved.

at common law the crime is complete the moment the agreement is made: however “(w)hile the unlawful agreement satisfies the definition of the crime... it does not exhaust it”.³⁵ The subsequent actions of the conspirators are not only the usual evidence by which the initial agreement is proved, but may also form part of the crime of conspiracy itself. If after they agree, the conspirators continue their combined efforts in pursuit of the plan, the conspiracy continues until its abandonment or success.³⁶ Not only does it have a time dimension, it can evolve and change over its duration, and members may join and leave at different times.³⁷ If there is general consensus as to what constitutes a criminal conspiracy, it eludes comprehensive definition. It is certainly a very long way from a normal commercial agreement. The idea which perhaps most neatly encapsulates the conspiratorial agreement is that of a “partnership” in illegality. Thus Justice Holmes in *US v Kissel* 38:

“A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but the result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes.”³⁹

This approach provided the handle that had hitherto been lacking in EC analysis. With the Commission now able to reconstruct what the cartel actually did in secret, instead of working backwards from the outward manifestations of the suspected collusion, the prohibition of Article 81 could be applied to the “partnership” in illegality with all the disagreements that may occur in a partnership or family without destroying the cohesion of the overall shared purpose. Echoing *Kissel*, one of the earliest decisions stated that “the agreement to which the Commission takes objection relates to a continuing enterprise or partnership to prevent restrict or distort competition in the PVC market over a period of several years.”⁴⁰

While the Polypropylene decision did not quite go so far as to equate conduct expressly with agreement (preferring to speak of “an overall framework agreement manifested in a series of more detailed sub-agreements worked out from time to time”,⁴¹ by the time of the Pre-Insulated Pipes decision in 1998 the same drafter was stating that “the term ‘agreement’ is therefore appropriate not only to cover the terms expressly agreed but also the implementation of what had been agreed.”⁴² The meaning of agreement had

³⁴ Black’s Law Dictionary 329 (8th edn, 2005) says that a conspiracy is “an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective, and [often] action or conduct that furthers the agreement; a combination for an unlawful purpose.”

³⁵ *US v Kissel*, supra n 5, 607.

³⁶ *DPP v Doot* [1973] A.C. 807. Lord Pearson observed that “the fact that the offence of conspiracy is complete at [the moment of the agreement] does not mean that the conspiratorial agreement is finished with. It is not dead. It is being performed. It is very much alive.”

³⁷ Per Viscount Dilhorne in *DPP v Doot*, supra n 36. For the US case law, see e.g. “Notes, Federal Treatment of Multiple Conspiracies”, (1957) 57 *Columbia Law Review* 387, 393. Courts are said to have “taken a broad realistic view in recognizing the continuance of a single dominant plan despite changes in personnel, location... or methods of operation.”

³⁸ *US v Kissel*, supra n 5.

³⁹ *US v Kissel*, supra n 5, 607.

⁴⁰ *PVC II* [1994] OJ L239/14.

⁴¹ *Polypropylene* [1986] OJ L230/1, recital 81.

⁴² *Pre-Insulated Pipes* [1999] OJ L24/1, recital 133.

progressively been extended even further. Embodying the “partnership” concept, “agreement” came to be applied to the whole of the joint venture including the bargaining process leading up to agreement in terms. 43 Nor was a short interlude in operations necessarily fatal for continuity.⁴⁴ So long as the underlying common enterprise endured, it could encompass “a shifting constellation of alliances”, even rivalries and temporary fallings-out. *Pre-Insulated Pipes* encapsulates the approach in its developed state: “[f]ormal agreement may never be reached on all matters. Agreement in one area may exist alongside conflicts in another.”⁴⁵ Capturing the fickle self-interest that characterises the typical cartel, the Commission observed that having set up an infrastructure of regular meetings, the parties were “involved in a continuous process of business diplomacy aimed at reconciling their various interests.”⁴⁶ The prohibition of Article 81 was brought to bear on “joint decision making and commitment to a common scheme.”⁴⁷

Importing this approach into EC competition thinking solved a number of the problems that had dogged the previous fitful attempts to apply Article 81 to cartels.⁴⁸ To be sure, the most visible effect was institutional recognition of the obvious fact that the formalities of a contract are unnecessary for a cartel agreement,

⁴³ “The term ‘agreement’ is [...] appropriate not only to cover the terms expressly agreed but also the implementation of what has been agreed. Further, even before a final comprehensive agreement is concluded [...] the bargaining process may involve reaching inchoate understandings and conditional or partial agreement(s) which restrict competition”: *Pre-Insulated Pipes*, *supra* n 42, recital 133. In recital 134, the decision adverts to the possibility that the “the divergent interests of the cartel members may also preclude a full consensus on all issues.”

⁴⁴ In *Pre-Insulated Pipes*, *supra* n 42, there was a short hiatus of six months during which as a result of a “power struggle” inside the cartel the normal arrangements and relationships were suspended but bilateral and trilateral contacts continued. The Commission found that on the facts the cartel had continued since there was “a continuing objective of restricting competition” but did not impose fines for the 6 month period when the arrangements were “effectively in abeyance”. ABB, the ringleader, did not contest that the cartel had continued throughout that period. It should be noted that the Guidelines in force at the time gave the Commission some discretion in calculating duration: see recital 170. According to Faull and Nikpay, “[t]he fact that there are certain gaps in the sequence of events established by the Commission does not mean that the infringement cannot be regarded as uninterrupted.” A temporary upturn in the market removing the need for close collusion does not mean to say that the collusion has actually stopped. For case law, see eg: Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441; Case T-208/01 *Volkswagen v Commission* [2003] ECR II-5141; Case T-279/02 *Degussa v Commission* [2006] ECR II-897; T-120/04 *Peroxidos Organicos v Commission* [2006] ECR II-4441. The CFI has allowed the Commission a degree of flexibility in relation to demonstrating continuation. If there is no evidence directly establishing the duration of an infringement, the Commission may adduce “evidence of facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterruptedly between two dates.” This is effectively a presumption of evidence that can be displaced by other facts, not a licence to assert that a cartel continued when the facts show it did not.

⁴⁵ *Pre-Insulated Pipes*, *supra* n 42, recital 134.

⁴⁶ *Pre-Insulated Pipes*, *supra* n 42, recital 137.

⁴⁷ *Pre-Insulated Pipes*, *supra* n 42, recital 129.

⁴⁸ For an account of the Commission’s forays into the arena of cartel enforcement between the 1960’s and the 1980’s, see Harding and Joshua, *supra* n 7, 117-131. The approach of demonstrating “collusion” by economic evidence was abandoned after the comprehensive demolition by the Court of Justice of the Commission’s *Woodpulp* decision in Case 89/85 and others, *Ahlstrom v Commission* [1993] ECR I-1307.

being avoided by the parties since secrecy is fundamental for a successful cartel.⁴⁹ The approach recognised that cartels worked on tacit, even inchoate, understandings as well as express assurances. It also necessarily implied that different players could play different roles but still be party to the same infringement.⁵⁰ The time element is however probably the single most critical aspect in which the “conspiracy agreement” captured the essence of cartel misbehaviour. Cartels, like any other complicated conspiracy, are “not born full-grown”⁵¹ but develop organically as the members conceive ever more sophisticated ways to achieve their objectives while reducing the risk of detection.⁵² Recognition of the time dimension served several useful purposes. By emphasising the continuing nature of the venture, it consigned to the dustbin the debate as to whether a cartel was one or a series of infringements.⁵³ It also rendered obsolete any inquiry as to whether this or that manifestation of the cartel was an “agreement” or a “concerted practice”: the distinction, if there ever was one, simply did not matter any more.⁵⁴ The Commission did not have to try any longer to apply legal definitions to the conduct that could be observed in the market, in specie simultaneous price increases (“outcome” in current jargon) in ignorance with few indications of whether it was driven by competition or collusion. Depending on which way or when you looked at it, the cartel conduct could present the characteristics more of one form of illicit conduct than the other or

⁴⁹ In organized crime conspiracies, “(t)he formalities of an agreement are not necessary and are usually lacking since the hallmark of a successful conspiracy is secrecy”: see *US v Varelli* 407 F 2d 735 (7th Cir. 1969). Price fixing cartels require a lot more paperwork. In many hardcore cartels, there is an actual underlying and documented agreement, sometimes in the form of basic rules of considerable sophistication to which actual formal consent is given, while the continuing operation over many years may also be recorded and memorialised in such detail that one can speak almost of agreed terms. The discovery by the Commission of the original cartel “blueprint” followed by evidence of regular meetings of the kind envisaged therein (as in PVC) has in some cases compensated for the unexplained absence of internal price instructions showing implementation of concerted industry price initiatives.

⁵⁰ *Polypropylene*, *supra* n 41, recital 83; confirmed by the ECJ: see eg *Anic Partecipazione*, *supra* n 8, para 83. However, the Commission must in assessing the penalty, take account of their different roles: see eg *Joined Cases C-238/99P and others LVM and others v Commission* [2002] ECR I-8375, paras 508-510; *Joined Cases C-189/02P and others Dansk Rorindustri* [2005] ECR I -5425, para 145.

⁵¹ “Conspiracies involving such elaborate arrangements generally are not born full grown. Rather, they mature by successive stages which are necessary to bring in the essential parties”, per the US Supreme Court in *Blumenthal v US* 332 US 539, 556 (1947). See also *US v Consolidated Packaging Corp* 575 F2d

⁵² See *US v Consolidated Packaging Corp* 575 F2d 117 (7th Cir 1978): “If persons devise some subtle unique form of conspiracy tailored to best serve their own purposes which purposely leaves few tracks or fingerprints, it may violate the law even though it cannot be easily accommodated in the familiar mould of a simple and limited conspiracy.” The Commission decisions are replete with examples of ingenious measures to conceal cartels including the setting up of entire “virtual” trade associations with dummy minutes to provide a plausible excuse for regular meetings.

⁵³ See *Polypropylene*, *supra* n 41, recital 87; see also *Enichem Anic v Commission*, *supra* n 8 : “These schemes were part of a series of efforts made by the undertakings [...] in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of a number of separate infringements.”

⁵⁴ See *Pre-Insulated Pipes*, *supra* n 42, recital 132. “The concepts are fluid and may overlap”. For a discussion, see Joshua and Jordan, *supra* n.4, 675; L Antunes, “Agreements and Concerted Practices under EEC Competition Law” (1991) 11 *Yearbook of European Law* 57. In *Pre-insulated Pipes* the drafter disposed en passant of the misconception that the terms of the bargain struck by the parties is an “agreement” and its working out a “concerted practice.”

other or of both at the same time.⁵⁵ But there was no need to invoke such indirect analytical tools or make such distinctions when the Commission was as good as sitting in on the cartel meetings - hence, the “single” and the “complex” aspects in the descriptive “SCCI” title of the cartel offence. Although the Polypropylene decision still paid lip service to the need to look at both forms of prohibited conduct, by Pre-Insulated Pipes the Commission was treating the whole cartel simply as an agreement, even during the periodic outbreaks of conflict inside the cartel. ⁵⁶ The ‘cheating’ phenomenon which the participants had argued showed their lack of ‘commitment’ (hence no “agreement” or “concerted practice”) was simply part of the normal life of a cartel, and would in any case be corrected by its mechanisms.⁵⁷ And echoing the familiar injunction of common law judges that a conspiracy must be treated as a whole and not broken up into its component parts,⁵⁸ the Community courts took a holistic view of cartel conduct.⁵⁹ The whole process, the negotiations leading up to a consensus, the jockeying for position, periodic fits of sulks, indeed the whole unedifying game of cartel diplomacy, was viewed as an integrated whole.⁶⁰ Treating a cartel in this way also implied that membership could change, the *modus operandi* could evolve and the scope extended without each development being a new infringement.⁶¹

Recognition of the conspiratorial - and durable - nature of cartels has also mandated a fresh approach to issues of proof by the Commission and more importantly the courts. It hardly needs stating that proof may often be circumstantial, though of course this does not mean it can be equivocal.⁶² Requiring the Commission to prove each and every manifestation of the cartel and every action taken to advance its purposes by every participant would however fail to take account of the way cartels operate. Given the secrecy cartels need in order to thrive, and their composite nature, it should suffice to (a) demonstrate the essential features, objectives and operation of the cartel as an ongoing venture by clear and convincing evidence; (b) connect, by means of the appropriate evidence, each participant to the common scheme for the duration of their alleged involvement, and in practice (c), show the role played by each.⁶³ Accusations

⁵⁵ Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, para 256.

⁵⁶ *Polypropylene*, *supra* n 41, recital 87. (Some episodes identified as a “concerted practice”).

⁵⁷ Besides the use of reporting mechanisms to monitor compliance with quotas, a standard feature of many hardcore cartels is the use of compensation schemes and penalties to regularise discrepancies: see *Pre-Insulated Pipes*, *supra* n 42, recital 65; *Citric Acid* [2002] OJ L 239/18.

⁵⁸ *US v Patten*, 226 US 525, 544 (1913): “It hardly needs statement that the character and effect of a company is (sic) not to be determined by dismembering it and viewing its separate parts but only by looking at it as a whole”.

⁵⁹ See e.g. *Enichem Anic v Commission*, *supra* n 8, paras 203-204. The ECJ was already applying this common-sense approach in *Dyestuffs*: “... the question whether there was concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole.” *Dyestuffs*, *supra* n 23, para 68.

⁶⁰ *Pre-Insulated Pipes*, *supra* n 42, recitals 137-138.

⁶¹ *Pre-Insulated Pipes*, *supra* n 42, recital 134.

⁶² Per the US Supreme Court in *Direct Sales Co v US* 319 US 703 (1943); the CFI holds the Commission to a high standard of proof: the Commission “must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place”. (Joined Cases T-67/00 and others *JFE Engineering Corp v Commission* [2004] ECR II-2501, para 179).

⁶³ *PVC II*, *supra* n 40, recital 25; *Cartonboard* [1994] OJ L 243/1, recital 117; *Rhône Poulenc v Commission*, *supra* n 8, para 126.

that the approach in itself implies guilt by association are wildly misplaced and have been dismissed by the Court of Justice.⁶⁴ While the venture is collective, guilt remains individual. Individual participants, especially at the margins, are not to be drawn into the net simply by reason of some or any contact with one of the main players: they have to participate intentionally and knowingly in the unlawful scheme. In a number of the early cases, fringe players who did not themselves participate in plenary meetings but were in contact with one of the core members after each cartel meeting (and even expressed “support”) were given the benefit of the doubt.⁶⁵ Community jurisprudence clearly does not subscribe to the evidential theory of some US courts that once the existence of the conspiracy is proved, “only slight evidence” is needed to connect the individuals to it.⁶⁶ In line with the tendency in the US to de-emphasise that formulation,⁶⁷ they have to adhere knowingly to the common enterprise.⁶⁸ Given the nature of conspiracy, establishing the participation in the common scheme of individual parties does not however require proving their actual or imputed knowledge of every single detail, so long as they were clearly aware of the “general contours” at the time of their adherence.⁶⁹

OUT OF MANY, ONE?

In a series of judgments the EC Courts gave their imprimatur to the concept developed in the petrochemicals and other decisions.⁷⁰ In order to establish that a complex of offending conduct constituted a single continuing infringement, the Commission has to show (a) the existence of a common plan underlying the actions of the participants (b) a contribution by each of them to that common plan.⁷¹ In these circumstances, each undertaking is jointly responsible not only for its own individual conduct, but also for that of the other members pursuant to the common plan, if it knew or should have known how the land lay.

The locus classicus is the holding of the ECJ in *Anic Partecipazione v Commission* ⁷² that

⁶⁴ *Commission v Anic Partecipazioni*, *supra* n 8, paras 72 – 92.

⁶⁵ As with Amoco and BP in *Polypropylene*, *supra* n 41, recital 78; see J Joshua, “Proof in Contested EEC Competition Cases” (1987) 12 *European Law Review* 323-324.

⁶⁶ See e.g. *Morton Salt v US* 235 F2d 573,580; *US v Federico* 658 F2d 1337 (9th Cir 1981).

⁶⁷ It has been explained by the Ninth Circuit that the rule means that the defendant may be convicted if the jury finds beyond reasonable doubt that the defendant was a party to the conspiracy even if he played a minor role or was only tangentially involved. The evidence must establish “beyond a reasonable doubt a knowing connection of the defendant with the conspiracy, even though the connection be slight”: see e.g. *US v Meyers* 847 F2d 1408, 1413 (9th Cir, 1988). “Slight” qualifies “connection” not “evidence”. However the Supreme Court has warned that it is precisely in cases where the conspiracy is broadened to include minor players that the possibilities of injustice to a particular defendant become greater and greater: *Kotteakos v US*, 328 US 750, 776 (1946).

⁶⁸ See e.g. the case of Sigma in Pre-Insulated Pipes, *Sigma Technologie v Commission* [2002] ECR II-1845, para 40; also *Faull & Nikpay*, *supra* n 2, 8.495.

⁶⁹ *Blumenthal v US*, 332 US 539, 557 (1947); *US v Zichitello*, 208 F3d 72, 100 (2nd Cir 2000).

⁷⁰ *Rhône-Poulenc v Commission*, *supra* n 8; *Anic Partecipazioni v Commission*, *supra* n 8; *LVM v Commission*; *Aalborg Portland A/S v Commission*; *Degussa v Commission*, etc.

⁷¹ *Anic Partecipazioni*, *supra* n 8, para 88; case T-14/89 *Montecatini v Commission* [1999] ECR I-4539, para 195; see also *Seifert*, *supra* n 2, 548.

⁷² *Anic Partecipazioni*, *supra* n 8.

“[A]n undertaking that had taken part in such an infringement through conduct of its own which formed an agreement or concerted practice having an anti-competitive object for the purposes of Article 85(1) of the Treaty and which was intended to help bring about the infringement as a whole was also responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk.”⁷³

But although the Commission invariably cites this passage in decisions, it does not dispose of the question, were there single or multiple infringements? The “continuing infringement” was conceived as an instrument for treating conduct that was clearly all part of the same cartel as a single scheme. This is clear from the formulation used in *Lysine*⁷⁴:

“This series of anti-competitive agreements was concluded in the context of a single common plan to regulate prices and supply on the lysine market. The undertakings concerned participated in an overall framework which manifested itself in agreements with the object of restricting competition between the participating undertakings on the lysine market. The Commission considers therefore that it is artificial to subdivide the individual actions into separate infringements as it is clear that the actions were undertaken in the context of an overall common plan pursuing the same anti-competitive purpose.”⁷⁵

Commission officials closely connected with the administration of the current enforcement programme put it like this:

“As is clear from its description, a ‘single and continuous infringement’ is both a ‘single’ infringement in that the facts and circumstances involved are interwoven, and a ‘continuous’ one, in that the behaviour can be seen as belonging to an (uninterrupted or at least interrelated) string of occurrences.”⁷⁶

If its underlying logic is robust enough to point at least to a general approach to the separate issue of whether a given complex of conduct is one or several violations, the single infringement analysis did not on its own provide an answer. In pre-leniency days, the Commission went on the evidence created by the participants themselves in *tempore non suspecto* without the assistance of oral narrative and commentary helpfully provided by the lawyers acting for leniency applicants. If the issue of single or multiple cartels came up, the hard documentation seized in the dawn raids usually provided the answer. Where the cartel involves one product and the evidence shows the existence of a common plan, defence attempts to depict each separate episode of the cartel as separate infringements are a forlorn hope.⁷⁷ Even where there are several distinct products, this by no means automatically means different infringements: the functioning and structure of the cartel itself may provide the best indication of its scope. The parties sometimes even resolved the

⁷³ *Anic Partecipazioni*, *supra* n 8, para 83.

⁷⁴ *Lysine* [2001] OJ L152/24.

⁷⁵ *Lysine*, *supra* n 74, para 237.

⁷⁶ E Sakkers and F Arbault in *Faull and Nikpay*, *supra* n 2, 8.496.

⁷⁷ See e.g. *Anic Partecipazioni*, *supra* n 8, paras 72-92. Also case T-53/03 *BPB v Commission*, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-158/07> accessed on 6 May 2009, at points 246- 261 where the CFI rejected the argument that the Commission had erred in law by finding that the original common purpose in 1992 could be a basis for the illegality of subsequent manifestations of the cartel. BPB was basically making the circular argument that continuity of purpose had to be assessed by splitting the cartel into its component parts, an approach that runs counter to the basic tenet that cartel conduct has to be assessed as a whole and in their overall context.

resolved the question themselves by providing for several products in one written agreement. In *Peroxygen Products*⁷⁸ the producers concluded the formal, though secret, “France”, “Germany” and “Benelux” agreements each covering both hydrogen peroxide and sodium perborate. It is not decisive either that “markets are national” in the jargon of accepted merger analysis; one cartel can cover the whole EU /EEA or even the whole world.⁷⁹ And of course as a cartel grows in strength, markets are developed, barriers to trade come down and mutual “trust” is enhanced, its members may well extend its geographic scope, as in the 1998 *Pre-Insulated Pipes* decision.⁸⁰

If earlier cases presented few problems on this score, as the Commission’s case docket has grown, driven largely by the institution of leniency, the issues have become less clear-cut and the decisions less consistent.

SINGLE OR MANIFOLD INFRINGEMENTS: THE CONTROVERSY

The “single or manifold infringement(s)” question has been decisive and controversial in various contexts in EU enforcement, including when:

(a) The “continuous” conduct arguably comprises successive and discrete cartels, which the Commission combines to increase duration and thus the fine or even to avoid the first fact set being time-barred;⁸¹

b) Simultaneous collusive arrangements in different products, not all of which are made by all the players, are treated by the Commission as one cartel, making undertakings jointly liable for price-fixing in products they do not make, with consequent exposure as co-conspirators to civil damages;⁸²

(c) A “one-product” cartel covers the whole or a large part of the EU/EEA but operates sub-parts in some member states and one (or more) of the smaller producers that participates directly in only one national subset has been held liable for the overall infringement;⁸³

⁷⁸ *Peroxygen Products* [1984] OJ L35/1.

⁷⁹ This does not however mean there is such a thing as a “global infringement” of Article 81: the Commission may only penalise conduct to the extent it constitutes an infringement of Article 81 and affects trade between Member States.

⁸⁰ *Pre-insulated Pipes*, *supra* n 42.

⁸¹ As in *BASF and UCB v Commission*, *supra* n 10. Under Article 25 of Regulation 1/2003 the power of the Commission to impose fines is subject to a five year limitation period. Time begins to run on the day on which the infringement is committed. “However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.” Limitation is interrupted by an investigative measure, usually a dawn raid in a cartel case. If the Commission can run two consecutive fact sets together into a single infringement, time only starts running at the cessation of the second period.

⁸² See e.g. *Methacrylates*, <http://ec.europa.eu/competition/antitrust/cases/decisions/38645/en.pdf> accessed on 6 May 2009. The Commission stated that “...[T]he fact that one company [...] does not produce all three PMMA-products like the other participants of the anti-competitive arrangements does not change the nature and the object of the infringement which was to distort the normal movement of prices with regard to the three PMMA-products. [I]t is clear that all participants in the anticompetitive arrangements adhered and contributed, to the extent they *could* (i.e. to the extent they were active in one or more of the products concerned by the arrangements) to the common anti-competitive plan.”

⁸³ See the position of Sigma in *Pre-Insulated Pipes* (the CFI annulled the finding of participation in the overall infringement).

(d) Arguably unconnected cartel arrangements in the EU and overseas are conflated into an alleged single “global cartel”, treatment which blurs both jurisdictional lines and the precise definition of the substantive infringement of Article 81;⁸⁴

(e) The Commission rolls up national “trade association” cartels, which may have started at different times, into a grand overarching conspiracy, thus potentially maximising the fine;⁸⁵ and

(f) In the reverse play of the last scenario, the same big players operate identical collusive arrangements in several “national” markets and the Commission (while fining the top group parents) treats the arrangements as separate local cartels rather than as one overall scheme, complicating still further the already unpredictable operation under Modernisation of leniency at both member state and EU level. The list is by no means exhaustive and scenarios may well overlap.

In theory, treating related behaviour as one single infringement instead of separate violations of Article 81 could sometimes favour the addressees of the proceedings since the total fine is capped at ten per cent of turnover.⁸⁶ Had separate infringements been found on the same facts, it would be possible to go up to 10 per cent for each infringement. This is not so much a threat as it seems. In reality, the calculation of fines by reference to the turnover in each product in the 2006 Fining Guidelines removes sting from the risk of dual imposition in concurrent behaviour.⁸⁷ On the other hand, running consecutive arguably unconnected episodes together can have an exponential effect on the fine. ⁸⁸ In most cases (see (a) to (e) above), treating episodes as one infringement increases the fine. In a tight call, the “one infringement” approach usually works to the undertakings’ disadvantage, whether in terms of penalty or follow-on exposure to civil liability.

Although in some cases it has barely addressed the issue, when it has sought to justify its choice in the decision, the Commission has invoked various “objective elements”: whether there was a common objective; whether the arrangements covered different products or services; whether the behaviour was similar in different geographic areas; and points of commonality in terms of cartel membership, modus operandi, personnel and nature of meetings.⁸⁹ According to received wisdom, the elements are to be considered

⁸⁴ See *BASF and UCB v Commission*, *supra* n 10, where the CFI overturned the Commission’s decision that a global Choline Chloride “home market” cartel between the North American and European producers had morphed into an arrangement between the European producers after the first global arrangement had broken down. See also the Commission Decision in *Gas Insulated Switchgear* [2008] OJ C5/7 where similar issues are raised. The Japanese producers contended that they were only involved in a worldwide cartel which was separate from the European agreement.

⁸⁵ Under the Fine Guidelines, the appropriate percentage of sales of each participant in the last full year of the cartel’s operation is multiplied by the number of years’ duration. If the national cartels are treated as one infringement, the “duration” is calculated from the start of the first manifestation.

⁸⁶ Article 23(2) of Regulation 1/2003 provides that for each participant “the fine shall not exceed 10% of its total turnover in the preceding business year.”

⁸⁷ Under the 2006 Fining Guidelines, the Commission sets the basic amount of the fine based on the value of the undertaking’ sales of the goods or services to which the infringement relates: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2, point 13.

⁸⁸ Each year of duration allows the Commission to increase the fine by 100 per cent : 2006 Fine Guidelines, point 24.

⁸⁹ *Faull and Nikpay*, *supra* n 2, 8.499 citing Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co and others v Commission* [2005] ECR II-10, paras 118-124. In that case, the CFI concluded that

considered together, no one factor is decisive, and the weight accorded to each varies from case to case.⁹⁰ That sounds reasonable enough, but EC officials seem to take the view that provided the Commission rehearses the various considerations, it has a “margin of discretion”. While some decisions do discuss the question at considerable length, articulating a general conception, “some indwelling and creative principle”, seems to have eluded the Commission. Decisions usually point to two features, a broadly defined “common goal” of fixing prices and various similarities in the schemes, but rarely does the Commission explain how the components are interlinked or what degree of knowledge is required. No doubt the Commission often reaches the “right” solution intuitively. The danger is that if the exercise becomes a mere recitation, it fuels accusations that the result is “political”. And it does not help that to the extent the Commission has developed and articulated any principled test, its application on the ground is not entirely consistent.

Similar fact sets have given rise to decisions on both sides of the line.

Of course, cases with superficially similar or overlapping facts can fall on either side of the line and the decision is nevertheless obviously the right one.

The finding in Lombard Club 91 that the one and the same cartel covered the whole range of banking product services in Austria seems intuitively correct since the eponymous Club of top executives acted as the overall decision making body and an umbrella for the lower level specialist committees. And few would condemn the Commission’s finding in Vitamins 92 of twelve separate cartels, one per product, with separate fines, although the two main players, BASF and Roche both made virtually the full range, the modus operandi of the arrangements for each of the vitamins was very similar and price increases for all vitamins were usually announced on the same occasion. Whatever the commonalities, there was no overall coordinating body, and the Commission may have baulked at the implications of making the less prominent producers liable, along with the two largest players, as co-conspirators in arrangements in products they did not make. And where, as in Citric Acid 93 and Sodium Gluconate, 94 one company happens to take part in two entirely separate cartels for two different products, the Commission can hardly be criticised for rejecting summarily claims that it “artificially” unravelled what was supposedly one cartel in order to fine the company twice. All these decisions were upheld by the CFI and few reasonable observers would challenge the outcome.

the Commission had based its choice on “objective factors” but did not attempt to articulate any test or guidelines.

⁹⁰ Faull and Nikpay, *supra* n 2, 8.499.

⁹¹ Joined Cases T-259/02 to T-264/02 and T-271/02 *Raffaelsen Zentralbank Österreich and others v Commission* [2006] ECR II-5169, paras 113-121.

⁹² *Vitamins* [2003] OJ L6/1. The CFI dismissed as based on a false premiss and a misreading of the 1998 Fine Guidelines, the argument of BASF that if the Commission had treated the cartels as a single infringement it would have had to limit the start point for the fine to € 20 million (points 65-69). The Court made the point that if the Commission had found that there was a single infringement covering all vitamin products, it could probably also have included the company’s turnover in two products where as a discrete infringement the collusion was time barred under Regulation 2988/74. This proposition is considered as “speculative” by the author of Faull and Nikpay, *supra* n 2, 8.498.

⁹³ *Citric Acid* [2002] OJ L239/18.

⁹⁴ *Sodium Gluconate*

http://ec.europa.eu/competition/antitrust/cases/decisions/36756/non_confidential_version.pdf accessed on 6 May 2009.

There was a potentially much more problematic outcome in Methacrylates 95 which is currently before the CFI for review: there one single infringement was found covering the three PMMA products, (moulding, solid sheet and bathroom) despite one minor producer making only solid sheet. The Commission found there were “sufficient links” to demonstrate adherence of all to a single common scheme: a core group of the same undertakings, a common chemical basis, spill-over in pricing, “occasional” common meetings and similar methods. One cartel can of course cover separate products, but it remains to be seen how the CFI will view the characterisation of the arrangements in the decision as an integrated whole in light of the Commission’s having to drop after the oral hearing for lack of evidence the original allegation as against all addressees that the cartel had also included the upstream base product MMA.⁹⁶

In Hydrogen Peroxide and Perborate, 97 once again not all the undertakings fined for the “single infringement” produced both products. The Commission finding that a common scheme encompassed both hydrogen peroxide and sodium perborate seems plausible enough however, since a considerable part of hydrogen peroxide production is consumed downstream as a raw material for perborate: a change in the price or quantity produced in one product would have a bearing on the downstream product and vice versa. The Commission may have come closer than in other cases to articulating a principled test in observing that “the effects of the agreements regarding HP were intertwined with the arrangements regarding PBS.” But troublesome issues remain since the collusion on PBS began later and ceased earlier than in peroxide, thus tending to undermine the interdependency of the arrangements. 98

To be sure, the horizons of cartel planners and participants are not circumscribed by “relevant market” analysis.⁹⁹ The Commission observed correctly in Industrial Bags that by concluding anticompetitive agreements, undertakings determine de facto the parameters within which they compete with one another.¹⁰⁰ There is no need for the Commission to resort to proxy methods for determining whether and what competition has been affected. But even if cartels know no frontiers, the geographic area or areas covered can give rise to problems. Is there one overall master conspiracy with sub-schemes, or multiple unrelated conspiracies? Where there are separate national cartels, but the same players are present in each, does it make any difference to find one overall cartel as opposed to several? And even if there is a broad scheme, what is the right way to treat a minor player that participates in only one “national” subset? The question came up in Sigma’s appeal in Pre-Insulated Pipes.¹⁰¹ The fact that Sigma had only been to meetings of the Italian contact group was recognised in the decision and rewarded in the form of a two-thirds

⁹⁵ *Methacrylates*, *supra* n 82.

⁹⁶ *Methacrylates*, *supra* n 82, para 27.

⁹⁷ *Hydrogen Peroxide and perborate*, <http://ec.europa.eu/competition/antitrust/cases/decisions/38620/en.pdf> accessed on 6 May 2009.

⁹⁸ The Commission’s invocation as a precedent of the old *Peroxygen* cartel decision of 1984 where the two products were part of the same infringements is somewhat misplaced since there the parties had saved the Commission the trouble of having to decide whether there was one or multiple infringements by concluding “national” agreements in writing each expressly covering both products. (In line with the distinction made by the parties themselves, the Commission treated each national agreement as a separate infringement): [1985] OJ L 35/1.

⁹⁹ See discussion in Faull and Nikpay, *supra* n 2, 8.500 and 8.502.

¹⁰⁰ *Industrial Bags*, <http://ec.europa.eu/competition/antitrust/cases/decisions/38354/en.pdf> accessed on 6 May 2009, paras 23-28; see also Case T-71/03, *Tokai Carbon and others v Commission*, *supra* n 89, recital 90.

¹⁰¹ Case T-28/99 *Sigma Technologie v Commission* [2002] ECR II-1845.

thirds reduction in its otherwise appropriate fine, but the CFI read the decision as holding it was a member of the overall cartel¹⁰² and overturned that finding on the ground the Commission had not proved that the applicant knew or ought to have known that by participating in the arrangements on the Italian market, it was also joining the wider European cartel. As the CFI remarked “The mere fact that there is identity of object between an agreement in which an undertaking participated and a global cartel does not suffice to render that undertaking responsible for the global cartel.” To be sure, the Commission did not prove that it knew it was part of the wider scheme. Sigma may have been lucky: in similar circumstances, a US court would have asked what prejudice there had been to its substantial rights.¹⁰³ Of course the issue may have more significance in today’s climate of greater exposure to civil damages than was the case ten years ago, but the judgment does show that even where there was clearly one overall illegal venture, in the case of a minor player present in just one of its sub-schemes, the Commission “over charges” at its peril.

Pre-Insulated Pipes¹⁰⁴ was a case where on the evidence there was one overall European cartel operated by the “core” with a couple of minor players each active in just one national sub-part. In Industrial Bags¹⁰⁵ however it is not so obvious there was one over-arching scheme: the arrangements were operated largely through regional subgroups for France, Germany, Benelux and confusingly perhaps, Belgium and the Netherlands as well, plus at least one functional subgroup, forming more of a loose confederacy than a federation. The diffuse organisation and membership variations notwithstanding, the Commission found that a common “general strategy” of distorting the normal development of prices in plastic industrial bags was enough to draw them together in one collusive scheme.¹⁰⁶ And while in one still pending case, “trade association” cartels in various member states are being treated as a single overall infringement, the Commission in Lifts and Escalators¹⁰⁷ determined without discussion that the arrangements between the four big players were “four separate but related single and continuous infringements of Article 81 in Belgium, Germany, Luxembourg and the Netherlands”.¹⁰⁸ There are a number of curious features to the case. The decision lists a whole series of factors which have been cited in other decisions as commonalities pointing to a single scheme.¹⁰⁹ Only one of the producers disputed that there were separate national infringements.¹¹⁰

¹⁰² Article 1 of the *Pre-Insulated Pipes* Decision specifically defined the infringement by reference to the participation of the named undertakings “in the manner and to the extent set out in the reasoning”. The decision had made it clear Sigma had only participated in the local arrangements for Italy and reduced the fine by two-thirds on that basis.

¹⁰³ The issue arises in the context of a variance between the indictment and the government’s proof at trial. *Berger v US*, 295 US 78 (1935) is the seminal case.

¹⁰⁴ *Pre-Insulated Pipes*, *supra* n 42.

¹⁰⁵ *Pre-Insulated Pipes*, *supra* n 42

¹⁰⁶ *Industrial Bags*, *supra* n 100, paras 443-449. One company that participated only in the Dutch sub-group was forced not to have participated in the overall cartel.

¹⁰⁷ *Lifts and Escalators*, <http://ec.europa.eu/competition/antitrust/cases/decisions/38823/en.pdf> accessed on 6 May 2009.

¹⁰⁸ See Summary, [2008] OJ C75/19, para 1. The full decision characterises the arrangements as “very similar, parallel illegal schemes in the four different member states” (para 555).

¹⁰⁹ *Lifts and Escalators*, *supra* n 107, para 139. The factors listed are: identical membership; identical products and sources; similar and overlapping duration; very similar and sometimes identical *modus operandi*.

that there were separate national infringements.¹¹⁰ The fragmentation into discrete infringements generated a confusing leniency hodgepodge: although the investigation did not start as a result of an immunity application, different manufacturers coming in with fresh revelations after the ex officio dawn raids obtained full immunity in different “new” national markets.¹¹¹ The difference in outcome between finding several infringements as opposed to one might have been even more dramatic had the case started not with a complaint but an 8 (a) immunity application.¹¹² And even on the scenario that did occur, the complications of the competing immunity applications which have apparently been made to national authorities scarcely bear thinking about.¹¹³

So far, in view of the long lead times, few “difficult” cases have come up on appeal. In most cases, the CFI has supported the Commission’s finding. Usually (but not always) the Commission has found one overall scheme and the applicants argue there were separate infringements.¹¹⁴ In *JFE Engineering*¹¹⁵ the CFI made short work of the argument of the Japanese producers that the “home market agreement” was in fact two cartels, one in Japan, the other in Europe (to which they did not belong), finding in a few terse paragraphs that the agreement to which all producers subscribed was an “integrated set of rules” that it would be artificial to decorticate.¹¹⁶ If the judgment gives little general guidance, it is hard on the facts to disagree with the Court that any other finding by the Commission would have been inappropriate.

The CFI took a very different view in another case where there were also both “global” price stabilisation arrangements and a European carve-up. In *BASF v Commission* ¹¹⁷ in December 2007, the Commission was called to order by the judges for what the applicants claimed was a colourable attempt to circumvent

¹¹⁰ *Lifts and Escalators, supra* n 107, para 555. (Thyssen Krupp).

¹¹¹ The original inspections took place simultaneously in Belgium and Germany. Kone obtained full immunity for Belgium and Luxembourg and received a fine reduction of 50% for Germany. Otis was given full immunity for the Netherlands, reductions of 40% for Belgium and Luxembourg, and 25% for Germany. Thyssen Krupp was awarded discounts of 25% and 40% for Belgium and the Netherlands respectively.

¹¹² If the conduct has been viewed as a single infringement, a company coming under Point 8(a) of the Leniency Notice might have received full immunity for the whole cartel even if it did not disclose its full geographic scope.

¹¹³ Under the system of “parallel competences” created by Regulation 1/2003, the national competition authorities (NACs) of the Member States are empowered to bring enforcement proceedings under Article 81 as well as under national law. Each authority has competence to decide whether or not to bring proceedings and each has its own leniency programme.

There is no harmonised EU-wide system of leniency and an application to one authority does not count as an application to any other or to the Commission. Nor does an application to the Commission exclude NCA competence until the Commission formally opens a procedure. For the non-binding principles of case allocation (there are no rules) see the Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

¹¹⁴ The CFI had little difficulty exposing the fragility in case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435 of the claim that the Sodium Gluconate and Citric Acid cartels were but one infringement which the Commission had artfully split up into two so that it could exceed the 10 per cent fining cap: see Paragraphs 308-314.

¹¹⁵ *JFE Engineering v Commission, supra* n 62.

¹¹⁶ *JFE Engineering v Commission, supra* n 62, paras 370 – 374.

¹¹⁷ *BASF and UCB v Commission, supra* n 10.

Article 25 (1) of Regulation 1/2003 - the Statute of Limitations- and extend duration by two years. An otherwise time-barred global cartel between the North American and EU producers of Choline Chloride that stopped in April 1994 was rolled into the same “continuous infringement” as a later agreement between the EU producers that was still operating shortly before the investigations.¹¹⁸ While the US and Canadian producers escaped fines, the EU players were held responsible for an infringement going back to the formation of the first, global, cartel with the North Americans in 1992. In its decision the Commission maintained that the global and European arrangements were in pursuit of “a single identical anticompetitive economic aim, namely the distortion of normal competitive conditions in the EEA for choline chloride. All of the concrete anti-competitive activities at the global level in respect of the EEA fit within that overall anticompetitive object, as do the activities at a European level.”¹¹⁹ The reliance on assertion as much as hard evidence to demonstrate the “link” seems to have jarred with the court, as did the Commission’s expansive interpretation of common objective. On appeal, the CFI found that an impact on competition constitutes “a consubstantial element of any conduct covered by Article 81”.¹²⁰ If a broad intention to increase prices were enough, different types of offending conduct in a particular sector would always have to be treated as a single infringement. The CFI concluded that to establish a single violation, (a) there had to be a common plan or economic aim; (b) the arrangements had to be “complementary”, in the sense of interacting to realise the intended set of anti-competitive effects within the framework of a single objective.¹²¹ For the court, the European and global infringements were each continuous infringements on their own. To justify combining them into one, account had to be taken of all the circumstances, such as period of application, the content and methodology of the agreements and “correlatively”, their objective.¹²² In the CFI’s judgment, the Commission had failed to demonstrate sufficient interdependence between the global and the later EU cartel: the Europeans had not adhered to the global arrangement in order to divide up the EEA market, the control methods were dissimilar and they only began to allocate the European market amongst themselves after the global arrangement had failed.¹²³ Of course, a cartel can develop organically over time without becoming a new infringement. However absent firm evidence of continuity, the Commission invoked in vain *Pre-Insulated Pipes*,¹²⁴ where right from the beginnings of the cartel in Denmark the aim had been to extend it to the whole of Europe.¹²⁵

¹¹⁸ The effect of Article 25 is that the Commission may not impose fines in respect of an infringement that ceased more than five years before the date of the inspections.

¹¹⁹ *Choline Chloride*, <http://ec.europa.eu/competition/antitrust/cases/decisions/37533/en.pdf> accessed on 6 May 2009, recital 150.

¹²⁰ *BASF and UCB v Commission*, *supra* n 10, para 180.

¹²¹ *BASF and UCB v Commission*, *supra* n 10, para 179.

¹²² *BASF and UCB v Commission*, *supra* n 10, para 181.

¹²³ *BASF and UCB v Commission*, *supra* n 10, paras 182 – 209.

¹²⁴ *Pre-Insulated Pipes*, *supra* n 42.

¹²⁵ Similar issues arose in the Commission decision in *Gas Insulated Switchgear*, *supra* n 84 which is currently before the CFI (although there the global (“GQ”) and European (“EQ”) arrangements were alleged to have been operated simultaneously). The Japanese producers claimed they were only involved in the worldwide cartel separate from the European cartel. Rejecting the argument, the Commission emphasised (a) the arrangements were contemporaneous; (b) the EQ agreement was expressly subordinated to the GQ agreement; (c) the members of the E-Group were parties to both Agreements; and (d) the content and mechanisms were interlinked: the Commission therefore “considers the measures agreed and taken at the European level as one coherent set of measures (sic) of the arrangements agreed at both the global and European level.” (See Paragraph 278). In respect of several producers who allegedly left and returned to the cartel the Commission characterised their involvement as “repeated participation in the same infringement”.

Durable as the single infringement concept has proved, it certainly was never intended as a slogan to substitute for robust legal or factual assessment. Nor, without more detailed analysis, is it determinative of the issue of whether a given course of conduct constitutes a single conspiracy or multiple conspiracies. But if conceptually the distinction between a single and many conspiracies is clear enough, its empirical application is beset with difficulty. Overturning the decision on the facts, the Court basically confirmed the generic “totality of the evidence” approach of the previous case law.

Although the CFI has made it clear in BASF that meeting the interdependency requirement is not going to be a walk-over for the Commission, it would be helpful to have some workable guidance.¹²⁶ The assessment is an empirical one, but it should not be left to the Commission’s discretion how to treat a given set of facts. An objective rule would free the Commission from suspicion that the approach it takes is driven by the desired outcome.

Given the single infringement’s origins in the law of conspiracy, the US jurisprudence is a rich source to draw on to resolve the conundrum. The “single v multiple conspiracy” question arises in several contexts, including the due process clause in the Fifth Amendment.¹²⁷ When one broad conspiracy is charged, the evidence as it comes out in court may show the existence of several conspiracies. Put very shortly, the inquiry on appeal in such cases is whether a variance between indictment and proof at trial has prejudiced the defendant’s substantial rights.¹²⁸ Casting the dragnet too wide can result in jury confusion and “transference” of the core players’ guilt to minor actors.¹²⁹ The Antitrust Division grand jury manual¹³⁰ instructs prosecutors that the allegations in the indictment must mirror what the evidence demonstrates: if the evidence supports one overall conspiracy with several sub-parts, it is appropriate to charge a single conspiracy. On the other hand, if more than one conspiracy is indicated, a defendant may properly be charged with more than one violation. There can be separate agreements with some parties common to all. There can be one overall agreement with changing membership. The evaluation of which way to go may be tricky since it is a mixed question of law and fact. Attorneys are warned that whichever path they choose, it will probably be challenged.

infringement”. The Commission sidestepped limitation issues by finding as a matter of fact that any “gap” period only began within the five years preceding the date of the dawn raids. (Under Article 25 of Regulation 1/2003, in the case of a continuing or repeated infringement, time only starts running when the infringement ceases.) See notice of action brought by Siemens in case T-110/07 ([2007] OJ C140/26).

¹²⁶ Seifert, *supra* n 2, 555.

¹²⁷ The other main context in which the question arises is the double jeopardy clause, also embedded in the Fifth Amendment. In this context, the defendant attempts in a second prosecution to show that he has already been tried for the same conspiracy. The considerations are different from the due process context but on this question the threshold enquiry is essentially the same. See Note, “Single v Multiple Conspiracies : a Uniform Method of Enquiry for Due Process and Double Jeopardy Purposes” (1980-1981) 65 *Minn L Rev.* 295.

¹²⁸ *Berger v US*, 295 US 78, (1935); see “Notes Federal Treatment of Multiple conspiracies”, *supra* n 37, 387; also discussion in DOJ Grand Jury Manual, pp 31-34.

¹²⁹ See *Kotteakos v US*, 328 US 750 (1946); *US v Varelli*, 407 F.2d 735 (7th Cir. 1969); *US v Miller*, 471 US 130 (1985).

¹³⁰ Grand Jury Manual, page 24. <http://www.usdoj.gov/atr/public/guidelines/207021.htm> accessed on 6 May 2009.

For the courts, the task has been to find some means to analyse the facts that will lead to an objective, rather than wholly subjective determination of the scope of conspiracies. As the DoJ manual points out, “(i)t is the need to prove conspiracies by inference that makes determining the existence of single v multiple conspiracies so difficult.”¹³¹ Unlike a civil contractual dispute where the parties are usually arguing over the interpretation of an agreement they both acknowledge they made, a conspiracy prosecution requires the government to prove the existence of an agreement which the parties deny making ¹³²: the scope of the conspiracy has to a large extent to be deduced by inference from the conduct that can be proved.¹³³

Although Sherman Act price fixing conspiracies have special features, US case law on the law of conspiracy in general may be helpful. To determine whether the evidence supported a single overall conspiracy, courts trying organised crime cases used to adopt a three-step enquiry: (a) First, the court examined whether there was a common goal among the conspirators; (b) next, it looked at the “nature (or structure) of the scheme”; and (c) it examined the extent of any overlap among participants.¹³⁴

The reference to “structure” in the second prong derives from the distinction in classical conspiracy reasoning between the “chain” and the “wheel” or “hub and spoke” conspiracy.¹³⁵ In the former, where the participants are engaged at different levels in the same enterprise, knowledge of the existence of “remote links” may be inferred from the nature of the enterprise alone.¹³⁶ Each link in the chain is obviously dependent on the others. In the “wheel” conspiracy, with the hub performing the same illegal acts with each of the spokes, it could well be that none of the latter even knows the others exist: the hub may be involved in separate conspiracies with each of the spokes.¹³⁷ But structure is not in itself the determining factor: the essential point in both chain and wheel conspiracies is whether the actions of the conspirators were in furtherance of the same goal and they knew success of the whole depends on the success of each part.¹³⁸ And as the First Circuit pertinently observed in *US v Portela*,¹³⁹ what the case law sometimes calls the

¹³¹ Grand Jury Manual, *supra* n 130, page 25.

¹³² J. B. Baker, *Two Sherman Act Dilemmas*, *supra* n 4, page 179, fn 72.

¹³³ Grand Jury Manual, *supra* n 130, page 25; Note, “Single v Multiple” Criminal Conspiracies, *Minn. L. Rev.*, *supra* n 127, 318.

¹³⁴ See e.g. *US v Gaviria*, 116 F.3d 1498, 1533 (D.C. Cir 1997).

¹³⁵ Note, “Single v Multiple” Criminal Conspiracies, *Minn. L. Rev.*, *supra* n 127, 302.

¹³⁶ See e.g. *US v Magnano*, 543 F.2d 431, 434 (2nd Cir 1976); *US v Agueci*, 310 F.2d 817 (2nd Cir 1962). (Individual associating himself with a chain conspiracy knows it has a ‘scope’ and for its success requires under organisation than that disclosed by his individual participation). See also Note, “Federal Treatment of Multiple Conspiracies”, *Colum L Rev.*, *supra* n 37, 390. The chain conspiracy is the model for drug smuggling and distribution conspiracies.

¹³⁷ *Kotteakos v US*, *supra* n 37. See. *Blumenthal v US*, 332US 539,555 (1947) where evidence showed knowledge by the “spoke” that he was part of a wider scheme. “Wheel conspiracy” analysis has recently become topical in UK competition enforcement with the cases in which price fixing by retailers was alleged to have been coordinated or facilitated by a supplier: see e.g. *JJB Sports PLC v OFT* [2004] CAT 17; *Argos Ltd and Littlewoods Ltd v OFT*; *JJB Sports PLC v OFT* [2006] EWCA Civ. 1318.

¹³⁸ See discussion in Note “Federal Treatment of Multiple Conspiracies”, *Colum L Rev.*, *supra* n 37, 388-389.

¹³⁹ 167 F.3d 687; see also *US v Wilson*, 116 F.3d 1066 (5th Cir. 1997).

calls the “nature of the scheme” really involves the analysis of interdependence. To determine if the evidence supports a finding of a single conspiracy (a single general agreement), courts should look for (1) a common goal; (2) interdependence among the participants, and (3) overlap among the participants.

US courts have thus more recently shifted away from a formal structural analysis in favour of a functional test. Cartels especially may not fit easily into one or the other traditional presentation of a conspiracy as a wheel or chain. 140 US antitrust cases have therefore tended to involve a “totality of the circumstances” test.¹⁴¹ Courts have developed a checklist of important factors: (1) number of alleged overt acts in common; (2) overlap in personnel (3) overlap in the time periods (4) similarity in the modus operandi (5) location of the actions (6) the sharing of a common objective and (7) the degree of interdependence required between the parts and the whole for the scheme to succeed.¹⁴² Once it is understood that the “nature of the scheme” refers to interdependence rather than formal structure, the difference between the “nature of the scheme” and the “totality of the circumstances” tests becomes a matter of semantics.

Whatever the test is called, it should involve a consistent, reasonable and objective approach. The list of relevant factors proposed by Commission officials, before BASF, is very close to the Antitrust Division’s – without the critical last element of “interdependence”. Whatever its attractions in terms of flexibility, the broad approach is too vague. Two people applying it could depending on the weight they apply to the different factors come to opposite but equally reasonable conclusions.¹⁴³ It needs a focus. The various elements of commonality should be considered not as a laundry-list to be ticked off but as sub-sets relevant to the determination of the main issue, namely the scope of the agreement.

Perhaps the most useful approach derives from the essential nature of conspiracy as an agreement. What exactly was it the parties agreed to?

The judgment of the Supreme Court in *Braverman v US* 144 provides a starting point of sorts:

“The precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects.”¹⁴⁵

According to the DoJ manual, “*Braverman* stands for the proposition that the scope of a conspiracy is determined by what the parties agreed to rather than by how many overt acts were involved or what the

¹⁴⁰ The recent supplier- retailer cases fit readily into the “hub and spoke” analysis. In *JJB Sports v OFT* in the CAT, the Tribunal held that it was not necessary to find whether there was one overall agreement or a series of interlocking agreements or concerted practice between the supplier Umbro and each of the retailers concerned: *JJB*, *supra* n.137, at paragraph 656. In *Pioneer Hifi Equipment* [1980] OJ L 60/21, the European Commission found that arrangements orchestrated by the Japanese producer to protect the high prices of MDF, the French exclusive distributor, from parallel imports from Germany and the UK involved two separate concerted practices between Pioneer, MDF and the respective UK and German exclusive distributors.

¹⁴¹ Grand Jury Manual, *supra* n 130, chapter seven, page 28.

¹⁴² Grand Jury Manual, chapter seven, page 28; see e.g. *US v Chagra*, 653 F.2d 26,29 (1st Cir 1981); *US v Tercero*, 580 F2d 312, 315 (8th Cir 1978); Note, “Single v multiple” criminal conspiracies”, *Minn. L. Rev.*, *supra* n 127, 310-317.

¹⁴³ Grand Jury Manual, *supra* n 130, chapter seven, page 28.

¹⁴⁴ 317 US 49 (1942).

¹⁴⁵ 317 US at 54.

objects of the agreement might have been.”¹⁴⁶ Where the terms and scope of the conspiracy agreement are known, the number of agreements determines the number of conspiracies. But like the EC single infringement analysis in *Anic*, the Braverman approach on its own is circular. It presupposes there is one conspiracy.¹⁴⁷ Of course the more that is known of the facts, the more material there is to inform the decision how many agreements there are. Cartels however thrive on secrecy, internally as well as towards the outside world. Not all members may be fully in the loop:

“The key is the scope of the agreement. However this is not agreement in a subjective, contract sense of the word, for this would often result in extremely narrow conspiracies. If the general contours of a conspiracy are known, all those that interact with any other conspirators in such a way as to further the goals of the conspiracy are parties to the conspiracy and the sum of the interactions becomes the scope of the agreement.”¹⁴⁸

The DoJ’s formulation encapsulates the critical issue neatly enough. Absent a formal document memorialising the agreement, it is the interactions of the parties themselves that define the terms of their agreement. While the scope of what ringleaders agreed may be easy enough to ascertain, the position of peripheral players can be problematic. The success of an overall scheme may depend on spawning sub-conspiracies, but minor players are sometimes just cat’s paws of the core perpetrators. Inside a scheme that covers the whole of the US (or Europe), their role may well be limited to a narrow local arrangement. And the more complex the enterprise is, the more likely it is that there will be a “division of labour.” Here the authorities are faced with a conundrum: the venture will only succeed by virtue of the combined efforts, but the more complex the enterprise, the more plausibly some of the participants could maintain they knew only about their own sub-scheme. On the one hand, participants should not be allowed too easily to assert their ignorance of the larger enterprise, but on the other, membership of the conspiracy should not be too broadly extended to minor players. To make them responsible for the broader scheme of which their actions are a part requires more than a purely structural analysis. Establishing the critical interdependence not only involves determining “whether the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme”;¹⁴⁹ each participant has to understand that this is the case. “Each defendant’s state of mind, and not his mere participation in some branch of the venture is key.”¹⁵⁰ Knowing involvement is a vital component of interdependence. “Put another way, evidence of the individual participants understanding of the interdependence of the co-conspirators’ activities is evidence – often the best evidence – of tacit agreement between the individual and his co-conspirators”.

The DoJ guidance puts it like this in relation to cases where complicated fact patterns make the determination of single v multiple conspiracies tricky. To be able to hold a “fringe player” responsible for the whole venture, there is a two-step inquiry:

“Were the defendants generally aware of the objectives and composition of the larger conspiracy, and was the success of the various parts of the necessary to the success of the whole and vice versa?”¹⁵¹

¹⁴⁶ Grand Jury Manual, *supra* n 130, chapter seven, page 25.

¹⁴⁷ Note, “Single v multiple” criminal conspiracies”, *Minn. L. Rev.*, *supra* n 127, 309.

¹⁴⁸ Grand Jury Manual, *supra* n 130, chapter seven, page 31.

¹⁴⁹ *US v Wilson*, 116 F.3d 1066, 1076 (5th Cir 1997).

¹⁵⁰ *US v Glenn*, 828 F.2d 855, 857-859 (1st Cir 1987); *US v Portela*, 167 F.3d 687 (1st Cir 1999).

¹⁵¹ Grand Jury Manual, *supra* n 130, chapter seven, page 28.

Once the “outer boundaries” of the agreement are thus defined by reference to (a) knowledge and (b) interdependence “that becomes the conspiracy that must be charged; it may not be broken down into numerous lesser conspiracies because it embraced numerous lesser objectives.”¹⁵²

Knowledge does not however have to be perfect. Consolidated Packaging 153 provides an instructive counterweight to protestations of ignorance: “Consolidated...knew enough about the [overall] conspiracy to use it to serve its own purposes when needed...there was interested cooperation with a stake in the venture”.¹⁵⁴ “Known interdependence ... makes it reasonable to speak of a common understanding.”¹⁵⁵

Combining a web of agreements into one overall conspiracy calls not only for a nexus of some kind between the components: the participants should all be stakeholders in the overall venture. To provide a fair and workable test in the EC context, the “interdependence” enquiry mandated by the CFI as the second leg in BASF 156 should itself be refined into a two-stage factual assessment of whether (a) the success of the various parts of the conspiracy is essential to success of the whole and vice versa, and (b) the participants, whatever their various roles, consciously contributed to and “had a stake” in the success of the whole enterprise. Once the outer boundaries of the scope of the agreement to which the parties have subscribed have been drawn by reference to this subjective and objective test, it is appropriate to define that as the infringement. With minor adaptations, the test can be used in any scenario. The key is giving the “totality of the circumstances” test a clear focus on answering the question: what was the scope of the enterprise in which all players had a stake?

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¹⁵² The DOJ Manual explains, “Of course, the overall conspiracy may be broken down into numerous conspiracies so long as no defendant is charged more than once.” If the government charges an overall conspiracy, and the evidence proves two, “variance in proof is harmless unless the defendant’s substantial rights are adversely affected”.

¹⁵³ *US v Consolidated Packaging*, 575 F.2d 117 (7th Cir 1978).

¹⁵⁴ 575 F.2d, at 127; see also *Direct Sales v US*, 319 US 703 (1943).

¹⁵⁵ *US v Glenn*, *supra* n 150, 857-59.

¹⁵⁶ *BASF and UCB v Commission*, *supra* n 10, paras 179-180.