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CARTEL CASE STUDIES

Case submitted by the European Commission

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DIRECT AND INDIRECT EVIDENCE: THE PVC II CASE

EUROPEAN COMMISSION

1. Introduction

1. The purpose of the present paper is to provide by means of a concrete case example an insight of the European Commission's practice to use indirect evidence in antitrust decisions in order to establish infringements of European competition rules. The analysis will therefore concentrate on a cartel decision issued by the Commission in July 1994 against 12 producers of Polyvinylchloride (PVC), imposing a total fine of 19.25 Million ECU¹. This decision is commonly known as the PVC II decision as it was based on an earlier decision adopted by the Commission in December 1988, imposing fines on 14 PVC producers, which had been annulled by the European Court of Justice in 1994 on technical grounds². The PVC II decision, read in conjunction with the subsequent judgements of the Court of First Instance and the Court of Justice, gives a good example of the combined use of direct and indirect evidence.

2. Summary of the PVC II case

2.1 *The Commission's decision*

2.1.1 *The product*

2. PVC was one of the first bulk thermoplastic products to be developed. It is produced from vinyl chloride monomer (VCM), itself obtained from ethylene and chlorine feedstock. PVC has many important uses in heavy industry and construction as well as varied consumer applications. It can be converted into hard material or - compounded with plasticizers - made into flexible articles, including film. PVC is converted into the various end products by a variety of processes including extrusion, continuous coating, blow moulding and injection. Rigid PVC is mainly used for making pipes and construction materials. Four different types of PVC are produced by various technologies and plant processes.

2.1.2 *The Commission's investigations*

3. The existence of a possible infringement first came to light in late 1983 during investigations concerning another thermoplastic product, polypropylene. Following inspections conducted in the polypropylene sector in October 1983 further investigation visits were made in November 1983 to ICI and Shell, this time on the basis of authorisations specifically relating to a suspected cartel in the PVC sector. Subsequently during 1984 the Commission was obliged to adopt a decision under Article 11(5) of Regulation No 17³ requiring ICI to provide information relating to documents discovered at its premises.

4. In January 1987 the Commission carried out investigations without prior warning at Atochem, Enichem and Solvay. More investigation visits were made later in 1987 to Hüls, Wacker and LVM. The Commission was also obliged to adopt a series of decisions under Article 11(5) following the refusal or failure of a large number of undertakings to provide information. In most cases the undertakings maintained their initial refusal.

5. In March 1988 the Commission initiated a proceeding under Article 3(1) of Regulation No 17 against 14 PVC producers. In April 1988 it sent each of those undertakings a statement of objections. All of the undertakings concerned submitted observations on the statement of objections in June 1988. At the

end of the proceeding the Commission adopted the first PVC Decision in December 1988 finding that an infringement had been committed by 14 undertakings and imposing fines.

6. Following the annulment of this decision by the Court of Justice in June 1994⁴, the Commission adopted a new decision on 27 July 1994 (the “PVC II” decision) in relation to the producers who had been the subject of the original decision, with the exception of Solvay and Norsk Hydro AS⁵.

2.1.3 The Commission’s findings

7. The Commission came to the conclusion that from about the end of 1980 until the end of 1984 the producers of PVC supplying the European Community had been involved in a hard core cartel, which was contrary to Article 85(1) of the EC Treaty (now Article 81(1) of the Treaty), in pursuance of which they held regular secret meetings in order to coordinate their commercial behaviour, plan concerted price initiatives, fix target and/or minimum prices, agree target sales quotas for each producer and monitor the progress of the said collusive arrangements. The infringement extended to all EU Member States and covered virtually all trade in the Community.

8. This decision was addressed to Elf Atochem SA, BASF AG, DSM NV, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij NV, Montedison SpA, Société Artésienne de Vinyl SA, Shell International Chemical Company Ltd and Wacker-Chemie GmbH.

2.2 The Courts’ findings

2.2.1 The Court of First Instance (CFI)

9. Following the appeal of the decision by the addressees of the Commission decision, the Court of First Instance upheld most of the Commission’s findings⁶. In its judgement of 20 April 1999 the CFI reduced duration of involvement of one party to the infringement and reduced the fines imposed on three cartel members by between 265.000 and 950.000 euros. The remainder of the applications were dismissed.

2.2.2 The European Court of Justice (ECJ)

10. Finally, in the judgement of 15 October 2002⁷, the ECJ confirmed the line followed by the Commission in its decision of 27 July 1994 and also clarified a number of procedural questions relating to the re-adoption of decisions annulled on formal grounds. The judgment of the ECJ annulled the CFI judgement in two points. Firstly the ECJ judged that the CFI wrongly dismissed a new plea raised by one party claiming an infringement of its right of access to the Commission file, secondly it found that the CFI failed to respond to a plea raised by the same party concerning the question of power to impose penalties following the Commission’s decision. In all other points the Court of Justice dismissed the appeals.

2.3 Evidence used in the PVC II case

11. In the PVC II decision the Commission based its line of argumentation on a combination of direct and indirect evidence. Consequently not only hard factual evidence was used to prove the existence of a hardcore cartel but also deductions and circumstantial evidence played a decisive role in the argumentation.

2.3.1 Direct evidence

12. In the first place the Commission established an infringement of Article 81 of the EC Treaty relying on direct evidence which had been found in the premises of the involved undertakings. Direct

evidence in this context is understood as any documentary or oral evidence which directly implicates the participants of the cartel.

13. The proofs with the highest direct evidential value in the PVC II case were the following:

- The Commission found two planning documents amounting to a blueprint for the cartel. The first document proposed a new framework of meetings to administer a revised quota system and price fixing scheme, and the second recorded the generally favourable reaction of other producers to this proposal⁸.
- Furthermore various documents found referred to a compensation system for PVC in 1981. For example according to a memorandum found at one undertaking headed “Sharing the Pain” the PVC producers “were able to work on agreed market share for 1981”. The PVC compensation scheme however “only allowed for adjustments if a company's or group of companies” sales fell below 95 % of the “target”⁹.
- Other documentation showed the exchange of information between the PVC producers on their individual sales in each national market between 1980 and 1984¹⁰. This exchange was based on the 1980 planning document, which proposed that the meetings of the producers should cover the exchange of monthly data on sales by each producer in each country. Annual reports for the PVC sector found at one undertaking showed that during the whole period covered by the decision the home producers in certain major national markets had informed each other of the tonnages they had sold in that market.
- Finally a document headed “PVC - First quarter” and relating to 1984 was discovered at the premises of one enterprise. It listed the detailed monthly sales of the individual PVC producers for each of the first four months of the year and compared the achieved percentage market shares of each producer in the first quarter of 1984 with a target share¹¹. This document allowed the producers a comparison with actual performances

2.3.2 *Indirect evidence*

14. To strengthen the decision the Commission relied in some extent on indirect or circumstantial evidence. In this context indirect evidence will be referred to as evidence corroborating the proof of the existence of a cartel by way of deduction, common sense, economic analysis or logic operation. Indirect evidence gains its evidential value only if it is seen in conjunction with other (provable) facts.

15. In this context the Commission’s PVC II decision reads as follows:

- Recital 23: “It is inherent in the nature of the infringement with which the present case is concerned that any decision will to a large extent have to be based upon circumstantial evidence: the existence of the facts constituting the infringement of Article 85 [now Article 81] may in part at least have to be proved by logical deduction from other proven facts.

In the present case besides circumstantial evidence the Commission has also obtained a substantial body of direct documentary proof relating to the facts in issue.”

- Recital 24: “The undertakings have during the administrative procedure attempted to treat each single item of evidence in isolation from the rest; they argue (for example) that there is no evidence that the 1980 plan was ever implemented; that it is not proved that the meetings were concerned with collusive discussions; that price initiatives are not shown to have any

connection with meetings. Allegedly plausible hypotheses are advanced for each item of evidence which (it is argued) is consistent with the non-existence of a cartel or the non-participation of the particular producer concerned. In most cases however the arguments advanced by the undertakings in relation to a particular document find no support in the express terms of the document itself.

The Commission considers that the various items of direct and circumstantial evidence in the present case must be considered together. In particular, the system of regular meetings cannot be divorced from the overall plan proposed in 1980; nor can the price initiatives be isolated from the existence of the meetings, given the clear statement of their purpose in the 1980 ICI plan. Taken in this light, each element of proof reinforces the others with respect to the facts in issue and leads to the conclusion that a market sharing and price fixing cartel was being operated in PVC.”

16. In light of the above the Commission used inter alia the following elements of indirect evidence:

- To prove the operation of a system of regular meetings, conclusions of participation in such meetings were drawn from diary entries of the suspected participants at such meetings.
- Industry-wide price initiatives were used to deduce concerted price schemes. In this regard, the decision reads: *“Price initiatives by the industry are frequently described in the producers’ internal documentation. [...] Given the express intention in the 1980 plan found at ICI to set up meetings to administer such schemes, the Commission is led to the conclusion that the regular meetings were in fact concerned with these subjects.”*¹²
- To further prove the exchange of information and the implementation of concerted pricing actions, the decision refers, on the one hand, to *“the phenomenon of uniform industry price initiatives over the period when the undertakings were regularly meeting.”*¹³
- On the other hand a logical deduction is made from *“the identical price targets introduced by certain producers due to come into effect on the same day.”*¹⁴
- Finally the decision also relied on rumours in the specialist press reports of *“a particular price push or initiative”* and about *“rumours that a meeting of PVC producers had been held in Paris to discuss market discipline, volume control and set new price targets”*¹⁵.

3. The Court’s findings regarding the use of indirect evidence

17. In the appeal to the CFI the parties challenged, on the one hand, the probative value of certain types of document used against them by the Commission and, on the other hand, they accused the Commission of infringing the principles concerning the adducing of evidence¹⁶. More precisely two parties raised the argument that the proof of incriminating facts may not be exclusively based on statements of the accused, or on the statements of other accused undertakings. Concerning this argument the Court laid down in its findings that *“there is no general principle of Community law which prohibits the Commission from using information and documents such as those referred to by the applicants. Secondly, if the applicants’ argument were to be accepted, the Commission’s burden of proving conduct contrary to Articles 85 and 86 of the Treaty [now Articles 81 and 82] would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the Treaty.”*¹⁷

18. Further to that some parties argued that the Commission had infringed the principle of the presumption of innocence and the burden of proof to which it is subject. These parties submitted that

“whatever practical difficulties the Commission might encounter in adducing evidence, the burden of proving an alleged infringement rests with it, as the counterpart to the wide powers of inquiry which are granted to it. [...] For that purpose, the Commission cannot restrict itself to assertions, suppositions or inferences. It must refer to serious, precise and consistent evidence. [...] Moreover, there must be a direct causal link between the facts and the conclusions that are drawn from them, which must be reasonably and objectively free of doubt.”¹⁸

19. Consequently the parties argued that “the undertakings accused of an infringement of Article 85 of the Treaty must be given the benefit of the doubt. In addition, they do not necessarily have to go so far as to show that the Commission's assertions are wrong, but merely have to show that they are unsafe or insufficiently proven.”¹⁹

20. Regarding the extracts from the trade press the parties submitted that these “could constitute neither evidence nor even an indication of infringement. They were therefore not sufficient to support the Commission's argument.”²⁰

21. In reaction to this, the Commission argued that “the use of indirect evidence is permissible. [...] That was in any case indispensable bearing in mind the growing awareness in European business circles of the scope of competition law. Moreover, items of evidence should be regarded not in isolation but in their entirety [...] and individual items of evidence cannot be divorced from their context.”²¹

22. The CFI rejected the arguments of the parties concerning the adducing of evidence and subscribed to the view of the Commission. Consequently the CFI followed a two step approach in order to scrutinise the use of direct and indirect evidence. In the first step it analysed the reasoning of the Commission, regarding both direct and indirect evidence in conjunction, and concluded if the interpretation of the Commission in the single aspects was convincing. In the second step it put itself in the position of the appealing party and replaced the Commission's interpretation of the evidence with the interpretation presented by the parties.

23. The CFI did not give an opinion on the use of indirect evidence per se and followed, without explicitly mentioning, the view of the Commission, that indirect evidence is an important factor to establish and to corroborate the facts of a cartel case. In all aspects the CFI came to the conclusion, that the interpretations drawn by the Commission were convincing²². The alternative interpretations given by the parties did not convince the CFI, as it followed the Commission's approach to read the indirect and direct evidence in conjunction, which often did not leave any space for an alternative interpretation²³.

24. In paragraph 653 of the judgement, for example, the CFI spells out the following principle: “In the light of a meticulous examination of the numerous documents relating to PVC prices produced by the Commission as appendices to the statement of objections, [...], the Court considers that it has been established, on the evidence adduced by the Commission, that the 'price increases', 'price initiatives' or 'target prices' to which those documents refer did not constitute mere individual decisions taken by each of the producers independently, but were the result of collusion between them.”

25. Regarding the press releases to which the Commission had referred, the CFI states: “Moreover, the excerpts from the trade press annexed by the Commission to the statement of objections confirm those increases on the dates identified by the Commission”²⁴.

26. The judgement also affirms the Commission's view regarding that “for the purposes of assessing the facts in relation to Article 85 of the Treaty, it is not essential for the date, and a fortiori the place, of the meetings between the producers to be established by the Commission.”²⁵

27. The Court of Justice in the PVC II case did not further comment on the questions related to indirect or indirect evidence, stating that “*such an appraisal cannot be reviewed by the Court of Justice, unless the evidence has been distorted.*”²⁶”

4. Conclusions

28. PVC II shows that the Commission has a significant discretion to use various kinds of indirect evidence in its cartel decision in order to establish infringements of competition rules. However the use of indirect evidence remains subject to scrutiny by the European Courts. Both indirect and direct evidence must always be read in conjunction and the benchmark for using indirect evidence should be the exclusion of any logical convincing alternative scenario disproving the interpretation given by the Commission.

NOTES

1. Commission Decision of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 - PVC), Official Journal L 239, 14.09.1994, p. 0014 – 0035
2. Court of Justice, judgment of 15 June 1994 in Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555.
3. Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013, 21.02.1962, p. 0204 – 0211.
4. The ground for the annulment was that the Commission had not complied with a specific article in its own rules of procedure which requires the Decision of the European Commission to be authenticated in the authentic language versions by the signatures of the President and the Secretary-General.
5. The Commission decision of April 1988 in this case remained valid as regards to these two undertakings, because Solvay had not appealed on that decision and the appeal of Norsk Hydro was dismissed by the Court as it had been filed out of time.
6. Judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931.
7. Judgment of the Court of Justice of 15 October 2002 in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV (LVM) and Others v Commission* [2002] ECR I-8618.
8. Commission Decision of 27 July 1994 (IV/31.865 - PVC), Official Journal L 239, 14.09.1994, recital 7.
9. *Idem*, recital 11.
Idem, recitals 15, 16.
11. *Idem*, recital 12.
12. *Idem*, recital 9.
13. *Idem*, recital 23 d).
14. *Idem*, recital 23 e).
15. *Idem*, recitals 18, 19.
16. Court of First Instance, judgment of 20 April 1999 in joined cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others v Commission*, [1999] ECR Page II-00931.
17. *Idem*, Para. 512.

18. *Idem*, 517, 518.
19. *Idem*, Para. 519.
20. *Idem*, Para. 581.
21. *Idem*, Para. 529.
22. *Idem*, Para. 605, 609, 653, 661.
23. *Idem*, Para. 598, 612, 633, 668.
24. *Idem*, Para. 643.
25. *Idem*, Para. 675.
26. *Idem*, Para. 441.