

CONCERTED PRACTICES

SOME RECENT CASES IN EUROPE

Presentation in Santiago, Chile

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CONCERTED PRACTICES SOME RECENT CASES IN EUROPE

Structure of presentation

- ◉ Introductory comments about cartels
- ◉ The meaning of a ‘concerted practice’ in EU law
- ◉ Some recent cases on concerted practices in Europe
- ◉ Conclusion

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INTRODUCTORY COMMENTS

- ◉ There is widespread consensus among the competition authorities of the world today that hard-core cartels must be eradicated
- ◉ See the Supreme Court in *Verizon v Trinko*: cartels are ‘the supreme evil of antitrust’ (2004)
- ◉ See Mario Monti, former European Commissioner for Competition: cartels are ‘cancers on the open market economy’ (2000)

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INTRODUCTORY COMMENTS

- ◉ See the Supreme Court of Chile in *Retail Pharmacies*: ‘the companies involved in this case committed an extremely grave infraction’ (2012)
- ◉ In the European Union the Commission today imposes very large fines on the undertakings involved in cartels: the fines in the last five years amount to €7 040 649 074 (CLP 481 700 000 000)

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INTRODUCTORY COMMENTS

- ◉ In many cartel cases it is reasonably clear that there is an ‘agreement’ between undertakings contrary to, for example, Article 101 TFEU, section 1 Sherman Act or Article 3 Chilean Competition Act
- ◉ Many cartels are well-organised, long-lasting and have elaborate policing and enforcement mechanisms: it is easy to describe these as ‘agreements’
- ◉ But what about more ‘informal’ cases?

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INTRODUCTORY COMMENTS

- ◉ Article 101 TFEU: prohibits agreements, decisions and **concerted practices** that have as their object or effect the restriction of competition
- ◉ Article 3 Chilean Competition Act prohibits ‘express or tacit agreements, or **concerted practices between them**, that confer them market power ...’
- ◉ So what is a **concerted practice**?

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THE MEANING OF A CONCERTED PRACTICE IN EU LAW

- ◉ The classic definition was established by the Court of Justice in the *Dyestuffs* case (1972):
 - ‘a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, **knowingly substitute practical cooperation between them for the risks of competition**’

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THE MEANING OF A CONCERTED PRACTICE IN EU LAW

◉ In the *Sugar Cartel* case (1975) the Court of Justice explained that a cartel could come about by ‘any direct or indirect between ... operators’ that might influence their conduct on the market or disclose how they are likely to behave

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THE MEANING OF A CONCERTED PRACTICE IN EU LAW

◉ Advocate General Reischl stated in *Van Landewyck* (1980) that there is little point in defining the precise point at which an agreement ends and a concerted practice begins: the important point is the distinction between an agreement/concerted practice on the one hand and truly unilateral behaviour on the other

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THE MEANING OF A CONCERTED PRACTICE IN EU LAW

- ◉ The Court of Justice has permitted the Commission to conclude that undertakings were party to an agreement ‘and/or’ a concerted practice: see for example *ANIC* (1999)
- ◉ There can be a concerted practice without a need to demonstrate an actual effect on the market, because there is a presumption that effects will follow: the *Anic* presumption (1999)

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SOME RECENT CASES ON CONCERTED PRACTICES IN EUROPE

T-Mobile (2009, Court of Justice)

- Five mobile telephone operators met on **one** occasion: the main purpose of the meeting was a legitimate one
- During the meeting the operators exchanged information about the rates of remuneration to be paid to sales agents
- That information was sensitive and confidential

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T-Mobile (continued)

- ◉ The Court of Justice concluded that these facts were capable of amounting to a concerted practice by object
- ◉ It was not necessary to prove actual effects because of the *ANIC* presumption
- ◉ It was not necessary for the concerted practice to relate to the final price to be paid by consumers

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SOME RECENT CASES ON CONCERTED PRACTICES IN EUROPE

Loan pricing (2011, UK Office of Fair Trading)

- ◉ The Royal Bank of Scotland provided to Barclays information about the terms on which it provided ‘professional loans’
- ◉ Barclays **did not** provide such information to RBS
- ◉ Barclays blew the whistle to RBS
- ◉ This amounted to a concerted practice that restricted competition by object

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SOME RECENT CASES ON CONCERTED PRACTICES IN EUROPE

Tesco Stores v OFT (UK Competition Appeal Tribunal, 2012)

- ◉ A ‘hub and spoke’ concerted practice in relation to the retail price of cheese
- ◉ The concerted practice came about as a result of **indirect** contact between supermarkets via a common supplier
- ◉ The Competition Appeal Tribunal relied on *Dyestuffs*, *Sugar Cartel* and the *ANIC* presumption

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Tesco Stores v OFT (continued)

◉ Note also paragraph 56 of the judgment: ‘the courts have refrained from seeking to define the concept of a concerted practice with a degree of precision that would artificially restrict the breadth of the concept of a concerted practice’. A concerted practice is a versatile concept’.

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Dole Food Company (General Court, 2013)

- ◉ A concerted practice that restricted competition by object between three banana producers where they exchanged information **bilaterally** on a weekly basis about price-setting factors (Wednesdays) and about the prices that they had actually quoted (Thursdays) over a period of nearly three years

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Dole Food Company (continued)

- ◉ A concerted practice that restricts competition by object can arise where undertakings exchange information if this ‘reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is reduced’ (paragraph 62)
- ◉ The information does not have to relate to final prices to consumers (paragraph 64, citing *T-Mobile*)

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CISAC (General Court, 2013)

- ◉ The European Commission concluded that there was a concerted practice between copyright collecting societies that each would licence performing copyright only to users in their respective territories
- ◉ On appeal the General Court annulled the decision for lack of evidence
- ◉ The Court considered that the parallel behaviour of the collecting societies could be explained other than by reference to a concerted practice

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CONCLUSION

- ◉ In many cases there is no need to resort to the concept of a concerted practice to conclude that competition law is infringed
- ◉ However in some cases it is more appropriate to characterise behaviour as a concerted practice than an agreement
- ◉ The concept does not lend itself to precise legal definition
- ◉ And the concept is a ‘versatile’ one
- ◉ Thank you for your attention!