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POLITICS AND PRAGMATISM

TWO VOLUMES

VOLUME ONE

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ABSTRACT

This thesis seeks to undertake a critical investigation of the process and substance of decision-making by the European Commission under Article 85 Treaty of Rome 1957. The study evaluates the Commission's definition and characterisation of antitrust and the impact of this classification on both the nature, scope and use of enforcement powers and defence rights and on fundamental legal principles. The factors influencing this characterisation are considered. Special attention is paid to the effect of political and pragmatic goals on decision-making.

The main body of the research examines, in detail, DGIV's enforcement choices and their impact on defence safeguards with particular reference to whether and how DGIV uses the 'law as a resource' in pursuit of political and pragmatic objectives. The consequences of DGIV's conduct are considered by drawing a criminological analogy between the Commission's enforcement of competition issues and the English criminal process.

Using the evidence amassed, the study then considers whether DGIV's exercise of discretion is legally justified by assessing it against fundamental legal principles, thus disclosing whether DGIV operates a consistent, equitable competition policy. Again, the impact of political and pragmatic aims on the Commission's discretionary choices is examined.

Finally, in order to provide a clearer picture of antitrust enforcement, a broad comparative analysis of the classification and application of antitrust in the US is undertaken.

Overall, the research seeks to contribute to the current debate on the true characterisation of antitrust. The detailed evaluation of the EC's enforcement process should assist in a better understanding of the nature of antitrust and the problems associated with its enforcement. In this respect, by exploring further the issues involved in the developing area of procedural matters, particularly defence rights, the

study seeks to highlight the competing interests at work within the enforcement process, so adding to the debate. The comparative analysis should indicate the breadth of any enforcement problems and may suggest possible solutions. Most importantly, the study seeks to contribute to the debate by making explicit the strong political and pragmatic influences at work within antitrust decision-making and their effect on the characterisation, enforcement, and ultimately, the justiciability of competition issues.

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PREFACE

This research stems from an awareness of the increasing importance of the role of competition law in the regulation of modern commercial activites. The specific focus of the study is the result of the growing significance of procedural issues and other matters relating to the nforcement of antitrust rules and their impact on the development of this area of regulation.

As far as possible, the law is correct to 1 May, 1997, though some amendments to 1 September, 1997 have been possible.

Finally, I would like to express my gratitude to the University of Northumbria for their financial assisstance in the undertaking of this research. In particular, I would like to thank my Director of Studies, Dr.S.Mercer, for her continued support and guidance and Mr.L.Rutherford, until recently, Head of Research in the Law Division, University of Northumbria. My thanks also go to the many other members of staff within the Law Division for their help and encouragement.

CHAPTER ONE

INTRODUCTION

"Yet each man kills the thing he loves,
By each let this be heard.
Some do it with a bitter look,
Some with a flattering word." [1]

A)INTRODUCTION

Any exercise of discretion possesses enormous potential for abuse and the discretion exercised by the European Commission in relation to the application of EC competition law and policy under Article 85 Treaty of Rome 1957 is of particular concern as the Commission occupies a strategic position within the European Community interposed between businessmen, courts and politicians. The Commission's quasi-judicial role requires much of it. Not only must it attempt to preserve competition within the EC whilst doing justice between conflicting parties, it must also meet additional important objectives. Of fundamental concern is the political goal of economic integration. Competition law has been identified as the linchpin of the Single Market. Thus, it is regarded as crucial to the economic and political success of the Single Market that the Commission's decision-making in this area meets the needs of integration [2]. In practice, the Commission is extremely short of resources with which to enforce competition rules and develop policy and is only able to deal with a fraction of the actual competition issues raised [3]. In view of these bureaucratic problems, it is essential that DGIV's decision-making achieves the speedy, cost-effective resolution of competition cases.

B)BACKGROUND TO THE RESEARCH

An examination of the literature on EC competition law reveals trenchant criticism of the application and enforcement of EC competition policy by the Commission and the review, both in terms of the process of decision-making and the actual decision itself, provided by the European Court of Justice (ECJ). The main issues will be reviewed below.

1)Legal Uncertainty

Much criticism of the Commission centres around the lack of legal certainty and confusion engendered by the Commission's practices. In particular, critics have noted that, whilst competition law has far-reaching effects on both national and international contract law, the Commission's failure to articulate clear reasons for its decisions means that it nevertheless remains unclear which practices are pro/anti-competitive [4]. For instance, there is considerable legal uncertainty regarding the difference in constitution between price-fixing/market division cartels, which are vehemently opposed and heavily sanctioned, and restructuring cartels, which despite employing the same strategies as market division cartels, have been given exemption under Article 85(3) Treaty of Rome 1957 on several occasions. Indeed, it is not uncommon for a case to be labelled initially as a crisis cartel by the Commission only to conclude by being sanctioned as a market division cartel and vice versa [5]. Such problems of characterisation necessarily make the advising of clients problematic.

2)Administrative Problems

Many other criticisms revolve around the Commission's bureaucratic problems, particularly, delays in reaching decisions, the use and legal authority of comfort letters, informal settlements and group exemptions. Van Bael, in particular, has criticised the

Commission's use of selective prosecution and informal settlements because of the ambiguity created and the lack of legal safeguards [6]. It appears that these more pragmatic avenues of enforcement neither enhance legal certainty nor assist in resolving administrative difficulties, but rather add to the problem provoking confusion, resentment and a concomitant unwillingness to comply with antitrust provisions. It is on the basis of such criticism that academics and practitioners alike are concerned that eventually this erratic approach will both distort business transactions and result in the undermining contract law itself.

3)Classification of Antitrust and Procedural Issues

A particularly important area of the current debate has centred around the legal characterisation of competition law and procedural matters, reflecting the increase in appeals to the Court of First Instance (CFI) and the ECJ on procedural issues. Some valuable work has been done in these areas by Harding and Green [7].

a)Classification of Antitrust

Both commentators argue that it is vital that the nature of competition law is explicitly characterised, as the difference in classification results in very different consequences and attitudes to the issues involved. Classifying conduct as 'criminal' not only results in the stigmatisation of the offender but, more importantly, it results in an insistence that there is adequate legal protection for those subject to criminal proceedings [8]. Conversely, by classifying antitrust transgressions as 'administrative', the procedure is regarded as more informal, resulting in less stigmatisation of the violator. However, within administrative proceedings defence rights are seen as much less important. Several recent cases relating to the European Convention on Human Rights (ECHR) are relevant. Most importantly, *Societe Stenuit v France*_addressed the issue of the characterisation of competition law. Here, the Commission held that, regardless of the nominal classification of the law, it is the nature of the offence and the severity of the

sanctions imposed which determine the true characterisation of the law. In consequence, the Commission decided that a claim of anti-competitive conduct amounted to a criminal charge [9]. This focus on the penal nature of sanctions has been reiterated, most recently, by Advocate-General (AG) Darmon in *Woodpulp II* [10]. In the light of such cases, commentators [11] argue that, the seriousness of the conduct being investigated, the intrusive nature of the investigation and the penal character of the sanctions all suggest that EC competition law is criminal, or at least quasi-criminal, in nature and consequently, that the procedural and evidential rules employed in the enforcement process should reflect the criminal nature of antitrust.

In this context, Harding has drawn an analogy between the national enforcement of criminal law and the supra-national enforcement of competition cases by the Commission, with particular emphasis on the balance between the Commission's powers of regulation and the protection afforded to infringing firms. He has questioned whether a repressive, criminal framework is an appropriate method of regulating competition, given that economic regulation is generally regarded as morally neutral. More specifically, he asks whether blunt criminal sanctions are a sufficiently sensitive method of controlling complex economic business situations like crisis cartels. He goes on to argue that the criminal law may not be an effective means of control as, thus far, there is no evidence to show that the punitive level of fines has deterred potential offenders or has stigmatised those fined and resulted in censure from competitors or consumers. Finally, on the issue of the classification of antitrust, he argues that the important question is whether the legal characterisation of antitrust violations should have any bearing on the degree of protection afforded to violators.

b)Procedural Matters

With regard to procedural issues, Green has examined briefly the rules of evidence in relation to the criminal nature of antitrust, particularly whether a clear burden and standard of proof exist. He concludes that, at present, no such coherent body of evidential rules exists and he has called on the CFI to rectify this.

Other commentators have focused on procedural issues relating to DGIV's investigative powers [12] and on defence rights during the course of the enforcement process [13]. Some have concluded that, in the light of the ECHR cases mentioned above and their classification of antitrust, the scope of respective defence rights and enforcement powers in the EC requires review [14].

A related avenue of research has highlighted the need to make competition law more 'user-friendly' thereby commanding the respect of all those involved. Here, both Goyder and Wood [15] have identified certain qualities which they believe such a system should possess [16].

4)Review of Competition Issues

A further area of criticism is that the Commission's erratic approach to competition enforcement is exacerbated by the ECJ's attitude to review. Indeed, there are serious doubts as to whether the ECJ's powers of review balance out the Commission's monlithic discretion [17]. Whilst the ECJ have been prepared to judicially review Commission decision-making and reduce fines, they have regularly refused to undertake any economic review, leaving large areas of Commission decision-making untouched. Moreover, there are important areas where the ECJ may be powerless to act. The informal resolution of infringements may well not be suceptible to review, yet the vast majority of cases are settled in precisely this manner [18]. Furthermore, Commission impartiality may be threatened by its private consultations with the Advisory Committee on Restrictive Practices and Monopolies. This may result in political bias, yet such bias would be virtually imposssible to substantiate, and its influence could not be reviewed by the courts [19].

Even where the Court do undertake review, it is far from thorough. For instance, DGIV's investigatory powers are limited to what is strictly "necessary" [20] and are governed by the principle of proportionality. But, in several cases, the Court have simply upheld the Commission's discretion to decide what is necessary [21]. Not surprisingly, the ECJ have never found the Commmission to have violated the

principles of necessity or proportionality in this area. In contrast, the CFI's attitude to review has been refreshing. In several recent cases, they have shown considerable willingness to audit incisively DGIV's evaluations and to require a greater degree of procedural integrity in EC competition enforcement [22].

5)Justiciability

A final area of discussion focuses on the justiciability of competition issues and the problems involved in deciding what sort of legal control over competition matters is both desirable and realistically achievable [23]. Whilst it is widely accepted that today's complex industrial society needs some form of control upon market power, many difficulties exist. At the outset, it is essential to appreciate that competition is a highly complex, dynamic and amorphous concept. This raises the initial question of whether something as rigid as legal rules are capable of providing consistent, equitable control over something as fluid as the concept of competition. Moreover, in formulating effective antitrust regulation, decisions must be made relating to the most appropriate type and extent of control and the apparatus for implementation [24]. The choices made here are important ones. They impinge directly on the effectiveness of the control and thus the justiciability of the issues involved [25]. But, such decisions are far from easy as any antitrust supervision must strike a balance between the need for certainty within the law, so that firms know where they stand, and flexibility, so that the law can adapt to the changing economic and political circumstances of competition. The potential for conflict between these two requirements means that each type of control possess its own drawbacks and difficulties.

The initial problem faced in this struggle is in drafting legislation which covers all possible contingencies without becoming completely incomprehensible. Broad definitions will provide flexibility alone, whilst pigeonholing antitrust practices as legal/illegal will give only certainty. The format of control also poses problems. Formalistic, interventionist, judicial control may well provide certainty, but it may not allow the necessary degree of flexibility to cope with the complex demands of

competition in practice. Moreover, an interventionist policy may be politically difficult to sustain. Conversely, a pragmatic, non-interventionist, administrative approach will give flexibility, possibly too much, leading to uncertainty and delays. Such problems in approach raise the very real possibility that any attempt to adjudicate competition matters will create so many difficulties that the justiciability of the issues involved is undermined [26].

Further problems in drafting and application exist. Competition does not have a single clear meaning, nor does economic efficiency. Despite this lack of consensus, any antitrust control would need to define both [27]. Similarly, antitrust policy must address the role and weight of non-economic considerations in decision-making, particularly political goals. Economic opinion is again divided. Yet, the role of non-economic values is a vital one as their influence directly affects the consistency, and therefore success, of antitrust enforcement [28].

Numerous other problems exist. Concerns have been raised over who should decide what is the right type and amount of competition. Whoever this task falls to wields considerable political and economic power, making it essential that such discretion is fully accountable. In addition, competition issues are highly technical, subjective matters and it is argued that a competition authority comprising judges or civil servants may be ill-equipped to undertake such analysis. Indeed, there are inherent problems in deciding how to measure whether the right type and amount of competition has been achieved [29].

A final problem relating to justiciability is the potential for abuse of antitrust rules. Research suggests that many firms employ such rules to injure rivals and so protect themselves from competition. Moreover, there is some indication that competition authorities acquiesce, or even collude with business, in this subversion of legal control. Such conduct necessarily threatens the legal basis of antitrust [30].

Given all these difficulties, formulating an appropriate means of antitrust control is clearly problematic. The inability of economists and lawyers to agree on the definition, aims and most appropriate enforcement method of competition serves only to exacerbate matters. Ultimately, the existence of so many conflicting imponderables

begs the question of whether competition issues are fully justiciable. At this stage, it is not possible to reach any firm conclusions. However, this issue will be returned to in the final chapter following the examination of current antitrust enforcement in the EC and US. This assessment should enable a more informed opinion on the justiciability of competition and on the most appropriate form of legal control to be reached [31].

C)METHODOLOGY

1)Aims of the Research

In view of the enormity of the Commission's task and the breadth of the criticisms noted above, the main aim of this study is to undertake a critical investigation of the process and substance of Commission decision-making under Article 85 Treaty of Rome 1957 [32]. In order to evaluate the Commission's exercise of discretion and to reflect and contribute to the present debate on the characterisation of antitrust, it is intended to examine DGIV's classification and application of competition rules and policy by considering :

a)DGIV's definition and characterisation of antitrust offences ;

b)the effect of this classification on the nature, scope and use of both DGIV's enforcement powers and defence rights ;

c)the impact of these enforcement choices on fundamental legal principles.

In so doing, the study will consider the factors influencing this characterisation. Specific attention will be paid to the impact of political and pragmatic goals on the above aspects of decision-making. In addition, the discussion will seek to identify which agreements are pro/anti-competitive and whether the Commission's approach varies within/between types of agreement.

2)Main Arguments of the Research

Given the trenchant criticism and the overwhelming impression of confusion and uncertainty regarding EC competition law, the central argument of the research is that the application of competition law by the Commission is not dynamic, as traditionalists would argue, but contradictory. The reason for this is the Commission's exclusive focus on political and pragmatic goals [33]. The research aims to demonstrate that political and pragmatic objectives impact upon all aspects of decision-making. Not only do they control DGIV's classification of offences and the nature, scope and use of enforcement powers and defence rights, but these objectives also drive and justify the Commission's manipulation of the law. However, it will be asserted that, as political and economic circumstances are in constant flux, DGIV's current political and pragmatic goals are an extremely volatile focus for competition policy. Their nature means that, in order to achieve their desired ends, these twin policy factors impact upon similar agreements in very different ways, often with controversial results [34]. Clearly, DGIV's pursuit of such a policy must be a direct cause of the present uncertainty. Indeed, the research aims to show that the Commission's discretion is distorted, in that the paramouncy of the integration goal, as enunciated by Articles 2 and 3(g) Treaty of Rome 1957, conflicts with Article 85, compromising the Commission's independence by leaving it insufficiently distanced from the political forum whilst rendering it largely unaccountable. More importantly, Article 3(g)'s focus on integration means that, whenever necessary, due process, substantive soundness and even the 'rule of law' [35] are sacrificed to achieve the 'higher' goal of market integration. If this present approach to EC competition law is pursued to its ultimate conclusion, the very aim of achieving economic integration will eventually ensure the disintegration of the Single Market, by undermining the juridical basis of EC competition law in particular and Community law in general.

Consequently, the main theme of the investigation will be an examination of the effect of DGIV's political and pragmatic goals on both the classification and application of competition law and policy and essential 'rule of law' principles. At the

outset, it is acknowledged that various competing opinions exist explaining the Commission's current approach to competition policy. However, it is intended to examine the situation from the viewpoint outlined above. So, whilst it is conceded that contrary arguments subsist, it is not the intention of this thesis to consider thoroughly all possible explanations for DGIV's exercise of discretion, though to maintain a degree of balance, some discussion of competing interpretations will occur where appropriate. Instead, it is proposed to concentrate on evidence supporting the above hypothesis in order to explore fully this theory as a possible explanation for the Commission's conduct of competition cases.

3)Analytical Approach

The study will be laid out in the following order. First, to enable an understanding of the issues involved, the goals of EC and US competition policy will be examined, considering what guidance is available for its application in these jurisdictions. As "a lawyer who has not studied economics....is very apt to become a public enemy" [36], an awareness of the economic background to competition law is assumed. Then, the main body of the study will analyse, in detail, DGIV's exercise of discretion in deciding whether and how to apply Art.85 to both horizontal and vertical arrangements. In order to understand and evaluate the Commission's behaviour, an analysis of DGIV's characterisation of violations and the effect of this classification on both the nature, scope and use of enforcement powers and defence rights is required. But, as debate exists over the true nature of antitrust, it is proposed to examine DGIV's activities from both criminal and administrative perspectives. Thus, the overall analytical format within the main body of the research comprises several layers :

a)First, a criminal/criminological evaluation of DGIV's approach will be undertaken.

b)Then, the 'rule of law' analysis will address the issue of accountability, in terms of DGIV's adherence to 'rule of law' principles.

c)Finally, in order to provide a clearer picture of the realities of antitrust enforcement, a comparative analysis of the classification and application of competition law in the US will be undertaken.

Overall, it is anticipated that this approach to analysis will clarify the issues involved and reveal whether the Commission operates a consistent, equitable competition policy. In addition, the research should contribute to an assessment of the true characterisation of antitrust and the justiciability of competition issues. The ensuing sections discuss each of these analytical layers more fully.

a)Criminal/Criminological Evaluation

As the Commission acts as police, prosecutor and judge in competition cases and as many of its decisions are similar to the pre-trial decisions made within the criminal justice system, this first layer of analysis evaluates the Commission's discretion from a criminal/criminological viewpoint. This examination argues from the perspective that antitrust is criminal and so discusses DGIV's decision-making under the criminal justice stages of investigation, prosecution and trial and sentence. Overall, this layer of the analysis seeks to establish how and why the Commission characterises antitrust and the impact of this on both enforcement powers and defence rights, thereby shedding light on the true nature of antitrust.

This criminal/criminological evaluation comprises two parts. The first part is an evaluation of the process and substance of Commission decision-making combined with a 'law as a resource' analysis. The second element is a criminological analogy. These will be explained further below.

i)Process and Substance /'Law as a Resource' Analysis

This section comprises the main element of the research. It intends to critically investigate the process and substance of DGIV's decision-making by considering how and why the Commission exercises its discretion in applying Art.85. Particular attention will be paid to an evaluation of the criminal characteristics of antitrust by

examining DGIV's classification of offences and the effect of this on enforcement. In order to establish whether antitrust is criminal in nature, it is intended to examine whether, and to what extent, certain characteristics normally associated with the criminal law are present in the antitrust context. Principally, the criminal law is characterised by the breadth of its enforcement powers, the separation of investigation, prosecution and trial decisions and adequate defence rights sufficient to counter-balance the intrusive nature of the law. Thus, this element of the discussion will examine DGIV's classification of violations, the factors influencing that characterisation and the scope and use of enforcement powers and defence rights for evidence of these 'criminal' characteristics. In this latter respect, the existence and scope of due process protections like the right to silence, the right to comment and the presumption of innocence will be considered, allowing their practical value to be assessed.

It will be argued here that antitrust is essentially penal in nature but that the Commission's monolithic role substantially offends against defendants' due process rights as the punitive nature of antitrust is not sufficiently balanced by due process protections.

Combined with this assessment of the nature of EC antitrust, the process and substance of DGIV's decision-making will be scrutinised further by asking why the Commission has chosen to act in this particular way. This element of the evaluation focuses on the factors influencing DGIV's choices, the inherent malleability of legal rules and DGIV's consequent use of the 'law as a resource' in its application of competition law [37]. In particular, this aspect of the discussion concentrates on the impact of political and pragmatic goals on decision-making. It will be argued that the need to achieve these goals dominates enforcement and drives DGIV's manipulation of the law with considerable impact on the characterisation and ambit of enforcememt powers and defence rights, the manner of enforcement and the eventual outcome of cases.

The Commission's use of the 'law as a resource' will be examined at both substantive and procedural levels. At a substantive level, it will be demonstrated that

this exploitation of legal rules allows DGIV to determine the classification of the offence. As a result, DGIV is able to control the construction of the case, in terms of the interpretation and definition of relevant legal issues, the choice and weight of influencing factors, the depth of analysis and the quality and quantity of evidence required to prove an offence. Similarly, the Commission's manipulation of procedural law will be investigated. This will enable an assessment of the value of existing defence protections to be made. It will be argued that DGIV is able to dictate both the characterisation and scope of enforcement powers and defence rights. Issues such as the burden and standard of proof will be examined noting their role in the Commission's exploitation of legal rules. The research will demonstrate that both defence rights and evidential rules are disregarded, abused or modified wherever necessary to achieve the Commission's desired outcome. In particular, it will be seen that the requirements of pragmatism provoke an increase in informal settlements with a concomitant loss of due process protections.

The study intends to demonstrate that DGIV's use of the 'law as a resource' is incremental. Under this appproach, every action and decision is interpreted and employed to facilitate and/or justify the next step in the process and the eventual attainment of political and pragmatic goals. Ultimately, DGIV's choices secure the conviction and punishment of all conduct threatening these objectives. The Commission's monolithic discretion and the intrinsic flexibility of the law make this manipulation a relatively simple task. However, it will be asserted that the nature of these political and pragmatic goals means that this exploitation of the law results in arbitrary enforcement. The resulting inconsistency of decision-making, neither achieves economic integration, solves administrative problems nor encourages compliance ; it merely results in inequality and uncertainty. Of course, any exercise of discretion permits some selection from a range of choices, and some political influence in antitrust is inevitable, but, the assertion here is that the Commission's selection is arbitrary, with both law and economics being used as resources to accomplish essentially political strategies and endow them with credibility and legitimacy.

ii)Criminological Analogy

The next step in the evaluation of the Commission's activities is to draw a criminological analogy. Overall, this assessment aims to examine the extent of any similarities between criminal and competition law and to allow the problems and consequences ensuing from the criminal nature of antitrust to be evaluated. In particular, it will assess DGIV's use of the 'law as a resource' against existing criminological research on the operation of the criminal justice system, specifically, the effect of this same 'law as a resource' phenomenon within the justice system. Again, it is readily accepted that contrary viewpoints exist on the current state of the criminal process. Limitations of space mean that they cannot all be considered thoroughly, Instead, in order to follow through the ideas and arguments explored in the main examination of DGIV's approach, it is intended to focus on research evidence which demonstrates the possible consequences of such a use of the law. Whilst such research may form only one view of the process, it does represent the opinion of many leading academics [38].

Here, comparison can be drawn between the criminal process and its powers of questioning, search and seizure and confessions and the Commission's selective use of its investigatory powers, dawn raids and the duty to give information. Similarly, plea-bargaining can be compared with informal settlements, and the requirements of natural justice and the rules of evidence can be set against the Commission's monolithic role.

It may be that, like some criminological research on the justice system, this study will reveal that within antitrust, formal equality is invariably achieved at the expense of substantive fairness. So, just as this criminological research has questioned the validity and propriety of pre-trial decision-making in the justice system and has shown that here both substantive and procedural rules are used, not for the defendant's protection, but as resources to secure conviction, so too, within antitrust, the research may discover that due process has been used for crime control and that the defendant's protections are equally inadequate [39]. If so, it will be possible to conclude that just as this use of the 'law as a resource' has provoked enormous

criticism of, and disrespect for, criminal justice, so too may competition regulation result in widespread non-compliance, if this present method of enforcement continues to be pursued.

Later, the research will question to what extent any problems resulting from the 'law as a resource' exercise are directly attributable to the possibly unsuitable nature of the criminal law as a method of economic regulation. Here the questions raised by Harding on this subject will be addressed [40].

This analytical approach will provide an extension of Harding's work by undertaking a deeper criminological analogy and by a fuller discussion of the problems associated with the penal nature of antitrust. Moreover, it is hoped that a clearer picture of the scale of enforcement difficulties will be obtained by conducting a more specific case study of the enforcement process than undertaken by Harding. In addition, Green's work will be developed throughout the main element of the analysis [41]. His research will be augmented by examining the existence and scope of evidential rules and their part in the 'law as a resource' manipulation within the context of different types of agreement. Finally, the criminological analogy will supplement the work done by both Green and Harding by disclosing whether the classification of antitrust has a substantial effect on the value of the defendant's due process protections.

b)Rule of Law Analysis

Under this second layer of analysis, antitrust is nominally classified as 'administrative' and the evidence already amassed will be used to consider whether the Commission's exercise of discretion is legally justified by subjecting it to an administrative evaluation under a 'rule of law' analysis. This assessment should disclose whether the Commission operates a consistent, equitable competition policy.

By evaluating DGIV's behaviour against established 'rule of law' principles, this assessment will examine whether the Commission's use of 'law as a resource' complements or conflicts with the 'rule of law' [42]. This element of the research

develops both Goyder and Wood's [43] research by evaluating DGIV's behaviour against the qualities suggested by these commentators to see whether the Commission operates a 'user-friendly' system.

This evaluation will consider whether the twin objectives of 'politics and pragmatism' compromise DGIV's discretion and lead to a failure to respect basic legal principles resulting in a response which is not dynamic but inconsistent. Of course, the need for flexibility necessarily means some loss of consistency, but nevertheless, despite any superficial inconsistencies, Commission decision-making should adhere to those underlying legal principles. Without such adherence, there can be no consistency and no equity ; merely a wilderness of single instances.

Finally, if this appraisal of Commission discretion does reveal problems relating to the political and pragmatic nature of antitrust, it may be necessary to accept that competition is not a fully justiciable subject, in that, the application of legal principles is an inadequate, and possibly unfair, means of antitrust decision-making.

c)Comparative Analysis

In order to provide a broader picture of the realities of antitrust enforcement, this final layer of analysis will compare and contrast the Commission's approach to that of the US jurisdiction. This section will provide an overview of the process and substance of US antitrust enforcement, specifically, how it classifies antitrust and how this affects both the nature and use of enforcement powers and the ambit of defence rights. By broadly subjecting this jurisdiction to the same 'law as a resource' format of analysis, the research will attempt to demonstrate any similarities or differences in the approaches of the Commission and US competition authorities towards the classification and application of competition law and indicate any prevailing policy reasons for any variability of approach. Specific consideration will be given to the extent, scope and effect of political and pragmatic goals on enforcement in the US.

The comparative analysis of the US should provide several benefits. The US have operated a full criminal antitrust policy for over a century and there is

considerable critical enthusiasm for antitrust in this jurisdiction. The overtly criminal antitrust policy of the US provides the opportunity to identify whether any common ground exists betweeen the EC and US regarding the characterisation and application of antitrust and to examine whether US substantive and procedural rules reflect the penal nature of US antitrust. It also allows consideration of the effectiveness of these rules through an assessment of whether and how the law is used as resource to secure the defendant's conviction. Consequently, an understanding of US antitrust is invaluable to an understanding of competition law in general and the nexus between the characterisation of antitrust and the use of enforcement powers in particular. Moreover, in discussing the problems associated with the criminal nature of the law, comparison with the US should prove helpful as, within the US jurisdiction, it is possible to examine the perceived advantages/disadvantages of such a policy, particularly those of a long-term nature.

Overall, the comparative analysis should prove highly informative to both a discussion of the true nature and justiciability of competition, as well as suggesting beneficial features which the EC might profitably adopt to enhance its antitrust enforcement.

The idea behind using several layers of analysis and assessing the Commission's activities against both criminological research and rule of law principles is that this will not only reveal whether any political influence exists, but more pertinently, it will demonstrate that, regardless of whether antitrust is classified as criminal or administrative in nature, the Commission's exercise of discretion is flawed.

4)Sources of Information

In order to obtain detailed evidence of the Commission's classification of antitrust offences, its use of enforcement powers and the effect on the existence and scope of defence rights, it is intended to conduct a limited case study of horizontal and vertical agreements. Using 1980 as a cut off point, approximately thirty cases have been

selected in each of these categories [44]. The chosen cases form a representative selection covering the main activities of the Commission during this period. Any cases omitted are so similar to those chosen that nothing should be lost by their ommission. Thus, it should be possible to extract some broad numerical conclusions from the cases studied, though the main thrust of the evaluation is a close analysis of the cases rather than a statistical survey. The selected cases have been analysed thoroughly and information regarding the respective parties' arguments and the approach of the Commission and Court to decision-making has been extracted from them. In addition, these cases form the exclusive source of data regarding the contents of the SO and DGIV's other enforcement decisions. Whilst the selected cases will form the basis of the examination of the Commission's enforcement of competition rules, other cases may be mentioned in support. In addition, Commission Annual Reports on Competition Policy, critiques of competition law and other research evidence will be used to substantiate findings.

Within the horizontal agreements section, the case study will comprise market division/price-fixing cases and crisis cartels [45]. The former will provide information on the Commission's general approach to horizontal cartels, whilst the latter, which will be dealt with under the Art.85(3) exemption of horizontal cartels, will allow examination of an alternative approach to the regulation of horizontal agreements by DGIV. The restructuring cartels listed comprise all such cartels dealt with recently by the Commission. Thus, any numerical data derived from this element of the study will be complete.

A similar approach willl be taken in the examination of vertical arrangements. Within this category, it is intended to concentrate on exclusive and selective distribution arrangements as there has been considerable Commission activity in this area recently, thus allowing an evaluation of the Commission's typical approach to vertical agreements. Again, as broad a range of formally prosecuted and negatively cleared cases as possible has been selected, including all recent major cases. All vertical agreements granted individual exemption will be examined, again providing scope for a full analysis of DGIV's decision-making in this area.

With regard to data sources for the comparative analysis, limitations of space mean that it is not possible to undertake a thorough case study of the US jurisdiction. Thus, information will be derived from a general study of its caselaw, critiques, goverment reports and other research into competition law in this system. This should allow sufficient information to be obtained to enable the process and substance of decision-making in the US to be compared and contrasted with that of the EC.

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1 Oscar Wilde *The Ballad of Reading Goal.*

2 Much literature the European Union/EC discusses the importance of competition law to the achievement of economic integration and the need for the Commission to tailor its decision-making accordingly. See eg : Owens and Dynes *The Times Guide To 1992* Times Books Ltd (1990) at pp 126-127 ; Dudley *Strategies For The Single Market* Kogan Page (1990) at p 32 ; Roney *The European Community Fact Book* Kogan Page (1991) at pp 90-95 ; Whish *Competition Law* Butterworths (1993) at p 29.

3 For instance in 1990, the Commission had 2,734 outstanding cases but only took 15 substantive decisions that year. In addition, a further 868 cases were informally resolved by various means. In 1991, 2,287 cases were pending, 13 substantive decisions were taken and 822 cases were informally resolved. In 1992, 1,562 cases were outstanding, 20 substantive decisions were made and 729 cases were resolved. See 20th, 21st, 22nd Reports on Competition Policy 1990, 1991, 1992 at points 91, 73 and 126 respectively. See Appendix B, Table 8 for further information. The Commission's administrative problems will be explained further in this chapter and their consequences examined throughout the course of the study.

4 The continuing and continuous nature of this criticism is evidenced in a wealth of literature over the last decade or more. See in particular, Korah *Competition Law in Britain and the Common Market* Martinus Nijhoff (1982a) ; Green *Commercial Agreements and Competition Law : Practice and Procedure in UK and EEC* Graham and Trotman (1986) and Whish *Competition Law.*

5 Eg *LdPE* [1990] 4 CMLR 382 ; *PVC* [1990] 4 CMLR 345 ; *BPCL/ICI* [1985] 2 CMLR 330 ; *Synthetic Fibres* [1985] 1 CMLR 787.

6 See Van Bael 'The Antitrust Settlement Procedure of the EC Commission' *CMLR* [1986] 61 ; Van Bael 'Transparency of EC Commission Proceedings' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 192 ; Waelbroeck 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards : Is Regulation 17 Falling into Abeyance?' *ELR* [1986] 268.

7 See particularly, Harding *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) ; Green 'Evidence and Proof in EC Competition Cases' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 127.

[8] The importance of this guarantee of proper defence rights is reflected in Art.6 of the European Convention on Human Rights which seeks to ensure the fair treatment of those subject to criminal proceedings.

[9] See *Societe Stenuit v France* (1992) 14 EHRR 509 at paras 62-64, hereafter referred to as *Stenuit*. See also *Ozturk* (1984) 6 EHRR 409 at paras 48-50 and *Engel* 8/6/76 Series A No.22 at para 82. Other ECHR cases are relevant : *Deweer* 27/2/80 Series A No.35 at para 46, which held that there can be a 'criminal charge' even where a person has not been arrested or charged ; *Church X/UK* 17/12/68 and *Dombo Beheer BV / The Netherland* 27/10/93 Series A No.274, both held that the protection afforded under Art.6 ECHR applies to natural and legal persons. These issues are discussed further by Green 'Evidence and Proof in EC Competition Cases' ; Vaughan 'Access to the File and Confidentiality' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 169 ; Van Overbeck 'The Right to Remain Silent in Competition Investigations : The Funke Decision of the ECHR Makes Revision of the ECJ's Caselaw Necessary' *ECLR* [1994] 127. These cases and their implications for EC competition law will be examined further in the course of the study.

[10] *Woodpulp II* [1993] 4 CMLR 407 at p 539. See also comments by AG Vesterdorf in *Hercules* [1992] 84 at pp 100-101.

[11] See particularly, Harding *EC Investigations and Sanctions* at pp 68-91, 128-143 ; Green 'Evidence and Proof in EC Competition Cases' at pp 128-130 ; Vaughan 'Access to the File and Confidentiality' at p 169 ; Van Overbeck 'The Right to Remain Silent in Competition Investigations'.

[12] Particularly the legality of dawn raids, the duty to give information and the right to silence.

[13] See here, eg Joshua 'The Element of Surprise : EEC Competition Investigations under Art.14(3) of Reg.17' *ELR* [1983] 3 ; Joshua 'Information in EEC Competition Law Procedures' *ELR* [1986] 409 ; Korah 'Inspections under EC Competition Rules : Dangers of Voluntary Submissions' *BLR* [1983] 23 ; Williams 'The European Commission and the "right to silence"' *SJ* [1989] 938 ; Vaughan 'Access to the File and Confidentiality' ; Van Overbeek 'The Right to Remain Silent in Competition Investigations' ; Doherty 'Playing Poker with the Commission : Rights of Access to the Commission's File in Competition Cases' *ECLR* [1994] 8

[14] See comments by Doherty 'Playing Poker with the Commission'; Van Overbeek 'The Right to Remain Silent in Competition Investigations' ; Vaughan 'Access to the File and Confidentiality'.

[15] Goyder 'User Friendly Competition Law' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 1 and Wood 'User Friendly Competition Law in the United States' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 6.

[16] In particular, these include transparency, fair procedure, efficiency and consistency and substantive soundness. These elements will be discussed further in the discussion of the 'rule of law' analysis infra.

[17] What Coppel in 'Curbing the Ruling Passion : A New Force for Judicial Review in the European Communities' *ECLR* [1992] 143 at p 143, refers to as a "democracy deficit". Van Bael in 'The Antitrust Settlement Procedure of the EC Commission' at p 68, argues that the Commission has claimed for itself unlimited discretion in settling and prosecuting cases. This width of discretion is discussed by Temple Lang, a Commission official, in 'Community Antitrust Law - Compliance and Enforcement' *CMLR* [1981] 335 at p 352.

[18] In fact 96% of cases are settled informally. This information has been extracted from Commission Annual Reports on Competition Policy 1976-1984. Informal resolutions cover comfort letters and the negotiated settlement of more complex cases. In such cases, the Commission either simply closes its file or suspends proceedings in return for undertakings by a firm. As such informal action is not a formal decision nor an "act" within the terms of Art.173

Treaty of Rome 1957, it is not susceptible to challenge under that Article. However, as DGIV has taken some form of action, it cannot be challenged for a failure to act under Art.175 Treaty of Rome 1957. For further discussion of these issues see Green *Commercial Agreements and Competition Law* at pp 304-305 ; Waelbroeck 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards' ; Harding *EC Investigations and Sanctions* ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' ; Korah 'Comfort Letters - Reflections on the Perfume Cases' *ELR* [1981] 14.

[19] See particularly, House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at pp x, 5-6, 17-18, 25, 52-53, 67 and House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at pp 18-24, where widespread criticism was voiced by many witnesses in their evidence before these Committees.

[20] Art.14(1) Reg.17/62. The necessity principle has been upheld on a number of occasions, eg *Orkem v Commission* [1989] ECR 3283 ; *National Panasonic v Commission* [1980] ECR 2033.

[21] See *Orkem v Commission* [1989] ECR 3283 ; *National Panasonic v Commission* [1980] ECR 2033.

[22] See particularly, the rulings in *SIV* [1992] ECR 1403 ; *Hercules* [1992] 4 CMLR 84 and *Cement* [1995] 4 CMLR 327. In this context, the ECJ's recent attitude to review, particularly in *Woodpulp II*, has shown a greater willingness to scrutinise DGIV's decision-making. The CFI's impact on the development of procedural issues will be noted during the course of the research.

[23] Whish *Competition Law* at p 16 ; Korah *Competition Law* (1982a) at pp XIX-XXII ; Stevens and Yamey *The Restrictive Practices Court : A Study of the Judicial Process and Economic Policy* Wiedenfeld and Nicolson (1965) Ch3.

[24] For instance, choices must be made as to whether the legislation will be formalistic or pragmatic in approach, interventionist or non-interventionist, and whether the process will be judicial or administrative, adversarial or inquisitorial.

[25] R.Baldwin in 'Why Rules Don't Work' *MLR* [1990] 321, discusses the nexus between rule type and enforcement strategy and the effect of such choices on the overall effectiveness of enforcement.

[26] Whish *Competition Law* at p 20 ; Korah *Introductory Guide to EEC Competition Law and Practice* ESC Publishing (1986a) at p 6 ; Korah *Competition Law* (1982a) at pp XXII, 284 ; Green, Hartley and Usher *The Legal Foundations of the Single Market* Oxford Univ. Press (1991) at p 198 ; Hay 'Pigeonholes in Antitrust' *Antitrust Bulletin* [1984] 133, all discuss further the problems involved in finding a suitable means of legal control.

[27] In respect of economic efficiency, it would also need to specify its role in decision-making.

[28] For further on these issues, see Pitofsky 'The Political Content of Antitrust' *Un Penn LR* [1978-79] 1051 at pp 1052, 1060 ; Schwartz '"Justice" and Other Non-Economic Goals of Antitrust' *Un Penn LR* [1978-79] 1076 at p 1077 ; Fox 'The Modernisation of Antitrust : A New Equilibrium' *Cornell LR* [1980] 1140 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' *ECLR* [1987] 344

[29] There is considerable economic controversy on what success looks like and many quantitative economic measurements have been criticised as indirect and circumstantial and therefore creating uncertainty. Yet, qualitative measurements may well have the same effect. See further discussion in Korah 'EEC Competition Policy : Legal Form or Economic Efficiency' *CLP* [1986b] 85 ; Whish *Competition Law* ; Stevens and Yamey *The Restrictive Practices Court.*

[30] For further examination of this aspect of antitrust, see Baumol, Panzar and Willig *Contestable Markets and the Theory of Industry Structure* Harcourt Brace Jovanovich (1982) ;

Breit and Elzinga 'Private Antitrust Enforcement : The New Learning *Jo Law and Economics* [1985] 405 ; Collins and Sunshine 'Is Private Enforcement Effective Antitrust Policy' in SLOT and McDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 50.

[31] For further on these issues, see Pitofsky 'The Political Content of Antitrust' at pp 1052, 1060 ; Schwartz 'Justice and Other Non-Economic Goals of Antitrust' at p 1077 ; Bock 'An Economist Considers Some Basic Issues of Antitrust Law in the US' *ECLR* [1990] 52 at pp 53, 55 ; Hay 'Pigeonholes in Antitrust' at p 135 ; Hawk 'The American Antitrust Revolution : Lessons For The EEC?' *ECLR* [1988] 53 at p 59.

[32] Hereafter referred to as Art.85.

[33] These objectives are discussed in further detail in Ch2 infra.

[34] Both Burns 'Rethinking the "Agreement" Element in Vertical Antitrust Restraints' *Ohio State Law Journal* [1990] 1 and Denis 'Focusing on the Characterisation of Per Se Unlawful Horizontal Restraints' *Antitrust Bulletin* [1991] 641, discuss the nexus between the characterisation of violations and use of enforcement powers. Essentially, those practices which offend against major antitrust objectives are classified as criminal and are enforced against and sanctioned as such.

[35] In this thesis, the 'rule of law' refers to those general principles of law and fundamental rights developed by the ECJ in accordance with which it interprets Community law and reviews the legality of the actions of Community institutions. Such principles include legal certainty, legitmate expectation, equality, natural justice and proportionality. See the cases of *Nold v Commission* [1974] ECR 491 and *Amsterdam Bulb* [1977] ECR 137 and also Wyatt and Dashwood *The Substantive Law of the EEC* Sweet and Maxwell (1993) at pp 59-71, for further discussion of these principles. This analytical format is considered in more detail infra.

[36] Judge Brandeis 1916. It was hoped to contain in the thesis a chapter setting competition law in its economic context. To that end, a consideration of the objectives and functions of competition was prepared. Unfortunately, limitations on space have not permitted its inclusion in the main body of the research. However, the information has been placed in Appendix C for those who wish to review the central issues involved. Further information may also be obtained from : Whish *Competition Law* at p 1 et seq ; Agnew *Competition Law* Allen and Unwin (1985) at pp 17-19 ; de Jong 'EEC Competition Policy towards Restrictive Practices' in GEORGE and JOLL (Eds) *Competition Policy in the UK and EEC* Cambridge Unv. Press (1975) at p 58 ; Hay 'Competition Policy' *Ox Rev Ec P* [1986] 1 at p 3 ; Scherer and Ross *Industrial Market Structure and Economic Performance* (3rd Edn) Rand McNally (1991) Chs 1,2 ; Swann *Competition and Consumer Protection* London (1979) Ch3 ; Asch *Industrial Organisation and Antitrust Policy* (1983) Ch1 ; Fox 'The Modernisation of Antitrust' ; Liesner and Glynn 'Does Antitrust Make Economic Sense' ; Thompson 'Competition as a Strategic Process' *Antitrust Bulletin* [1980] 777.

[37] Here the term 'law as a resource' indicates the use of the law as an instrument with which to achieve undisclosed political, economic and social objectives. For further discussion, see McBarnet 'Pre-Trial Procedures and the Construction of Conviction' in CARLEN (Ed) *The Sociology of Law* University of Keele (1976) ; R.White *The Administration of Justice* Blackwell (1985) ; McConville, Sanders and Leng *The Case for the Prosecution* Routledge (1991). See also Burns 'Rethinking the "Agreement" Element' and Denis 'Per Se Unlawful Horizontal Restraints', who discuss the nexus between the characterisation of violations and use of enforcement powers.

[38] See comments in eg, McConville, Sanders and Leng *The Case for the Prosecution* ; Sanders and Young *Criminal Justice* Butterworths (1994) ; MCCONVILLE and BRIDGES (Eds) Edward Elgar (1994) ; WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) ; Bottoms and McClean *Defendants in the Criminal Process* Routledge and Kegan Paul (1976) ; McBarnet 'Pre-Trial Procedures and the Construction of Conviction' ; Ashworth *Sentencing and Penal Policy* Weidenfeld and Nicolson (1983).

[39] For further on this, see McBarnet 'Pre-Trial Procedures and the Construction of Conviction' ; R.White *The Administration of Justice* Blackwell (1985) ; Bottoms and McClean *Defendants in the Criminal Process* ; Packer *The Limits of the Criminal Sanction* Stanford Unv. Press (1968).

[40] For further on Harding's arguments, see earlier discussion. See also Harding *EC Investigations and Sanctions* at Ch10.

[41] For discussion of Green's work, see discussion supra and Green 'Evidence and Proof in EC Competition Cases'.

[42] As previously discussed, this term embodies such principles as legal certainty, legitmate expectation, equality, natural justice and proportionality. See the cases of *Nold v Commission* [1974] ECR 491 and *Amsterdam Bulb* [1977] ECR 137 and also Wyatt and Dashwood *The Substantive Law of the EEC* Sweet and Maxwell (1993) at pp 59-71, for further discussion of these principles.

[43] Goyder 'User Friendly Competition Law' and Wood 'User Friendly Competition Law in the United States'. The recommended attributes include transparency, fair procedure, efficiency and consistency and substantive soundness. Both critics suggest that such features would increase respect for, and thus compliance with, antitrust provisions. Moreover, on the issue of substantive soundness, Goyder, at pp 3-4, asserts that this would enhance legal certainty and make explicit any political element in the decision.

[44] See Appendix B, Tables 1 and 2 for a full list of the cases included.

[45] These cases have been selected on the basis that they comprise the major cartels which have occupied so much of DGIV's time over the last 15 years. Information agreements as such are not included in the case study as such agreements hinge on the concept of a concerted practice which can be dealt with fully under the cases selected. However, the shared nature of this concept means that it will still be possible to draw the conclusion that any problems occurring as a result of DGIV's interpretation of this concept in relation to the agreements studied are likely to be replicated in its treatment of information agreements.

CHAPTER TWO

PERSPECTIVE ON ANTITRUST

"To be seriously rich, it helps to have ancestors who were in business before competition laws were developed." [1]

A)INTRODUCTION

The legal basis of competition must now be addressed. The following chapters will examine the process and substance of enforcement. But, an evaluation of how the EC and US approach this task can only be appreciated fully with an awareness of the perceived function of competition law in these jurisdictions. Thus, this chapter will examine how each jurisdiction defines competition and the policy goals and guidance available for the application of their respective competition policies.

B)GOALS AND GUIDANCE

This section seeks to acquire an understanding of each jurisdiction's vision of competition, ascertaining how they define competition, whether they are obliged to adhere to any particular economic theory and whether any guidance is provided for the consistent and equitable application of competition policy.

EC

1)Guidance

Despite the complexities of competition cases, little formal guidance exists. There is no official definition of competition in Art.85 or elsewhere, no official statement of the central goals of competition policy and no code of practice to assist Commission decision-making. The only formal policy guidance is the broad statements contained in Articles 2 and 3(g) Treaty of Rome 1957 which indicate that by establishing a common market, economic efficiency, prosperity and stability will accrue and that one of the principal avenues for achieving this is the establishment of a system of undistorted competition [2]. The absence of clear guidance means that DGIV's discretion in this area is virtually unlimited.

However, this lack of information means that DGIV's priorities must be gleaned from its Annual Reports on Competition Policy, which as well as detailing the significant Commission decisions of that year, also provide broad policy statements. Overall, these reports reflect a belief in the centrality of an effective competition policy to securing the Treaty's aims. Thus, whilst the reports are influenced by prevalent economic and social tensions, a survey of them reveals from first to last one overriding, unchanging objective : Single Market integration. In addition, other clear goals are the pragmatic resolution of competition issues, the maximisation of economic efficiency and the promotion of fairness. It should be noted that these goals may contain a number of subordinate objectives and principles which may not always be easy to reconcile. These principal objectives will now be examined in greater detail.

2)Economic/Non-Economic Goals

a)Single Market Integration

This overtly political goal dominates Commission reports [3]. The Commission believes that the establishment and maintenance of an open and unified European market is the primary function of EC competition policy and all other goals are subordinate to it. DGIV clearly believes that the preservation of effective competition by the elimination of all barriers to competition will overcome the recurring problems of inflation and unemployment, raise living standards and enhance EC superiority on the world market [4]. So important is the integration goal that numerous reports speak of "fighting with vigour and determination" all private and public entities which hinder the realisation of this objective and the imposition of heavy fines upon offenders [5]. One particular and continuing concern has been the protectionist activities of many major industries facing changing economic circumstances. Their attempts to shield themselves from the ravages of competitive forces have invariably run counter to the Commission's goal of economic integration [6].

Unfortunately, the integration goal suffers from definition problems. Whilst economic integration, the merging of isolated markets into a single unified market, is relatively easy to define, political integration causes problems. Politicians have so far failed to agree on whether the end result of such integration will be a federal Europe or merely increasing economic co-operation without any loss of national sovereignty. Such ambiguity within so fundamental an objective must cause the Commission problems. Nevertheless, the importance of this political goal as a powerful force shaping EC competition policy should not be underestimated.

b)Economic Efficiency

As well as discussing economic efficiency under this heading, broader economic issues and their role in EC competition policy will also be addressed, examining further the EC's definition of competition and the role of economic theory in the formulation of the Commission's competition policy.

As previously noted, no official definition of competition exists. However, the Commission clearly sees the maintenance of the "right amount of competition" as an

important goal and the ECJ has gone so far as to declare that the "maintenance of effective competition is so essential that without it many Treaty provisions would be pointless" [7]. Nevertheless, how much competition constitutes the right amount and who should make this decision have never been articulated [8].

Whilst both DGIV and the ECJ frequently refer to 'effective' and 'workable' competition, these phrases do not seem to be rooted in any particular economic theory but rather indicate the degree of competition necessary to attain the Treaty's objectives, in particular, Single Market integration. Moreover, whilst the Treaty provisions clearly establish an allegiance to the tenets of free market enterprise, the Commission has never explicitly proclaimed adherence to any particular economic theory. Indeed, it is only in the last fifteen years that the Commission has shown any awareness of the role of economics in deciding competition cases. Its increased sensitivity to the relationship between competition policy and economic principles are demonstrated in its 14th Report where it stated that the satisfactory operation of competition fulfils three functions ; a resource allocation function, an incentive function, and an innovative function, all increasing economic efficiency and thereby assisting full economic integration [9]. The innovative function seems to have been taken up in the 15th Report, indicating some affinity for Austrian economic theory [10]. The Report states that "dynamic, innovative competition led by entrepreneurs" is the "lifeblood of the economy" but that innovation must not be allowed to "degenerate into monopolistic rigidity". The Commission believes that "efficient competition" will prevent such abuse [11]. However, the exact role and weight of economic efficiency in EC competition cases is the subject of considerable debate [12]. Indeed, the pursuit of allocative efficiency as the only objective of competition policy, as advocated by Chicagoists, may well conflict with the primary objectives of economic integration and the protection of small and medium-sized enterprises (SMEs). To date, DGIV has shown only limited enthusiasm for Chicago economics [13]. For this reason, efficiency may only ever play a subordinate role in EC competition policy, though the dynamic nature of competition may alter this. Finally, it should be noted that the Commission considers the notion of competition to be flawed. It believes that competition carries

with it the seeds of its own destruction, though the Commission avers that the EC can overcome this problem by maintaining a competitive market structure [14].

c)Pragmatism

This too, is an important aim of EC competition policy. As explained in Chapter 1, the Commission's dearth of resources means that competition decision-making is required to take the most pragmatic and cost-efficient route to enforcement. Whilst little more needs to be said here on this subject, this should not detract from the significance of this objective [15]. Its impact on enforcement will be made apparent in the course of the study.

d)Fairness

This somewhat ambiguous goal is a recurring theme in Competition Reports. In its 9th Report, the Commission discussed its prime importance, identifying three main aspects of application :

i)equality of opportunity ;

ii)the protection of SMEs ;

iii)the advancement of consumerism.

The first two strands may be dealt with jointly. These aspects of the Commission's policy are most obvious in their approach to state aids, relations between public and private enterprises and SMEs. In order to ensure equity between MS, the Commission is vigilant to ensure that goverments do not favour enterprises within their own MS by the grant of state aids to the detriment of competitors in other MS. Similarly, in relation to public/private enterprises, the Commission attempts, by means of requiring financial transparency of dealings, to ensure that state enterprises do not receive financial or other advantages over their private competitors. In the protection of SMEs, the Commission reflects its populist roots, believing the protection of such enterprises to be the protection of democracy from dictatorship and the epitome of

economic freedom. To this end, the Commission has been prepared to adapt the competition rules to allow co-operation between SMEs so that they may compete with larger enterprises [16]. Finally, equity demands that the Commission's competition policy takes account of the legitimate interests of workers, users and consumers, allowing them a fair share of the benefits derived by firms. Indeed, this protection of consumers is incorporated into Art.85(3), though where consumerism conflicts with unification this may stand for little [17].

e)Other Objectives

Other subsiduary functions and qualities of EC competition policy can be identified. The Commission has made several references to the social function of competition policy urging that rationalisation be carried out with due regard to "the human element". In its 10th Report, it went so far as to state that an essential function of competition policy was "the pouring of oil on the troubled waters of social tension" [18]. Furthermore, the Commission has identified transparency and certainty as important qualities. Ex-Commissioner Sutherland [19] argues that transparency is fundamental if competition policy is to become part of everyday life and the Single Market is to become a reality. Similarly, the Commission believes that legal certainty is equally essential and promises to provide this by adopting "precise, clearly viable criteria notably with regard to exempting agreements under Art.85(3)" [20].

3)General Principles of Community Law

Although no formal guidance is given to the Commission to assist it in its decision-making, its actions must comply with the general tenets of Community law [21]. Relevant principles are proportionality, legal certainty and legitimate expectation, equality, natural justice and other miscellaneous principles. Little more needs to be said on these principles at this stage. Their scope and impact on Commission decision-making will be assessed more thoroughly in Chapter 9 under the 'rule of law' analysis.

US

1)Guidance

Here too, there is scant formal guidance. There is no official definition of competition, no clear code of practice to guide decision-making and no comprehensive statement of policy goals.

To some extent, the US vision of competition can be ascertained from caselaw. During the first half of this century, the Supreme Court traditionally defined competition as an impersonal force governing business conduct and ensuring both the protection of consumers and business freedom to compete fairly. Since then, competition has become increasingly synonymous with the Chicago view of economic efficiency [22].

In the absence of express policy guidance, both the approach of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to decision-making must be gleaned from their advice to industry [23]. However, the guidance provided by such sources is of limited value as, with the exception of Trade Regulations, these guidelines are not fully binding on the courts or the agencies [24]. Thus, whilst the DOJ Merger Guidelines have been followed, those on vertical restraints have proved controversial and have frequently been disregarded [25].

Whilst the overriding purpose of antitrust is seen as the promotion and maintenance of competition in open markets, what are and what should be the predominant values of US antitrust is a topic to which many US lawyers and economists have devoted considerable literature and passion [26]. Briefly, the argument centres around the Chicago belief that the sole goal of antitrust should be allocative efficiency. Others, like Sullivan [27], argue that if antitrust law is to remain a system of law rather than applied economics, it must also reflect political and social considerations. These non-economic values as well as the goal of efficiency will be discussed in the following section.

2)Economic/Non-Economic Goals

a)Politics

Successive US Administrations have placed strong emphasis on the politico-economic ideology of free market enterprise, and US antitrust has been influenced by this political desire to promote entrepreneurial freedom. Consequently, ensuring that antitrust enforcement is in accordance with this political ideology forms an increasingly important political goal of US enforcement. However, shifting political attitudes as to how antitrust should serve this objective have caused confusion. This uncertainty has manifested itself in several recent Administrations, producing significant changes in prosecution policy. But, it does seem that the promotion of this political goal demands an increasingly tougher and more active approach to enforcement. The full impact of political goals on US antitrust enforcement will be considered further in the comparative analysis.

b)Economic Efficiency

Whilst efficiency is an extremely important factor in US antitrust and has controlled much recent antitrust decision-making, limitations on space mean that it will only be discussed briefly [28]. Essentially, Chicagoists argue that by basing antitrust soley on allocative efficiency, big business will be set free, thereby promoting ever efficient competition and ensuring increasing prosperity for business and consumers alike [29]. It is the hidden political content of this goal which concerns Chicago's opponents most, as it enables the concentration of economic power and protection for the few from competitive forces [30]. Furthermore, Chicago's opponents argue that concentrating on efficiency is bad law and bad policy as it does not reflect Congressional will. They insist that social and political values are essential to a balanced antitrust assessment [31]. Conversely, Chicagoists argue that such factors are irrelevant and that antitrust assessment based on overt political values reduces

competition by encouraging inefficiency and protectionism [32]. Where this debate will end is impossible to forecast. The comparative analysis may shed some light on this issue.

c)Pragmatism

Like most jurisdictions, the need for antitrust enforcement in the US outweighs available resources. Over recent years, the scale of this problem has increased. Thus, the US also places significant emphasis on a pragmatic approach to enforcement [33]. As a result, a clear aim of US antitrust is securing the resolution of the maximum number of competition matters by the quickest and most cost-effective means.

d)Fear of Concentrated Power

The persistent distrust of power is an integral part of the US character and as such has formed common ground unifying support from all factions. It is based on a belief that no single entity should be able to acquire such power as to be immune from attack and thus be in a position to threaten the very foundations of democracy. Consequently. the US solution is to insist on the dispersal of power. This is complemented by the institution of a system of checks and balances to control the acquisition of power, and the US preference for legal and administrative processes so that "to the end, it may be a Goverment of law and not of men" [34]. This attitude has considerable judicial support and forms the basis of the case for the inclusion of a political dimension to antitrust assessment [35].

e)Individual Freedom

The preservation of the individual's ability to engage in the business activity of their choice is seen as essential to the maintenance of the US system of free enterprise [36]. Thus, a major objective of US antitrust is ensuring that this freedom of economic

activity and opportunity is not restricted by concentrated power employing restrictive practices and manipulating entry barriers in order to destroy individual competitors. Both small businesses and entrepreneurs, seen as the lifeblood of US life, benefit particularly from this attitude. Indeed, so fundamental is this goal that many antitrust statutes have been passed in response to this need [37].

In conclusion, despite the advances of Chicago's influence in recent years, there is widespread, deep-rooted support for the inclusion of various social and political values in US antitrust assessment. Indeed, as Fox points out, efficiency has never been an express goal of Congress [38]. However, Congress has always been concerned about issues such as freedom and the opportunity to compete, encroaching economic power and justice [39]. Not only the legislative history of antitrust laws, but the resulting caselaw of the federal courts supports this. Together they provide the US view of the public interest which, it is argued, should pervade the interpretation of antitrust laws [40].

However, much debate centres both on whether such non-economic values should play a role in antitrust, and which values should be included and what their precise role should be. Pitofsky, whilst arguing for the inclusion of non-economic factors, including the preservation of individual liberty, does not favour special protection for small businesses [41]. Schwartz calls for a return to the "venerable non-economic goal of ... justice" [42]. As for the role of such factors, Pitofsky considers that economic factors should remain paramount in the antitrust assessment with political values merely acting as tie-breakers, whilst Schwartz envisages a more dispositive role for non-economic values [43].

3)Other General Principles

Like the EC, the US has recourse to other general legal principles to guide its decision-making. The most important will be considered here. The competition law of this common law jurisdiction is founded in the restraint of trade doctrine [44]. Linked to

this doctrine is both the developing concept of tortious liability for unfair competition and similar liability for economic loss [45]. These concepts have been readily developed in the US [46]. In addition, decision-making in the US jurisdiction must adhere to the requirements of due process and natural justice [47].

C)CONCLUSION

Neither jurisdiction officially defines competition, articulates clearly its chosen goals or provides any explicit guidance on decision-making. Moreover, whilst both jurisdictions endorse free market economics, only the US with its recent, though perhaps waning, allegiance to Chicago economics, clearly shows a preference for a specific economic approach. Indeed, while both systems recognise the importance of promoting competition, enunciated policy objectives differ significantly. The primary EC goal is Single Market integration which has no counterpart in the US. Currently, the paramount goal of US antitrust is economic efficiency.

The disagreement over the primary focus of antitrust is reflected in each jurisdiction's attitude towards economic efficiency as an enunciated goal of antitrust. In recent decades, allocative efficiency has been the exclusive focus of US antitrust. Consequently, the US accords this economic objective much greater weight than non-efficiency goals and indulges in considerably more economic analysis, largely eschewing open consideration of social and political values. Overall, this has resulted in an insistence upon the protection of competition rather than competitors. This contrasts sharply with other jurisdictions. Whilst the EC openly acknowledges economic efficiency as a significant goal of EC antitrust, it is by no means paramount. Moreover, increasing efficiency is seen as a means, not of protecting competition, but of aiding market integration. The weight and nature of non-efficiency goals also differ between jurisdictions. In the EC, there is considerable emphasis on a variety of social and political goals. As already noted, market integration is the paramount

non-efficiency goal, but fairness in the marketplace, equality of opportunity and the protection of SME's are also significant aims of EC competition law. In the US, non-efficiency objectives have been ignored largely, though the waning influence of Chicago economics may herald a return to greater emphasis on these values as significant and explicit goals of US antitrust. Indeed, despite Chicago's impact, populist values such as the desire to promote individual freedom and distrust of concentrated power have remained constant, though sometimes covert, influences upon US antitrust.

With each jurisdiction, there is potential for conflict between competing goals. For instance, in the EC, the desire to ensure economic integration, particularly in the context of protecting SME's, may directly conflict with the efficiency objective. The pursuit of these goals may justify co-operation between firms which serves these goals, but which restricts competition thereby reducing economic efficiency. Similarly in the US, the sole emphasis on efficiency may serve to increase and concentrate economic power in a few major firms, running directly counter to the US distrust of concentrated power and its desire to protect small businesses.

Whatever their differences, common ground does exist. Political and pragmatic needs form clear goals of antitrust in both jurisdictions. The political goal may be viewed both in terms of the needs of the prevailing political ideology, and in terms of more specific political objectives, like market integration. In both jurisdictions, the focus on pragmatism is constant. Both systems face resource shortages of varying degrees which oblige them to apply antitrust rules in the most cost-efficient, expedient way. Whilst it is apparent from this review that political and pragmatic needs exert some control as goals of antitrust in both systems, the precise extent and impact of their influence will be evaluated during the course of the research.

Competition law in both jurisdictions is almost entirely statutory [48]. Both EC and US legislation is broadly framed, effects-based legislation [49]. The format of EC legislation has been criticised. It is argued that the bifurcation of Art.85 into para (1) and para (3) overcomplicates matters and causes problems in the formulation and enforcement of competition rules, as the blanket prohibition of Art.85(1) is expressly

made inapplicable by Art.85(3). Thus, agreements labelled anti-competitive under Art.85(1) are permitted under Art.85(3) where they promote economic progress. This forces the Commission and the Court to engage in complex and difficult economic analysis. In addition, this bifurcation may cause uncertainty in enforcement, as prior to a Commission decision, no agreement can unequivocally be said to be illegal [50].

In contrast, US law prohibits all restrictive agreements without more. Of course, such a blanket prohibition requires some qualification. This has led to the development of per se and rule of reason categories as tools for analysing arrangements [51]. As agreements qualifying under the rule of reason are deemed to fall outside s.1 ShA, this approach is regarded as more straight-forward and conceptually neater than the bifurcated approach of Art.85. But, the US approach has its critics. The breadth of s.1 ShA and concomitant problems relating to the scope and application of the per se rule/rule of reason approach have resulted in considerable uncertainty.

Thus, it seems that regardless of how legislation is formulated, it possesses the potential to create problems regarding the equitable and consistent application of competition rules, ultimately provoking questions over the justiciabilty of competition issues.

Having reviewed each jurisdiction's aims and approach to competition law, it is now apposite to examine in depth the process, substance and impact of antitrust decision-making.

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1 Quoted by Bennett and Cave *Competition Policy* Heinemann (1991) at p 36.

[2] Hereafter the Treaty of Rome 1957 will be referred to as the Treaty. For further discussion on this lack of guidance and ensuing consequences, see Van Bael 'The Antitrust Settlement Procedure of the EC Commission' *CMLR* [1986] 61 ; Temple Lang 'Community Antitrust Law - Compliance and Enforcement' *CMLR* [1981] 335.

[3] Numerous writers have commented on and criticised the paramouncy of this goal. See Korah 'EEC Competition Policy - Legal Form or Economic Efficiency' *CLP* [1986b] 85 ; Hawk 'The American Antitrust Revolution : Lessons for the EEC?' *ECLR* [1988] 53 ; Snyder 'Ideologies of Competition in EC Law' *MLR* [1989] 149 ; Green, Hartley and Usher *The Legal Foundations of the Single European Market* Oxford Univ. Press (1991).

[4] All these issues are recurring themes in the reports and are seen as important aims of EC competition policy.

[5] See eg 9th Report on Competition Policy 1979 at p 10.

[6] Eg *LdPE* [1990] CMLR 382 ; *Soda Ash* [1994] 4 CMLR 454 ; *Italian Flat Glass* [1990] 4 CMLR 535. In addition, matters have been exacerbated by Member States (MS) employing state aids as short term means of combatting inflation and unemployment. Such protectionism has combined with that of major industries and their economic problems to form a vicious circle, hindering competition policy's role in the restructuring and rationlisation of European industry, damaging competition and so preventing Single Market integration. For further discussion, see Whish *Competition Law* Butterworths (1993) ; Bellamy and Child *Common Market on Competition* (3rd Edn) Sweet and Maxwell.(1987) ; Korah 'EEC Competition Policy' [1986b] ; Hawk 'The American Antitrust Revolution' ; Snyder 'Ideologies of Competition in EC Law'.

[7] See 9th Report on Competition Policy 1979 at p 10 and *Continental Can v Commission* [1973] ECR 215 at p 244 respectively.

[8] This has caused concern in some quarters. See, in particular, the discussion in Korah 'EEC Competition Policy' [1986b].

[9] 14th Report on Competition Policy 1984 at p 12.

[10] For further on the Austrian economic theory, see Appendix C.

[11] See 15th Report on Competition Policy 1985 at p 12. These comments were made during Commissioner Sutherland's office and have been reiterated by him elsewhere and may thus represent his personal opinions rather than on-going Commission policy. See Sutherland 'Towards a Positive Competition Policy' *ECLR* [1985] 283.

[12] See discussion by Hawk 'The American Antitrust Revolution' ; Korah 'EEC Competition Policy' [1986b].

[13] Hawk in 'The American Antitrust Revolution' explores this further and argues that the integration goal precludes the EC from ever accepting Chicago economics.

[14] 9th Report on Competition Policy 1979 at p 10. See also generally on this section : Green, Hartley and Usher *The Legal Foundations of the Single European Market* at pp 203, 205, 212 ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at p 68 ; Snyder 'Ideologies of Competition' at p 150 ; Sutherland 'Towards a Positive Competition Policy' at pp 284, 290 ; Hawk 'The American Antitrust Revolution' at pp 62, 85.

[15] As early as its 9th Report on Competition Policy 1979 at p 9, the Commission recognised the need to strike a balance between flexibility and rigidity in its competition policy, believing that dogmatism must be eschewed in favour of a pragmatic approach based on the fundamental provisions of the Treaty.

[16] Eg *Transocean Marine Paints* [1967] CMLR D9.

[17] On this point, see *Distillers v Commission* [1980] ECR 2229. On this section, see : Whish *Competition Law* at pp 18-19 ; Korah *Competition Law in Britain and the Common Market* Martinus Nijhoff (1982a) at p 91 ; Green, Hartley and Usher *The Legal Foundations of the Single European Market* at pp 200-201 ; A.Evans 'EC Competition Law and Consumers : The Article 85(3) Exemption' *ECLR* [1981] 425 ; 9th and 10th Reports on Competition Policy 1979, 1980.

[18] 10th Report on Competition Policy 1980 at p 10. See also similar comments in 5th and 8th Reports on Competition Policy 1975, 1978. Whether competition policy should even attempt to achieve such goals is open to debate. For further consideration of this, see : Whish *Competition Law* at p 255 ; Hornsby 'Competition Policy in the 80s' *ELR* [1987] 79 ; Verstrynge 'Current Antitrust Policy Issues in the EEC : Some Reflections on the Second Generation of Competition Policy' in HAWK (Ed) *Annual Proceedings* Fordham Corp Law Inst (1984) at p 673.

[19] Sutherland 'Towards a Positive Competition Policy'.

[20] See EC Commission Action Programme Statement, November 1962. Whether the Commission achieves these aims will be considered throughout the course of the study.

[21] The Treaty provisions are required to be applied in accordance with the general legal principles common to the MS and the ECJ has developed a body of caselaw on these issues beginning with *Internationale Handelgesellschaft* [1970] ECR 1125. Interesting discussions on the juridical basis of these principles and their sources in national law may be found in : Wyatt 'New Legal Order or Old' *ELR* [1982] 147 ; Pescatore 'Fundamental Rights and Freedoms in the System of the European Communities' *AJIL* [1970] 343 ; Usher 'The Influence of National Concepts on Decisions of the ECJ' *ELR* [1976] 359.

[22] See eg cases like *Fashion Originators Guild of America v FTC* 312 US 457 (1941) and *Continental TV Inc v GTE Sylvania* 433 US 36 (1977). For further discussion, see Whish *Competition Law* at pp 16-20 ; Fox 'The Politics of Law and Economics in Judicial Decision-Making : Antitrust as a Window' *NYULRev* [1986b] 554 at pp 565-567 ; McChesney 'Law's Honor Lost : The Plight of Antitrust' *Antitrust Bulletin* [1986] 359.

[23] Eg DOJ *Merger Guidelines* 49 Fed. Reg. 26,823 (1984) and *Vertical Restraints Guidelines* 4 Trade Reg. Rep. (CCH) 13,105. For additional comment, see L.Sullivan 'The Justice Department's Guidelines on Mergers and Vertical Restraints' *Antitrust Law and Economics Review* [1984] 11. The other guidance provided to industry is evaluated in Ch10 infra in the context of the US enforcement process.

[24] DOJ Guidelines and FTC Industry Guides are non-binding. Business Review Letters and Advisory Opinions whilst binding, may be rescinded. As such, they may create more uncertainty than certainty. See Ch10 infra, for more detailed discussion of the methods of informal resolution in the US.

[25] This is discussed further in Kingdon 'Economic Argument in Antitrust Cases : A Litigator's Perspective' *ECLR* [1987] 371 at pp 376-378 and Hawk and Veltrop 'Dual Antitrust Enforcement in the United States : Positive or Negative Lessons for the European Commmunity' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 21.

[26] The range of literature is enormous, see eg Bork and Bowman 'The Crisis In Antitrust' *Columbia LR* [1965] 363 ; Easterbrook 'The Limits of Antitrust' *Texas LR* [1984a] 1 ; Fox 'The Modernisation of Antitrust : A New Equilibrium' *Cornell LR* [1980] 1140 ; Fox and L.Sullivan 'Antitrust - Retrospective and Prospective : Where Are We Coming From? Where Are We Going?' *NYULRev* [1987a] 936 ; Pitofsky 'The Political Content of Antitrust' *Un Penn LR* [1979-79] 1051.

[27] L.Sullivan *Handbook of the Law of Antitrust* West Publishing Co (1977) at p 11.

[28] See Appendix C for a more thorough review of the issues involved.

[29] Bork and Bowman 'The Crisis In Antitrust' discusses this in depth.

[30] See particularly, Fox 'The Modernisation of Antitrust' and Pitofsky 'The Political Content of Antitrust'.

[31] These issues are explored thoroughly by Pitofsky 'The Political Content of Antitrust'.

[32] Bork and Bowman in 'The Crisis In Antitrust' examine these concerns further. Blake and Jones 'In Defense of Antitrust' *Columbia LR* [1965] 377 provide a spirited response.

[33] The growing need for pragmatism in antitrust enforcement is discussed in Nelson 'Reading Their Lips : Changes in Antitrust Policy under the Bush Administration' *Antitrust Bulletin* [1991] 681 ; McAnneny 'The Justice Department's Crusade Against Price-Fixing - Intiative or Reaction' *Antitrust Bulletin* [1991] 521 ; Denis 'Focusing on the Characterisation of Per Se Unlawful Horizontal Restraints' *Antitrust Bulletin* [1991] 641.

[34] See Massachusetts Bill of Rights, discussed in Kelly, Harrison and Belz *The American Constitution : Its Origins and Development* W W Norton & Co (1983).

[35] See Judge Learned Hand's famous judicial statement on this issue in *US v Alcoa* 148 F.2d 416 (2d Circ 1945). Interesting comments on this aspect may be found in Van Cise 'Religion and Antitrust' *Antitrust Bulletin* [1978] 455 ; Hawk 'The American Antitrust Revolution' and Neale and Goyder *Antitrust Laws of the US* Cambridge Unv. Press (1980) at pp 439-444.

[36] Once again, this notion has its origins in the Constitution, see Kelly, Harrison and Belz *The American Constitution* Ch20 for further.

[37] For instance the Sherman Act 1890 (ShA) was introduced to control concentrated power and enhance individual liberty and has often been referred to as a "charter for freedom". See the comments made by Rep. Sherman 21 Cong Rec 2460 (1890) ; Sen. Reed 51 Cong Rec 15687 (1914), also *Appalachian Coals v US* 288 US 344, 359-360 and *Report of the National Commission for the Review of Antitrust Laws and Procedures* Washington DC (1979). Moreover, the Robinson-Patman Act 1936 was passed a a result of sectional pressure from small businesses.

[38] Fox 'The Politics of Law and Economics in Judicial Decision-Making' [1986b].

[39] Fox 'The Modernisation of Antitrust' and Schwartz '"Justice" and Other Non-Economic Goals of Antitrust' *Un Penn LR* [1978-79] 1076, who both develop these themes further.

[40] Schwartz '"Justice" and Other Non-Economic Goals of Antitrust' at pp 1076-1077.

[41] Pitofsky 'The Political Content of Antitrust'.

[42] Schwartz '"Justice" and Other Non-Economic Goals of Antitrust' at p 1076.

[43] These issues are discussed by both Schwartz '"Justice" and Other Non-Economic Goals of Antitrust' and Pitofsky 'The Political Content of Antitrust'. See also, Fox 'The New American Competition Policy - From Antitrust to Pro-Efficiency' *ECLR* [1981] 439 and Fox 'The Politics of Law and Economics in Judicial Decision-Making'[1986b].

[44] For details of the history and the current position of the restraint doctrine, see Whish *Competition Law* ; Agnew *Competition Law* Allen and Unwin (1985) ; Heydon 'The Frontiers of the Restraint of Trade Doctrine' *LQR* [1965] 229 and Rutherford 'Restraint of Trade - The Public Interest' *MLR* [1972] 651.

[45] These aspects are discussed further in Terry 'Unfair Competition and the Misappropriation of a Competitor's Trade Values' *MLR* [1988] 296 ; Adams 'Is There A Tort of Unfair Competition' *JBL* 1985 26 and Whish *Competition Law* Ch2.

[46] See the US case of *International News Service v Associated Press* 248 US 215 (1918). In contrast, in other common law jurisdictions like the UK, courts have approached new developments with extreme caution. See the UK case of *Cadbury Schweppes Ltd. v Pub Squash Co Ltd* [1981] 1 All ER 213.

[47] For more thorough treatment of these matters, see Wade *Constitutional Law* (5th Edn) Oxford Unv. Press (1982) and Lord McKenzie Stuart 'Legitimate Expectation and Estoppel in Community Law and English Administrative Law' *LIEI* [1983] 53.

[48] Further details of the legislative format in each jurisdiction will be provided during the course of the study. In addition, the substantive law is dealt with thoroughly in : Whish *Competition Law* ; Bellamy and Child *Common Market on Competition* ; Korah *Competition Law* (1982a) ; Agnew *Competition Law* ; L.Sullivan *Law of Antitrust* ; Neale and Goyder *Antitrust Laws of the US.* The full text of the relevant legislation is provided in Appendix A infra.

[49] In contrast, UK law is form-based, its emphasis being on conduct rather than effect. Whilst the highly formalistic nature of UK legislation does provide certainty, it also gives rise to two main defects. Firstly, the highly legalistic format is too strict, making it virtually impossible for an agreement to gain approval under the Restrictive Trade Practices Act 1976. Moreover, the formalism highlights the deficiencies of the legal process in dealing with economic issues, raising questions regarding the justiciability of competition. However, this form-based approach is only relevant in relation to initial registration. Subsequent evaluation is concerned with the effects of the agreement. Nevertheless, Whish has criticised UK legislation as bizarre and unduly complex. See Whish *Competition Law* at pp 123, 155.

[50] These problems are explored further by Bock 'An Economist Considers Some Basic Issues of Antitrust Law in the US' *ECLR* [1990] 52 ; Hawk 'The American Antitrust Revolution'.

[51] Per se rules and the rule of reason will be discussed further in the comparative analysis of US law in Ch10.

CHAPTER THREE

THE CRIMINAL/CRIMINOLOGICAL EVALUATION OF HORIZONTAL CARTELS - INVESTIGATION

"It was a maxim with Foxey - our revered father, gentlemen - 'Always suspect everybody'." [1]

A)INTRODUCTION

Before examining the process and substance of the Commission's approach to horizontal cartels, these agreements will be set within their economic context. As there is wide agreement that horizontal collusion is undoubtedly anti-competitive, the economic situation will be discussed briefly [2]. Horizontal cartels may take several forms [3]. Whatever the form, it is accepted that all such collusion limits competition and results in the earning of supra-competitive profits. Industries where there is considerable product homogeneity and little technical development are particularly prone to cartelisation [4]. Of all types of horizontal collusion, the greatest opprobrium is accorded to blatant price-fixing cartels. Often within these cartels, the drive to maximise profits inevitably leads to cheating and the subsequent demise of the cartel [5]. Many forms of market division are executed in support of a price-fixing cartel as a means of policing the system [6]. Of course, the earning of supra-competitive profits may well attract new entrants to the market. Thus, the cartel will invariably take measures to erect artificial entry barriers to exclude such parties [7].

The economic disadvantages of market division tend to outweigh the advantages. Most potently, consumers suffer from the extraction of monopoly profits and geographical market division tends to reduce consumer choice. In the EC, horizontal collusion is particularly harmful as it directly conflicts with the prime objective of Single Market integration. Yet, the temptation to collude is considerable as market division is readily achieved along national lines.

Some arguments in favour of market division do exist [8]. It has been argued that market sharing may enhance efficiency, reduce distribution costs and allow groups

of smaller firms to compete effectively against larger companies [9]. In addition, price-fixing and product restrictions may well be desirable when operated by a restructuring cartel.

B)PROCESS AND SUBSTANCE /'LAW AS A RESOURCE' ANALYSIS

As well as detailing the Commission's approach to horizontal cartels, the following chapters will analyse the criminal characteristics of antitrust. It is intended to take each criminal justice stage and examine the process within that stage chronologically. At each procedural event, the substantive and procedural rules will be examined thereby mapping out the parameters of DGIV's discretion [10]. The discussion will then move on to a critical evaluation of the nature, scope and use of those powers with particular reference to the case study. Consideration will also be given to the existence and scope of defence rights at each stage in the process. Principally, at investigation, the rights to silence and to confidentiality will be examined. At prosecution, disclosure rights will be considered, whilst at trial, defence rights to an independent tribunal and to comment will be assessed. Where appropriate, the presumption of innocence will be examined. Then, an assessment of how both the Commission's use of its enforcement powers and the ambit of defence rights represent the use of 'law as a resource' will be made. Later, a criminological analogy will be drawn. Setting out the discussion in this way may mean some degree of overlap. However, this is inevitable as the issues involved need to be isolated in order to render the subject comprehensible.

C)PROCESS AND SUBSTANCE - INVESTIGATION - COMMISSION POWERS

1)Nature, Scope and Use of Fact-finding Powers [11]

The Commission may become aware of possible infringements by three main avenues :

a)notification ;

b)complaints, and ;

c)Commission surveillance of potential problems areas of industry.

Once aware of a possible infringement, DGIV has considerable fact-finding powers under Arts.11-14 of Regulation 17 with which to acquire sufficient information to decide whether and how to enforce competition rules against violators [12]. The availability of documentary evidence is vital to the Commission as it lacks the authority to obtain sworn oral evidence.

Article 11 empowers DGIV to obtain "all necessary information" [13]. The Article contains a two stage procedure. Under Article 11(3), the Commission may request the supply of written answers to its enquiries and other documentary evidence. There is no duty to comply with a request but penalties may be imposed for supplying false or misleading information [14]. Where information is refused, the Commission may compel the information to be produced [15]. All requests and decisions must state the legal basis and purpose of the request, precisely identify what information is required and give notice of possible penalties [16]. Art.11 may be used before or after the exercise of Art.14 [17].

Article 14 provides for both voluntary and mandatory investigations [18]. Regardless of which method is employed, DGIV's powers of inspection remain the same, incorporating powers of interrogation, search and verification [19]. Decisions ordering mandatory inspections must identify the subject matter and purpose of the inspection, indicate the date on which the investigation will begin, the penalties for

refusal and the right of appeal [20]. DGIV's powers under Arts.11 and 14 are bounded by the proportionality principle [21].

Having noted the Commission's powers under Reg.17, the next step is to consider the practical scope and use of these powers in horizontal cartel cases. First, a brief mention must be made of DGIV's selection of cases for investigation. The Commission has wide discretion whether to investigate and administrative burdens dictate that some selection is inevitable. Given the threat horizontal cartels pose to market integration, it is likely that all such cases are investigated to a greater or lesser extent [22]. It seems that recidivists are more likely to be investigated [23]. However, it is difficult to ascertain whether DGIV's selection of cases for investigation is arbitrary or discriminatory as such issues often only come to light where a complainant pursues the matter [24]. There are indications that the real problem is one of arbitrary selection at the prosecution stage and the issue will be discussed further at that point [25]. The investigation of horizontal cartels principally takes place under Art.14 [26]. Thus, the scope and use of the Commission's powers under Art.14 will be discussed first, followed by an examination of the application of Art.11.

a)Article 14 Inspections

Other than the necessity principle, Reg.17 provides little guidance on the circumstances in which Art.14 should be used or the form visits should take. The lack of clarity regarding the precise extent of DGIV's inspection powers leaves it unclear what obligations are placed upon undertakings [27]. Together with DGIV's recent use of its investigatory powers, this has raised several fundamental concerns, namely ; the ambit of DGIV's powers of entry, the legality of dawn raids, judicial warrants and the extent of inspectors' powers once on the premises. Each issue will be discussed in turn. It will be seen that the central problem is the striking of a proper balance between enforcement needs and fairness. A considerable amount has been written on how DGIV's powers should be interpreted. In response to the gravity of the issues raised, many critics have advocated a restrictive construction of these powers [28].

However, it will be demonstrated that, in all aspects of investigation, Commission inspectors refuse to accept any curtailment of their powers.

i)Inviolability

Many of the arguments regarding the scope of the Commission's search powers are predicated ultimately upon the general principle of the inviolability of private premises. The constitutions of several MS enshrine this principle as does Art.8 ECHR [29]. This issue was principally raised by *Hoechst* [30] who justified their refusal to submit to an Art.14 investigation by arguing that such inspections infringed their fundamental right to the inviolability of their business premises. The ECJ's response was equivocal. It was unable to identify any principle common to all MS whereby legal rather than natural persons may claim a right to inviolability of premises under Art.8 ECHR. Nevertheless, it recognised a fundamental Community right affording protection against arbitrary or disproportionate intervention [31]. Duffy suggests that this ruling needs to be re-assessed in the light of the ECHR case of *Niemitz*, where it was held that lawyer's offices came within the scope of Art.8 ECHR [32]. However, at present, business premises are covered only by a limited guarantee of inviolability. How far this safeguard extends in practice is debateable. The limitation placed upon the exercise of this right, particularly in relation to judicial warrants, may render this guarantee worthless [33].

ii)Right of Entry/Dawn Raids

One of the chief limitations placed upon the protection afforded by the inviolability principle is the wide definition given to DGIV's rights of entry. There have been several recent challenges to DGIV's powers under Art.14(3) which have argued that the Commission's fact-finding abilities infringe fundamental Community rights and therefore should be curtailed in the interests of natural justice [34]. Specifically, these cases have asserted that a proper respect for defence rights and the inviolability guarantee demands either a right of prior warning of an investigation or, in the absence of that, a requirement that a search warrant be obtained before undertaking an Art.14(3) inspection [35].

The issue of prior warning was discussed in depth in *National Panasonic* [36] who raised a number of arguments challenging the legality of surprise inspections. These arguments fell into two broad categories ; firstly, that surprise raids infringed the necessity principle and secondly, that they violated due process and defence rights. Panasonic asserted that the proportionality principle required DGIV to attempt to obtain the information voluntarily under Art.14(2) before employing the mandatory procedure [37]. On the matter of due process, they claimed that they had a right to be heard before a decision appreciably affecting their interests was taken. Denial of this right meant that they were unable to seek legal advice. The firm asserted that a proper respect for due process demanded a right to prior notice and that dawn raids should only be used in cases of manifest gravity. In particular, they argued that the right of prior warning was implicit in Art.8 ECHR and that DGIV's dawn raids breached this guarantee of inviolability [38]. In reply, the Commission relied on the qualification in Art.8(2) ECHR that this right only applied insofar as it was consistent with "economic well-being of the country". DGIV also argued that all Community fundamental rights were subject to public interest limitations or constraints "justified by the overall objectives pursued by the Community" [39].

The ECJ upheld DGIV's absolute discretion in its choice of investigation powers and confirmed that the Commission was not obliged to attempt investigation first by warrant, nor did DGIV have to justify its choices. The Court confirmed that the overriding public interest in enforcing competition rules outweighed the guarantee of inviolability [40].

An alternative approach challenging the legality of dawn raids has argued that a distinction should be drawn between narrow powers of investigation and wider powers of search [41]. This approach has asserted that the intrusive nature of searches and a respect for defence rights, particularly the inviolability guarantee, demand that searches be subject to greater legal control. Thus, a warrant should be obtained prior to conducting a search [42]. Such arguments have found considerable support. The House of Lords Select Committee has repeatedly advocated the adoption of a system of judicial warrants [43]. Indeed, the Deringer Report [44] on the drafting of Reg.17

advocated the use of a system of warrants. However, the Council rejected the need for such a system considering that the proportionality principle provided sufficient protection. But, in *Dow Chemical Iberica* [45], the ECJ clearly stated that DGIV did not require a warrant to search private premises and that the necessity for a search was entirely a matter for the Commission's discretion, subject only to review by the Court at a later date [46]. In *Hoechst*, the Court firmly rejected arguments distinguishing investigations and searches, insisting that investigation was a generic term with search merely being a more wide-ranging form of investigation. However, the ECJ did acknowledge defence rights during investigation, holding that the defendant's right to a fair hearing later in the process must not be irremediably undermined during the investigation. So, where a firm refuses to co-operate with an Art.14(3) decision, DGIV cannot insist upon entry unless it has complied first with the relevant national procedural safeguards regarding searches [47]. But, the ECJ has placed strict limits on the national court's review powers. The domestic court cannot substitute its own assessment of the necessity of the investigation. The Commission's assessment prevails, subject only to review by the ECJ itself. The national court must confine itself to assessing whether the decision is authentic and whether the measures applied for are arbitrary or excessive given the purpose of the investigation [48].

The precise effect of the *Hoechst* and *Dow* cases upon future Commission practice is ambiguous. Shaw, [49] is concerned that, in practice, the protection of Community defence rights under Art.14(3) is subject to enforcement by national courts, She argues that is tantamount to finding that EC law is contingent upon national law. Clearly, this offends against principles of autonomy and supremacy which the ECJ have always been quick to affirm, not least in *Dow Iberica* itself. There is also concern that proceeding by way of Art.14(6) requires DGIV to submit to domestic laws and any relevant procedural guarentees. As national controls vary widely, this may result in inequality of treatment. Moreover, the cumbersome nature of some domestic laws may limit the effectiveness of the Commission's inspection [50]. Furthermore, these rulings require a distinction to be drawn within Art.14(3) between those firms who refuse to submit and those who reluctantly submit. Shaw argues that

it is unfair that undertakings who unwillingly submit to investigation, as in the *Dow* cases, should receive less protection under law than firms who outrightly refused investigation [51]. Finally, if proceedings under Art.14(6) are used frequently, there is a danger that firms will automatically refuse the inspection and force the Commission to obtain a national search warrant as a matter of course. Ultimately, this will render Art.14(3) inoperative and DGIV will lose both the element of surprise and control of the investigation [52]. A solution to these problems would be to require the Commission to obtain a European search warrant from the CFI prior to conducting the investigation. This would require DGIV to establish a convincing prima facie case for its inspection. Hopefully, this would allay concerns over the present lack of due process and overcome problems relating to lack of uniformity in domestic law [53]. Unfortunately, there is a marked reluctance on the part of DGIV to travel this route as it would require an amendment of Reg.17 [54]. The recent case of *Niemitz* [55] may prove the spur for such amendments to be made.

Finally, it is necessary to consider what criteria actually do exist to govern the exercise of Art.14(3). In its Ninth Report, DGIV stated that dawn raids would be used where it feared the commission of a serious violation, the destruction of evidence or where several inspections were being undertaken simultaneously [56]. Joshua discusses these factors further [57]. He argues that, as the most serious infringements are the best concealed and the most likely to resist inspection, the element of surprise is both a proper and vital precaution to preventing the destruction of valuable evidence [58]. A further factor is DGIV's awareness of criticism of its fact-finding and its belief that such shortcomings can be remedied by the element of surprise [59]. Another important factor influencing DGIV's Art.14(3) decisions is the firm's past conduct. Where a firm has a previous record of infringement and/or of misleading the Commission, the likelihood of a dawn raid is increased appreciably. However, many of these criteria are imprecise and possibly discriminatory and leave DGIV with a wide discretion in the matter [60]. Critics have called for clearer, more limited conditions governing the use of Art.14(3). The House of Lords Select Committee has urged repeatedly that dawn raids only be used in cases of "clear necessity" [61]. In the absence

of a system of judicial warrants, it has been suggested that the Commission informally adopt similar criteria to those applied by judges and include full reasoning in the Art.14(3) decision [62]. However, until some system of control is adopted governing the use of Art.14(3), premises are not inviolable and extensive searches may be undertaken entirely at DGIV's discretion.

Thus, the present situation is that, whilst giving limited recognition to due process protections, the overall effect of the various challenges is to leave DGIV's search powers largely untouched. Neither the vaguely construed due process safeguards nor the narrowly defined role of the national courts greatly curtail DGIV's discretion. This situation reflects the ECJ's assessment of where the proper balance between effective enforcement and fundamental rights should lie. The clear message is that business premises are not inviolable where this hinders the implementation of Reg.17.

b) Use of Article 14 Powers

Having reviewed the extent of DGIV's Art.14 powers, it is now necessary to examine how the Commission applies them. The extensive discretion which DGIV possesses is clearly reflected in its choice of investigation method under Art.14. Since *National Panasonic*, the Commission's investigation policy has undergone a dramatic change. Previously, DGIV used its Art.14(3) powers sparingly and, even where the element of surprise was considered vital, visits were made under the voluntary procedure. Only when firms refused to co-operate voluntarily, did the Commission exercise its powers by decision [63]. However, there is abundant evidence demonstrating that DGIV has employed the latitude afforded by *National Panasonic* to significantly increase the number of mandatory inspections [64]. Attempts to obtain information by voluntary means are virtually non-existent. Quite simply, the dawn raid has become the norm. Between 1973-1979, 31 Art.14(3) decisions were made [65]. In contrast, between 1979-1983, 67 such decisions were made [66]. Unfortunately, it has been impossible to obtain precise statistical data on the total number of Art.14(3) decisions made between

1980 and the present date as DGIV is not obliged to publish such information [67]. However, from the study it is clear that all the major cartels of the 1980s were investigated under Art.14(3) [68]. Of the 22 horizontal cartels in the case study subject to formal prosecution by DGIV [69], 16 of these were inspected under Art.14(3), whilst only one was investigated entirely under Art.14(2) [70].

Evidence of DGIV's use of its inspection powers in the UK suggests that between 10-50 visits under Art.14 are made here by the Commission each year. OFT evidence confirms this. Between 1980-1989, 312 Art.14 visits were made in the UK [71].

Of the investigations carried out in the study, few directly challenged DGIV's right of entry under Art.14(3), though the challenges that were mounted achieved significant developments in the law [72]. Moreover, DGIV seems to make little use of Art.14(6) [73]. Furthermore, there were only two instances in the study of outright refusals of the inspection [74]. However, there were several examples of undertakings reluctantly submitting to investigation believing that they had no other option but to do so [75]. There are a number reasons for DGIV's infrequent use of its Art14(6) powers. With many firms reluctantly submitting to inspection, the Commission rarely needs to enlist the assistance of national authorities [76]. Where it does, the Commission may both lose the element of surprise and control of the case, at least in the short term, as well as possible challenge by domestic competition authorities [77]. It is perhaps for such reasons that DGIV, in *Hoechst*, strenuously argued that it could conduct such searches without the assistance of national authorities and without adhering to national procedural safeguards [78]. Certainly, the Commission's attitude discloses its reluctance to have any check placed upon its discretion. Of course, in the event of a refusal to submit, DGIV may impose substantial fines. This it did in both instances in the case study where inspections were refused [79].

In the study, the factors influencing the choice of method under Art.14 were unclear. Art.14(3) decisions do not explain why that specific investigation method was chosen [80]. It seems that DGIV's use of Art.14(3) is automatic and, on occasion, impossible to justify. The CBI has cited evidence of Art.14(3) inspections where no

evidence was found and no prosecution resulted. Clearly, had the Commission been required to apply for a warrant and establish 'reasonable cause' it would have been unable to do so [81]. Moreover, in such situations, DGIV has not been prepared to have its judgement questioned. Both the OFT and CBI expressed concern over an inspection where the OFT questioned the use of Art.14(3) believing that, on the information available, there was insufficient justification for its use. DGIV ignored these concerns and proceeded with the investigation [82]. Yet, perhaps it would have been more effective, and certainly fairer, for the Commission to have heeded these anxieties. CBI evidence suggests that, in the UK, the ratio of Commission prosecutions to investigations is less than 30% [83]. As such, the automatic use of Art.14(3) would seem to represent both a waste of precious Commission resources and an unwarranted intrusion upon the premises of private individuals. Given the penalties which may be imposed for refusal of an inspection, review of this policy seems appropriate. Past infringements by undertakings clearly increase the likelihood of a dawn raid. This certainly true of a number of firms who have been involved in some/all of the major petrochemical cartels included in the case study [84]. A similar approach to recidivist behaviour can be seen in DGIV's attitude to the glass industry, where the Benelux and Italian markets have been subjected to repeated investigations [85]. The problem here is that the line between justified Commission concern over possible covert behaviour and an unjustified presumption of guilt is ambiguous. The undertaking's nationality is also of influence. Many Dutch and Belgian firms involved in national associations have found themselves subject to Commission investigation. In the case study, eight violations directly concerned such Dutch and Belgian national associations [86]. Again, the problem is whether DGIV pays sufficient attention to differentiating between proper concern over potential collusion and improper discrimination.

In addition, there have been complaints regarding the scope of inspectors' search powers once on the firm's premises [87]. Whilst inspectors possess no powers of search as such, their powers are extensive [88]. But, the use of these powers is controversial. The main allegation is that the Commission uses its powers to

undertake 'fishing trips'. DGIV's position on this is unequivocal ; it does not conduct such outings [89]. Whether this the reality of the situation regarding horizontal cartels is debateable. Reynolds has complained of both inspectors' tendency to ask questions which extend beyond the ambit of the documents being examined and evidence that the Commission asks to see documents not relevant to the immediate inquiry [90]. The situation is compounded by the vaguely worded nature of Art.14(3) documents and an equal lack of specificity on the part of inspectors questioned about the nature of their investigation [91]. This vagueness both makes it difficult for firms to comply with the investigation and provides ample width for DGIV to conduct 'fishing trips' if it so desires. In response to criticism, the Commission now attaches an Explanatory Memo to its Art.14(3) decisions, setting out the scope and limits of inspectors' powers and the rights of the firm concerned. However, the generalised nature of this has been criticised itself [92].

These concerns are reflected in the case study. Several cases complained that the vagueness of the Art.14(3) decision infringed Art.190 [93]. In these cases, whilst the ECJ admitted that the Art.14(3) decision was imprecise and thus open to criticism, they nevertheless upheld DGIV, stating that the decision broadly contained the information required [94]. In *Dow Benelux*, the firm objected that information obtained incidentally in the *Polypropylene* investigation was used as the basis for inspection of the *PVC* cartel thus infringing the Art.20 guarantee of confidentiality. The Court held that, in doing this, DGIV was not using information for a purpose other than that indicated in the Art.14(3) decision [95]. This interpretation of the 'purpose' of the investigation extends the Commission's powers and allows information from one investigation to fuel another. Elsewhere in the *PVC* cartel, it was strongly argued that, despite DGIV possessing sufficient evidence of an offence, it both continued and widened the scope of its investigation resulting in the discovery of the *LdPE* cartel [96]. The ECJ's position on this use of investigatory powers is equivocal. The Court have repeatedly confined themselves to stating that DGIV's powers are governed by the principle of proportionality and affirming that the Commission itself retains the discretion to decide what is "necessary" [97]. Not surprisingly, the Court have, so far,

never found DGIV to have infringed the proportionality principle. In *Orkem*, AG Darmon considered that in reviewing the Commission's discretion the ECJ should draw a line between investigations where there was sufficient evidence to establish "reasonable grounds for suspicion" and investigations which were simply probing for evidence [98]. However, given the latitude afforded to the Commission by the Court, the precise location of this line may vary both between cases and over time. For the present the lack of specificity required of the Commission's decisions and the Court's obvious reluctance to interfere means that there is nothing to prevent the Commission from undertaking 'fishing trips', particularly in market division cases which directly threaten the Single Market and justifying it later by recourse to a liberal definition of the necessity principle. Clearly, this situation lends weight to arguments that control after the event is rarely adequate and strengthens calls for the introduction of judicial warrants [99].

c)Article 11 [100]

Having reviewed DGIV's use of Art.14 powers, it is now necessary to consider the ambit and application of its Art.11 powers. The main cases discussing the scope of these powers are *Orkem* and *Solvay* who challenged the Commission on several grounds [101]. First, these cases asserted that the Art.11(5) decision constituted a disguised Statement of Objections (SO) and as such breached their right to be heard. They also argued that DGIV was abusing its powers by attempting to obtain documents under Art.11 when this was only authorised under Art.14 and that the decision breached the principle of proportionality by seeking unnecessary information [102]. Again, the ECJ's response was to broaden the scope and use of DGIV's powers by its generous interpretation of the 'purpose' of the investigation. Consequently, the information requested was held to be consistent with the purpose of the investigation. Thus, the principle of proportionality was not breached. Moreover, the decision, by outlining DGIV's suspicions, did not constitute a disguised SO but merely fulfilled its obligation under Art.11(3) to state the purpose of the decision. Thus, defence rights

were not infringed. In addition, the Court confirmed that the procedures under Arts.11 and 14 were entirely separate and DGIV was entitled to request documents under Art.11 [103]. The overall effect of these rulings has been to affirm the Commission's discretion and provide unrestricted scope for the application of its Art.11 powers.

As for the use of these powers, Art.11 is rarely employed as a primary means of investigating horizontal cartels [104]. More often, it is used after a dawn raid, either to obtain additional information from the firms involved, or to elicit information from other undertakings on the periphery of the infringement. In 14 of the formally prosecuted cases in the study, Art.11 was used in this way [105]. Inevitably, the recalcitrance of those involved has required DGIV to resort to Art.11(5) decisions to obtain compliance. In 1987, the Commission issued 31 such decisions [106]. In the case study, Art.11(5) decisions were issued in relation to several cartel investigations [107].

2)Conclusion - Commission Powers

It is clear from this evaluation of horizontal cartel investigations. that the scope and use of the Commission's investigatory powers is plainly criminal in nature. Whilst DGIV cannot effect a forcible entry, in practice, its investigation powers are as wide as those of the criminal law. In particular, its right of surprise and the scope of its search powers are extensive and have not been seriously curtailed by the *Hoechst* and *Dow* cases. The undertaking's duty to co-operate, the evidential difficulties faced in obtaining interim relief and the possibility of substantial fines for non-cooperation render a right of forcible entry superfluous. Firms have little option but to submit to investigation.

The paramouncy of Reg.17 is reinforced at every point. Plainly, DGIV is not prepared to permit any interference with effective application of this Regulation and has used its discretion to interpret its powers accordingly. Certainly, in the area of horizontal cartels, the Commission makes the fullest use of its search powers. The frequency with which DGIV uses Art.14 in preference to all other methods discloses

the Commission's perception of the criminal nature of horizontal offences and its willingness to interpret and use its powers penally. Its actions demonstrate no inclination to adopt an incremental approach to investigation. On the contrary, any attempt to limit DGIV's fact-finding powers is met with strong opposition. As a result, the Commission's comprehensive powers are bounded by few controls. For instance, DGIV is not required to justify its choice of investigation method nor is its decision-making here subject to any guidelines. Art.14 does not require the Commission to possess any documentary evidence before it can act, nor does DGIV need to satisfy a court of a prima facie case before it can undertake a dawn raid. Such decisions are not subject to control by the Court until after the decision is both taken and executed. Yet, there is some evidence suggesting that many investigations do not result in prosecution. As such this would seem to represent an excessive use by DGIV of its penal powers and an unjustifiable intrusion upon the lives and premises of private individuals. Moreover, the streamlining of DGIV's administrative procedures means that investigation decisions no longer need to be submitted to the full Commission, but instead may be taken by an individual official [108]. Similarly, DGIV has refused to be fettered by the inviolability guarantee. Whilst inviolability is recognised in principle, in practice, it is subordinated to the effective implementation of Reg.17 and economic integration. Of further significance is the Commission's decision not to use Art.14(6) rather than lose control to national courts and be subject to their due process safeguards, and its reluctance to adopt a system of judicial warrants. Obviously, DGIV regards any external control of its discretionary powers a hindrance to effective enforcement. Finally, whilst categorically denying 'fishing trips', the Commission's broad construction of both the scope and the necessity of the investigation has allowed it to uncover further violations in the course of a search in the absence of any effective review by the Court.

DGIV's generous interpretation of its investigatory powers invariably has the full backing of the ECJ. The Court's attitude seems to be based on a belief that their role is to interpret the legislation in a way which enables the Commission to enforce Reg.17 most productively.

DGIV's investigation choices further its political and pragmatic goals in a number of ways. As well as providing a deterrent to potential violators, DGIV's penal approach to investigation also has the political benefit that the Commission is seen to be 'doing something about' persistent offenders. Art.8 ECHR's inviolability guarantee was explicitly limited by DGIV in pursuit of the political goal of "economic well-being" : a clear indication that Art.3(g)'s objective of Single Market integration overrides due process. Plainly, fundamental rights are subordinate to the Commission's political and pragmatic goals. Finally, the more extensive DGIV's powers, the more cost-efficient is the enforcement process. Thus, DGIV's investigation choices in horizontal violations have obvious pragmatic advantages.

In conclusion, the ambit and application of DGIV's fact-finding powers are criminal in nature. However, the absence of a system of judicial warrants means that these powers are not subject to criminal law controls. This suggests that there is not a proper balance between administrative efficiency and fairness. To discover whether this is so, defence rights must be examined.

D)PROCESS AND SUBSTANCE - DEFENCE RIGHTS

This section will consider whether and to what extent defence rights exist at investigation and the effect of DGIV's investigation choices on the exercise of these rights. Until recently, defence rights at this stage were not recognised [109]. However, in *Hoechst*, greater respect was accorded to the rights of defendants by ruling that the Commission's conduct of the investigation must not irremediably impair defence rights later in the process [110].

1)Self Incrimination [111]

Given the wide scope and use of the Commission's investigation powers, an important question for defendants is whether a privilege against self incrimination exists which could curtail DGIV's discretion. Reg.17 is silent on the issue [112]. Consequently, it has been left to the ECJ to rule on the legality and propriety of requiring firms to supply evidence of their Art.85 violations. In the leading case of *Orkem*, the Court held that a limited right to remain silent existed as a fundamental principle of Community law [113]. This ruling raises two main issues regarding the extent of the protection afforded. Firstly, whether the protection applies to administrative as well as criminal proceedings and whether the right extends to corporate persons.

In *Orkem*, AG Darmon took a restrictive approach both in his review of the existence and scope of the right in MS and under Art.6 ECHR and also on the wider issue of the nature of competition law [114]. Darmon argued that the ambit of this privilege varied so much amongst MS as to provide no clear authority but only "a mosaic of national approaches" [115]. As regards Art.6 ECHR, Darmon asserted that did not "formally and expressly" uphold a right of silence [116]. On the issue of classification, Darmon made it clear that he favoured a restrictive interpretation of 'criminal proceedings' thereby rendering competition issues strictly administrative [117]. He concluded that, even if Art.6 ECHR did contain a privilege against self incrimination, it did not apply to competition proceedings [118].

The Court endorsed Darmon's findings that neither MS law nor the ECHR seemed to uphold such a privilege. But, in the light of the ruling in *Hoechst*, the ECJ went on to consider self incrimination in the context of the "integral fairness" of competition proceedings. They held that the need to safeguard defence rights and ensure that they were not irremediably undermined by the conduct of the investigation required the recognition of a limited right of silence. Thus, undertakings were entitled to refuse to answer leading questions. But, this did not permit firms to refuse to answer factual questions or to hand over documents establishing the offence [119].

This describes the present state of EC law on the subject. However, two recent ECHR cases would seem to require a change in EC law [120]. Most important is the case of *Funke* which held that a right of silence is implicit in Art.6(1) ECHR [121]. Even more importantly, the Court held that this privilege applies not only in a strict criminal context but also in administrative, regulatory procedures. This would seem to cover competition law and is consistent with previous ECHR caselaw in *Oztürk* and *Stenuit* which both held that regardless of the nominal classification of the law, it is the nature of the offence and the severity of the penalties imposed which determine the true character of the law in question [122]. Moreover, *Funke* held that this right can be relied upon at the investigation stage and protects defendants from supplying factual information [123]. As such, the ruling in *Funke* goes considerably beyond the ECJ's ruling in *Orkem*. Furthermore, the ECHR have held that Art.6 ECHR applies to both natural and corporate persons [124].

The implications for EC competition law are considerable. As *Funke* clearly recognises a privilege against self incrimination as fundamental to Art.6 ECHR, *Orkem* can no longer be considered good law [125]. In addition, the implementation of the *Funke* decision in EC competition law may increase the frequency of dawn raids [126]. This was recognised by the Court in *Funke*, but it did not deter them. Clearly ,the Court considered procedural integrity to be of paramount importance. It is now necessary to await CFI/ECJ reaction to these cases.

Other than the cases already discussed, there are no other instances in the study challenging the scope of this protection [127]. However, the *Funke* decision may encourage further challenges. Until such appeals occur, the privilege is dependent on the integral fairness of proceedings. Whether this fairness is readily detectable in practice is questionable. DGIV's wide investigatory powers seem to considerably reduce its real value. Probably, the greatest threat to defence rights at this stage is the duty to co-operate with the Commission's investigations. Several cases have ruled that firms are under a positive and continuing obligation to assist DGIV with its fact-finding [128]. This obligation raises the matter of the Commission's powers to question staff during inspections and their right to legal representation.

The Commission does have a power under Art.14(1)(c) to require oral explanations. In *National Panasonic*, the ECJ held that DGIV were entitled to ask questions on the records and matters arising therefrom and relating to the subject of the investigation [129]. The width of this ruling leaves the scope of DGIV's power uncertain [130]. Concerns over the indeterminate nature of the Commission's powers have resulted in recommendations for strict limits to be placed on inspectors' powers to pose oral questions during investigations [131]. Such concerns may be justified as past cases show that oral explanations are sometimes used as evidence against undertakings [132].

Similarly, an undertaking's right to legal representation during inspection is uncertain. The House of Lords have highlighted the importance of legal representation [133]. Now, the Commission's Explanatory Memo informs defendants that a right to representation is permitted, provided it does not cause undue delay [134]. Moreover, in *Hoechst*, the ECJ recognised a right to representation as one of the rights of the defence [135]. The reality is somewhat different. The CBI has cited evidence of investigations where DGIV refused to wait for legal representation [136]. Similarly, in *National Panasonic*, DGIV declined to delay the investigation until the arrival of a lawyer, claiming that this did not prejudice Panasonic's interests [137]. Many would disagree. Given that oral evidence obtained in the absence of legal advice may be used as proof of an infringement, it is considered vital that a lawyer should be present before such statements are made. Thus, the right to legal representation should be protected by Reg.17 and not dependent upon DGIV's discretion [138].

It is clear from this examination that the defendant's right to silence is further curtailed by their duty to co-operate. Moreover, undertakings who insist upon their right and decline to co-operate may find themselves penalised [139]. A refusal of an investigation may take various forms from an outright refusal to permit Commission inspectors on to the premises, to a more subtle forms of non-cooperation, such as providing narrow or misleading answers [140]. It is at the latter end of this spectrum that the line between reliance on a privilege against self incrimination and a refusal to submit is particularly blurred. What is clear is that DGIV's definition of a refusal to

submit is very broadly defined and that it is its policy to impose significant fines in every instance. In the study, notable fines for outright refusals to submit were imposed in several instances [141]. Once the inspection is underway, refusals to supply documents and obstruction of the investigation by declining to give oral explanations are regarded as constructive refusals and fined accordingly [142]. However, it seems that DGIV's interpretation of a refusal is even wider. On several occasions, it has fined undertakings for providing incorrect or misleading information. The Commission has made it clear that it expects answers from firms to be full and fair replies which observe the spirit as well as the letter of the question [143]. Thus, not only does DGIV object to the supply of false information, but also to a failure to supply a fuller answer which it considers to be an attempt to mislead. Korah has been extremely critical of the Commission's approach. She argues that it is unreasonable of the Commission to expect firms to guess what questions DGIV would have asked if it had been aware of more facts and supply answers to those questions in anticipation, and then fine firms who fail to guess correctly [144]. Nevertheless, in a number of cases this is precisely what the Commission has done [145]. Korah argues that the Commission's high-handed attitude here has been a powerful deterrent to firms voluntarily submitting to investigation and suggests that, unless DGIV's approach changes radically, the situation will deteriorate further, possibly to the point of complete non-compliance. Current attitudes within the petrochemical and glass industries would seem to indicate that Korah's forecast is correct.

In summary, a right to silence is recognised in competition law. But the practical value of this protection is severely curtailed by the Commission's use of its enforcement powers. A fundamental conflict exists between the needs of Reg.17 and the requirement to safeguard defence rights. In the area of self incrimination, DGIV has chosen to resolve this conflict both by its classification of competition proceedings as administrative and by securing the co-operation of the Court and the defendant.

By choosing to characterise proceedings as 'administrative', DGIV avoids the need to recognise the full protection of the right to silence as required by the criminal

process [146]. This choice clearly demonstrates that the Commission regards those subject to administrative proceedings as being entitled to reduced legal protection. It has been assisted in this strategy by the ECJ, who by basing defence rights on the vague, and therefore highly malleable concept of 'integral Fairness', have allowed the right to silence to be curtailed significantly. Indeed, this concept is so ambiguous that it can be constantly re-interpreted to meet the current requirements of the Commission and Court yet still respect due process [147]. But, the continued success of this strategy is not guaranteed. The ECHR decision in *Funke* may force the ECJ to recognise fully the privilege against self incrimination.

Moreover, whilst ultimately the case may be for the Commission to prove, it is obviously determined to have the defendant's co-operation, Defence assistance has been co-opted most potently by DGIV's generous interpretation of the duty to co-operate and its willingness to fine recalcitrance. The result is that, far from respecting a protection against self incrimination, the Commission's interpretation of Reg.17 demands the active participation of the defendant in his own conviction. There is no clearer example than this of the law being used as a resource, nor the belief that due process is exclusively for crime control [148]. DGIV's willingness to penalise all degrees of non-cooperation makes it all but impossible to insist on one's rights and refuse to incriminate oneself. Yet, at times, the line between a refusal to co-operate and a proper insistence on one's legal protection is so fine and the subject of such uncertainty, that it seems manifestly unjust to impose sanctions. This is particularly so where fines are exacted from firms who fail to forecast correctly DGIV's likely questions. The Commission's attitude towards legal representation provides further evidence of its disregard for defence rights. Not only does DGIV expect defendants to relinquish their right to silence, but it expects them to do so in the absence of any legal representation. Inevitably, defendants find themselves in a Catch 22 situation. The only sure way to avoid fines for procedural violations is to supply the Commission with sufficient information with which to convict. The reward is that the evidence supplied will be used to establish a substantive infringement and may result in a significant fine. Clearly, in the conflict between Reg.17 and the defendant's right to

silence, Reg.17 wins. Certainly, DGIV's use of its investigation powers here does not appear to reflect a true respect for defence rights or a real desire to maintain fairness of competition proceedings. Rather it has used its enforcement powers to the full to acquire the information necessary to establish an offence. Evidently, both the Commission and the Court consider that Reg.17 is there to be enforced regardless of the defendant's right to silence. Consequently, the ambit of the protection is defined in a way which maximises the successful enforcement of Reg.17. Where necessary, Reg.17 is employed punitively ; an insistence on one's right to silence is punished. So whilst the Commission's construction of due process here does create a degree of formal equality, what DGIV terms 'integral fairness', this concept is manipulated to ensure the fruitful application of Reg.17, and in so doing, may promote substantive unfairness.

DGIV has a great deal to gain by this manipulation of the law. Not only does it acquire sufficient information to enable successful prosecution, but it also considerably advances political and pragmatic goals. DGIV's punitive translation of Reg.17 greatly assists in achieving the political mandate of Single Market integration. Market division recidivists tend to receive universal censure because the economic power they wield poses a significant threat to government. This risk is heightened in the European context by the danger such undertakings pose to economic integration. Thus, by interpreting the defendant's right to silence, in particular, and Reg.17, in a way which guarantees the conviction of all such firms, much is done to eliminate the immediate political danger, as well as having a long term deterrent effect on other similarly minded undertakings. Moreover, this tough stance against large economic entities is consistent the EC's populist economic background and its commitment to SME's. This interpretation of Reg.17 has pragmatic advantages too. It is considerably more cost-efficient to require defendants to provide the evidence necessary for conviction than it is for the Commission to establish this by independent means. The savings in time, money and manpower are considerable. Moreover, the very malleability of the 'integral fairness' concept makes it a most profitable source of assistance in achieving both political and pragmatic objectives ; it can be interpreted to

mean whatever DGIV wants it to mean. Thus, in the market division context, it can be construed restrictively to assist conviction. Elsewhere, when a more subtle approach is expedient, 'integral fairness' can be employed to justify a more generous approach by DGIV.

Overall, the message is clear. Reg.17 is paramount. The defendant's right to silence is permitted only insofar as it assists, or at least does not hinder, the Commission's investigation of competition offences.

2)Protection of Confidential Documents [149]

Over the last twenty years the legal status of confidential information in the context of Commission investigations has caused considerable concern [150]. Two main categories of confidential information can be identified : business secrets and documents claiming legal professional privilege. The law relating to each will be discussed in turn.

a)Business Secrets

AM&S made it clear that business secrets are subject to inspection under Art.14 [151]. Firms have no right to refuse to disclose the information as Art.20 imposes an obligation on the Commission not to divulge such confidential information. Firms have argued that this protection is insufficient because Reg.17 provides no protection against disclosure *to* the Commission [152]. As a result, it was proposed that undertakings should have a right to refuse to disclose documents which contained business secrets, communication of which would cause great harm to the business in circumstances where DGIV had failed to establish that the information was of sufficient importance to warrant disclosure [153]. Little seems to have come of this. All cases challenging the disclosure of business secrets have been unsuccessful [154]. Thus, it seems clear that business secrets receive no special protection against Commission investigation. More successful has been the protection of information subject to legal professional privilege.

b)Legal Professional Privilege

Again, Reg.17 is silent on the matter. However, *AM&S* examined fully whether the Commission's investigation powers are limited by this right [155]. Here the ECJ recognised a qualified protection, but left the precise scope of the privilege unclear.

DGIV raised a number of points in *AM&S* challenging the existence of this right in Community law [156]. It argued that the protection was unnecessary as the Council had specifically rejected its incorporation in Reg.17 and since then the lack of this protection had caused few problems [157]. Moreover, it argued that the varied approach of national laws made it difficult to recognise a clear right of protection. Alternatively, DGIV asserted that, if such a privilege did exist, it was not a substantive right but was based entirely on the Commission's willingness to act fairly and was subordinate to its enforcement policy [158]. DGIV made it equally clear that it alone was competent to decide whether a document was privileged [159]. Thus, the Commission suggested that a suitable verification procedure was for all documents to be disclosed to Commission inspectors who would decide for themselves which documents were protected by privilege. These documents would then not be adduced as evidence against the undertaking [160].

AM&S advanced a very strong case for the recognition of legal professional privilege in Community law. They argued that there was general recognition in all MS of this principle, and whilst some variations existed, there remained ample scope for Community law to distil a "best solution" from these sources which would uphold the spirit and purpose of domestic laws [161]. AM&S were adamant that this right was a substantive one and not dependent on DGIV's sense of fair play. They emphasised the immense practical value of protecting such fundamental rights and the importance of promoting due process over the needs of pragmatism [162].

The Commission's verification process was criticised extensively. Most fundamentally, it was argued that the Commission's monolithic role threatened the basis of this guarantee. The inspector's knowledge of the document automatically rendered the protection worthless. Furthermore, DGIV's verification procedure

imposed a conflict of roles upon inspectors and placed them in the position of having to forget the contents of some documents when making later decisions. Finally, the possibility of inspectors making errors in determining privilege caused considerable concern. Consequently, AM&S asserted that an independent arbiter to determine privilege was vital [163]. It was suggested that this role could be undertaken by national courts or the ECJ itself. AM&S insisted that it was imperative that the ECJ, in ruling on the scope of the Commission's powers, drew a clear distinction between a firm's obligation to produce documents and a requirement to disclose their contents [164]. DGIV rejected this proposal outright, arguing that it was time consuming and hindered the application of Reg.17 [165].

The ECJ in its ruling, stated that the preservation of defence rights was essential and that the protection of legal professional privilege was a vital element of such rights. Thus, the Court held that the Commission's investigatory powers were subject to legal professional privilege [166]. But, the ECJ qualified this protection by ruling that it was only available in respect of some, but not all, confidential communication between a client and an independent lawyer. The precise scope of this qualification has caused concern. Firstly, it raises the question of when this privilege arises, specifically whether it only covers communications made after the initiation of proceedings or whether it includes earlier documents. It seems that it chiefly covers communications relating to a client's defence after the initiation of proceedings, but may also include earlier correspondence which is closely related to the subject matter of the procedure [167]. The ruling also excludes from protection communications between an undertaking and its in-house lawyer. This element has been the subject of considerable discussion and criticism. However, no change in approach appears imminent [168]. As regards the verification process, the ECJ rejected all arguments in favour of national courts and independent experts. Instead, they awarded themselves sole jurisdiction to determine the issue [169]. However, using Art.173 as a verification process has been criticised as cumbersome and as causing considerable delays and thus unfair to defendants. The House of Lords have urged for a more satisfactory solution to be found to this "most intractable problem" [170].

Despite the uncertain scope of *AM&S*, the case study shows that since then there have few actual problems relating to legal professional privilege in horizontal agreements. The study reveals no other challenges on this issue [171]. The reason for this may be that as cartels are conducted covertly, little or nothing is committed to paper. Thus, there are few documents to claim as privileged.

In summary, the defendant's right of legal professional privilege is recognised. But, like self incrimination, its scope is curtailed in the face of enforcement needs. As recognising this protection as a substantive right would conflict with the Commission's policy, DGIV again employ the 'fair play' argument to mete out a type of formal due process which suits its enforcement needs but which does not necessarily provide any real protection for undertakings involved. Quite plainly, any due process must be on the Commission's terms. This attitude is echoed in DGIV's evident mistrust of all parties involved ; undertakings, lawyers, and even the ECJ itself, and provides further evidence that the Commission sees it as essential to achieving its political and pragmatic goals that it retains full control of all decision-making. Moreover, the ECJ, whilst reserving jurisdiction over the issue of privilege, have upheld the Commission's enforcement policy by viewing legal professional privilege as merely an element of defence rights. Again, by basing the existence of this safeguard on the integral fairness of proceedings, the ECJ have preserved sufficient flexibility to ensure the paramouncy of Reg.17 over defence rights whenever necessary.

This flexible approach to defence protections has both political and pragmatic advantages for DGIV, enabling it to obtain, by the most cost-efficient means, the necessary information with which to prosecute firms. Such an interpretation of defence rights seems to allow political and pragmatic objectives to triumph over substantive justice. By recognising legal professional privilege, formal equality is preserved. But, by limiting the extent of this protection in accordance with enforcement demands, the reality may be substantive injustice. This leaves one wondering how far this right would protect a party where the only evidence of an infringement was privileged [172].

3)Presumption of Innocence [173]

This protection is a well recognised fundamental right in the criminal law of most jurisdictions and is explicitly acknowledged in Art.6(2) ECHR [174]. Reg.17 makes no mention of a presumption of innocence. Thus, evidence of its existence and scope in EC competition law must be sought from the practice of the Commission and Court. The case study reveals no obvious recognition of this protection in competition investigations. There is little direct discussion on the subject. However, clues to DGIV's attitude do exist, suggesting that it may operate a presumption of guilt. For instance, one must question whether the Commission's frequent resort to Art.14(3) in the investigation of horizontal cartels would occur quite so often if DGIV did not believe that the undertakings were guilty and in possession of incriminating evidence. Moreover, in *AM&S*, the Commission revealed its deep-seated suspicions of firms in general [175]. Again, one must ask whether such distrust would be so readily manifest if DGIV was not already convinced of the firm's guilt and its willingness to deceive. Further circumstantial evidence of a presumption of guilt is reflected in DGIV's attitude towards investigation choices and defence protections. It may affect the Commission's definition of the 'necessity' for the investigation, influencing the type of investigation and DGIV's willingness to limit the right to silence, legal professional privilege and the inviolability of premises. Certainly , the Commission's inclination to curtail these rights is consistent with a belief that firms have transgressed and a determination on the part of DGIV to expose the violation.

The Court's position on this fundamental protection at the investigation stage is unstated. Presumably, the ECJ would interpret this safeguard in accordance with its recognised position of upholding the integral fairness of proceedings. As the Court has approved DGIV's curtailment of other due process protections in the pursuit of effective enforcement, it is unlikely that the Court would seriously object to a restriction of this safeguard too.

Perhaps, the most cogent evidence of the Commission and Court's attitude is their lack of comment on this most basic of protections. In so doing, they leave

themselves open to accusations that they lack real commitment to maintaining fairness of proceedings [176].

The Commission's political and pragmatic goals encourage and benefit from the reversal of this presumption. A presumption of guilt, albeit unspoken, may well enable DGIV to justify the curtailment of other due process protections, so enhancing the paramouncy of Reg.17 and streamlining the enforcement process. Thus, clear cost-efficiency and political gains result from the overturning of this basic safeguard. Admittedly, at this stage, evidence is circumstantial. Nevertheless, a denial, or at least a limitation of a presumption of innocence seems consistent with DGIV's approach towards other defence rights. Examination of this presumption at prosecution and trial stages may shed further light on the issue.

E)CONCLUSION - INVESTIGATION

It is now necessary to summarise how the ambit and application of the Commission's powers and the defendant's protections represent the use of 'law as a resource'. It has been demonstrated that DGIV uses its extensive discretion and the inherent flexibility of the law to ensure the paramouncy of Reg.17. At every point, the Commission insists upon the sole right to decide and control all enforcement issues. Specifically, it uses its discretion to increase the scope of its own powers and restrict defendants' rights.

This examination has already revealed how DGIV gives a penal interpretation to the scope and use of its investigation powers. In particular, the inherent malleability of the law has allowed the Commission to manipulate relevant legal definitions, widening the ambit of its search powers considerably. Thus, the necessity for and the purpose of the investigation have been liberally constructed. In contrast, the inviolability principle, which threatens to curtail DGIV's powers, has received a restrictive interpretation and has been explicitly subordinated to economic

requirements. Similarly, the Commission has insisted upon a discretion regarding its choice of investigation method. This has resulted in the automatic use of Art.14(3) and the curtailed application of Art.14(6). This approach both maximises enforcement powers and ensures no immediate check upon them. It is backed by an ability and willingness to punish non-cooperation. Thus, it is evident that DGIV has exploited the flexibility of the law to meet its enforcement needs and augment its investigatory powers.

Similarly, the evaluation of defence rights has shown that the Commission uses its discretion to ensure the curtailment of this protections. A deep-seated contradiction exists between DGIV's enforcement requirements and the need to safeguard defence rights. The Commission has chosen to resolve this conflict by both its characterisation of defence rights and by securing the assistance of the Court and the defendant.

By classifying defence protections as 'administrative', DGIV avoids the need to recognise full defence rights which might otherwise curb its discretion. Indeed, defence rights are based on the highly malleable concept of 'integral fairness' which can be re-defined endlessly to suit DGIV's requirements. Thus, there is only a limited recognition of a privilege against self incrimination. The value of this right is seriously reduced by the wide interpretation that the Commission has chosen to give the defendant's duty to co-operate and its willingness to penalise any non-cooperation. In this way, the defendant's active participation in his own conviction is effectively co-opted. The scope of legal professional privilege is also curtailed. DGIV's desire to have sole control of all enforcement issues is particularly evident here and reflects a belief that any other solution would unnecessarily limit its fact-finding powers. The approach here leaves one wondering how far this privilege would protect documents which comprised the sole incriminating evidence. As for the most basic of all protections, the presumption of innocence, it is simply not mentioned. In its place, there is circumstantial evidence of a presumption of guilt.

The flexibility secured by this approach to investigation allows the Commission to manipulate the law to meet all its enforcement demands. DGIV has secured for itself extensive search powers. The existence of defence rights is permitted only

insofar as they assist, or at least do not hinder the Commission's enforcement powers. Invariably, their ambit is defined in a way which maximises DGIV's information gathering ability. Quite simply, the Commission uses its discretion and the flexibility of the law to ensure that enforcement and due process are on the Commission's terms. In so doing, DGIV has created an imbalance between its own penal powers and the defendant's administrative protections and thereby secured control of the process and increased conviction prospects considerably. This desire to command the process appears to derive from the belief that the ability to control all decision-making is imperative for the attainment of political and pragmatic goals.

It is now necessary to evaluate the consequences of this approach by drawing a criminological analogy.

F)CRIMINOLOGICAL ANALOGY [177]

It is intended here to briefly discuss the scope and use of investigation powers and defence rights within the the criminal justice system [178]. This examination will focus on the use of 'law as a resource' within the criminal process. It will be seen that the same pattern of expansion of investigation powers and limitation of defence rights in the interests of effective enforcement exists here. The problems and consequences of this approach will then be discussed. It will be suggested that the Commission's enforcement policy is sufficiently similar to attract the same problems and consequences that have beset the English criminal process in recent years.

1)Powers of Investigation

As may be expected, police investigation powers are extensive [179]. Generally, the exercise of these powers is controlled by the requirement that there are 'reasonable

grounds for suspicion' justifying the search. However, this apparent legal safeguard has not appreciably constrained the exercise of police discretion. There are a number of reasons for this. The ambiguity of 'reasonable suspicion' leaves it too vague to be an effective standard by which to assess police conduct. The statutory provisions providing for the recording of searches and informing the defendant of his relevant protections are too difficult to enforce. The majority of searches are done in informal situations or with the defendant's consent, thereby circumventing any control imposed by 'reasonable suspicion'. Finally, there is a lack of congruence between the rules controlling investigation and the practical setting in which those rules are carried out. All this leaves ample scope for the police to construct or circumvent 'reasonable suspicion' to meet their investigation needs. Current evidence suggests that the police use their discretion, combined with the flexibility inherent in this concept, to extend their already wide criminal powers of investigation and control the situation [180].

The police approach to search powers seems to reflect their view of the entire process. McConville et al [181] discuss in depth the police's approach to their powers and their use of 'law as a resource' to construct cases. The discussion highlights the fact that, like the European Commission, the police consider the maximisation of their powers and the minimisation of any possible curtailment to these powers as imperative to securing control of the process. It is this command over legal and procedural rules which empowers them and enables them to construct cases successfully [182].

2)Presumption of Innocence/Right to Silence

The presumption of innocence is a fundamental concept and requires that the burden is on the prosecutor to establish guilt beyond reasonable doubt. The right to silence is further expression of this presumption. Defendants cannot be required to provide incriminating evidence, this is for the prosecutor to do [183]. Whilst the right to silence is a well established privilege, its exercise is constrained by both statute and the context in which it is implemented [184]. Recently, it has become subject to even greater restrictions as now adverse inferences may be drawn from silence [185].

In addition to statutory constraints, there are many practical factors limiting the exercise of this right. In the past, this protection was governed by the Judges' Rules, but the ambiguous status of these rules and their inconsistent enforcement by the courts made it difficult for defendants to rely on their rights. It seems that the reforms introduced by PACE have not noticeably changed this situation [186]. The greatest limitation is that this right must be exercised within an enviroment which is entirely under police control. Research evidence indicates that the police use their ability to control the social and psychological enviroment to create an power imbalance between themselves and the suspect. This allows them to manipulate the situation and, by the use of various techniques, induce some form of confession [187]. This ability to control the interrogation enviroment permits the police to 'penalise' non-cooperation. Inevitably, defendants are co-opted to provide incriminating evidence. As a result, only 3% of suspects remain entirely silent during questioning [188]. Indeed, research draws attention to the importance of confession evidence in securing convictions. Between 54%-75% of convictions are obtained solely on the basis of confession evidence [189]. As such, the right to silence seems to offer little real protection. Moreover, the ability to draw adverse inferences from silence amounts to a reversal of the burden of proof. In real terms, this means that there is a presumption of guilt. Yet, the numerous recent miscarriages of justice from the Confait case to that of the Bridgewater Four show that construing the privilege against self incrimination in this manner leads to the production of extremely unreliable evidence, the conviction of the innocent and the disrepute of the justice system [190].

3)Legal Representation

Prior to PACE, the Judges' Rules allowed access to a solicitor providing "no unreasonable delay or hindrance" was suffered by the police. This gave the police considerable latitude to refuse access to legal advice. Now PACE provides a right to legal representation [191]. However, the police are still able to manipulate this protection. Evidence suggests that the police are generally hostile to legal

representation. They see solicitors as the suspect's ally in a hostile enviroment and therefore an obstacle to gaining a confession. Consequently, the police employ a number of tactics to prevent/delay access to legal advice, isolate the defendant and thereby obtain a confession [192]. Police ploys include the provision of vague, incomplete or incorrect information regarding legal advice, threats of delays, lack of need for a solicitor and promises of bail [193]. This active discouragement to take up legal advice means that only 9% of suspects are questioned in the presence of their legal representative. The overwhelming majority waive their right to a solicitor [194]. Even where suspects are legally represented, this is often of little real value [195]. Thus, unhindered access to legal advice is not guaranteed under the system. The police are able to discourage the exercise of this right in most cases. Indeed, their ability to do so was an important feature of several miscarriage cases enabling them to obtain confessions [196]. Even where legal advice is obtained, research shows that its value is debateable [197].

4)Conclusion - Criminolgical Analogy

It can be seen from the above discussion that the police take every opportunity to manipulate legal and procedural rules to secure broad investigative powers and limit any possible challenges to their discretion, thereby creating an enviroment under their control where conviction is more likely than not. As such, this approach shares many similarities with the Commission's application of competition rules. The requirement that searches only be undertaken where there is 'reasonable suspicion' that a crime has been committed is tailored to meet enforcement needs, just as the inviolablity principle is subject to DGIV's investigation requirements. Neither protection fetters the power to search. In both areas, defence rights are curtailed to in the interests of effective enforcement. Both the police and the Commission appear to operate a presumption of guilt and make it difficult for defendants to insist on a right to silence. Ultimately, defendants in both jurisdictions are persuaded to provide incriminating evidence. Similarly in both processes, legal repesentation is only permitted where it does not

hinder investigation. Moreover, both employ the same tactic of deliberate ambiguity when informing defendants of the extent of search powers and defence rights. Overall, the same pattern of manipulating the law to increase enforcement powers and limit defence rights in the name of effective enforcement can be seen in both systems. It is also important to note that the English criminal process possesses the very type of substantive defence rights that critics of EC competition law would like to see enshrined in Reg.17 to govern investigations. Yet, despite their substantive nature, they are largely ineffective and are still subjugated to enforcement needs.

The problems and consequences of the present approach to criminal justice have generated abundant literature, evaluating the issues in both general and specific terms. Present limitations of space mean that it is only possible to discuss these effects briefly in general terms [198]. All the literature criticises the inequity of a system which is geared to conviction and therefore produces large quantities of highly unreliable evidence, resulting in the many much publicised miscarriages of justice [199]. The real concern is that these cases may be merely the tip of the iceberg and that many more routine convictions are equally unjust [200]. Moreover, research indicates that the present use of the 'law as a resource' to secure convictions has induced a sense of crisis and chaos within the justice system, inevitably destroying much of the credibilty and integrity hitherto enjoyed by the English criminal process.

The most important framework for evaluating this use of the 'law as a resource' within the justice process has been through the criminal justice models of due process and crime control [201]. The following sections will discuss and apply these theoretical models.

Due process seeks to create a fair system. It upholds the primacy of individual liberty and thus recognises the need to limit oppressive state power. One of the central constraints upon official power is the presumption of innocence and the requirement that the prosecutor must establish guilt beyond reasonable doubt. Due process insists upon formal adjudication with cases being tested by an impartial, public court. Conviction must be the result of lawfully obtained evidence. Equal emphasis is placed on the reliability of the system and equality of arms regarding the provision of

resources with which to mount a defence. Due process accepts that categories of those legally and factually guilty do not always coincide in a due process system and that some factually guilty persons may escape conviction.

In contrast, crime control views the repression of criminal conduct as the most important function of the process. It operates from a presumption of guilt and requires proof of guilt on a balance of probabilities only. For crime control, the end justifies the means. Any relevant evidence, however acquired, may be used to secure convictions. As resources are limited, the emphasis is on speed and minimising opportunities for challenging the 'prosecution momentum'. Cost-efficient conviction is achieved by several means. Firstly, the model aims to ensure that only the strongest cases go forward to trial and conviction. Weak cases are discarded as soon as possible. Crime control also employs methods, chiefly the obtaining of confessions, which produce a high rate of guilty pleas. This model believes that the police are in the best position to judge guilt. Thus, it seeks to give them maximum control of the system. Where they decide that the suspect is guilty, ensuing stages of the process should be as truncated as possible. Thus, crime control displays a preference for informal processes. Finally, under a crime control approach more of the legally guilty are convicted ; as are more of the wholly innocent. Crime control accepts this as a necessary evil for the repression of criminal conduct.

It is generally accepted that the English justice system most closely resembles the crime control model. There several points of similarity. The police's wide investigation powers and their control of the system with concomitant limtations on the right of silence and legal representation which may hinder conviction, are crime control characteristics. Similarly, the presumption of guilt, the reliance on confession evidence, the high number of guilty pleas in the system, the increase in plea-bargaining and the discretionary exclusion of improperly obtained evidence are all features of a crime control approach [202]. Finally, the high number of miscarriages cases demonstrates the reality of crime control - that the innocent are often convicted. This has caused many to conclude that it is the disregard for due process, which is often

implicit in a crime control approach, that is the direct cause of the present chaos within the English justice system.

If the crime control model is applied to the Commission's approach to competition enforcement, many similarities can be identified. Like the police, the central aim for DGIV is the cost-efficient repression of criminal conduct, revealing that political and pragmatic aims are crime control goals [203]. Moreover, the end - Single Market integration, always justifies the means - the paramouncy of Reg.17. At investigation, this encourages the expansion of its fact-finding powers, specifically the extensive use of Art.14(3) by which it can obtain maximum information with minimum cost and effort. DGIV also seeks to control all aspects of the enforcement process and ensure conviction by limiting the opportunities to challenge the process. Thus, DGIV has curtailed the scope and discouraged the use of defence rights. Moreover, it appears that DGIV operates a presumption of guilt and seeks to manipulate conditions thereby securing, however unwillingly, the defendant's co-operation in the production of incriminating evidence. This approach creates the same imbalance between the Commission and defendants as seen between police and suspects. From this it is possible to state that DGIV's of investigation horizontal cartels resembles a crime control approach. If this pattern is also evident at prosecution and trial stages, then it can be concluded that the present problems of the English criminal process will be the future legacy of the European Commission's competition policy.

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1 Charles Dickens *The Old Curiosity Shop.*

2 For further discussion, see Whish *Competition Law* Butterworths (1993) ; Guerrin and Kyriazis 'Cartels : 'Proof and Procedural Issues' *Fordham LJ* [1992] 266. In recent years, the Chicago School has cast doubt on whether all horizontal collusion is anti-competitive. See discussion of this by Bork *The Antitrust Paradox : A Policy at War with Itself* (1978) ; Posner 'The Chicago School of Antitrust' *Un Penn LR* [1979] 925 and Easterbrook 'The Limits of Antitrust' *Texas LR* [1984a] 1.

[3] Division may occur by restrictions on territorial markets, production quotas, classes of customers and terms and conditions offered to customers.

[4] See OFT's Booklet *Cartels : Detection and Remedies A Guide for Local Authorites* which lists the factors encouraging cartelisation.

[5] Eg *Zinc Producers Cartel* [1985] 2 CMLR 108.

[6] In addition, market division may be employed instead of price-fixing. Such collusion may well prove a cheaper, more efficient and more easily policed means of restricting competition.

[7] Such tactics would include the use of group boycotts and aggregated rebate cartels. It is not proposed to discuss this element any further, but additional information may be obtained from Whish *Competition Law* at pp 426-428.

[8] See here, arguments advanced by Chicago school, eg Bork *The Antitrust Paradox* ; Posner 'The Chicago School of Antitrust' and Easterbrook 'The Limits of Antitrust' [1984a].

[9] Bork *The Antitrust Paradox* Ch13, suggests the adoption of a rule of reason approach here.

[10] Such issues as powers of investigation and search, prosecutorial discretion and decision-making and sanctioning powers will be assessed. The procedure of competition cases is primarily governed by Regulation 17/62, OJ (Special Edition 1959-62) p 57, which gives the Commmission wide powers, hereafter referred to as Reg.17. See also Regulation 99/63 governing hearings conducted under Reg.17, hereafter referred to as Reg.99. For the full text of Reg.17 and Reg.99, see Appendix A.

[11] For background information on this section, see : Kerse *EC Antitrust Procedure* (3rd Edn) Sweet and Maxwell (1994) Ch3 ; Harding *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) Ch2 ; Green *Commercial Agreements and Competition Law : Practice and Procedure in UK and EEC* Graham and Trotman (1986) Ch6 ; Joshua 'The Element of Surprise : Competition Investigations under Art.14(3) of Reg.17' *ELR* [1983] 3 ; Joshua 'Information in EEC Competition Law Procedures' *ELR* [1986] 409 ; Temple Lang 'The Procedure of the Commission in Competition Cases' *CMLR* [1977] 155 ; Temple Lang 'Community Antitrust Law - Compliance and Enforcement' *CMLR* [1981] 335 and Williams 'The European Commission and the "right to silence"' *SJ* [1989] 938.

[12] For the full text of these Articles see Appendix A. Hereafter, unless otherwise stated, all such provisions refer to Reg.17.

[13] This information may be obtained from a wide range of sources including Goverments, competent authorities, undertakings, complainants and competitors.

[14] Art.15.

[15] Art.11(5).

[16] In addition, decisions under Art.11(5) must set a time limit for reply to the Commission.

[17] Kerse *EC Antitrust Procedure* at para 3.15.

[18] See Arts.14(2) and 14(3). The nexus between the two types of investigation will be discussed in the following section under 'Rights of Entry/Dawn Raids'.

[19] Thus, during an inspection, the Commission may enter the premises of the undertaking under investigation and examine books and take copies and ask for spontaneous oral explanations. See Art.14(1) and Kerse *EC Antitrust Procedure* at para 3.16 et seq.

[20] Art.14(3) and *National Panasonic* [1980] ECR 2033 at pp 2059-2060.

[21] Kerse *EC Antitrust Procedure* at paras 3.03, 3.16. The limitations which this places on the Commission will be evaluated shortly in the discussion of search powers and later in Ch9 under the 'rule of law' analysis.

[22] Temple Lang 'Community Antitrust Law' particularly at pp 343 et seq.

[23] Commission distrust of past offenders is manifest in a number of cases. See eg *AM&S* [1982] ECR 1575.

[24] Ic review of the Commission's failure to act under Art.175 Treaty of Rome 1957.

[25] See Chs 4 and 5 infra ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' *CMLR* [1986] 61 and Van Bael's Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 219.

[26] For further information on the Commission's preferences, see Harding *EC Investigations and Sanctions* at p 31 ; Harding 'Procedural Questions' *ICLQ* [1986] 696 and House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO.

[27] Kerse *EC Antitrust Procedure* at para 3.16 and OFT Memo to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at p 43.

[28] For further, see Egerton-Vernon 'The Role of the Solicitor in the Context of EC Commission Investigations' *LSG* [1983] 1434 ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at pp xii-xviii ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at pp 16-17.

[29] See Harding *EC Investigations and Sanctions* at p 32 for examples. It should be noted that whether business premises of legal persons are protected is in some doubt. The relevant provision in both the Netherlands and Ireland specifically excludes business premises and the issue has not yet been tested under the ECHR.

[30] *Hoechst* [1989] ECR 2859.

[31] *Hoechst* [1989] ECR 2859 at paras 15-20.

[32] *Niemitz v Germany* (1993) 16 EHRR 97 - this was a decision by the Human Rights Commission not the Court. See also Written Submission by Duffy to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 196-197.

[33] See discussion of judicial warrants later in this chapter. Also Harding *EC Investigations and Sanctions* at pp 31-33 and Shaw 'Recent Developments in the Field of Competition Procedure' *ELR* [1990] 326 at pp 330, 332.

[34] *National Panasonic* [1980] ECR 2033 ; *Hoechst* [1989] ECR 2859 ; *Dow Chemical Benelux* [1989] ECR 3150 ; *Dow Chemical Iberica* [1989] ECR 3165.

[35] *National Panasonic* [1980] ECR 2033 at p 2040 ; *Hoechst* [1989] ECR 2859 at para 42, discussed by Shaw in 'Recent Developments' at pp 328-329.

[36] [1980] ECR 2033.

[37] They argued that as this system applied under Art.11, it should apply under Art.14. The issue of proportionality willl be examined more fully in the 'rule of law' analysis in Ch9 infra. It is intended here to concentrate on the fundamental rights issue.

[38] *National Panasonic* [1980] ECR 2033 at pp 2044-2046, 2068. Discussed by Mendelson 'The ECJ and Human Rights' *YBEL* [1981] 125 at pp 146-148.

[39] *National Panasonic* [1980] ECR 2033 at p 2045. Furthermore, the Commission argued that its investigation powers were considerably more limited than those of other jurisdictions and that Panasonic's arguments were based on the erroneous assumption that investigations were drastic and highly damaging events.

[40] *National Panasonic* [1980] ECR 2033 at p 2056, confirmed in *Orkem/CdF Chemie* [1987] 3 CMLR 716.

41 The crucial difference here seems to hinge on the attitude of the party under investigation. Thus, 'investigation' assumes voluntary co-operation by the firm being investigated, whilst 'search' denotes unwillingness to assist with the inspection and therefore the necessity for a forcible search. See particularly, *Hoechst* [1989] ECR 2859 ; *Dow Chemical Benelux* [1989] ECR 3150 ; *Dow Chemical Iberica* [1989] ECR 3165. Hoechst refused to submit to an Art.14(3) investigation, even after a decision imposing periodic penalty payments was made, and challenged the decison in Germany and the ECJ. Hoechst eventually co-operated after the Bundeskartellamt obtained a warrant on behalf of the Commission in the German civil courts. In *Dow Chemical Benelux* and *Dow Chemical Iberica*, both firms reluctantly submitted to the Art.14(3) inspection believing they had no choice. All three parties appealed on similar grounds asserting that defence rights should be recognised at the investigation and recognition of those rights, particularly the right to a fair hearing and the inviolability guarantee, demanded the obtaining of a warrant prior to search. The arguments are discussed further in Harding *EC Investigations and Sanctions* at pp 19-21, 37-38 and Shaw 'Recent Developments'.

42 *Hoechst* [1989] ECR 2859 ; *Dow Chemical Benelux* [1989] ECR 3150 ; *Dow Chemical Iberica* [1989] ECR 3165. Discussed by Shaw 'Recent Developments'. Several national competition authorities of MS make such a distinction, eg Arts.47, 48 of the French Law of 1986, Ordinance 86/1243 1/12/86 and Art.46 of the German Law on Restrictions of Competition of 1957. In both jurisdictions, the distinction is drawn between an investigation and a search and require that a judicial warrant be obtained prior to undertaking such a search. This issue is discussed by Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods in European Law, with Special Reference to Competition' *YBEL* [1982] 1 at pp 12-17 and Vaughan and Hall *Investigatory Powers of the EC Commission in Competition Matters* Report of the Joint Working Parties of the Bar and Law Society (1979).

43 House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at pp 16-19. Also, CBI and UNICE evidence to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 50-61 and DTI Memo to the Committee, Minutes of Evidence at p 41 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at pp 16-17 and Written Submission to the Committee by Reynolds, Minutes of Evidence at p 15.

44 Doc. No. 57 7/9/61 Eur.Parl.

45 [1989] ECR 3165 - part of the *PVC* cartel.

46 *Dow Chemical Iberica* [1989] ECR 3165 at p 3191. This of course raises the question of whether control after the event can ever be adequate.

47 *Hoechst* [1989] ECR 2859 at paras 15-20. Also *Dow Chemical Benelux* [1989] ECR 3150 and *Dow Chemical Iberica* [1989] ECR 3165. Of course, at this point, instead of proceeding under Art.14(6), DGIV may choose to proceed by way of fines under Art.15. This aspect of refusal to co-operate with an investigation will be discussed further when the defendant's right against self incrimination is considered later in the chapter.

48 *Hoechst* [1989] ECR 2859 at paras 34-36.

49 On the impact of these cases, see Shaw 'Recent Developments' at pp 330-333.

50 Some national rules even envisage the use of police powers, though these have never been used. See Joshua 'Information in EEC Competition Law Procedures' at p 414. Many critics have expressed concern at this increased use of Art14(6) - not least the Commission who have singled out UK rules for criticism. See House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at pp xvii-xviii. See also, Written Submission by the CBI and OFT Memo to the Select Committee, Minutes of Evidence at p 79 and p 45 respectively ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at pp 17, 40 and Written Submissions by the OFT and JWP to the Committee, Minutes of Evidence at p 60 and p 90 respectively. This aspect is also evaluated by Harding *EC Investigations and Sanctions* at p 35 and Shaw 'Recent Developments' at p 333.

51 See Shaw 'Recent Developments' at p 334.

[52] See comments by AG Mischo in *Hoechst* [1989] ECR 2859 at p 2900 ; Whish *Competition Law* at pp 292-293 ; Harding *EC Investigations and Sanctions* at pp 35-37.

[53] The House of Lords Select Committee has advocated the adoption of such a system for almost 15 years. See House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at p xii, CBI evidence to the Committee, Minutes of Evidence at pp 13-15 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 113-115.

[54] See CBI evidence to House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO, Minutes of Evidence at pp 13-16 ; DTI Memo to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 40-42, who reported that DGIV was unwilling to introduce changes because it believed that a system of judicial warrants was unrealistic as it placed an additional burden on an already over-burdened ECJ and that there were sufficient existing internal checks and balances within the system ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at para 36, where Ehlerman, giving evidence on behalf of the Commission, clearly stated that the adoption of such a system was not a priority.

[55] See earlier discussion of this case.

[56] 9th Report on Competition Policy 1979 at pt 137.

[57] Joshua 'The Element of Surprise' at pp 4-7.

[58] See 9th Report on Competition Policy 1979 at pt 137 ; AG Warner's comments in *National Panasonic* [1980] ECR 2033 at p 2069 and Davidow 'EEC Fact Finding Procedures in Competition Cases' *CMLR* [1977] 175.

[59] The CFI/ECJ have criticised DGIV on several occasions for its inadequate fact-finding and have reduced or cancelled fines and annulled decisions as a result, eg *Quinine* [1970] ECR 661, *Hoffman La Roche* [1979] ECR 461, *BASF* [1992] 4 CMLR 357, *SIV* [1992] ECR 1403, *Woodpulp II* [1993] 4 CMLR 407. Whether it is entirely fair of the Commission to blame its shortcomings on a firm's failure to provide sufficient incriminating evidence will be discussed later in the chapter under the assessment of defence rights.

[60] See comments in JWP's Written Submission to the House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 88-91.

[61] See House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at p 58 ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at p xiv and JWP's Written Submission to the Committee, Minutes of Evidence at p 90. In particular, the JWP would like to see the adoption of a two stage approach under Art.14 which they consider would limit the use of dawn raids and elicit the co-operation of many undertakings.

[62] In particular, the JWP's Written Submission to the House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 90-91, suggested the adoption of criteria similar to those employed under the Data Protection Act 1984. They propose that before adopting an Art.14(3) decision, DGIV should satisfy itself that : a)an offence has been committed ; b)that evidence of the violation is on the premises and c)that seven days notice has been given to the occupier and access has been refused, unless giving notice would defeat the object of entry. The JWP argue that such criteria would help limit the use of Art.14(3) and, if the stated reasons appear inadequate, they would provide the firm concerned with a more effective basis to challenge the decision before the ECJ. Van Bael disagrees with this. In his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 221, he asserts that there have been too many instances of the Commission departing from self-imposed rules for this to work.

[63] For further comments, see Joshua 'The Element of Surprise' at pp 4, 11, 12.

64 See comments in 12th, 18th and 20th Reports on Competition Policy 1982, 1988, 1990 respectively ; Kerse *EC Antitrust Procedure* at para 3.19 ; Harding *EC Investigations and Sanctions* at pp 98-102 ; Joshua 'The Element of Surprise' at p 4.

65 See Answer to Written Question 677/69 OJ [1980] C310/30.

66 Joshua 'The Element of Surprise' at p 4.

67 Art.21 details the Commission's obligations regarding publication.

68 See particularly, *Polypropylene* [1992] 4 CMLR 84 ; *PVC* [1990] 4 CMLR 345 ; *LdPE* [1990] 4 CMLR 382 ; *Soda Ash* [1991] 4 CMLR 169 ; *Italian Flat Glass* [1990] 4 CMLR 535 ; *Cast Iron and Steel Rolls* [1984] 1 CMLR 694. For further statistics of investigation choices, see Appendix B, Table 3.

69 See Cases 1-22 in Appendix B, Table 1 for the case list of formally prosecuted cases, ie :
1)PVC Cartel [1990] 4 CMLR 345 (hereafter referred to as *PVC*). Appealed to CFI as *BASF* [1992] 4 CMLR 357 (hereafter referred to as *BASF*). Appealed to ECJ as Case 137/92 *PVC I* [1995] 5 CMLR 8 (hereafter referred to as *PVC I*). Further Commission decision *PVC II* OJ [1994] L239/14. *PVC II* is currently on appeal ;
2)Polypropylene Cartel [1988] 4 CMLR 347. Appealed as *Hercules* [1992] 4 CMLR 84 (hereafter referred to as *Polypropylene* or *Hercules*) ;
3)Soda Ash Cartel [1991] 4 CMLR 169, [1994] 4 CMLR 454, [1994] 4 CMLR 645 (hereafter referred to as *Soda Ash*). Also related case of *Soda Ash* [1994] 4 CMLR 482. *Soda Ash* is on appeal to CFI as Case T30/91 ;
4)LdPE Cartel [1990] 4 CMLR 382 (hereafter referred to as *LdPE*). On appeal as Case T165/89 *Dow Chemicals* ;
5)Peroxygen Cartel [1985] 1 CMLR 481 (hereafter referred to as *Peroxygen*) ;
6)Zinc Producers Cartel [1985] 2 CMLR 108 (hereafter referred to as *Zinc Producers*) and interim appeal *AM&S* [1982] ECR 1575 (hereafter referred to as *AM&S*);
7)Woodpulp Cartel [1985] 3 CMLR 474 (hereafter referred to as *Woodpulp*). Appealed as *Woodpulp II* [1993] 4 CMLR 407 (hereafter referred to as *Woodpulp II*);
8)Belgian Roofing Felt Cartel [1991] 4 CMLR 130 (hereafter referred to as *Belgian Roofing Felt*). Appealed as *Belasco* [1991] 4 CMLR 96 (hereafter referred to as *Belasco*) ;
9)Italian Flat Glass [1990] 4 CMLR 535 (hereafter referred to as *Italian Flat Glass*). Appealed as *SIV* [1992] ECR 1403 (hereafter referred to as *SIV*) ;
10)Meldoc [1989] 4 CMLR 853 (hereafter referred to as *Meldoc*) ;
11)Dutch Books Cartel [1984] ECR 19 (hereafter referred to as *VBBB*) ;
12)Dutch Cigarettes Cartel [1982] 3 CMLR 702 (hereafter referred to as *Dutch Cigarettes*). Appealed as *SSI* [1985] ECR 3831 (hereafter referred to as *SSI*) ;
13)Rolled Zinc Products [1983] 2 CMLR 285 (hereafter referred to as *Rolled Zinc*). Appealed as *CRAM* [1984] ECR 1679 (hereafter referred to as *CRAM*) ;
14)Cast Iron and Steel Rolls [1984] 1 CMLR 694 (hereafter referred to as *Cast Iron and Steel*) ;
15)Benelux Flat Glass [1985] 2 CMLR 694 (hereafter referred to as *Benelux Flat Glass*) ;
16)GB-INNO-BM v Fedetab [1978] 3 CMLR 524 (hereafter referred to as *Fedetab*). Appealed as *Van Landewyck* [1980] ECR 3125 (hereafter referred to as *Van Landewyck*) ;
17)French-West African Shipowners' Committees OJ [1992] L134/1, [1993] 5 CMLR 446 (hereafter referred to as *FWA*). See also 22nd Report on Competition Policy 1992 at pp 98-99. Appealed as *Compagnie Maritime Belge Transports* [1997] 4 CMLR 273 (hereafter referred to as *Compagnie Maritime Belge*);
18)Dutch Builders Cartel [1993] 5 CMLR 135 (hereafter referred to as *Dutch Builders*). On appeal as Case T29/92 *SPO* :
19)ANSEAU [1992] 2 CMLR 193 (hereafter referred to as *ANSEAU*). Appealed as *IAZ Belgium* [1983] ECR 3369 (hereafter referred to as *IAZ*). Also *Re IPTC Belgium* [1984] 2 CMLR 131 ;
20)Welded Steel Mesh [1991] 4 CMLR 13 (hereafter referred to as *Welded Steel*) ;
21)Uniform Eurocheques [1985] 3 CMLR 434, *Eurocheque : Helsinki Agreement* OJ [1992] L95/50. Appealed as *Groupment De Bancaires* [1994] ECR 49 (hereafter referred to as *GCB*) ;
22)SA Cimenteries [1995] 4 CMLR 327 (hereafter referred to as *Cement* or *Cement Cartel*). See also interim appeals *SA Cimenteries* [1993] 4 CMLR 243 ; *SA Cimenteries* [1993] 4 CMLR 259.
The remaining horizontal cartels listed in the case study are discussed under Art.85(3).

70 Only *Dutch Builders* appears to have been investigated entirely under Art.14(2). *PVC*, *Polypropylene*, *Soda Ash*, *LdPE*, *Peroxygen*, *Zinc Producers*, *Woodpulp*, *Belgian Roofing Felt*, *Italian Flat Glass*, *Welded Steel*, *Benelux Flat Glass*, *FWA*, *Cement*, *Cast Iron and Steel*, *ANSEAU* and *Rolled Zinc* were all investigated under Art.14(3). *Meldoc* was investigated under Art.14, but it is unclear from the Commission case report under which provision the inspection took place. The remaining four cases, *VBBB*, *Dutch Cigarettes*, *Fedetab* and *Uniform Cheques/GCB*, were investigated under Art.11. In the latter three cases, it is unclear from the Commission decision whether or not Art.14 was employed. In addition, there were some instances where Art.14(3) and Art.14(2) were used in the same cartel investigation, with Art.14(2) being reserved for the investigation of firms who were only peripherally involved. See eg *Polypropylene*, *SIV* and *Cement*. See also, Appendix B, Table 3 for details of investigation choices in the study.

71 The Commission's use of its investigation powers in the UK is considered to be comparable to its application in other MS. See Green *Commercial Agreements and Competition Law* at p 277, who also notes that the annual trend is increasing upwards. See also *DG/OFT Annual Reports* and OFT Memo to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 42-47 for further details of Art.14 visits in the UK. Unfortunately, from 1990, the DG/OFT's reports ceased to indicate the number of such visits made annually in the UK.

72 The main challenges in the case study came from *Hoechst* [1989] ECR 2859, *Dow Benelux* [1989] ECR 3150 *and Dow Chemical Iberica* [1989] ECR 3165, as part of the *PVC* cartel. They have already been discussed in full above. Of course, the lack of other challenges does not mean that firms are happy with DGIV's use of its investigatory powers.

73 Joshua 'Information in EEC Competition Law Procedures' at p 414 and OFT Memo to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 42-47, notes that there few serious incidents of obstruction. Until 1984, the Commmission had only called upon the OFT twice to assist it under Art.14(6).

74 See *Hoechst* [1989] ECR 2859 - as part of the *PVC* cartel and *FWA*. In both cases warrant/injunctions ordering the inspection were obtained.

75 Eg *Dow Benelux* [1989] ECR 3150 and *Dow Chemical Iberica* [1989] ECR 3165. The threat of a fine inevitably affects their decision to submit. This aspect is discussed further by Shaw 'Recent Developments'.

76 However, following the ruling in *Hoechst* [1989] ECR 2859, in future many more firms may consider it to be in their best interests to refuse investigation initially and thereby obtain protection under national safeguards.

77 See eg the challenge by the OFT, discussed in OFT Memo to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at p 51.

78 *Hoechst* [1989] ECR 2859, though the ECJ firmly rejected this argument. See earlier discussion of this issue under 'Rights of Entry/Dawn Raids'.

79 In *Hoechst* [1989] ECR 2859, fines/periodic penalty payments to a total of 55,000 ECU were imposed. In *FWA*, Ukwal was fined 5,000 ECU and Mewac 4,000 ECU. Fines for misleading/incomplete information will be dealt with later during the assessment of the defendant's right to silence.

80 See OFT evidence to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at p 51.

81 See CBI evidence to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 76-77.

82 See OFT and CBI evidence to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at p 45 and p 79 respectively. Indeed, so deep were

the OFT's concerns, that the Commission inspector, on arrival at the firm's offices, handed over a note from the OFT stating that the OFT believed the decision to be wrong, but that nevertheless, the undertaking was obliged to submit to the investigation. Unfortunately, the OFT did not name the firm involved so it has been impossible to ascertain whether their concerns were well-founded. However, such an open dispute between DGIV and a national competition authority must inevitably seriously undermine legal certainty.

83 CBI evidence to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at p 83.

84 Eg Atochem, Hoechst, BASF, DSM, Hercules, Solvay, ICI, Shell, Montedison and Huls who have been implicated in some/all of the following cartels : *PVC*, *Polypropylene*, *LdPE*, *Peroxygen* and *Soda Ash*.

85 Both St. Gobain and BSN, involved in the *Benelux Flat Glass* cartel, had been subject to previous Commission decisions as had members of the Italian market. See OJ [1974] L160/1 ; OJ [1980] L383/19 ; OJ [1981] L326/32 and *Italian Flat Glass* OJ [1981] L326/32 respectively. On these earlier occasions, fines were not imposed. However in *Benlux Flat Glass* and *SIV*, both included in the case study, substantial fines were levied. Harding *EC Investigations and Sanctions* at pp 102-103, discusses further DGIV's approach to these industries.

86 The eight cases concerned are : *Belgian Roofing Felt*, *Meldoc*, *VBBB*, *Dutch Cigarettes*, *Benelux Flat Glass*, *Fedetab*, *ANSEAU*, *Dutch Builders*. In addition, the *Cement* cartel involved national and international associations, including Dutch and Belgian groups. *Welded Steel* involved collusion in the Benelux market. Harding *EC Investigations and Sanctions* at pp 101-103, details numerous other instances.

87 See CBI evidence to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 76-79 ; Written Submissions from Reynolds, JWP and Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 15-34, pp 60-61 and p 220 respectively.

88 Discussed by Kerse *EC Antitrust Procedure* at paras 3.32, 3.37. Art.14(1)(d) gives DGIV a right of access to all premises. Moreover, the ECJ held in *Hoechst* [1989] ECR 2859 at para 27, that the Commission's power of entry would be worthless if firms could dictate where inspectors could go. It is clear however, that DGIV has no right of forcible entry.

89 See specifically DGIV's comments in *Orkem* [1989] ECR 3283 at p 3320. In addition, both Harding *EC Investigations and Sanctions* at pp 24-25 and Joshua 'The Element of Surprise' at p 11, have rejected such claims on the Commission's behalf.

90 See CBI evidence to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 76-77 and Written Submission from Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 15, 34. The issues involved are also reviewed by Williams 'The European Commission and the "right to silence"' at p 938.

91 See CBI evidence to House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at p 76 ; Written Submission from Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 34 ; Williams 'The European Commission and the "right to silence"' at p 938. The evidence indicates that when inspectors have been asked about the nature of the investigation, they have simply replied that it concerned a possible breach of Arts.85/86. For many years now, the House of Lords Select Committee has complained about the lack of specficity in Art.14(3) documents and has advocated greater definition of the purpose of the investigation in order to combat the likelihood of DGIV 'fishing trips'.

92 See 11th and 12th Reports on Competition Policy 1981, 1982 and also Kerse *EC Antitrust Procedure* Appendix H for full text. The Memo is discussed in Written Submissions from JWP and Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 89-91 and pp 220-222 respectively.

[93] Treaty of Rome 1957. On this, see particularly the cases of *Hoechst* [1989] ECR 2859, *Dow Benelux* [1989] ECR 3150 and *Dow Chemical Iberica* [1989] ECR 3165. A similar complaint was made in *FIDES* [1979] 1 CMLR 650.

[94] *Hoechst* [1989] ECR 2859 at para 42.

[95] *Dow Benelux* [1989] ECR 3150 at para 10. The Court merely considered that the Commission were merely opening a fresh inquiry to clarify the situation.

[96] See particularly, complaints made in *LdPE* at p 418 and *Orkem* [1989] ECR 3283 at p 3348. A number of other firms in the case study have made similar allegations, eg *Hoechst* [1989] ECR 2859 at p 2924 ; *AM&S* at p 2924. See also, *Italian Flat Glass* and *Soda Ash*.

[97] The Court has justified this position by stating that, as the Commission fulfils both the narrow role of prosecuting offenders and the wider function of ensuring that competition laws are applied, then the 'necessity' for the investigation should be given a wide interpretation. See *Orkem* [1989] ECR 3283 at p 3330.

[98] *Orkem* [1989] ECR 3283 at p 3330.

[99] Van Bael in his Writtem Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 220-222, criticises the ease with which the Commission departs from this self-imposed safeguard. In their evidence to the same Committee, Reynolds and JWP call for greater supervision of the investigation and conduct of cases in order to avoid repeats of the undesirable outcomes in the *SIV* and *Woodpulp* cases, Minutes of Evidence at p 15 and p 60 respectively. As a result, the Committee at para 142, recomended immediate procedural amendments of Reg.17.

[100] For background information on this section, see : Kerse *EC Antitrust Procedure* at paras 3.02-3.15 : Whish *Competition Law* at pp 290-291 ; Shaw 'Recent Developments' at pp 331-332.

[101] *Orkem* [1989] ECR 3283 ; *Solvay* [1989] ECR 3355.

[102] These cases also challenged the Commission on the issue of self incrimination. This is considered further in the discussion of defence rights infra.

[103] See *Solvay* [1989] ECR 3355 at paras 8-12 and *Orkem* [1989] ECR 3283 at paras 11-16.

[104] The case study shows only four cases of this, *VBBB*, *Dutch Cigarettes*, *Fedetab*, *Eurocheque/GCB*, and in the latter three cases, Commission information in the reports is incomplete. It is therefore unclear whether Art.14 was also used.

[105] See *PVC*, *Polypropylene*, *Soda Ash*, *LdPE*, *Peroxygen*, *Zinc Producers*, *Woodpulp*, *Cement*, *Meldoc*, *Cast Iron and Steel*, *Welded Steel*, *FWA*, *Dutch Builders* and *ANSEAU*.

[106] See 17th Report on Competition Policy 1987 at pt 57.

[107] See *FWA*, *LdPE*, and *PVC*. Appeals by *Orkem* and *Solvay* in *PVC/LdPE* were unsuccessful. See Van Overbeek 'The Right to Remain Silent in Competition Investigations : The Funke Decision of the ECHR Makes Revision of the ECJ's Caselaw Necessary' *ECLR* [1994] 127 at p 127 n.2 for a list of other firms receiving similar treatment.

[108] Art.27 Provisional Internal Regulation OJ 147 July 11th.1967, as modified by Commission decision 75/461 OJ 199/43. Objections were expressed on this matter by the British Goverment but were later withdrawn. See comments in House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at p 7 and also 15th Report on Competition Policy 1985 at p 56.

[109] See *National Panasonic* [1980] ECR 2033. Whilst the Court here admitted a limited guarantee regarding the inviolability of private premises, the ECJ refused to recognise a general defence right to be heard at investigation. The Commission are simply expected to act fairly.

[110] *Hoechst* [1989] ECR 2859 at paras 14-15.

[111] For background information, see : Whish *Competition Law* at p 296 ; Harding *EC Investigations and Sanctions* at pp 26-28 ; Harding 'Procedural Questions' ; Lavoie 'The Investigative Powers of the Commission with Respect to Business Secrets under Community Competition Rules' *ELR* [1992] 20 ; Korah 'The Rights of the Defence in Adminstrative Proceedings under Commmunity Law' *CLP* [1980] 73 ; Korah 'Narrow or Misleading Replies to Requests for Information' *BLR* [1982b] 69 ; Korah 'Inspections under EC Competition Rules : Dangers of Voluntary Submissions' *BLR* [1983] 23 ; Van Overbeek 'The Right to Remain Silent in Competition Investigations' ; Lasok 'The Privilege Against Self Inrimination in Competition Cases' *ECLR* [1990] 90 ; Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods' ; Philip 'EEC Competition Law and Privilege Against Self Incrimination in English Law' *LIEI* [1981] 49 ; Williams 'The European Commission and the "right to silence"' ; Joshua 'The Element of Surprise' at pp 11-15 ; Joshua 'Information in EEC Competition Law Procedures' at pp 425-427. The protection of confidential and possibly incriminating information will be discussed below under 'Protection of Confidential Documents'.

[112] Braun *Les Droits de la Defense devant la Commission et le Cour de Justice de Communantes Europeennes* at p 8 finds the absence of such a right "profoundly shocking".

[113] *Orkem* [1989] ECR 3283 and also *Solvay* [1989] ECR 3355.

[114] This approach finds considerable support. Many agree that this right only applies in the criminal context and then only to natural persons. Joshua 'The Element of Surprise' at pp 13-14, and Joshua 'Proof in Contested EEC Competition Cases : A Comparision with the Rules of Evidence in Common Law' *ELR* {1987] 315 at pp 337-338, insists that the right of silence does not apply to regulatory offences such as competition violations, as invariably the information needed to establish an offence is exclusively in the hands of the violator. Recognising such a right would result in the uneven application of EC law and produce the paradox that the more serious the infringement,the greater the protection from prosecution would be. Ultimately, he argues that recognising this protection would render Reg.17 nugatory. Van der Esch *AIEC Conference* (March 1980) and Ehlerman and Oldekop *FIDE* (1978) at para 11.5, agree that such rights apply only in relation to individuals exposed to custodial sentences. In contrast, Harding *EC Investigations and Sanctions* at p 27, whilst agreeing that the existence and scope of a right to silence hinges ultimately on the characterisation of antitrust, questions whether, if antitrust is administrative in nature, this should justify a lower level of protection. Originally, the European Parliament proposed to incorporate a right of silence into Reg.17. See OJ [1961] 15/11/61 p 1406. This recommendation was based on the Deringer Report and would have applied to Art.11 but not Art.14. This proposal was decisively rejected by the Council and later by AG Warner in *AM&S* [1982] ECR 1575 at p 1621, on the basis that such a privilege would render Reg.17 and the Commission's powers impotent.

[115] *Orkem* [1989] ECR 3283 at p 3332.

[116] *Orkem* [1989] ECR 2383 at p 3336.

[117] *Orkem* [1989] ECR 2383 at pp 3336-3337. In so doing, AG Darmon rejected the ECHR's definition of 'criminal proceedings' in *Ozturk* (1984) 6 EHRR 409 as too wide. He also took into account EC caselaw according to which the Commission is not a tribunal under Art.6 ECHR. On this, see particularly, *Fedetab* at para 81 and *MDF* [1983] 1825 at para 7. It is interesting to note that in AG Darmon's recent Opinion in *Woodpulp II*, his classification of antitrust, like many others, has radically changed. He now considers competition "manifestly of a penal nature" See *Woodpulp II* at p 539.

[118] *Orkem* [1989] ECR 3283 at pp 3337-3339. Darmon seems to have been influenced by the argument that defence rights are less important at investigation than in later stages of enforcement. It was only at these later stages that a right to silence was recognised. See also *National Panasonic* [1980] ECR 2033 at para 21.

[119] *Orkem* [1989] ECR 3283 at paras 28-30, 33-37. On 'integral fairness', see *Hoechst* [1989] ECR 2859.

[120] *Funke* [1993] 1 CMLR 879 and *Societe Stenuit v France* (1992) 14 EHRR 509.

[121] The case involved F, a German national, living in France and held that under Art.6(1) ECHR, French Customs officials could not compel F to produce particulars of his assets abroad. For further details and discussion of the implications of this case, see Van Overbeek 'The Right to Remain Silent in Competition Investigations' at pp 129-133.

[122] See *Societe Stenuit v France* (1992) 14 EHRR 509 at paras 62-64 and *Ozturk* (1984) 6 EHRR 409 at paras 48-50. Also ECHR judgement in *Engel* 8/6/76 Series A No.22 at para 82.

[123] See Van Overbeek 'The Right to Remain Silent in Competition Investigations' at p 130. This is in line with ECHR *Deweer* case 27/2/80 Series A No.35 at para 46, which held that there can be criminal charge even where a person has not been arrested or charged.

[124] On this, see ECHR cases of *Church of X /UK* 17/12/68 ; *Societe Stenuit v France* (1992) 14 EHRR 509 at para 66 ; *Dombo Beheer BV/The Netherland* 27/10 93 Series A No.274. All held that legal persons can invoke Art.6 ECHR.

[125] Van Overbeek 'The Right to Remain Silent in Competition Investigations' at pp 129, 132, who argues that whilst the ECJ is not strictly obliged to follow ECHR rulings, it would be strange for them to have a very different view of fundamental principles. For further discussion of the nexus between ECJ and ECHR rulings and the ECJ approach to human rights, see Schwarze 'The Administrative Law of the Community and the Protection of Human Rights' *CMLR* [1986] 401 ; Dauses 'The Protection of Fundamental Rights in the Community Legal Order' *ELR* [1985] 398, McBridge and Brown 'The UK, the European Community and the ECHR' *YBEL* [1981] 167 ; Mendelson 'The ECJ and Human Rights' and Ghandi 'Interaction between the Protection of Fundamental Rights in the EEC and under the European Convention on Human Rights' *LIEI* [1981/2] 1.

[126] This problem is commented upon by Van Overbeck 'The Right to Remain Silent in Competition Investigations' at p 130.

[127] See *Orkem* [1989] ECR 3283 : *Solvay* [1989] ECR 3355 ; *AM&S* [1982] ECR 1575 . The latter case did not directly assert this right, but AG Warner did discuss it fully in his Opinion.

[128] *Orkem* [1989] ECR 3283 ; *Pisani* [1980] 2 CMLR 354 and *Sciarra* [1980] ECR 362 - the latter two cases were part of the *Italian Flat Glass* cartel. If specific documents are requested, the firm must show the inspectors where to find them - they cannot simply allow them unlimited access to filing cabinets. Discussed by Whish *Competition Law* at p 292 ; Joshua 'The Element of Surprise' at p 10.

[129] *National Panasonic* [1980] ECR 2033 at p 2056.

[130] Nor is it clear to whom such questions can be addressed. On this, see Written Submissions by Reynolds and JWP to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 15, 34 and p 91 respectively. Both the JWP and Reynolds expressed criticism regarding oral questioning in stressful conditions in the absence of legal advisers.

[131] See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at para 113. This recommendation for change and improved guidance dates back to House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at p 58. Thus far, little has been done.

[132] See particularly, House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at p 58 ; Korah 'Narrow or Misleading Replies' [1982b] ; Gliess-Hirsch *Kommentar zum EWG Kartellrecht* (3rd Edn) (1978) at p 510. Such authors suggest that if individuals need to check details before answering questions, then questioning is no longer 'on the spot' and can be refused. Alternately, they recommend that questions should be answered by a committee appointed for that purpose. But, care is needed in following such advice as such action may be regarded as a refusal to submit to investigation and attract a fine. On this aspect, see Egerton-Vernon 'The Role of the Solicitor'.

[133] House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at p 56 and House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at p 41.

[134] The Memo is discussed and reproduced in Kerse *EC Antitrust Procedure* at para 3.40 and Appendix H. See also, 13th Report on Competition Policy 1983 at pt 74a.

[135] *Hoechst* [1989] ECR 2859 at para 16.

136 See CBI Written Submission to the House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at p 77. Here the inspection went ahead, no incriminating evidence was discovered and no further action was taken.

137 *National Panasonic* [1980] ECR 2033 at p 2045.

138 See particularly criticism and comments by JWP in their Written Submission to the House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO, Minutes of Evidence at p 58 ; JWP's Written Submission to the House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at pp 91, 99, 100 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at para 113 and Reynold's evidence to the Committee, Minutes of Evidence at pp 15,34.

139 As Art.14(3) is mandatory in nature, any refusal will bring into play the Commission's sanctioning powers. Art.15 allows DGIV to impose up to 5,000 ECU for a refusal to submit to an investigation - including supplying misleading/incorrect information. Furthermore, Art.16 allows the impostion of periodic penalty payments of up to 1,000 ECU per day for a continuing refusal. See Appendix A for the full text of Reg.17.

140 See Kerse *EC Antitrust Procedure* at para 3.39 and Joshua 'The Element of Surprise' at p 12, for further discussion of the range of refusals.

141 Eg *Hoechst* [1989] ECR 2859 and *Dow Chemical Nederland* [1989] ECR 3137 - both part of the *PVC* cartel. Maximum fines were also imposed in the maritime sector in *FWA* on *Ukwal* OJ [1992] L121/45, *Secretama* OJ [1991] L35/23 and *Mewac* OJ [1993] L20/6. Particularly reluctant firms like Hoechst also find themselves subject to periodic penalty payments. Discussed by Whish *Competition Law* at p 293.

142 Eg *Pisani* [1980] 2 CMLR 354 fined 5,000 ECU ; *Sciarra* [1980] 2 CMLR 362 fined 5,000 ECU ; *FNICF* [1983] 1 CMLR 575 fined 5,000 ECU ; *Baccarat* [1992] 5 CMLR 189 fined 10,000 ECU under Art.16 and *CSM/NV* OJ [1992] L308/16 fined 3,000 ECU. In relation to oral questions, Kries in 'EEC Commission Investigation Procedures in Competition Cases' *The International Lawyer* [1983] 14, distinguishes between "silence" and "lies" on the issue of penalties. Whether the Commission would make the same distinction is doubtful!.

143 On this, see Kerse *EC Antitrust Procedure* at paras 7.05-7.08.

144 Korah 'Inspections under EC Competition Rules' ; Korah 'Narrow or Misleading Replies' [1982b] at p 70.

145 See eg *Comptoir Commercial d'Importation* [1982] 1 CMLR 440 ; *Telos* [1982] 1 CMLR 267 ; *National Panasonic* [1982] 2 CMLR 410 ; *Peugot* [1989] 4 CMLR 371 and *Secretama* OJ [1991] L35/23. All except Peugot, who was fined 4,000 ECU, were fined 5,000 ECU.

146 This point has been noted by Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at p 91. See also, UNICE Memo discussed by Joshua in 'The Element of Surprise' at p 20.

147 Coppel 'Curbing the Ruling Passion : A New Force for Judicial Review in the European Communities' *ECLR* [1994] 143 at p 144, argues that the Commission should recognise procedural integrity as a value in itself. He is particularly critical of the fact that the present approach leaves considerable room for legitimate procedural impropriety. See also, Schwarze 'Protection of Human Rights' at p 408.

148 There is a vast amount of literature on this issue, see eg McBarnet 'Pre-Trial Procedures and the Construction of Conviction' in CARLEN (Ed) *The Sociology of Law* University of Keele (1976) ; R.White *The Administration of Justice* Blackwell (1985) ; Bottoms and McClean *Defendants in the Criminal Process* Routledge and Kegan Paul(1976) ; Packer *The Limits of the Criminal Sanction* Stanford Unv. Press (1968).

149 Background information on this section may be found in : Kerse *EC Antitrust Procedure* at paras 8.13-8.17 ; Lasok *The European Court of Justice : Practice and Procedure* (2nd Edn) Butterworths (1994) at pp 415-417 ; Whish *Competition Law* at pp 294-295 ; House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers

1981/82 (91) HMSO ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO ; Lavoie 'The Investigative Powers of the Commission' ; Korah 'The Rights of the Defence' ; Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods' ; Joshua 'The Element of Surprise' at pp 15-18 ; Joshua 'Proof in Contested EEC Competition Cases' at pp 340-345 ; Temple Lang 'The Procedure of the Commission in Competition Cases' at pp 171-172 ; Harding *EC Investigations and Sanctions* at pp 28-31 ; Christoforou 'Protection of Legal Professional Privilege in EEC Competition Law' *Fordham LJ* [1985-86] 1 ; Stewart and Vaughan 'Does Legal Professional Privilege Exist in the EEC' *LSG* [Dec 1975] 20 ; Edwards *The Professional Secret, Confidentiality, and Legal Professional Privilege in the Nine Member States of the EEC* CCBE (1976).

150 See for instance, the comments made in House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at paras 11-12 and p 59 ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at pp xiv-xvi ; Lavoie 'The Investigative Powers of the Commission' at pp 20-22.

151 *AM&S* [1982] ECR 1575.

152 On this point, see Lavoie 'The Investigative Powers of the Commission' at p 24.

153 On this, see unpublished Memo of the Law Reform Committee of the Council of the Law Society and the Senate of the Inns of Court and the Bar on Investigatory Procedures of the Commission under Arts.11, 12, 13 and 14 (March 1976).

154 See *FIDES* OJ [1979] L57/33 ; *AM&S* [1982] ECR 1575 ; *FNICF* [1983] 1 CMLR 575.

155 *AM&S* [1982] ECR 1575.

156 The Commission were supported by the French who intervened on DGIV's behalf.

157 See Deringer Report Doc.104/1960/61 and Commission in *AM&S* at p 1583.

158 On a number of occasions, the Commission emphasised that the degree of protection permitted depended on the Commission's need for disclosure : the greater its need, the less protection afforded to the defendant, see *AM&S* at pp 1583-1585, 1588, 1608 and 1611. Also on the issue of this protection being discretionary in nature, see Written Reply to Mr.Couste MEP's question on this issue - Written Answer 63/78 given on 22/6/78.

159 *AM&S* at pp 1583, 1586-1587, 1594. The Commission insisted that neither the firm nor its lawyers could be trusted to verify the privileged nature of the documents, and that, as the issue was a question of fact, it was outside the ECJ's jurisdiction.

160 *AM&S* at pp 1586-1587, 1593.

161 *AM&S* at p 1600. Moreover, the competition laws of several MS expressly made the exercise of investigatory powers subject to this protection. For a fuller review of MS law, see AG Warner's Opinion in *AM&S* at pp 1621-1624, 1632-1637. The subject is also discussed by Joshua 'The Element of Surprise' at pp 15-17 ; Joshua 'Proof in Contested EEC Competition Cases' at pp 340-345. AM&S were backed by the UK goverment and the CCBE in their appeal.

162 *AM&S* at pp 1588-1589, 1596, 1600, 1602. These arguments have found considerable support with the House of Lords. See House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at pp xii, 16,26,42,58,67.

163 *AM&S* at pp 1581-1582, 1589, 1601. This conflict of roles arose between the inspector's positive duty to investigate which was in direct conflict with the duty to determine privilege. On the issue of verification, AM&S suggested that firms should demonstrate the privileged nature of documents by showing limited parts of them to the Commission. If that proved insufficient, the documents should then be referred to an independent arbiter for determination

164 *AM&S* at p 1602.

165 *AM&S* at p 1594.

166 *AM&S* at pp 1610-1612. At the same time, the Court took the opportunity to confirm that the Commission's investigation powers were based on the necessity principle and it was for the Commission alone to determine necessity.

167 Discussed by Kerse *EC Antitrust Procedure* at para 8.14.

168 In *AM&S* at p 1655 et seq, AG Slynn put forward a powerful argument for the inclusion of in-house lawyers. In addition, the House of Lords Select Committee has frequently criticised the exclusion of in-house lawyers as overtly discriminatory. Apparently, the Commission initially intended to persuade the Council to change this ruling. However, as it would require an amendment of Reg.17, which DGIV is reluctant to undertake, the plan was dropped. See House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at pp xiv-xvi, paras 62,64 and DTI evidence to the Committee, Minutes of Evidence at pp 42, 54-55 ; JWP's Written Submission to the House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 90-91, 97-99 ; 13th Report on Competition Policy 1983 at pt 78. For further evaluation of the issues involved, see Faull 'Legal Professional Privilege (AM&S) ; The Commission Proposes International Negotiations ' *ELR* [1985] 119 ; Faull 'The Enforcement of Competition Policy in the European Community : A Mature System' in HAWK (Ed) *Annual Proceedings* Fordham Corp Law Inst (1991) p 139.

169 Review would take place under Art.173 Treaty of Rome 1957. It is envisaged that on claiming protection, the firm must provide sufficient evidence of such a nature as to demonstrate that the communication fulfils the conditions for being granted legal protection. If doubt remains, the Commission can take an Art.14(3) decision requiring the production of either additional evidence or the communication itself. This decision can then be challenged by the firm under Art.173. For additional information, see Kerse *EC Antitrust Procedure* at para 8.15 and Lasok *The European Court of Justice* at p 417.

170 House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at pp xiv,xvi.

171 Kerse *EC Antitrust Procedure* at para 8.13 and House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at para 38 agree.

172 This concern has been voiced by Harding in *EC Investigations and Sanctions* at pp 28-30.

173 For additional information on this section, see : Harding *EC Investigations and Sanctions* Ch3 ; Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods' ; Van Overbeek 'The Right to Remain Silent in Competition Investigations' ; Korah 'The Rights of the Defence' ; Joshua 'Proof in Contested EEC Competition Cases'.

174 Art.6(2) ECHR provides that "everyone charged with a criminal law offence shall be presumed innocent until proven guilty according to the law". The presumption of innocence is recognised in inquisitorial, as well as, accusatorial jurisdictions, eg under the French Penal Code, the burden of proof is on the prosecutor. So, the defendant benefits from a presumption of innocence. For further see Joshua 'Proof in Contested EEC Competition Cases' at p 321.

175 See *AM&S* at pp 1586-1588 particularly. The CBI's Written Submission to the House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO, Minutes of Evidence at p 79, also complained that a presumption of guilt was evident in the way some DGIV investigations were conducted.

176 In fairness to the Court, the CFI has begun to address many procedural issues. Its influence to date has been most greatly felt in relation to procedural rights at the prosecution stage, though in time they may be given the opportunity to review investigation methods and related defence rights.

177 Literature on this subject is extensive. For additional information see particularly : McBarnet *Conviction - Law, the State and the Construction of Justice* Macmillan (1981) ;

WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) ; Ashworth *The Criminal Process : An Evaluative Study* Clarendon Press (1994) ; McConville, Sanders and Leng *The Case for the Prosecution* Routledge (1991) ; MCCONVILLE and BRIDGES (Eds) *Criminal Justice in Crisis* Edward Elgar (1994) ; Bottoms and McClean *Defendants in the Criminal Process* ; McConville and J.Baldwin *Courts, Prosecution and Conviction* Clarendon Press (1981) ; HARDING, FENNELL, JORG and SWART (Eds) *Criminal Justice in Europe : A Comparative Study* Clarendon Press (1993) ; MORGAN and STEPHENSON (Eds) *Suspicion and Silence : The Right to Silence in Criminal Investigations* Blackstone Press (1994) ; Sanders and Young *Criminal Justice* Butterworths (1994).

178 As a vast amount of literature has been written on this subject, only the most salient points can be discussed here. The analogy will refer primarily to the criminal justice system in England and Wales, though references to the criminal processes of other jurisdictions may be discussed where appropriate. Although the English system is adversarial and the EC system broadly inquisitorial, this difference should not present a problem in comparison. What is important is that both jurisdictions face the same problems and challenges and may thus resort to the same solutions.

179 These information gathering powers are governed by the Police and Criminal Evidence Act 1984 (PACE) and fall into two main areas : stop and search powers (ss.1-3) and powers of entry, search and seizure (ss.8, 18, 19, 32).

180 The above points are all dealt with in greater detail in : Sanders and Young *Criminal Justice* Ch3 ; Coleman, Dixon and Bottomley 'Police Investigative Procedures : Researching the Impact of PACE' in WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) p 17.

181 McConville,Sanders and Leng *The Case For The Prosecution* at pp 36-38.

182 Similar views are shared by a number of criminological researchers eg McConville and J.Baldwin *Courts, Prosecution and Conviction* ; Reiner *The Politics of the Police* Wheatsheaf (1985) ; Shapland and Vagg *Policing the Public* Routledge (1988).

183 The background information for this section is derived largely from : MORGAN and STEPHENSON (Eds) *Suspicion and Silence* ; GREER and MORGAN (Eds) *The Right to Silence Debate* Bristol Centre for Criminal Justice (1989) ; Easton *The Right to Silence* Avebury (1991) ; McEllree and Starmer 'The Right to Silence' in WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) p 58. For the early history of this right, see MacNair 'The Early Development of the Privilege Against Self Incrimination' *Oxford Jo Legal Studies* [1990] 66.

184 Eg s.1 Criminal Evidence Act 1898 and s.31 Theft Act 1968. For further details of these constraints, see McEllree and Starmer 'The Right to Silence' at pp 62-64.

185 Ss.27-31 Criminal Justice and Public Order Act 1994. There has been hot debate over this issue. See eg Easton *The Right to Silence* ; GREER and MORGAN (Eds) *The Right to Silence Debate* ; MORGAN and STEPHENSON (Eds) *Suspicion and Silence* ; Greer 'The Right to Silence : A Review of the Current Debate' *MLR* [1994] 719. It should be noted that this change may not appreciably alter the reality. Research evidence indicates that, although in the past it was not permitted to draw adverse inferences from silence, in 80% of cases prosecutors managed at least to make juries aware of the defendant's silence during questioning. For further on this, see Zander and Henderson *Crown Court Study* (Royal Commission on Criminal Justice Research Study No.19) HMSO (1993).

186 Sanders and Young *Criminal Justice* at pp 107-108.

187 Research has noted that the relationship between police and suspect is both dynamic and negotiable. Much bargaining goes on during questioning and techniques like bail bargaining and threats of prolonged detention are employed to induce confessions. See particularly, discussion by McConville, Sanders and Leng *The Case for the Prosecution* Ch4 ; Sanders, Bridges, Mulvaney and Crozier *Advice and Assistance at Police Stations and the 24-Hour Duty Solicitor Scheme* Lord Chancellors Dept. London (1989) ; Dixon, Bottomley, Coleman, Gill and Wall 'Reality and Rules in the Construction and Regulation of Police Suspicion' *Int Jo of the Sociology of Law* [1989] 185 ; Maguire 'Effects of the PACE Provisions on Detentioning and Questioning' *Brit Jo of Criminology* [1988] 19 ; Irving and McKenzie *Police Interrogation : The Effects of PACE 1984* The Police Foundation (1989).

188 A further 10% refuse to answer some questions. See Leng *The Right to Silence in Police Interrogation : A Study of Some of the Issues Underlying the Debate* (Royal Commission on Criminal Justice Research Study No.10) HMSO (1993).

189 Gudjonsson *The Psychology of Interrogations : Confessions and Testimony* John Wiley and Sons (1992); Evans *The Conduct of Police Interviews with Juveniles* (Royal Commission on Criminal Justice Research Study Study No.8) HMSO (1993) ; McConville and J.Baldwin *Courts, Prosecution and Conviction* ; Bottoms and McClean *Defendants in the Criminal Process* ; Softley *Police Interrogation : An Observational Study in Four Police Stations* (Royal Commission on Criminal Procedure Research Study No.4) HMSO (1980) ; Sanders, Bridges, Mulvaney and Crozier *Advice and Assistance at Police Stations and the 24-Hour Duty Solicitor Scheme* Lord Chancellors Dept. London (1989) all establish the same link.

190 See particuarly the criticism in MCCONVILLE and BRIDGES (Eds) *Criminal Justice in Crisis.*

191 Ss. 58-59 PACE and Legal Aid Act 1988 Sch.6.

192 Sanders and Bridges 'The Right to Legal Advice' in WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) p 37 ; McConville, Sanders and Leng *The Case for the Prosecution* at pp 47-55 and Softley *Police Interrogation : An Observational Study in Four Police Stations* (Royal Commission on Criminal Procedure Research Study No.4) HMSO (1980).

193 Sanders and Bridges 'The Right to Legal Advice' at p 43 Table 3.1.

194 McConville, Sanders and Leng *The Case for the Prosecution* at p 54 Table 7, shows that 89% do so.

195 Research indicates that many legal representatives lack competence and remain passive in the face of the oppressive questioning of their client. Indeed, solicitors are often co-opted by the police to encourage their clients to confess. See Sanders and Bridges 'Access to Legal Advice and Police Malpractice' *Crim LR* [1990] 494 ; Maguire 'Effects of the PACE Provisions on Detentioning and Questioning' ; McConville, Sanders and Leng *The Case for the Prosecution* at p 53 ; Sanders and Bridges 'The Right to Legal Advice' at pp 46-54 ; MacKenzie 'Silence in Hampshire' *NLJ* [1990] 696.

196 Eg the Confait, Guildford Four, and Birmingham Six cases. Discussed in WALKER and STARMER *Justice in Error* and STOCKDALE and CASALE (Eds) *Criminal Justice Under Stress* Blackstone Press (1992)

197 On this point, see : Kaye *Unsafe and Unsatisfactory : Report of the Independent Inquiry into the Working Practices of the West Midlands Police Serious Crime Squad* Civil Liberties Trust (1991).

198 For examples of the literature, see Sanders and Young *Criminal Justice* ; WALKER and STARMER (Eds) *Justice in Error* ; MCCONVILLE and BRIDGES (Eds) *Criminal Justice in Crisis* ; Ashworth *The Criminal Process.*

199 Eg the cases of the Guildford Four, Birmingham Six, Tottenham Three, Kisko, and most recently, the Bridgewater Four. These miscarriages are discussed in detail in the above literature, see note 198 supra.

200 This issue is raised particularly by JUSTICE *Miscarriages of Justice* London (1989) at p 12.

201 These models were first developed by Packer in *The Limits Of The Criminal Sanction*, and has been used in much evaluative work since. See eg Bottoms and McClean *Defendants in the Criminal Process* ; McConville and J.Baldwin *Courts, Prosecution and Conviction* ; McConville, Sanders and Leng *The Case for the Prosecution* ; Sanders and Young *Criminal Justice* ; Ashworth *The Criminal Process.* The following discussion is derived from information obtained from these studies.

202 Guilty pleas currently occur in 93% of summary cases and 62% of Crown Court cases. See Crown Prosecution Service *Annual Report 1993* and Sanders and Young *Criminal Justice* at p 304. Exclusion of evidence is governed by s.76 PACE which provides for the mandatory exclusion of evidence in only very restricted circumstances.

203 Criminal conduct here being any activity threatening Single Market integration.

CHAPTER FOUR

THE CRIMINAL/CRIMINOLOGICAL EVALUATION OF HORIZONTAL CARTELS - FORMAL PROSECUTION

"People of the Same Trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." [1]

A)INTRODUCTION

Once in possession of evidence of horizontal cartels, the Commission must decide whether and how to prosecute. It is important to note that this decision is an exercise of discretion. However, other than to state repeatedly that its chief goal is economic integration, the Commission has never published an official policy statement setting out its priorities as a prosecutor [2]. One of the most potent factors influencing DGIV's prosecution choices is its lack of resources. As the Commission is only able to deal formally with a minute percentage of cases each year, prosecution is necessarily selective [3]. The CFI have suggested that DGIV should give priority to cases with a "Community interest" [4]. This "Community interest" may arise in a number of situations, all of which concern the development of major policy areas [5]. As there is considerable "Community interest" in horizontal cartels, most are prosecuted. But, how prosecution is managed seems to vary considerably [6]. When deciding how to prosecute, the Commission is faced with two choices : formal and informal prosecution [7]. The following two chapters will examine DGIV's approach to both types of prosecution, considering the impact of classification on the evaluation of horizontal violations, DGIV's choice of enforcement method and the effect of the Commission's choices on due process. In addition, the individual exemption of market division cases will be discussed. This section will compare and contrast DGIV's approach to crisis cartels with its attitude towards horizontal cartels in general. The present chapter will concentrate on the impact of classification on the construction and analysis of formally prosecuted cases. Following an evaluation of informally resolved and exempted cases, it should be possible to make some determination on the overall

impact of characterisation on DGIV's analysis and choice of enforcement approach in horizontal agreements. It will be seen that the Commission's extensive discretion and the width of legal rules enables it to pursue whichever prosecution course it chooses. Yet, there seems to be little objective justification for DGIV's choices.

B)PROCESS AND SUBSTANCE - FORMAL PROSECUTION - COMMISSION POWERS [8]

1)Statement of Objections (SO)

Where the Commission decides to initiate infringement proceedings under Art.3, it must serve an SO on the undertakings involved. Briefly, this must outline the principal points of DGIV's objections, the essential factors upon which the Commission relies and a legal assessment of those facts. All documents relied on by DGIV as evidence must be appended to the SO. It is crucial that the SO makes the undertakings involved aware of the case against them so that they are able to assess the probative value of the evidence[9].

2)Legal Evaluation

The requirement that the SO must contain a legal assessment of the facts leads to a discussion of how DGIV constructs and evaluates cases under Art.85. Broadly, case construction is a technique used particularly in criminal justice systems. It is an on-going process involving the manipulation and interpretation of legal rules thereby enabling the selection, creation and presentation of evidence in a way which is geared towards securing conviction. The complexities and effects of case construction upon individual cases have been studied by criminological research. Researchers argue that there is nothing intrinsically wrong with case construction providing both sides have

equal ability and resources to employ such techniques. However, some have expressed concern that case construction may serve to strengthen weak prosecution cases and obtain convictions where they are not warranted. There is also criticism that prosecution and defence resources are so unbalanced that defendants can do little to prevent unjustified convictions [10].

The following sections will assess the impact of DGIV's classification of horizontal offences on the construction and evaluation of formally prosecuted cases. It will be argued that their criminal characterisation controls the construction and assessment of these offences. It will be demonstrated that, in case construction, DGIV is able to employ the width of its monolithic discretion to manipulate the law and construct a case against the defendant which is difficult to disprove, thereby rendering conviction more likely than not. Case construction occurs in three main ways. By :

a)the ambit given to the substantive elements of Art.85 ;

b)the type of analysis used ;

c)the quantity and quality of evidence needed to prove an offence.

Each of these elements will be discussed in turn. At each point, it will be seen that political and pragmatic goals, and thus the criminal characterisation of the offence, dictate and justify DGIV's prosecution choices.

a)Criminal Classification.

First, it is necessary to establish the Commission's perception of these violations as criminal offences. The criminal characterisation of violations is difficult to determine as it is rather subjective in nature. However, here the assessment of DGIV's classification of offences has been based on the existence in case reports of typical characteristics associated with the criminal law enforcement [11]. Together these suggest that DGIV perceives such conduct as criminal, or at least quasi-criminal in nature. In 21 of the 22 formally prosecuted cases in the study, DGIV used criminal/quasi-criminal terminology to describe the nature of these offences [12]. Probably, the high water mark is the Commission's use of criminal language to

describe the offence in *Dutch Builders* as being one of "amongst the most serious infringements prosecuted, prohibited and penalised by the Commission" [13]. DGIV frequently refers to the "per se" or "manifestly anti-competitive nature" of violations [14]. There are also examples of the Commission alluding to the covert, institutionalised nature of these offences and a concomitant awareness by firms of the illegal nature of their behaviour [15].

The reason for DGIV's clear opposition and penal characterisation of these infringements was made explicit in *Cast Iron and Steel*. Practices which hinder the political goal of Single Market integration receive a criminal classification [16]. Thus, it seems that what constitutes anti-competitive behaviour in the EC is not conduct which hinders competition *per se*, but behaviour which threatens the attainment of political and pragmatic goals. Criminality too is grounded in these objectives. The study suggests that the greater the threat to these goals, the more penal DGIV's characterisation of the conduct. As horizontal cartels are perceived as particularly harmful to the integration goal, they routinely receive a criminal classification.

b)Ambit of Article 85

It is uncontentious that Art.85 is laid down in broad terms [17]. DGIV is able to use this flexibility of the substantive elements of Art.85(1) to ensure that the defendant's conduct falls within Art.85 and to construct a case against him. This malleability of legal terms has been noted elsewhere. Burns discusses extensively the nexus between enforcement and antitrust goals and how the substantive elements of the offence take their meaning from current antitrust goals [18]. Here, it will be argued that political and pragmatic goals dictate and justify the breadth which DGIV gives to the substantive elements of Art.85. The most useful definitions to DGIV have been those of 'concerted practice', 'collective responsibility' and 'single complex/continuing infringement'. These terms have been developed and extended to cover most conduct thereby increasing the ambit of DGIV's prosecution powers. The following sections

will discuss how the width of these definitions is frequently used by the Commission to construct its case [19].

i)Concerted Practice

Basically, this is defined as a form of co-ordination whereby practical co-operation is knowingly substituted for competition [20]. Whilst a concerted practice is conceptually distinct from an agreement, in practice, they coalesce [21]. The result is that all forms of collusive behaviour ranging from written agreements to more tenuous forms of consensual behaviour are covered by Art.85. The width of the concept of a concerted practice means that DGIV relies heavily on it to bring undesirable activity within the scope of its enforcement powers. In 19 of the 22 formally prosecuted cases in the study, this concept was used for precisely this purpose [22]. This breadth has enabled DGIV to bring even the most circumstantial of cartels within the ambit of Art.85 [23]. The width of the definition has also been used to bring peripherally involved firms within the scope of Art.85 [24]. Thus, any degree of contact between competitors risks raising the Commission's suspicions and increases the possibility of an investigation [25]. As such, the width of the concerted practice concept has been a vital tool for DGIV in criminalising behaviour. The problem is that the Commission's penal characterisation makes all parallel behaviour appear suspicious. Combined with DGIV's reliance on circumstantial evidence as proof of a concerted practice, this has led to concerns that much innocent parallelism may be punished as a concerted practice [26].

ii)Collective Responsibility

The Commission has made explicit the nature of collective responsibility :

> "Where the essence of the cartel is the combination of the members over a long period towards a common unlawful end, each participant must not only take responsibility for its own direct role as an individual, but also share responsibility for the operation of the cartel as a whole" [27].

In recent years, DGIV has introduced and used this concept on a number of occasions to implicate fully firms who were only peripherally involved in the cartel, thereby increasing the apparent culpability of their conduct and justifying the Commission's

penal approach to enforcement. It has been used in this way in ten of the formally prosecuted cartels in the study [28]. Collective responsibility has been of greatest effect when combined with the notion ofa concerted practice. The width of these two concepts has served to provide mutual support for one another. The cumulative effect of an increased number of participants engaging in a broader range of collusive behaviour has served to substantiate the legitimacy of DGIV's finding of a criminal violation of significant magnitude [29].

iii)Single Complex Infringement

A complex infringement consists of "continuous conduct characterised by a single purpose" [30]. As such this concept coalesces the notions of 'agreement', 'concerted practice' and 'anti-competitive object' into a single term. It has been used in 13 of the cartels in the study to extend the duration of the offence and thus increase the cumulative weight of evidence against the defendants and heighten the perception of the criminality of the offence [31]. More importantly, in six of these cartels, all three concepts discussed here were used in combination to construct a case of significant magnitude [32]. The CFI have endorsed DGIV's view of this on-going conduct [33].

In conclusion, under current political and pragmatic goals, horizontal activity is perceived as particularly harmful. The prime objective is to eradicate such behaviour. To this end, the Commission uses its discretion to widen the scope of the substantive elements of Art.85, effectively criminalising most conduct and bringing it within the scope of its prosecutorial discretion. The flexibility of Art.85 means that DGIV can interpret the substantive law in the way most likely to favour successful prosecution and conviction. In particular, the extension of the concept of a concerted practice and the development of collective responsibility and complex infringement have been most effective in augmenting the overall criminality of the conduct. Giving this behaviour the appearance of unequivocal criminal conduct ultimately ensures that conviction is automatic. This serves both the pragmatic goal of cost-effective conviction and the political need to eradicate threatening conduct. Thus, political and pragmatic aims control and justify the scope of Art.85. In general, the Court have affirmed DGIV's

generous construction of Art.85, though as will be seen later, there have been clashes over what constitutes proof of an offence. This has led to questions over whether DGIV has sufficient evidence to support the use of these wide definitions[34].

c) Type of Analysis[35]

Art.85 proscribes agreements whose "object *or* effect" is to restrain competition. This raises the issue of whether agreements whose object restricts competition are analysed differently from those whose effect does so[36]. Caselaw suggests that an analytical difference does exist. Where the object of an agreement restricts competition, no market analysis is required. But, where the object of an agreement is unclear, a full market analysis is needed to ascertain the actual extent of any adverse effects on competition. DGIV has an absolute discretion as to which category the offence falls into and how it should be evaluated[37]. This section will argue that the classification of the offence and the consequent breadth of Art.85 affects the type of analysis employed by the Commission in assessing infringements. The combined effect of these two factors means that DGIV considers most horizontal conduct as having a clearly anti-competitive object. This finding enables DGIV to employ a curtailed legal and economic evaluation. In all 22 formally prosecuted cases, the Commission made it clear that the activities involved were 'conduct' offences whose object was "manifestly anti-competitive"[38]. Without exception, DGIV employed a truncated legal and economic assessment, rejecting the need to evaluate agreements in their market context as "irrelevant"[39]. The concern here is that this use of the truncated 'object' format of analysis is based on the width of the substantive elements of Art.85 rather than solid evidence of an anti-competitive object or thorough individualised legal and economic assessment. Often the breadth and lack of distinction between an agreement and a concerted practice have been used to establish that the object must be to distort competition, obviating the need for a consideration of market effects[40]. Similarly, the definitions of product and geographical market are equally flexible and have been used to the Commission's advantage. By narrowly defining these markets, it is easier for

DGIV to establish that the *object* of the agreement was to distort competition [41]. This technique both reinforces the perception of the innate criminality of the offence and makes conviction easier by allowing the short-form 'object' analysis to be employed. Korah has criticised the Commission's formalistic approach to Art.85(1) and its reluctance to consider market context [42]. This criticism has been echoed in a number of cases in the study. In *SIV*, the CFI expressed concern over DGIV's inadequate assessment, ruling that it was insufficient to identify the object of the agreement and that, even in blatant horizontal cartels, market analysis was required [43]. However, DGIV seems to have little intention of changing its approach. Decisions taken since the *SIV* ruling have continued to employ an 'object' format of analysis [44]. Yet, this approach seems to be of little real benefit to the Commission as such decisions risk annullment because of the inadequacy of their legal assessment [45].

In conclusion, it is clear that the criminal classification and the breadth of Art.85 do impact upon the depth of DGIV's legal and economic analysis. Without exception, this combination dictates and justifies the routine use of the superficial 'object' form of evaluation. Despite criticism, DGIV continues to employ this shallow format undeterred. Whilst the Commission has never explained the basis for its choice of evaluation, there seem to be several clear advantages which can be inferred. Most importantly in the present context, DGIV's preference for superficial analysis seems to provide political and pragmatic advantages. Quite simply, it allows the speedy prosecution of politically damaging cartels without requiring the expenditure of resources to establish an anti-competitive effect. More specifically, as will be illustrated in the next section, the choice of 'object' analysis has a significant impact on the quality and quantity of evidence needed to establish an offence.

d)Quality and Quantity of Evidence [46]

The proceeding sections have demonstrated that the Commission classifies horizontal offences as criminal and that the generous scope of Art.85 brings most conduct within

the reach of DGIV's enforcement powers. It has also been shown that the Commission has absolute freedom in its choice of analysis and that it uses the criminal nature of the offence to justify its routine use of a truncated analytical format.

This section will focus on the rules of evidence employed by DGIV and Court on Commision decision-making. It will examine :

a)the nature, and ;

b)the standard of evidence required to establish a competition offence and how these evidential requirements can be manipulated by DGIV in the name of effective enforcement.

First, issues relating to the quality of evidence required and then those pertaining to the quantity of evidence will be examined.

i)Quality of Evidence

This section will first consider the extent of any evidential rules governing the nature of evidence required to establish a competition violation. Then, the quality of evidence adduced in the case study will be assessed [47]. Reg.17 is silent as to the type of evidence considered sufficient to establish an offence. Beyond that, there is scant literature or caselaw discussing the role of evidence in competition cases [48]. Broadly, DGIV will seek to adduce evidence demonstrating a common design. Two of the most important areas of evidence in competition cases are circumstantial evidence and economic evidence. The following discussion will concentrate on their role in the substantiating of competition cases.

The covert nature of cartels inevitably means that the Commission places considerable reliance on circumstantial evidence [49]. Thus, violations are often established entirely on the basis of such circumstantial evidence as telexes, minutes of meetings etc. The ECJ have long accepted the sufficiency of circumstantial evidence [50]. Similarly, hearsay evidence is equally admissible [51]. Indeed, the existence of a cartel may be proved entirely on the basis of the hearsay evidence of a co-conspirator [52].

Economic evidence relating to market conduct and structure also plays a major role in antitrust proceedings [53]. Particularly where evidence of collusion is based

on circumstantial evidence, economic expert evidence may be used to support or refute those findings. Again, no formal rules exist governing the admissibility or probative value to be placed on expert evidence. This problem has been exacerbated by the ECJ's long-standing reluctance to review economic evidence[54]. Brunt discusses extensively the role of economic evidence in antitrust proceedings. She emphasises the interpretive, malleable nature of economic evidence and notes that the relevance of economic evidence depends on the type of agreement in question[55].

Moreover, no formal requirement of corroboration exists under Reg 17. An offence may be proved on a single item of evidence[56].

It can be seen from the above discussion that few artificial rules of evidence exist. Indeed, the Court's approach to evidential matters is very flexible. The only criterion applied is the credibility of the evidence[57]. The Court have made it clear that they are prepared to accept *any* type of evidence from *any* source, providing that it is credible. Probative evidence will not be excluded because of artificial rules [58]. In addition, the Court have shown themselves willing to accept the Commission's word rather than independent evidence to prove an offence[59].

Thus, few evidential constraints operate. Those that do are vague and ill-defined. Green has criticised this situation arguing that, given the penal nature of antitrust, stringent evidential rules, sufficient to protect defendants should be in operation[60]. It will be seen in the following sections that the malleability of the present situation gives DGIV the freedom to dictate the quality and quantity of evidence necessary to establish an offence. Specifically, it is intended to demonstrate that the Commission's focus on anti-competitive object affects the type and amount of evidence required, leading to greater weight being placed on circumstantial evidence, less emphasis on economic evidence and a lower standard of proof being required[61].

Most of the cases in the study show an heavy reliance on circumstantial evidence. All cases involved relied to a greater or lesser extent on circumstantial evidence to prove the violation[62]. As a result, liability in *Peroxygen* was established by a single "red note", whilst in *Italian Flat Glass*, publication of identical price lists was damning [63]. In *Zinc Producers* and *Belgian Roofing Felt*, evidence contained in

internal memos of the relevant associations was held to be sufficient to implicate non-members [64]. Finally, in *Polypropylene*, evidence of price-fixing contained in a single note made by an employee of another firm who had not participated in the relevant meeting was considered sufficient [65]. The case study also reveals a concomitant decrease in the relevance of economic evidence. As has already been demonstrated, DGIV rejected the validity of economic arguments in all 22 cases [66].

It can be concluded from the above that, in line with previous research, the use of the 'object' analytical format does appear to affect the nature of evidence adduced resulting in substantial reliance on circumstantial evidence and a strong tendency to reject time consuming economic evidence. But, a closer examination of the case study highlights the sometimes dubious quality of the evidence and raises concerns that this approach may be flawed. Rather than depending on concrete evidence ot prove a case, the study suggests that the choice of the 'object' analysis and the lack of stringent evidential rules allows the Commission to 'convict' on evidence which on more detailed scrutiny is insufficient or unreliable.

The two most fruitful techniques employed by DGIV in constructing an effective case have been the focus on the anti-competitive object of the violation and the cumulative weight of the evidence.

On several occasions, DGIV has attempted to use its monolithic role to set the agenda as regards what constitutes a concerted practice/complex infringement and what will suffice as adequate proof [67]. In these cases, the Commission has argued that any concertation, direct or indirect, having an anti-competitive object is sufficient to establish a concerted practice. Each element of the offence does not have to be proved. All that is needed is proof of a common purpose [68]. Similarly, the definition of complex infringement coalesces notions of agreement and concerted practice. Simultaneous and cumulative proof of each element is not required. The focus is on the anti-competitive object of the offence [69]. However, under the 'object' analytical format, where the existence of an anti-competitive object has already been decided, it is easy to impute a finding of an anti-competitive purpose into the definition of a concerted practice/complex infringement and thus establish that element of the

offence. After that, any circumstantial evidence of parallel action, however innocent, will be sufficient to establish the 'concertation' element of the violation [70]. Much of this ignores the ECJ's approach that parallel behaviour may be circumstantial evidence of a concerted practice, but can never be conclusive where alternative explanations exist [71]. But, as market evaluation is not required under the 'object' analysis, DGIV is able to evade this issue. Alternative explanations are not sought. Innocence need not be considered. Moreover, vague evidential rules mean that corroboration of the Commission's evaluation is not required. Thus, the focus on the object of the conduct can be used to mask evidential inadequacies. In establishing these violations, objective proof of concert is not necessary. Instead, collusion may be imputed from circumstantial evidence of parallel action. This single element of circumstantial evidence is sufficient to establish all the essential elements of the violation [72]. Substantive proof of market effect is neither required nor sought. As such, the focus on anti-competitive object renders concerted practice/complex infringements self-fulfilling violations. As 19 of the cases in the study were concerted practices/complex infringements and all 22 cases were subject to the 'object' analysis, they have all, to a greater or lesser extent, been subject to the above approach and are therefore suspect. Indeed, many cases have challenged the Commission's approach [73]. *Hercules* questioned the concept of complex infringement arguing that it had been accused of both an agreement and a concerted practice, but that the Commission had adduced evidence of neither [74]. Both *VBBB* and *GCB* criticised DGIV's insistence on the 'object' format of assessment, arguing that it isolated issues from their context and thus made violations easier to prove [75]. In *Woodpulp II* and *SIV*, the Commission's approach was criticised as "highly questionable". It was found to have made categorical assertions regarding the existence of a concerted practice which were backed by little real evidence. As a result, DGIV had penalised firms for participating in a concerted practice in the face of strong evidence suggesting that no concerted practice existed [76].

DGIV combines its focus on the anti-competitive object of the offence with an emphasis on the cumulative weight of circumstantial evidence, thus attempting to

mask evidential inadequacies by allowing the quantity of evidence to compensate for its lack of quality. In consequence, the sum of evidence may outweigh its whole [77]. In PVC, where DGIV admitted an extensive absence of documentary evidence, it stated that, nevertheless, the existence of a cartel could be established by logical deduction [78]. This logical deduction seems to be based, not on objective evidence, but on the anti-competitive object/criminal classification of the offence which sees any parallel conduct as evidence of collusion [79]. In ten of the cartels under examination, the Commission specifically referred to the cumulative weight of the evidence, stating that it was its totality which allowed the finding of an infringement [80]. Elsewhere, DGIV has relied on the general vagueness of the evidence to overcome any lack of proof [81].

In these cases the cumulative and ambiguous nature of the evidence was used to absolve the Commission from the requirement of providing detailed evidence of the nature and duration of the cartel or the identity of all participants. Overall, in 17 cases this approach was used to extend the scope of the violation without the need to provide detailed proof [82]. In *PVC*, this approach enabled DGIV to admit freely that, although it did not know when the cartel had begun and when or whether it had ended or who had participated in the cartel, nevertheless an infringement had been committed and a number of firms were fined substantial amounts as a result [83]. Moreover, the concept of collective responsibility allows the cumulative weight of evidence to be increased by heightening the perception of the extent, and therefore the criminality of the offence. Yet the credibility of this approach is questionable as it allows a violation to be proved entirely on untested hearsay evidence [84]. Several cases have complained of DGIV's 'guilt by association' approach [85]. Recently, in *Woodpulp II*, AG Darmon criticised extensively the Commission's use of "doctrine of multiple evidence", and the consequent lack of individualisation in assessment because it allowed fines to be imposed though no proof had been adduced [86]. Darmon condemned the Commission's deliberate vagueness and pointed out that this lack of specificity was contrary to caselaw and hampered the defendant's ability to defend himself and the Court's ability to review cases [87]. The Court were equally critical and excluded evidence which failed to identify the parties DGIV was attempting to implicate under the concept of

collective responsibility [88]. Despite this criticism, the Commission continues to insist that a lack of evidence or errors in its evaluation does not relieve participants from liability nor vitiate the decision [89]. Yet, recent cases have demonstrated that DGIV's attitude towards evaluation and proof is cause for serious misgivings. Fifteen cases in the study challenged the sufficiency and reliability of DGIV's case against them [90]. In over half of these cases, the Court found DGIV wanting and wholly/partially annulled the decision and/or reduced fines as a result [91]. Criticism of DGIV has been trenchant. Several cases in the study have condemned the lack of objective proof, the excessive reliance on the cumulative weight of circumstantial evidence, the lack of specificity, the incorrect or inadequate legal and economic evaluation, and in *SIV*, deliberate deception, where the Commission used its monolithic discretion and the vagueness of evidential requirements to 'doctor' the evidence [92].

As well as raising concerns over the probative value of the evidence presented, the increased importance of circumstantial evidence under DGIV's current approach means that other reasonable explanations for the alleged anti-competitive conduct may exist, thus providing the opportunity to challenge the Commission's assessment [93]. However, the next section will demonstrate that the lack of clarity in the standard of proof enables DGIV to control evidential sufficiency and thus overcome such problems.

ii)Quantity of Evidence [94]

There are no set rules defining the burden or standard of proof in competiton cases [95]. *Orkem* made it clear that the burden is on DGIV to prove an infringement [96]. However, the standard to which a violation must be proved varies considerably from case to case. In *Continental Can*, the standard required was proof "beyond doubt" whilst in *United Brands*, "adequate legal proof" was sufficient [97]. Elsewhere, the Court have avoided reference to a specific standard and have simply held that DGIV's case was "sufficiently proved" [98]. Recently in *Polypropylene* and *SIV*, the CFI referred to the "requisite legal standard", but did not explicitly define what was required under this standard [99]. This lack of clarity means that the burden placed on defendants appealing against a Commission decision is uncertain. In *Suker Unie*, it was held

sufficient for the party to provide an "alternative explanation which cannot be ruled out" [100]. Whilst in *MDF*, AG Slynn suggested that the applicant need not show that a Commission decision was wrong but merely that it was "unsafe or insufficiently proven" [101]. Thus, caselaw suggests that a defendant need not provide an equally reasonable explanation, but rather *any* reasonable interpretation will discharge their evidential burden.

Whilst this approach may appear to even the balance between prosecution and defence positions, in practice, the flexible, ill-defined nature of the standard of proof, provides DGIV with the opportunity to manipulate it to serve enforcement needs, thereby both masking concerns over evidential sufficiency whilst increasing the problems encountered in challenging the Commission's case construction. This approach has been condemned [102]. Both Green and Brunt criticise the fact that the standard of proof can be dictated by the prosecutor through his line of argument and assert that this can affect the quality and quantity of evidence required to substantiate an offence ; the lower the standard of proof, the more probative the evidence and the easier it is for the Court to accept the prosecutor's construction of the facts. This control of the standard of proof may not only allow tenuous evidence to establish an offence but can also serve to increase the tactical burden on the defendant [103]. This burden is made additionally difficult to discharge by the exclusion of economic evidence, thereby making it problematic for defendants to provide an acceptable alternative explanation [104]. Thus, the case study intends to examine :

a)what standard of proof is applied and whether it is applied consistently, and ;

b)whether the Commission attempts to dictate the standard and burden of proof, noting the effect of this on enforcement.

Two cases in the study employed the formula of a "requisite legal standard" [105]. Quite what is expected under this standard is unclear and appears to vary within and between the two cases. In *Polypropylene*, the standard varies from "reasonable doubt" to "sufficient grounds" to a finding that participation in an infringement "may be concluded" from the evidence [106]. In *SIV*, the standard of "reasonable doubt" was not mentioned. Instead, the formula ranged from a requirement that the evidence

"explicitly and unambiguously" supported DGIV's interpretation, to simply stating that the allegation was not "sufficiently proved" [107]. In three cases, the Commission clearly sought to dictate the standard by arguing that a concerted practice was the only explanation for the behaviour [108]. This nominally sets a standard of "reasonable doubt". As already seen in *SIV*, the CFI applied the "requisite legal standard" formula. However, in both *Woodpulp II* and *CRAM*, the ECJ consistently employed a standard of "beyond reasonable doubt" [109]. It appears that DGIV's rationale behind this approach was an attempt to reverse the burden of proof. By arguing that the only valid explanation for the parallelism was a concerted practice, the defendant was required to prove the innocence of its conduct [110]. In all three cases, this tactic failed. The Court found clear contrary evidence proving the innocence of the conduct and largely annulled these decisions [111]. In the remaining 18 cases, the standard of proof is unclear and the Commission/Court merely confined themselves to stating whether or not an allegation was proved [112].

The precise effect of the Commission's approach on the defendant's burden is ambiguous. In six cases, the defendant appeared to face a low evidential burden [113]. This low burden may be more onerous to discharge than first appears bcause of DGIV's attempts to reverse the presumption of innocence [114]. Of the above cases, all except *Zinc Producers* had their alternative explanation of parallelism rejected at the Commission decision stage as "improbable" and "entirely unbelievable" [115]. It was only on appeal that proper recognition was given to these alternative explanations and partial annullment of the decisions resulted [116]. In *Fedetab* and *Polypropylene*, a high burden was placed on the defendant. In *Fedetab*, the Court held that the defendant must "cast serious doubt" on the Commission's assessment [117]. In *Polypropylene*, where the defendant's burden was theoretically low under a standard of "reasonable doubt", DGIV attempted to increase the burden by arguing that the defendant must give a "different explanation" of what occurred by advancing "exact information" [118]. This requirement to adduce specific proof could be difficult to fulfil given the access problems experienced by many defendants and the Court's antipathy towards economic evidence [119]. In 14 of the cases in the study, the evidential burden on the defendant

was unspecified and defence arguments were rejected outright as too generalised or irrelevant [120].

The defendant's evidential burden was made more uncertain by DGIV's equivocal attitude towards the presumption of continuance [121]. In *Soda Ash* and *Peroxygen*, the Commission refused to accept the firms' word that the violation had been terminated. Thus, the presumption of continuance applied increasing the defendant's evidential burden. In contrast, in *Zinc Producers*, DGIV exercised its discretion in favour of a presumption of cessation [122]. Of all the cases in the study, no defendant fully discharged their evidential burden [123]. Of the nine cases appealed, five were successful to some extent in discharging their evidential burden. But, almost as many entirely failed to do so [124]. Moreover, it should noted that in three of the successful appeals, the defendant faced a low burden because of the Commission's line of argument [125]. The outcome may not have been the same had this not been so.

The case study shows that the standard of proof applied to horizontal cartels is ambiguous and is not consistently applied within or between cases. The Commission is able to manipulate the standard via its line of argument. Whilst recent attempts have failed to result in conviction, it is cause for concern that DGIV is able to dictate the standard of proof at all. The lack of clarity in the standard of proof is of considerable advantage to the Commission. This vagueness allows public interest, ie political and pragmatic goals, to control evidential sufficiency, masking any problems of proof and significantly enhancing conviction prospects. The defendant's burden is equally vague and dependent on DGIV's line of argument. This resulting increase in legal uncertainty makes conviction more difficult to avoid.

3)Conclusion - Commission Powers

This examination of formally prosecuted cases reveals the far-reaching impact that the classification of horizontal violations has on the construction and evaluation of these offences. The role played in this by DGIV's use of the 'law as a resource' is equally extensive. Under this, DGIV takes every opportunity to augment its already

considerable powers and construct conviction. By its classification of offences, its interpretation of legal definitions and by creating and maintaining ambiguity, particularly regarding evidential matters, DGIV can exploit the law to improve conviction prospects significantly. The incremental nature of the Commission's case construction is obvious. At each point, the criminal characterisation of offences affects DGIV's choices. The Commission clearly regards horizontal cartels as serious criminal behaviour. DGIV has been particularly willing to characterise such conduct as criminal where recidivists in the petrochemical and glass industries are concerned. The basis of this classification is clear. Criminality is grounded in the EC's political and pragmatic goals. Behaviour hindering these objectives is deemed anti-competitive. The greater the threat to these goals, the more penal DGIV's characterisation of the behaviour. The enormous potential of horizontal cartels to jeopardise political and pragmatic goals means that such conduct is automatically ascribed a criminal classification. This characterisation sets in motion the Commission's incremental use of the 'law as a resource'. First, this penal characterisation permits and justifies DGIV's broad interpretation of Art.85, thus reinforcing the unequivocal criminality of the offending conduct and ultimately enhancing conviction prospects. In turn, the penal classification and the width of Art.85 combine to vindicate the routine use of the superficial 'object' format of analysis. The unquestionably criminal nature of the conduct allows DGIV to ground antitrust liability in the 'object' of the agreement, resulting in the truncated legal and economic evaluation of the case. Here, any similarity of behaviour between horizontal competitors is viewed automatically as illegal, or at least very suspicious, permitting DGIV to assume an anti-competitive object, and therefore liability, on the basis of very little substantive evidence or market analysis. Rather, this evaluation/outcome is based on DGIV's perception of the inherent criminality of such conduct and the consequent width of Art.85. The development of the concept of a single complex infringement has been particularly fruitful in this respect. The breadth of this notion considerably enhances the Commission's powers by expediting the substantiation of an offence. Similarly, the concept of collective responsibility has served to implicate peripheral firms as full

participants in an on-going violation. Both concepts increase the perceived criminality of the offence, justifying the 'object' analysis approach, whilst their flexibility brings most conduct within DGIV's remit.

Finally, the criminal classification and consequent reliance on this truncated analytical format affect evidential requirements. Combined with the absence of clear evidential rules, they impact upon the quality and quantitiy of evidence required to prove a violation, by permitting evidential rules to be interpreted in a manner which facilitates conviction. But, this approach has also caused unease over the amount and type of proof required. The extensive reliance on circumstantial evidence risks false inferences being drawn from the evidence and raises concerns that the sum of the evidence may outweigh its whole. Similarly, the indeterminancy of the burden and standard of proof allow the Commission's to control evidential sufficiency. Thus, rather than protecting defendants, these evidential rules may serve to impede an effective defence and instead promote prosecution. Nevertheless, by controlling the requisite quality and quantity of evidence, DGIV is able to establish the unequivocal criminality of the behaviour. Its extensive discretion allows DGIV to manipulate evidential sufficiency to make weak cases strong, thereby creating an illusion of guilt. The case study has suggested that this approach may result in the unjustified conviction of undertakings. Particularly in *SIV*, the Commission, in clear breach of trust, deliberately distorted the evidence to ensure conviction. One must wonder how many similar instances have gone undetected.

Thus, step by step, DGIV uses its monolithic discretion to construct a case against the defendant which is extremely difficult to disprove, rendering conviction virtually inevitable. At each point, political and pragmatic goals, through the medium of the criminal characterisation, dictate and justify DGIV's choices. The political and pragmatic benefits of this approach are clear. DGIV's tactics permit the certain conviction of those practices posing the greatest threat to the political goal of integration in a manner which avoids the problems and expense of thorough market analysis and proof.

A number of more general criticisms may be made about DGIV's approach. The fusion of 'agreement' and 'concerted practice' into a single broad term, whilst providing a useful tool for the Commission, only increases legal uncertainty. Despite this, DGIV has rejected criticism of the synthesis of these terms as an "irrelevant classification dispute" [126]. Nevertheless, the correctness of basing liability on a notion which the Commission, as prosecutor, is unable or unwilling to explicitly define or prove must be questioned. It is perhaps unfortunate that the CFI have endorsed DGIV's approach towards complex infringements. The Court's ruling regarding the cumulative nature of evidence permitted to support this concept seems to encourage and exacerbate the Commission's superficial assessment of cases of which the CFI were so critical in *SIV*. The definition of a concerted practice is particularly problematic. Under the abbreviated 'object' form of analysis, many intelligent market responses appear to be concerted practices resulting in liability. Only more sensitive market evaluation can ascertain the true nature of such activity. Yet, DGIV views market evaluation of horizontal cartels as "irrelevant" and has rejected the CFI's insistence for greater examination of the economic context of violations. In the absence of market evaluation, the Commission's inability to provide exacting evidence against cartels is disquieting. In its defence, DGIV often argues that the covert nature of cartels means that much evidence will be circumstantial. But surely this factor should render extensive market analysis essential not irrelevant. One must wonder why the enforcement of an 'effects' based legislation routinely refuses to examine anti-competitive effect.

Under present circumstances, DGIV is able to set the prosecution agenda. By using a formalistic approach which regards all parallel conduct as automatically anti-competitive, it avoids problematic, resource-consuming market analysis and ensures cost-effective prosecution. Whilst effective, one must question the integrity and equity of an approach which leaves those risking the heaviest sanctions incurring liability on often tenuous, unreliable evidence.

C)PROCESS AND SUBSTANCE - DEFENCE RIGHTS [127]

1)The Right to be Heard

Following the issuance of the SO, the defence has a right of reply within a stipulated time [128]. The Defence Reply gives the defendant the opportunity to state its own position and adduce supporting evidence.

In order to be fully aware of the nature and weight of the evidence against it, the defendant requires access to DGIV's files. Difficulties relating to the existence and scope of the right of access and the contents of the SO have made the defendant's assessment of the evidence and the preparation of a defence problematic [129]. Such issues have formed the basis of numerous recent appeals. Here, their importance are essential elements of the defendant's right to be heard will be assessed. Both the basis and the extent of the right to access are unclear [130]. Reg.17 and Reg.99 both recognise the existence of a right to be heard, but are silent on the specific issue of disclosure [131]. Nor do the Court recognise a general or absolute principle requiring disclosure to firms involved in competition cases [132]. However, in its 12th Report, the Commission permitted defendants a right to access but limited its scope by basing it on general principles of fairness [133].

Conversely, many lawyers argue that the right to access is a fundamental one based on the caselaw of the ECJ and ECHR [134]. AG Darmon has asserted that a right to access is essential to ensuring that there is an "equality of arms" in competition cases [135]. In *Cement*, the CFI regarded access as one of the procedural guarantees enabling undertakings to exercise their defence rights effectively [136]. The ECHR similarly regard the right to access as fundamental [137]. Alternatively, in *Hercules*, the CFI based the right to access on a form of estoppel, asserting that the Commission's 12th Report had created a legitimate expectation to access which DGIV was bound to fulfil [138]. The distinction between whether the right to access is a fundamental right or

a legitimate expectation is important. If merely based on estoppel, the right could be withdrawn by the Commission upon sufficient notice[139].

The scope of this right must also be considered. Broadly, DGIV considers it has fulfilled its obligations if it discloses documents relied on in the SO, documents found at a firms's offices and documents which are in the public domain[140]. Caselaw has settled a number of issues. Early cases upheld the Commission's restrictive approach to the duty of disclosure[141]. However, there now exists a substantial body of case law subjecting disclosure to the wider obligation to supply all "the details necessary to the defendant"[142]. Thus, disclosure should not only cover access to details of DGIV's allegations, but also details of other issues which may provide the defence with independent means of challenging the Commission[143]. The Court insist that DGIV must not base its decisions on documents not disclosed and must disclose all documents relied on in their entirety[144]. The current position is that stated in *Hercules*, where the CFI ruled that firms are entitled to see all documents, whether or not in their favour, save the Commission's internal documents, business secrets and other confidential documents[145]. Most importantly, the Court ruled that it is for the defence and not DGIV to decide which documents are necessary for the defence[146].

The apparently broad scope of access rights is limited particularly by the requirements of confidentiality. As noted above, access is currently subject to DGIV's obligation regarding professional secrecy and excludes the disclosure of documents containing business secrets, internal Commission papers and other confidential information[147]. Unfortunately, the interpretation of these rules leaves the precise scope of access rights unclear[148]. Generally, internal Commission documents are not disclosable[149]. The disclosure of inspectors' investigation reports has been raised several times. In *MDF*, the Court held that such reports could not be relied on as they had not been disclosed[150]. Whilst in *SIV*, DGIV held that such reports were not to be disclosed to defendants[151]. In *Azko II*, despite being given a clear opportuity to rule on this issue, the Court avoided the matter. But, the tenor of their ruling suggests that documents are not excluded from disclosure merely because they were drawn up by DGIV officials[152]. The current state of the law means that which internal documents

are disclosable and whether they will be disclosed in the instant case is uncertain. Whilst access to these documents may sometimes be possible, it seems that it is not probable. The ECJ have made it clear that compelling evidence that DGIV acted for covert motives would be required before they would grant an application for access to internal files[153]. This high burden this imposes on defendants has been criticised[154].

As far as documents excluded on grounds of professional secrecy are concerned, two main problems exist. Firstly, precisely what kind of information is covered by the term is uncertain. Secondly, difficulties exist regarding how conflicts between the requirements of confidentiality and defence rights should be resolved[155].

On the first issue, Art.214 imposes a duty of confidentiality upon Community institutions [156]. Both Reg.17 and the Court in *Azko* drew a distinction between business and professional secrets [157]. However, neither provide workable definitions [158]. Art.214 of the Treaty considers that protection should be afforded to "information about undertakings, their business relations or their cost components". But, this definition is so broad as to cover most information acquired by DGIV in the course of its investigations[159]. Space limitations means that it is impossible to discuss this area in further detail. What is important to note is that the terms are ambiguous and therefore malleable[160].

With regard to the conflict between confidentiality and the right to be heard, DGIV's duty of confidentiality is subject to Arts.19 and 21 [161]. Most frequently, this conflict arises in complex cartels where DGIV relies on confidential information obtained from one firm to prove an offence against other involved undertakings. Here, due process requires disclosure of that information to all defendants. This places DGIV in the awkward position of having to balance two conflicting public interests.

The Court have made it clear that Art.20(2) cannot be employed as a shield to withhold evidence, if to do so would materially jeopardise defence rights. Confidential documents not disclosed cannot be relied on[162]. However, DGIV has been concerned that disclosure of confidential information would produce anti-competitive effects. Thus, it prefers to proceed by way of a case by case assessment of these competing interests [163]. The uncertainty this has created has been exacerbated by the lack of a

coherent distinction between business and professional secrets. Following *Azko*, it seems that these two concepts may be afforded different levels of protection. Yet, as already discussed, which documents fall into which category is far from certain [164]. Furthermore, *Azko* referred to disclosure to third parties. Whether a similar approach would be taken with defendants in competition proceedings is unclear [165]. A number of suggestions have been made as to how these competing interests may be reconciled. The use of non-confidential summaries and reference to the Hearing Officer (HO) for a decision on disclosure are amongst the most prominent [166].

In conclusion, the right to access may be limited by DGIV in the interests of confidentiality. But the extent of this limitation is uncertain. Which documents would be covered, what level of protection would be afforded and how conflict with defence rights would be resolved are far from clear. The Commission's approach has provoked considerable criticism. This will be explored further in the following case study examination [167].

The case study reveals that DGIV continues to deny the existence of a general right of access [168]. Frequently, DGIV claims that it has discharged its obligations regarding disclosure by issuing the SO [169]. The degree of access permitted by the Commission varies. In half the cases in the study, full access was refused [170]. Several times the Commission limited the information available to defendants by only disclosing a selection of "core documents", or by only giving access to extracts of documents or to information relating to the individual defendants, but not the cartel as a whole [171]. This approach meant that in *Huls*, 69 documents described by DGIV itself as forming part of the main evidence were not disclosed to the defendant [172]. The Commission has sought to justify this approach by asserting that full access is inconsistent with efficient administration. However, the Court have condemned DGIV's restrictive approach to disclosure as "intolerable for the public interest" [173].

It is clear from the study that, in the conflict between defence rights and the requirements of confidentiality, confidentiality wins. In ten of the eleven cases where access was curtailed, the Commission justified this by claiming confidentiality [174]. This can cause defendants considerable problems of proof as exculpatory evidence may be

protected as confidential. Whilst DGIV admits it is obliged to disclose "manifestly exculpatory" documents, it asserts that the burden is on the defendant to identify and establish the exonerating nature of such documents [175]. This attitude has been criticised as placing an unreasonably high burden on the defendant. Moreover, the Commission appears unwilling to interpret Art.20 as subject to Art. 19(3) and seems unable to identify exonerating documents [176]. In *LdPE* and *PVC*, the parties attempted to overcome these problems by way of reciprocal waivers of confidentiality and the mutual exchange of documents. Here, DGIV emphasised that such exchanges were subject to the overriding public interest in ensuring that such disclosure did not itself constitute an infringement [177]. Above all, the study shows the Commission's determination to control the defendant's access to evidence. In *Polypropylene*, DGIV asserted that it had the right to determine which documents were relevant to the defendant [178]. Despite the CFI's criticism of this attitude the Commission continues to assert its control over defendants' access rights [179].

Several cartels have challenged DGIV's selective disclosure arguing that the Commission has used the concept of confidentiality to distort the weight of evidence and has based its decision on undisclosed evidence [180]. In *ICI*, access was refused to internal documents which revealed that DGIV had taken account of issues not mentioned in the decision [181]. In *Polypropylene*, DGIV made disclosure of documents conditional upon firms agreeing not to disclose the contents to the commercial side of the firm. The undertakings refused to accept these restrictions and challenged DGIV, arguing that it had used the confidentiality clause to distort the weight of evidence. The Commission rejected these allegations stating that, if firms were unable to obtain access to this evidence because they refused to accept the restriction, then they only had themselves to blame [182].

However, firms face considerable difficulties in proving that the Commission has abused the disclosure process and thereby altered the balance of the evidence. In *Polypropylene*, the CFI ruled that undertakings must establish that there were serious doubts as to the real reasons for the Commission's decision [183]. The problem here is that firms are unable to obtain sufficient compelling evidence proving that an offence

was based on undisclosed facts and that DGIV has used 'confidentiality' to deliberately conceal evidence, as the only proof is in DGIV's possession and is protected. The high tactical burden imposed on defendants and the protected status of the information makes it impossible to establish that the Commission is using the 'confidentiality' label as a resource to ensure smooth prosecution. Consequently, defendants regularly fail to discharge their evidential burden [184]. Yet, *SIV* indicates that DGIV are not above using 'confidentiality' for precisely this purpose [185].

In addition, several undertakings have complained that the vagueness of the SO and the time limits imposed by DGIV on the Defence Reply have limited the effectiveness of their right to be heard [186]. In *Polypropylene*, firms complained that DGIV introduced new legal and evidential issues in the course of proceedings and that the SO was so vague that it was unclear which documents supported which Commission allegations [187]. In *Cement*, defendants complained that the short time limit meant that they were unable to acquaint themselves with the facts and this limited their ability to defend themselves [188]. DGIV's attitude was made explicit in *Woodpulp II*, where it claimed that it was too time consuming to list all the evidence. The ECJ condemned this attitude by substantially annulling the decision because of the numerous defects in the SO [189].

It can be seen from the above examination that a right to access is recognised, but its real value is limited by DGIV's interpretation and application of Reg.17. Again, a conflict exists between Reg.17 and defence rights. Again, DGIV resolves the conflict in its favour both by its classification of the right to be heard and by the use of its enforcement powers to limit the information available to defendants.

The Commission apparently classifies the right to access as 'administrative'. Its belief that it has fulfilled its obligations by issuing a SO and its reluctance to disclose additional evidence point to the conclusion that access is based on a notion of administrative fairness and no more. Quite simply, access is a privilege permitted by the Commission [190]. Moreover, the ambit of the protection is defined in a way which limits the opportunity for, and the effectiveness of, the right to be heard. Caselaw [191]

insists that confidentiality must never undermine defence rights, yet DGIV's use of Art.20 does precisely that. Particularly in complex cartels, the Commission's classification of evidence as confidential significantly curtails the defendant's ability to acquire proof and prepare a defence. DGIV may withhold exonerating evidence by labelling it 'confidential', yet such a high standard is imposed on undertakings attempting to establish abuse, that defendants regularly fail to discharge their burden. That conditions regarding confidentiality can be imposed only to be lifted later [192] begs the question whether there ever was any confidentiality to protect and suggests that the 'confidentiality' label is more a resource employed to protect Commission prosecution chances than the defendant's legitimate interests. Similarly, the often vague and shifting nature of the SO leaves the defendant unsure of the scope and cogency of the case against him. These techniques enable DGIV to control the quantity and quality of evidence available to the defence. Combined with DGIV's extensive enforcement powers, this inevitably makes preparation of a defence problematic and prosecution easier [193].

Yet, much of DGIV's conduct ignores established caselaw. Given that the CFI have taken every opportunity to stress the importance of defence rights and the need for "equality of arms", to limit disclosure is to flout the law. To insist upon determining relevancy, ignores rulings in *AEG* and *Hercules* that defendants have the right to determine their own defence. To distort evidence by providing extracts of documents only, ignores the ruling in *Distillers* that documents must be disclosed in full. Refusing access on the basis of administrative efficiency, infringes the principles of legitimate expectation and equality and is inconsistent with the principle that administrative efficiency can never justify a failure to conform with Community law [194]. Indeed, Annual Competition Reports have never regarded access as administratively awkward. Moreover, the DGIV's approach is internally contradictory. The wide access afforded in *Polypropylene* and *British Gypsum* [195] is at variance with the Commission's approach in *LdPE*, *PVC*, *Soda Ash* and *Cement*. Overall, DGIV's restrictive interpretation of defence rights is in stark contrast with that of many MS and Art.6 ECHR [196]. Yet, the Commission insists that access problems are rare [197].

Many critics and undertakings would disagree. Critics have complained that DGIV's inconsistent interpretation of professional secrecy, its failure to resolve the confidentiality/access conflict and the lack of a uniform access procedure have led to very real problems in obtaining access and have had a detrimental effect on natural justice [198].

Nevertheless, despite the problems encountered as a result of inadequate access, the Court rarely annul decisions because of procedural defects. Invariably, they will hold that non-disclosure, whilst wrong, made no difference to defence rights [199]. The result is that firms may be fined on evidence never disclosed. This situation has led Doherty to conclude that, at the administrative stage, access is a right without a remedy, and on appeal, a right with only limited remedies. He asserts that the right to access is of no practical value if it can only be enforced by bringing an action to annul a final decision [200]. Finally, in 1982, the House of Lords Select Committee trenchantly criticised DGIV's attitude towards access and urged improvements, stating that "no single reform could do more to dispel distrust and dissatisfaction" [201]. More than a decade later, the distrust, dissatisfaction and the need for reform persist.

2)Presumption of Innocence

No explicit demonstration of DGIV's respect for a presumption of innocence exists. But, there is some evidence indicating that DGIV's prosecution case stems from a presumption of guilt. It has already been argued at investigation, that the Commission's habitual use of 'dawn raids' in horizontal cartels is suggestive of a presumption of guilt. At prosecution, this assumption is followed through in the focus on anti-competitive object, the mechanical employment on the 'object' format of analysis, the development and frequent use of complex infringements, DGIV's refusal to examine market effects and its routine rejection of alternative explanations for parallel conduct.

Several cases in the study argued that DGIV's approach ignored the presumption of innocence [202]. In *Woodpulp II*, the Commission's presumption of guilt

meant that it ignored alternative reasonable explanations of the conduct in question, despite clear evidence contradicting its assessment [203]. In *SIV*, the CFI criticised DGIV's biased evaluation and misuse of evidence [204].

This review suggests that the Commission's criminal characterisation of the offences may be translated into a presumption of guilt. It is this which enables DGIV to equate parallel conduct with anti-competitive behaviour and bolsters the inferences of guilt placed upon the circumstantial evidence so frequently relied upon by DGIV to establish violations.

D)CONCLUSION - FORMAL PROSECUTION

It is now apposite to summarise how the Commission's approach to formal prosecution represents the use of 'law as a resource'. This review reveals that DGIV uses its monolithic role and the flexibility of the law to increase its own powers and curtail defence rights thereby ensuring the paramouncy of Reg.17. The Commission's penal interpretation of its enforcement powers enables it to control the prosecution process and construct a case against the defendant which is difficult to disprove. As noted earlier, DGIV's focus on the anti-competitive object of the conduct, the flexibility of Art.85 and its ability to control the quality and quantity of evidence required to prove an offence, all serve to ensure that the prosecution momentum is not interrupted.

DGIV's incremental use of the 'law as a resource' is also apparent in its attitude toward defence rights. The Commission's control of the process enables it to curtail defendants' protections. By basing defence safeguards on notions of general fairness, DGIV is able to dictate the width and effectiveness of these protections, so that only in the most literal sense does the Commission fulfil its obligation under Art.19(1) that the defendant should know the case against him and have an opportunity to be heard.

By restricting access and presuming guilt, DGIV uses the defendant's protections as a resource to achieve smooth, effective prosecution. The Commission's insistence that it alone has the right to determine issues relevancy and confidentiality enables it to limit and manipulate the evidence available to the defendant. Classifying information as 'confidential' makes it possible for DGIV to prevent defence access to evidence which may damage prosecution prospects. As demonstrated above, this power has been most effective in controlling the quality and quantity of evidence available to defendants. *SIV* demonstrates that DGIV is able and willing to use the 'confidentiality' claim to distort evidence. One must ask how many similar instances have gone undetected because defendants have failed to discharge their considerable evidential burden. Moreover, the frequent ambiguity of the SO and the shifting characterisation of the offence makes the formulation of a defence problematic and improves prosecution chances of success significantly.

The Commission's apparent presumption of guilt is also of assistance. Having assured itself at the investigation stage of the defendant's guilt, DGIV feels justified, at prosecution, in broadly constructing its case and controlling the defendant's access to evidence. Thus, from the outset of prosecution, the defendant is at a disadvantage : a disadvantage which facilitates the effective enforcement of Reg.17.

DGIV's uncompromising approach to prosecution advances political and pragmatic goals appreciably. In *BASF*, the Commission asserted that this stern attitude had as its objective the promotion of administrative efficiency : a clear statement that pragmatism is more important than defence rights [205]. Moreover, it is undisputed that the swift, emphatic prosecution of horizontal cartels is both politically vital and pragmatically desirable. DGIV undertakes the formal prosecution of horizontal cartels with vigour. Its penal powers enable it to construct cases in a way that not only makes conviction virtually inescapable, but is also extremely cost-effective. The breadth of DGIV's powers contrasts with narrow defence protections which are impeded by limited disclosure, the distortion of evidence and the presumption of guilt. In effect, there is little more than lip-service to defence rights. Within formal prosecution, the mismatch between DGIV powers and defendants'

safeguards is obvious. Perhaps this is not surprising. DGIV itself has stated that defence rights must be balanced against the needs of effective prosecution [206]. This examination reveals that effective prosecution does indeed prevail.

Before drawing a criminological analogy, the Commission's approach to informal prosecution will be considered.

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1 Adam Smith 1776.

2 The need to eliminate market division features in most Competition Reports. See eg 1st Report on Competition Policy 1971 at p 15 ; 8th Report on Competition Policy 1978 at p 10 ; 16th Report on Competition Policy 1986 at p 81 ; 20th Report on Competition Policy 1990 at p 71.

3 In *VBBB* [1984] ECR 18 at paras 21-27, the Court upheld the Commission's discretion to determine its prosecution priorities. See also 14th Report on Competition Policy 1984. This dearth of resources has been catalogued by many critics. See eg Forrester and Norall 'The Laicisation of Community Law : Self Help and The Rule of Reason : How Competition Law Is and Could Be Applied' *CMLR* [1984] 11 at pp 29, 47 ; Groves 'Comment on 17th Report on Competition Policy' *BLR* [1989] 68 ; Whish *Competition Law* Butterworths (1993) at p 285. It is also mentioned in several Competition Policy Reports eg 20th Report 1990 at p 251. In 1990, the Commission had 2,734 outstanding cases, see 20th Report on Competition Policy 1990 at p 91. By 1992, this number stood at 1,526 cases, see 22nd Report on Competition Policy at p 126. The current number of outstanding cases is 1,058 Yet, the Commission makes fewer than 20 formal decisions per annum. In 1991, it made 13 substantive decisions and in 1992, only 20. See Appendix B, Table 8 for further statistical information.

4 *Automec* [1992] 5 CMLR 431. This is consistent with the Commission's policy of decentralising enforcement to the national courts. See 16th Report on Competition Policy 1986 at p 89 : 20th Report on Competition Policy 1990 at p 360 and 21st Report on Competition Policy 1991 at p 444.

5 They include serious transgressions where deterrent punishment is considered necessary ; complex economic situations covering several MS, where a uniform approach is required or cases involving important legal issues or long-term structural changes. Whish *Competition Law* at pp 285-286 and Temple Lang 'Community Antitrust Law - Compliance and Enforcement' *CMLR* [1981] 335 at pp 352-354, discuss further the possible factors influencing prosecution and identify those cases most likely to be prosecuted. At p 354, Temple Lang suggests that DGIV should concentrate exclusively on cases which ensure effective future competition rather than those which merely punish past anti-competitive behaviour.

6 This point is noted particularly by Van Bael 'The Antitrust Settlement Procedure of the EC Commission' *CMLR* [1986] 61 ; Van Bael 'Transparency of EC Commission Proceedings' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 192 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at para 22.

7 This latter area covers comfort letters and the negotiated resolution of more complex cases.

[8] See Appendix B, Table 1 for a list of those cases in the study which were formally prosecuted.

[9] See particularly the Opinion of AG Vesterdorf in *Hercules* at p 89 et seq. and also *Hoffman La Roche* [1979] ECR 461. The Commission cannot take action against firms regarding matters of which the undertakings have not been informed. Nor can it rely on evidence it is unable to divulge because of 'confidentiality'. The SO is provided for under Art.2(1)/Reg.99. See Kerse *EC Antitrust Procedure* (3rd Edn) Sweet and Maxwell (1994) at paras 4.02 - 4.06 ; Green *Commercial Agreements and Competition Law* Graham and Trotman (1986) at p 278 et seq ; Whish *Competition Law* at pp 304-310 and Harding *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) at pp 44-46, for greater details of the contents of the SO and the procedure involved.

[10] For further discussion, see particularly : McConville Sanders and Leng *The Case for the Prosecution* Routledge (1991) at pp 11-13 ; Zuckerman 'Bias and Suggestibility : Is there an Alternative to the Right to Silence ?' in MORGAN and STEPHENSON (Eds) *Suspicion and Silence* Blackstone Press (1994) p 117 and Sanders and Young *Criminal Justice* Butterworths (1994) at pp 222-223 ; McBarnet *Conviction - Law, the State and the Construction of Justice* Macmillan (1981). From a different research perspective, Denis 'Focusing on the Characterisation of Per Se Unlawful Restraints' *Antitrust Bulletin* [1991] 641, has noted the nexus between classification, analytical format and the quality and quantity of evidence required to prove an offence. He draws attention to the cost-savings to be derived from an enforcement approach based on a criminal classification and shortened analytical format. These issues are also explored by Burns 'Rethinking the "Agreement" Element in Vertical Antitrust Restraints' *Ohio State Law Jo* [1990] 1 Brunt 'The Use of Economic Evidence in Antitrust Litigation : Australia' *Australian Business LR* [1986] 261.

[11] Chiefly these are : i)DGIV's use of blatant criminal terminology/quasi-criminal language ; ii)the considerable opprobrium with which DGIV's treats such conduct ; iii)DGIV's repeated reference to the covert nature of such behaviour and firms' awareness of the illegality of their conduct ; iv)the penality of DGIV's sanctioning powers. This final aspect will be discussed in a later chapter.

[12] *VBBB* was the only exception.

[13] *Dutch Builders* at p 184. In several other cases, DGIV has used blatantly criminal terminology describing firms as being "guilty" of offences, eg *Hercules* at p 327 and *Woodpulp II* at pp 409, 495 and 555, who were described as being "guilty" of what was referred to at p 555, as a "flagrant example" of anti-competitive behaviour. See also *IAZ* at p 3398.

[14] Eg *Belgian Roofing* at p 130, *Meldoc* p 853, *Rolled Zinc* at p 285, *Benelux Flat Glass* at p 350, *Cement Cartel* at p 328 and *Soda Ash* [1994] 4 CMLR 482 at p 482, were all referred to as "per se" offences. Many others refer to the gravity of the offence, eg *PVC* at p 368 "manifestly anti-competitive nature" ; *Peroxygen* at p 482 "extremely grave" ; *FWA* in 22nd Report on Competition Policy 1992 at p 99 "major and serious breach" and in *FWA* at p 479 "a particularly serious offence".

[15] Eg *PVC* at p 376, *Polypropylene* at p 323, *LdPE* at pp 404,407, *Italian Flat Glass* at p 564, *Cast Iron and Steel* at p 716 and *Meldoc* at p 784, where DGIV described the cartel as "aggressive and covert".

[16] See *Cast Iron and Steel* at p 716, where DGIV described the violation as a "deliberate effort to frustrate one of the principal aims of the Treaty, namely the creation of a single market". In all, this link was made in 12 cases in the study. See also, *Dutch Builders*, *Soda Ash*, *Peroxygen*, *Belasco*, *Rolled Zinc*, *Welded Steel*, *FWA*, *ANSEAU*, *Zinc Producers*, *Cement* and *Woodpulp*.

[17] Its scope is discussed extensively by Whish *Competition Law* at p 187 et seq and Kerse *EC Antitrust Procedure* at para 1.03 et seq.

[18] Burns 'Rethinking the "Agreement" Element' at pp 3-9 particularly. She argues that many situations can be interpreted either to include or exclude them from antitrust regulation depending on current antitrust views and objectives. She concludes that, regardless of which antitrust goals are paramount, horizontal arrangements are interpreted to bring them within the scope of enforcement powers.

[19] The discussion of these elements will be brief. For more extensive examination of these and other elements of Art 85, see Whish *Competition Law* ; Kerse *EC Antitrust Procedure* and Bellamy and Child *Common Markat Law on Competition* (3rd Edn) Sweet and Maxwell (1987).

[20] See particularly, ECJ rulings in *Dyestuffs* [1972] ECR 619 and *Sugar Cartel* [1975] ECR 1163. It should be noted that it is at this point that the arguments regarding the scope of the concept and what constitutes requisite proof begin. On this, see particularly the Opinion of AG Darmon in *Woodpulp II* at p 467 et seq.

[21] Certainly the Commission makes no attempt to differentiate between the two and in *Polypropylene* at para 264, the CFI upheld DGIV's dual characterisation of the violation there as "an agreement and a concerted practice".

[22] *VBBB, ANSEAU* and *GCB* are the only exceptions. These were all notified agreements. See Table 4 in Appendix B. See particularly the discussion of concerted practice by AG Vesterdorf in *Hercules* at p 141 and AG Darmon in *Woodpulp II* at p 467.

[23] Eg *Polypropylene*, *PVC* and *LdPE*, where DGIV held that no proof of a prior plan was required. Also *Soda Ash* and *Welded Steel*. Elsewhere, outside the study, DGIV has taken a similar approach, see *Sugar Cartel* [1975] ECR 1163, *White Lead* [1979] 1 CMLR 464.

[24] Eg in *LdPE* at para 41, where BP, Monsanto and Shell were held to be parties to a concerted practice, even though they were not fully involved in the cartel. The Commission is able to extend concerted practice in this way with the assistance of the concept of 'collective responsibility' which will be discussed shortly.

[25] Even if the firm is the unwilling recipient of such contact and is drawn into a cartel through fear of retaliation, it receives little sympathy from DGIV, eg *Belgian Roofing Felt*, *Polypropylene* and *FWA*. This approach has been upheld by the CFI in *Belasco* and *Hercules*.

[26] Korah 'Concerted Practices' *MLR* [1973] 220, discusses the problems posed by the blurring of the distinction between a concerted practice and innocent parallelism. Moreover, in Korah 'The Rights of the Defence in Adminstrative Proceedings under Commmunity Law' *CLP* [1980] 73 at p 82, she notes the likelihood of drawing false inferences from the Commission's habit of piecing together instances of circumstantial evidence. Whish *Competition Law* at pp 197-199, also discusses problems of proof in relation to concerted practices. Finally, in a number of recent cases, the CFI/ECJ have rejected DGIV's circumstantial evidence of a concerted practice, eg *PVC*, *CRAM*, *SIV*, *Woodpulp II*. These problems of proof will be returned to later in this chapter under 'Quality and Quantity of Evidence'.

[27] *LdPE* at p 383. Also discussed by AG Vesterdorf in *Hercules* at pp 168-171 and by the CFI in *Hercules* at pp 316-318.

[28] Ie *Polypropylene*, *PVC*, *LdPE*, *Woodpulp*, *Belgian Roofing Felt*, *Welded Steel*, *FWA*, *GCB*, *Cement* and *ANSEAU*. It is also interesting to note that in five of the other cartels the concept of 'undertaking/undertaking identity' was employed to extend liability to cover companies or successors in title, eg *Peroxygen*, *Zinc Producers*, *Italian Flat Glass*, *Benelux Flat Glass* and *Cast Iron and Steel*. See Table 4, Appendix B.

[29] See particularly, *PVC*, *Woodpulp*, *LdPE* and *Polypropylene* cartels.

[30] See *Hoechst* [1992] ECR 629 at pp 631, 733. See also elsewhere in *Polypropylene*, eg *Hercules* at pp 117, 167, *Huls* [1992] 499 at p 502, *Solvay* [1992] ECR 907 at p 909. A similar approach was taken in *SIV* at pt 167.

[31] See *Polypropylene*, *PVC*, *LdPE*, *Woodpulp*, *Soda Ash*, *Zinc Producers*, *SIV*, *Meldoc*, *Welded Steel*, *Fedetab*, *Dutch Builders*, *Cast Iron and Steel* and *Cement*. See Appendix B, Table 4.

[32] See *PVC*, *Polypropylene*, *LdPE*, *Woodpulp*, *Cement* and *Welded Steel*.

[33] See *Hoechst*, *Huls*, *Shell* and *Solvay* in *Polypropylene* cartel. In *Hoechst* [1992] ECR 629 at pp 731-733, the Court stated that the supporting evidence need not be simultaneous and cumulative proof of an agreement and a concerted practice and that the criteria laid down by the ECJ in *CRAM* regarding concerted practices must be understood in the light of the need to maintain independent market conduct. See also discussion in *Hercules* by AG Vesterdorf at pp 140-168. Applicants in *Hercules* were critical of the concept of a single complex infringement,

arguing that it made a violation easier to prove by concealing evidential inadequacies. This aspect will be dealt with shortly under 'Quality and Quantity of Evidence'.

[34] See particularly, comments by Korah 'The Rights of the Defence' ; Coppel 'Curbing the Ruling Passion : A New Force for Judicial Review in the European Communities' *ECLR* [1992] 143 ; Shaw 'Recent Developments in the Field of Competition Procedure' *ELR* [1990] 326 ; and AG Darmon in *Woodpulp II* at p 467 et seq.

[35] For background information, see : Whish *Competition Law* at pp 203-205 and Kerse *EC Antitrust Procedure* at para 1.10 et seq.

[36] Whish *Competition Law* at p 203, raises this point.

[37] See *STM*_[1966] ECR 234 at p 249 and *VdS* [1987] ECR 405. Discussed by Kerse *EC Antitrust Procedure* at para 1.10 and Whish *Competition Law* at pp 203-205. Of course, DGIV's evaluation is subject to review by the Court. In assessing the market context, it is necessary to establish the relevant geographical and product markets and also to analyse other issues eg the impact of national competition rules and the behaviour of other competitors in order to place the agreement and its effects in its proper legal and economic context. On this, see remarks by the ECJ in *Brasserie de Haecht v Wilkin* [1961] ECR 407 at p 415.

[38] Eg *PVC* at pp 347, 368, *Zinc Producers* at pp 501, 504, *Belgian Roofing Felt* at p 151, *LdPE* at p 394, *Peroxygen* at p 501, *FWA* at OJ [1992] L134/14 and *Dutch Builders* at p 164.

[39] See *Peroxygen* at p 504. In all formally prosecuted cases in the study, DGIV showed a marked reluctance to entertain economic arguments explaining that the conduct involved market structures. See particularly, *Dutch Builders* at pp 160-164, *GCB* at pp 78-85, *IAZ* at p 3411, *Rolled Zinc* at pp 296-297/*CRAM* at pp 1693-1695, *SSI* at pp 3845-3846 and *Soda Ash* at pp 470-475

[40] DGIV used this approach in many cases in the study. See particularly, *Cement* at p 329, *Cast Iron and Steel* at pp 696, 712, *Italian Flat Glass* at p 571, *Soda Ash* at pp 470-475, *FWA* OJ [1992] L134/1 at L134/14, *Woodpulp* at p 502, *PVC* at p 368, *Hercules* at pp 313-314, *LdPE* at pp 405,407, *Zinc Producers* at p 127, *Belgian Roofing Felt* at p 151, *Dutch Builders* at p 164.

[41] See particularly, the challenges in *GCB* at pp 86-89, *VBBB* at pp 61-66, *Van Landewyck* at pp 3249-3257, *Belasco* at p 110 and *SIV* at p 1454. In addition, in *SIV* and *Woodpulp II*, there was more general criticism of the Commission's approach.

[42] Korah 'EEC Competition Policy : Legal Form or Economic Efficiency' *CLP* [1986b] 85, discusses extensively DGIV's formalistic approach to Art 85. She argues that, as a result of this formalism, the only escape route is Art.85(3) and this has led to a substantial backlog of cases.

[43] *SIV* at p 159. See also *GCB, Dutch Builders, Fedetab, SSI, Woodpulp II, Polypropylene* and *PVC* who all criticised DGIV's inadequate legal and economic assessment. Some of this criticism was echoed by the Court in *GCB* and *Woodpulp II*.

[44] Eg in *FWA*, the Commission considered that the object was so anti-competitive that market analysis was not required : OJ [1992] L134/1 at L134/14. A similar approach has been taken in *Dutch Builders, GCB* and *Cement*.

[45] This has happened in *SIV, GCB, Woodpulp II, Polypropylene* and *CRAM*.

46 For background information on this section, see : Korah 'The Rights of the Defence' ; Temple Lang 'The Procedure of the Commission in Competition Cases' *CMLR* [1977] 155 ; Temple Lang 'Community Antitrust Law' ; Green 'Evidence and Proof in EC Competition Cases' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 127 ; Rubli 'The Advocate General's Opinion in Woodpulp : Another Set-Back for the Commission's Competition Policy ' *ECLR* [1993] 26 ; Pope 'Some Reflections on Flat Glass' *ECLR* [1993] 172 ; Randolph 'An Overview of the Recent Opinion in the PVC Apppeal *ECLR* [1993] 235 ; Joshua 'Information in EEC Competition Law Procedures' *ELR* [1986] 409 ; Joshua 'Proof in Contested EEC Competition Cases : A Comparision with the Rules of Evidence in Common Law' *ELR* [1987] 315 ; Brearley ' The Burden of Proof Before the European Court' *ELR* [1985] 250 ; Lasok *The European Court of Justice : Practice and Procedure* (2nd Edn) Butterworths (1994) Ch13 ; Brunt 'The Use of Economic Evidence in Antitrust Litigation' ; Burns 'Rethinking the "Agreement" Element' ; Denis 'Per Se Unlawful Restraints'.

47 The admissibility of evidence will be considered more fully below under 'Defence Rights/The Right to be Heard'. This section will concentrate on the probative value of the evidence.

48 Lasok *The European Court of Justice* at p 420 discusses this problem. (AG Warner once remarked that "there are, as far as I can discern no rules of evidence" 1976 14 *JSPTL* 15). A few notable exceptions exist. See Brunt 'The Use of Economic Evidence in Antitrust Litigation' ; Guerrin and Kyriazis 'Cartels: Proof and Procedural Issues' 16 *Fordham LJ* [1992] 266 and Joshua 'Proof in Contested EEC Competition Cases' ; Brearley ' The Burden of Proof Before the European Court' ; Green 'Evidence and Proof in EC Competition Cases'. However, as the CFI have shown considerable willingness to tackle procedural and evidential matters, this will doubtlessly provoke an increase in literature on these issues.

49 Circumstantial evidence means that the facts in issue are proved by logical inference from other facts which are demonstrated. Direct evidence of collusion is extremely difficult to obtain given the secretive nature of cartels. For further on this problem, see Joshua 'Proof in Contested EEC Competition Cases'.

50 See *Dyestuffs - ICI* [1972] ECR 619, *Suker Unie* [1975] ECR 1663. The latter case argued that, given the quasi-criminal nature of the offence, circumstantial evidence should be inadmissible. The Court at p 1950, rejected the argument outright. In *Duraffour v Council* [1971] ECR 515 at p 525, it was held that a fact could be deduced from "sufficiently weighty and uncontradictory circumstantial evidence".

51 See Lasok *The European Court of Justice* at pp 432-434 and Joshua 'Proof in Contested EEC Competition Cases' at pp 324-328, for further discussion and comparison with other jurisdictions.

52 See *Suker Unie* [1975] ECR 1663 at p 1940 and *MDF* [1983] ECR 1825.

53 Economic evidence principally relates to evidence identifying markets, their structures, the competitive processes at work within them and the results produced. It may also refer to more technical evidence eg. entry barriers, marginal costs etc. Brunt 'The Use of Economic Evidence in Antitrust Litigation' extensively discusses the role of economic evidence in antitrust.

54 See Lasok *The European Court of Justice* at pp 356-357. Again, the CFI have demonstrated themselves as more willing to tackle such issues.

55 See Brunt 'The Use of Economic Evidence in Antitrust Litigation' at pp 262, 266-267 particularly. Here she states that in 'per se' offences, economic evidence is not of great importance, whilst under a rule of reason approach, economic evidence takes on much greater importance.

[56] See Joshua 'Proof in Contested EEC Competition Cases' at pp 330-331. In practice, this rarely happens and corroboration, either direct or circumstantial, is provided. Of course, the Commission may also be required to establish the credibility and probative value of its evidence in Court. See Lasok *The European Court of Justice* at pp 431-434.

[57] Known as the 'golden rule'. See discussion by Lasok *The European Court of Justice* at pp 431-434.

[58] See AG Vesterdorf in *Rhone Poulenc* [1991] ECR 867 at p 954.

[59] This is done on the assumption that Community institutions can be relied on to accurately present all relevant facts. The Commission has been found to have abused this trust, not least in *SIV*, where it doctored the evidence. Lasok *The European Court of Justice* at p 345, argues that this approach is particularly dangerous where an imbalance of resources between the Commission and defendants exists. In such circumstances, defendants can easily be kept ignorant of relevant, exculpatory evidence.

[60] See Green 'Evidence and Proof in EC Competition Cases'.

[61] See in particular, very interesting articles by Denis 'Per Se Unlawful Restraints' ; Burns 'Rethinking the "Agreement" Element' ; Brunt 'The Use of Economic Evidence in Antitrust Litigation', who all evaluate the relationship between the type of analysis employed and the quality and quantity of evidence required, as well as the role of economic evidence in antitrust cases.

[62] In all the recent major cartels, DGIV has explicitly noted the absence of direct evidence and the consequent need to rely heavily on circumstantial evidence. See eg. *PVC* at p 358, *Soda Ash* at p 475, *LdPE* at p 398, *Woodpulp* at pp 500-502, *Woodpulp II* at p 420 425, *Polypropylene* at p 179, *Cement* at p 248 and *CRAM* at p 1690. In only two cartels in the study did the Commission have ample direct evidence as well as circumstantial evidence. See *Meldoc* at p 872 and *Benelux Flat Glass* at p 355. It should be noted that in the latter case much of this direct evidence was supplied voluntarily by the parties in an effort to elicit a plea-bargain.

[63] *Peroxygen* at pp 501-502 and *Italian Flat Glass* at p 566.

[64] *Zinc Producers* at p 130 and *Belgian Roofing Felt* at p 152.

[65] *Hoechst* [1992] ECR 629 at pts 82-92.

[66] See earlier discussion regarding analytical format. Also *Peroxygen* at p 504, where economic arguments were considered irrelevant, *Soda Ash* at pp 470-475, *SSI* at pp 3845-3846, *GCB* at pp 78-85, *LdPE* at p 407. In all of these cases, it was made clear that economic analysis carried no weight because of the existence of an anti-competitive object.

[67] Eg *Hercules* at pp 310-312, *LdPE* at p 399, *CRAM* at p 1692, *Woodpulp II* at p 466, *Peroxygen* at p 501.

[68] See particularly, *LdPE* at p 399 and *Hercules* at p 310, where the same argument is also made regarding proof of collective responsibility. These issues are discussed by Rubli 'The Advocate General's Opinion in Woodpulp' and Pope 'Some Reflections on Flat Glass'.

[69] This approach to proof has been supported by the CFI several times, eg *Hercules* at p 318, *Hoechst* [1992] ECR 629 at p 633 - both part of the *Polyproplene Cartel*.

[70] See DGIV's arguments to this effect in *Woodpulp II* at p 534 et seq, where it was criticised extensively by AG Darmon.

[71] See *Woodpulp II* at pp 529-530, *CRAM* at p 1679, *Hercules* at pp 310-312. See also, AG Slynn in *MDF* [1983] ECR 1825 and the Commission's own approach in *Zinc Producers* at paras 75-76 and 14th Report on Competition Policy 1984 at pt 126, where it clearly stated that parallel action in itself was not sufficient evidence of a concerted practice.

[72] From a slightly different perspective, the CFI in *SIV* at para 358, criticised DGIV's "recyling" of facts to prove all elements of an offence. Discussed by Pope 'Some Reflections on Italian Flat Glass'.

[73] In all, 16 cases in the study directly challenged the Commission's evaluation of the infringement and the supporting evidence. *Meldoc, Cast Iron and Steel, Welded Steel, Peroxygen, Zinc Producers* and *Benelux Flat Glass* did not appeal against Commission decisions, though some of these did question DGIV's evaluation at the oral hearing.

[74] *Hercules* at pp 662-670, raised numerous objections regarding DGIV's analytical approach and its flimsy evidence of anti-competitive behaviour, as did many other firms involved in *Polypropylene* and the other pertochemical cartels. In *Polypropylene*, AG Vesterdorf at p 143, criticised the lack of distinction resulting from the Commission's coalescing of definitions into a complex infringement.

[75] Both asserted that focusing on the object of the conduct screened out many important issues and placed a different interpretation on the behaviour. Moreover, ignoring the context of the conduct caused the Commission to misjudge the situation and make errors in its evaluation. See *VBBB* at p 61 and *GCB* at pp 77, 84. In addition, in *CRAM*, the Court at pp 1713-1714, found instances where there was no evidence to support the use of the 'object' analysis.

[76] See *Woodpulp II* per AG Darmon at pp 495-497, 530, and the ECJ at pp 581-582. The ECJ annulled this part of the Commission's decision. Also, *SIV* at pp 1478-1479, 1487, 1495. These cases are discussed by Rubli 'The Advocate General's Opinion in Woodpulp' and Pope 'Some Reflections on Flat Glass'.

[77] Korah 'The Rights of the Defence' discusses this concern further.

[78] *PVC* at pp 358, 369. See also *LdPE* at p 398.

[79] See comments in *SIV* at pp 1442-1444, *Hoechst* [1992] ECR 629 at p 660 et seq, *Hercules* at p 310, *Woodpulp II* at p 466.

[80] See *CRAM* at p 1693, *PVC* at p 362, *Polypropylene* at p 231, *LdPE* at pp 398, 405-407. *Woodpulp II* at pp 439, 466, 530-536, *SIV* at p 1467 et seq, *Welded Steel* at p 72, *GCB* at pp 77, 84, 97-101, *Meldoc* at p 872 and *Cement* at p 327. In several of the petrochemical cartels, this cumulative evidence has taken the form of "core evidence" relating to the cartel as a whole. Here the Commission has asserted that it need not furnish proof of all the details of the offence as the core evidence proves the general purpose of the cartel and that is all that is required. See eg *LdPE* at pp 405-407, *Cement* at p 333 and *PVC* at pp 358, 360, 362 and *Polypropylene* at pp 140-169, 231.

[81] See eg *Soda Ash* at p 475, *Peroxygen* at p 501, *Zinc Producers* at p 129, *Dutch Cigarettes/SSI* at p 702 and pp 3835-3845 respectively.

[82] Eg *PVC* at p 346, where it was used to extend the collective responsibility for the cartel despite an absence of evidence regarding the identity of the participants. A similar approach to

collective responsibility was taken in *CRAM* at p 1715, *LdPE* at p 405, *Polypropylene* at pp 210-231, 310. In *Woodpulp II* at pp 436, 468, DGIV was found to have used the existence of a previous concerted practice to prove the present concerted practice. See also *Soda Ash* at p 475, *Peroxygen* at pp 500-502, *SIV* at pt 67, *Belasco* at p 99, *Meldoc* at p 872, *Van Landewyck* at p 3251, *Zinc Producers* at p 129, *SSI* at pp 3835-3845, *GCB* at p 95, *Welded Steel* at pp 72, 78, *Cement* at p 327, *Cast Iron and Steel* at p 694 and *PVC II*.

83 *PVC* at pp 346, 351-358, 362-363, 374. See similar vagueness in eg *Woodpulp II* at pp 482-489, *LdPE* at pp 390, 398-409, *Polypropylene* at p 172-176, *SIV* at pp 1467-1533, *CRAM* at pp 1712-1713, *Welded Steel* at pp 70-75.

84 In *Hercules* at p 262, DGIV insisted that it was not required to hold hearings to verify the credibility of hearsay evidence. This approach was criticised in *Woodpulp II* at pp 534-535.

85 See particularly, *Hercules* at p 316, *Woodpulp II* at pp 534-540, *GCB* at p 95.

86 *Woodpulp II* at p 456. Here, AG Darmon criticised the Commission for having "no objective evidence whatsoever" regarding some elements of the offence. See also pp 477, 534-536, where he condemned the "doctrine of multiple evidence" and urged caution in the use of circumstantial evidence. Here he also referred to other recent criticism of this doctrine, eg Helali 'La Convention européenne des droits de l'homme et les droits français et communautaire de la concurrence' *RTDE* [1991] 609. In *SIV* at para 358, the CFI criticised DGIV's "recyling" of evidence. This case is discussed further by Pope 'Some Reflections on Flat Glass'.

87 *Woodpulp II* at pp 535 and 538, where Darmon discussed the rulings in *Van Landewyck*, *VBBB* and *Hasselblad* regarding the need for specificity in the Commission's evaluation. This vagueness will be discussed further in relation to the defendant's right to access later in this chapter. See 'Defence Rights/The Right to be Heard'. At p 539, Darmon also argued that the penal nature of the law demanded that the Commission should provide individual proof of an infringement.

88 *Woodpulp II* at p 574. At p 572, the Court were highly critical of DGIV's deliberate vagueness regarding evaluation and proof. Other cases, eg *CRAM* and *GCB*, have also criticised the Commission's vagueness and excessive reliance on the cumulative weight of evidence. Several decisions have been annulled or fines reduced as a result. See discussion below for further details.

89 See particularly, *CRAM* at pp 1692-1693, *PVC* at p 363, *Welded Steel* at pp 70-75, *Woodpulp II* at p 450.

90 See *PVC I*, *Polypropylene*, *Woodpulp II*, *Belasco*, *SIV*, *VBBB*, *SSI*, *CRAM*, *Van Landewyck*, *IAZ*, *GCB*, *Soda Ash*, *LdPE*, *FWA*, *Dutch Builders*. In addition, *PVC II*, *Soda Ash*, *LdPE* and *SPO* are currently on appeal.

91 In *PVC I*, the decision was annulled. In *Polypropylene*, *Woodpulp II* , *SIV*, *IAZ* and *GCB*, decisions were partially annulled and fines reduced. In *SSI*, the fine was reduced and in *CRAM*, the decision was partially annulled and the fine cancelled. In *Compagnie Maritime Belge*, the CFI upheld the decision but reduced fines. In addition, several other cases, eg *Soda Ash*, *LdPE*, *SPO* and *PVC II* are on appeal and it is entirely possible that a similar fate awaits them.

92 See particularly criticism in *CRAM*, *GCB*, *Woodpulp II* and, of course, *SIV*. A number of articles are also critical of the Commission, eg Coppel ' Curbing the Ruling Passion' ; Korah 'The Rights of the Defence' ; Rubli 'The Advocate General's Opinion in Woodpulp' ; Pope 'Some Reflections on Flat Glass' ; Randolph 'An Overview of the Recent Opinion in the PVC Apppeal. In addition, the House of Lords has expressed concern over the Commission's economically dubious reasoning, see House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at p 24.

[93] For further discussion, see Brunt 'The Use of Economic Evidence in Antitrust Litigation' at p 285.

[94] In general, see Joshua 'Proof in Contested EEC Competition Cases'; Green 'Evidence and Proof in EC Competition Cases' ; Brearley 'The Burden of Proof Before the European Court' ; Lasok *The European Court of Justice*.

[95] Either in Reg.17 or the Court's Rules of Procedure.

[96] *Orkem* [1989] ECR 3283.

[97] See *Continental Can* [1973] ECR 215 at para 29 and *United Brands* [1978] ECR 208 at pp 243-247.

[98] See eg, *AEG* [1983] ECR 3151 ; *Commission v Netherlands* [1991] ECR 2461 at paras 21-22 ; *Hilti* [1991] ECR 1439 at para 44. Other examples of the standard of proof required are : "body of concordant evidence" in *Ferriera Valsabbia SpA v Commission* [1980] ECR 907 at para 129 ; "sufficiently clear evidence" in *Commission v Greece* [1990] ECR 3125 at para 31 and "specific and concrete evidence" in *Barbi v Commission* [1990] ECR 619 at para 45. Other examples are given in Lasok *The European Court of Justice* at pp 429-431.

[99] *Polypropylene* at p 267 and *SIV* at p 1521.

[100] *Suker Unie* [1975] ECR 1663 at para 354. Similarly, in *CRAM* [1984] ECR 1679 at para 16, it was held that it was sufficient for the party to adduce evidence casting the facts in a different light and thus allowed an alternative explanation to be substituted.

[101] *MDF* [1983] ECR 1825 at pp 1931-1933.

[102] See particularly, Green 'Evidence and Proof in EC Competition Cases' at p 140. Similar criticisms have been levelled by Brunt in 'The Use of Economic Evidence in Antitrust Litigation' at pp 285-287.

[103] Ie by admitting that facts could be explained another way the Commission can increase the burden and standard of proof required of the defendant firm. It is because of such problems that Green has argued that the penal nature of the law requires more explicit definition of evidential rules and a high standard of proof in order to protect the defendant. See Green 'Evidence and Proof in EC Competition Cases' at pp 132, 143 ; Brunt 'The Use of Economic Evidence in Antitrust Litigation' at pp 285-288 and Denis 'Per Se Unlawful Restraints' at pp 644-645.

[104] Ibid. Economic evidence may be excluded both by the Commission's rejection of it and by the Court's unwillingness to review such evidence.

[105] *Polypropylene* at pp 267, 271, 279, 287, 290, 294, 306, 311, 315 and 326 and *SIV* at pp 1479, 1492, 1521, 1523, 1529, 1530 and 1533.

[106] See *Polypropylene* at pp 207, 218, 196 and 220 respectively. *Polypropylene* also alluded to "requisite grounds" at p 225 ; "sufficiently cogent evidence" at p 234 ; and at p 231, "an adequate basis" for the finding.

[107] See *SIV* at p 1500 and p 1537 respectively. It should be noted that the references in *Polypropylene* to reasonable doubt were made by AG Vesterdorf and not the Court. Vesterdorf discussed in some detail the penal nature of antitrust. See particularly pp 207-210, 218, 249.

[108] . *Woodpulp* at p 502, *Woodpulp II* at pp 421, 422, 495-496, 502, 506. *SIV* at pp 1448, 1478, *CRAM* at pp 1679, 1701, 1711, 1712.

[109] *Woodpulp II* at p 445, "beyond doubt" ; at p 560, "nothing to cast doubt" per AG Darmon ; at p 574-577, "a firm, precise and concordant body of evidence". In *CRAM*, the formula of "sufficiently precise and coherent proof" was employed, eg at pp 1679, 1702, 1712. At p 1704, the Court held that "the conclusion cannot be avoided".

[110] See eg. *Woodpulp II* at pp 478, 495, 534-535, *CRAM* at p 1712, *Italian Flat Glass* at pp 566, 569, *SIV* at p 1478. Similar claims are on appeal in *PVC II*.

[111] *Woodpulp II* at pp 578, 582, *SIV* at pp 1466, 1499, 1511 and *CRAM* at pp 1680, 1702, 1712.

[112] Eg. *Peroxygen* at pp 493-97*, *Soda Ash* at p 477*, *Belasco* at p 120, *Meldoc* at p 874*, *VBBB* at p 87, *SSI* at p 3850, *Welded Steel* at pp 68, 71*, *Benelux Flat Glass* at p 361*, *Van Landewyck* at pp 3250-3251, *FWA* at p 460, *Zinc Producers* at p 129*, *Dutch Builders* at p 160*, *ANSEAU* at p 203/*IAZ* at p 3411, *Cast Iron and Steel* at p 712*, *GCB* at p 82, *Cement* at pp 493-495, 507-510* *LdPE* at p 309 and *PVC* at p 363. It should be noted that half the above cases (see those asterisked) were Commission decisions where the standard was set by the Commission alone with no review by the Court, though some of these cases are currently on appeal.

[113] In *Woodpulp II*, *SIV* and *CRAM* under the standard of "reasonable doubt". In *Soda Ash* at p 487, *Zinc Producers* at p 133, *Dutch Builders* at pp 174, 179, the standard and burden was unclear but seemed to suggest that any reasonable explanation would suffice.

[114] See discussion on this supra.

[115] *Italian Flat Glass* at p 569 and *Soda Ash* at p 487 respectively. See also *Rolled Zinc* at p 296, *Woodpulp II* at p 502, *Dutch Builders* at pp 171, 179. At p 133 in *Zinc Producers*, the firm's explanation was accepted as "plausible". The Commission's more understanding attitude here may be part of the plea-bargain in this case.

[116] See *Woodpulp II*, *SIV* and *CRAM*. In addition, *SPO* and *Soda Ash* are on appeal.

[117] See *Van Landewyck* at p 3262.

[118] *Hercules* at p 263. At p 166, AG Vesterdorf admitted that the burden on the defendant was a heavy one and that the defendant must produce "particularly cogent evidence to substantiate its theories". The defendant must at least show that there was a body of opinion that the market could never be affected by the measures.

[119] For discussion of problems of disclosure, see the evaluation of the defendant's right to be heard later in this chapter.

[120] See *Peroxygen* at pp 490-497, 507. In *VBBB* at p 62, the Court held that the association had failed to establish "any real link" to support their assertion. In *FWA* OJ [1992] L134/1 at L134/12, the Commission considered that the "defendant's assertions were not borne out by the facts". In *Dutch Builders* at p 179, DGIV found that the defendant's arguments did "not contain anything to suggest" that the UPR rules promoted competition. See also, *GCB*, *Cast Iron and Steel*, *Cement*, *ANSEAU*, *Benelux Flat Glass*, *Welded Steel*, *SSI*, *Meldoc*, *Belasco* and *PVC*.

[121] Under this, conduct is presumed to continue unless clear evidence of termination is adduced. See Lasok *The European Court of Justice* at pp 432-438.

[122] See *Soda Ash* at p 478, and in a related offence, *Soda Ash* [1994] 4 CMLR 482 at p 488, *Peroxygen* at p 507 and *Zinc Producers* at p 133. Both *Soda Ash* and *Peroxygen* involved the recidivist undertaking Solvay and this may have affected DGIV's attitude. Whilst, as already noted, *Zinc Producers* was the subject of a plea-bargain.

[123] Of those cases which were subject to a Commission decision only, none discharged their evidential burden, except *Zinc Producers* to a limited extent.

[124] See *Polypropylene*, *Woodpulp II*, *SIV*, *CRAM* and *GCB* who succeeded and *Belasco*, *VBBB*, *Van Landewyck* and *IAZ* who failed. Other cases are also on appeal.

[125] See *Woodpulp II*, *SIV* and *CRAM*.

[126] See *Hoechst* [1992] ECR 629 at p 725.

[127] For background information on defence rights at this stage, see : Kerse *EC Antitrust Procedure* at paras 4.06-4.25 ; Temple Lang 'Community Antitrust Law' ; Joshua 'Information in EEC Competition Law Procedures' ; Joshua 'Balancing the Public Interest : Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedures' *ECLR* [1994] 68 ; Doherty 'Playing Poker with the Commission : Rights of Access to the Commission's File in Competition Cases' *ECLR* [1994] 8 ; Vaughan 'Access to the File and Confidentiality' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 169 ; Dauses 'The Protection of Fundamental Rights in the Community Legal Order' *ELR* [1985] 398 ; Mendelson 'The ECJ and Human Rights *YBEL* [1981] 125 ; Schwarze 'The Administrative Law of the Community and the Protection of Human Rights' *CMLR* [1986] 401 ; McBridge and Brown 'The UK, the European Community and the ECHR' *YBEL* [1981] 167 ; Lavoie 'The Investigative Powers of the Commission with Respect to Business Secrets under Community Competition Rules' *ELR* [1992] 20 ; Coppel 'Curbing the Ruling Passion'.

[128] See Art.3/Reg.99. Discussed by Kerse *EC Antitrust Procedure* at para 4.22. The defendant also has a right to an oral hearing. This will be dealt with later in the chapter on the trial and sentencing of horizontal cartels.

[129] See Written Submission by JWP to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 59.

[130] See Kerse *EC Antitrust Procedure* at para 4.08.

[131] See Art.19(1)/Reg.17 and Art.3/Reg.99. Discussed by Kerse *EC Antitrust Procedure* at para. 4.07. See also Appendix A for text of these provisions.

[132] *AZKO* [1991] ECR 3359.

[133] 12th Report on Competition Policy 1982 at paras 34-35. See also 11th Report on Competition Policy 1981 at paras 22-25 ; 13th Report on Competition Policy 1983 at para 7 ; 18th Report on Competition Policy 1988 at paras 58-59 ; 20th Report on Competition Policy 1990 at para 89. Joshua also makes it clear that this right is based entirely on the need to maintain fairness of proceedings. See Joshua 'Information in EEC Competition Law Procedures' at p 418 and Joshua 'Balancing the Public Interest' at pp 68, 71 and 80.

134 See House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at para 24. THe JWP's Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 59-61, regards access as an integral part of the fundamental right to be heard.

135 See the anti-dumping case of *Al Jubail* [1991] 3 CMLR 337 at pt 12.

136 See *SA Cimenteries* [1993] 4 CMLR 243 at para 38.

137 For the exact requirements of this, see particularly, *Edwards v UK* (1992) 15 EHRR 417 at para 36. In the light of the recent ECHR cases of *Societe Stenuit v France* (1992) 14 EHRR 509 and *Funke* [1993] 1 CMLR 879, DGIV's present attitude to access may well infringe Art.6 ECHR. For discussion of this see Forwood's Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 208 1994 and Vaughan 'Access to the File and Confidentiality'. In addition, a wide right of access forms a vital procedural safeguard in many MS. See FIDE 8th Congress (1978).

138 *Hercules* at para 54. The CFI made similar comments in *SA Cimenteries* [1993] 4 CMLR 259 at para 4 and in *BPB Industries and British Gypsum v Commission* [1993] 4 CMLR 143. On further appeal in the latter case, the ECJ upheld the CFI's approach as fundamentally correct. See [1997] 4 CMLR 238.

139 Kerse *EC Antitrust Procedure* at para 4.08.

140 This attitude is similar to the Commission's ambivalent approach toward the nature of the right to access prior to its 12th Report on Competition Policy 1982. See JWP's Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence, Supplementary Memo at pp 83-84.

141 *Consten v Grundig* [1966] ECR 418 at p 468, held that the Commission need not disclose its entire file and limited DGIV's duty to disclosing "facts, the knowledge of which is necessary to ascertain which complaints were taken into consideration". Even more recently, in *VBBB*, the Court held that the Commission was not under a legal duty to disclose its files. Other early cases reiterated the general principle of a right to be heard eg. *Transocean Marine Paint* [1974] ECR 1063, *Hoffman La Roche* [1979] ECR 461 at p 512 and *Boeringer Mannheim* [1970] ECR 769. See also *Van Landewyck* at pp 168-169. Discussed by Kerse *EC Antitrust Procedure* at para 4.07.

142 See eg *Van Landewyck* at p 3237, *Hercules* at pp 264-267, *Hoffman La Roche* [1979] ECR 461 at p 512, *AEG* [1983] ECR 3151 and *Al Jubail* [1991] 3 CMLR 337, an anti-dumping case, but still relevant to the issue.

143 *Hercules* per AG Vesterdorf at pp 170-171. Also discussed by Doherty 'Playing Poker with the Commission' at p 8.

144 Art.4/Reg.99, *MDF* [1983] ECR 1825 at p 1880, *Hercules* per AG Vesterdorf at pt 115 and *Distillers* [1980] ECR 2229 at p 2295. Where the document relied on by Commission is already accessible to the firm, DGIV need not give access to it but must ensure that the defendant is aware of the Commission's reliance upon it. On this, see *AEG* [1983] ECR 3151 at pp 3192-3193, *MDF* [1983] ECR 1825 at pp 1882, 1885.

145 *Hercules* at pp 264-267.

[146] See *Hercules* at pp 264-167, and per AG Vesterdorf, at p 89. See also, *AEG* [1983] ECR 3151 at pt 24. Discussed by Vaughan 'Access to the File and Confidentiality' at pp 172-173. In *Polypropylene*, AG Vesterdorf gave a very influential opinion which reflects the current mood of the CFI. He emphasised that, particularly in complex cartel cases, the defence should be given access to all the evidence thereby enabling it to make an overall assessment of the true cogency of the case. On this, see *Hercules* particularly at pp 109-118.

[147] See Art.20/Reg.17 and 12th Report on Competition Policy 1982 in particular. The right to limit access on these grounds was most recently upheld by the ECJ in *BPB Industries and British Gypsum v Commission* [1997] 4 CMLR 238.

[148] JWP's Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 83.

[149] 12th Report on Competition Policy 1982 ; Written Submission by Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 15 ; Joshua 'Information in EEC Competition Law Procedures' at pp 418-419 ; Joshua 'Proof in Contested EEC Competition Cases' at pp 348-351; Doherty 'Playing Poker with the Commission' at p 11. Such documents include notes, drafts and other working papers. The disclosure of HO and Advisory Committee Reports will be discussed later at 'Trial' stage. The rationale behind this limitation is that the disclosure of such documents would inhibit Commission personnel from committing their true assessment of a case to paper and would cause DGIV significant administrative problems. See discussion by Reynolds in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 15.

[150] *MDF* [1983] ECR 1825 at p 1895.

[151] *SIV* at p 1444.

[152] For further discussion of this, see Doherty 'Playing Poker with the Commission' at p 11.

[153] *BAT & RJ Reynolds v Commission* [1987] ECR 4487.

[154] Reynolds in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 15, argues that this burden is very difficult to discharge unless important Commission documents are disclosed.

[155] These issues are discussed more extensively by Kerse *EC Antitrust Procedure* at paras 8.19 ; Lavoie 'The Investigative Powers of the Commission' ; Joshua 'Balancing the Public Interest' ; Doherty 'Playing Poker with the Commission' ; Schwarze 'Protection of Human Rights' ; Livingstone and Sherliker 'Confidentiality in UK and EEC Antitrust Procedures' *JBL* [1982] 31.

[156] Art.20/Reg.17 implements this in the antitrust context.

[157] Art.20/Reg.17 refers to professional secrecy, whilst Art.19(3)/Reg.17 discusses business secrets. See also, *Azko* [1991] ECR 3359.

[158] See here particularly, discussions by Doherty 'Playing Poker with the Commission' at pp 8,11 ; Joshua 'Balancing the Public Interest' at p 69.

[159] Joshua 'Balancing the Public Interest' at p 67 and AG Lenz in *Azko* [1991] ECR 3359 at pp 245-246.

[160] It has been suggested that 'business secrets' should be construed narrowly and only cover confidential know-how and secret formulas. But it may also cover other non-technical information. Professional secrecy seems to cover all other confidential information, including financial information, commercial strategies, contracts with suppliers and customers etc. These issues are discussed in considerably greater detail by Joshua 'Balancing the Public Interest' ; Kerse *EC Antitrust Procedure* at para 8.18 et seq and Livingstone and Sherliker 'Confidentiality in UK and EEC Antitrust Procedures'. All review the EC situation and consider the practices of other jurisdictions.

[161] Art.19/Reg.17 deals with a party's right to be heard and Art.21/Reg.17 with the publication of decisions. Only the former will be dealt with here. For further discussion of the conflict with Art.21 and the position of complainants and informants in relation to the confidentiality issue, see Lavoie 'The Investigative Powers of the Commission' ; Joshua 'Balancing the Public Interest' ; March Hunnings 'The Stanley Adams Affair or The Biter Bit' *CMLR* [1987] 65.

[162] See *Hoffman La Roche* [1979] ECR 461 at para 14 ; *Timex* [1985] ECR 849 ; *AEG* [1983] ECR 3151 at paras 22-25. Also discussed by Kerse *EC Antitrust Procedure* at paras 4.10 and 8.20 ; Lavoie 'The Investigative Powers of the Commission' ; Joshua 'Balancing the Public Interest'.

[163] See discussion by Joshua 'Balancing the Public Interest' at pp 70-71, 76. 79-80.

[164] *Azko* [[1991] ECR 3359 gave business secrets absolute protection and professional secrets qualified protection. For discussion of the issues involved and the implications of this ruling, see Lavoie 'The Investigative Powers of the Commission' at pp 34-36 ; Joshua 'Balancing the Public Interest' at pp 76-79 ; Doherty 'Playing Poker with the Commission' at p 12.

[165] The Court in *Azko* [19991] ECR 3359 at para 27 seemed to foresee no relaxing of the rules. The ECJ's recent decision in *BPB Industries and British Gypsum v Commission* [1997] 4 CMLR 238 appears to comfirm this. Cf AG Lenz in *Azko*, who recognised the possibility of limited exceptions to this absolute rule. However, the Court in *Hoffman La Roche* [1979] ECR 461 clearly required a reconciliation of these rights.

[166] See 11th Report on Competition Policy 1981 at pt 30 ; Lavoie 'The Investigative Powers of the Commission' at pp 35-36 ; Joshua 'Balancing the Public Interest' at pp 75-76 ; Written Submission by Ehlerman to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 112. Non confidential summaries were rejected as "inadequate" by AG Darmon in *Al Jubail* [1991] 3 CMLR 337 at p 407.

[167] See for instance, Written Submission by JWP to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 60-61.

[168] This was explicitly done on five occasions in the case study. See *PVC* at p 364, *LdPE* at p 403, *Cement* at pp 333-334 and *Soda Ash* at p 475, Woodpulp II at pp 453, 455, 458, 460. Discussed by Vaughan 'Access to the File and Confidentiality' at p 175 and Written Submission by JWP to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 60, 83.

169 This was so in nine cases in the study. See *PVC* at p 363, *Polypropylene* at p 115, *Woodpulp II* at p 460, *LdPE* at p 354, *VBBB* at p 59, *CRAM* at p 1690, *Van Landewyck* at p 3236, *Cement* at p 333, *Soda Ash* at p 475.

170 Access was limited in 11 cases : *Cement, Van Landewyck, CRAM, VBBB, SIV, Woodpulp, Zinc Producers, LdPE, Soda Ash, Polypropylene, PVC.* In addition, *SPO, Welded Steel* and *PVC II* are on appeal. In *Polypropylene*, wider access was given than in the other cases in the study. Nevertheless, the CFI in *Hercules*, at pts 46-54, took the opportunity to criticise the Commission's attitude to defence rights. In contrast, extensive access to 2,095 documents was given in *BPB Industries and British Gypsum v Commission* [1993] 4 CMLR 143. On this, see Written Submission by JWP to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 60.

171 See *PVC, Polypropylene, LdPE, CRAM, Woodpulp, Cement, SIV.*

172 *Huls* [1992] ECR 499 at p 522. Several other examples exist. In *Cement* at pp 333-334, where there were over 70 defendants, the Commission only disclosed that part of the SO which related to the defendant's own geographical market and denied access to information relating to the operation oof the cartel as a whole. In *CRAM*, at pp 1689-1690, Rheinzink was only given access to documents submitted by itself and was denied access to documents obtained from the other parties involved. Elsewhere, in *Polypropylene* at p 96, defendants were allowed access to only a "representative sample" of the information.

173 See the interim appeal in *Cement - SA Cimenteries* [1993] 4 CMLR 243 at pp 251, 257. This is particularly so in complex cartel cases, where the CFI have recognised the importance of having access to information regarding the operation of the cartel as a whole, so that a proper assessment of the cogency of the evidence may be made. See *Hercules* at pp 264-267 and similar criticism in *SIV* at pp 1442, 1444 ; *Woodpulp II* at pp 569-570. DGIV's approach to disclosure is discussed further by Vaughan 'Access to the File and Confidentiality'.

174 See *PVC, Polypropylene, Soda Ash, LdPE, SIV, Woodpulp II, VBBB, CRAM, Van Landewyck* and *Cement.* In the interim appeal in *Cement - SA Cimenteries* [1993] 4 CMLR 243 at pp 243, 250, 252, DGIV insisted that the needs of confidentiality overrode those of access. However, the President of the CFI held that professional secrecy did not necessarily require the Commission to withhold evidence and strongly criticised the DGIV's failure to adhere to caselaw on access. In *Polypropylene* at pp 109-118 and *Woodpulp II* at pp 458-464, AGs Vesterdorf and Darmon respectively reviewed the issues involved. Most recently, the ECJ in *BPB Industries and British Gypsum v Commission* [1997] 4 CMLR 238, upheld the right to limit access on grounds of confidentiality.

175 See Written Submissions by Ehlerman and JWP to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at paras 30-31 and para 27 respectively.

176 See Written Submission by JWP to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 59-60, 84-85, where the JWP trenchantly criticised DGIV's approach to the access/cnfidentiality conflict. The JWP's criticism is largely endorsed by Lever and Reynolds in their Written Submissions to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at paras 22-23 and at p 15 respectively. See also, AG Vesterdorf in *Hercules* at p 114. DGIV has justified its approach by asserting that it cannot be expected to anticipate the defendant's line of argument. See JwP's Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 84.

177 See *PVC* at p 364 and *LdPE* at p 382.

178 *Polypropylene* at pp 112, 114, 115. Here, DGIV refused access to documents which "did not concern" the defence. See also, *VBBB* at p 59, *Van Landewyck* at p 3236, *PVC* at p 364, *LdPE* at pp 402-404.

179 See CFI criticism in *Hercules* at pts 46-54. Gyselen (Asst to DG of DGIV) at the Leiden Seminar 1993 stated that "access to the files ... means access to the *relevant* file and it is for the Commission to determine relevancy". See 'Discussion : Confidentiality v Access to the File' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) at p 190.

180 See *PVC, Polypropylene, Soda Ash, LdPE, Woodpulp II, SIV, VBBB, CRAM, Van Landewyck and Cement.*

181 These documents related to statements made at a press conference. See *Polypropylene* cartel *ICI* [1992] ECR 1021. Discussed by AG Vesterdorf in *Hercules* at pp 106-109.

182 See *Huls* [1992] ECR 499 at pp 524-528 ; *Hoechst* [1992] ECR 629 at pp 653-656 ; *Shell* [1992] ECR 757 at pp 784-789 ; *Hercules* at pp 95-96, 112, 264-267, 306. Other examples of criticism of selective disclosure exist. In *CRAM* at pp 1689-1690, Rheinzink claimed that confidential documents from other parties were being used against it yet it was refused access to this evidence. In *Woodpulp II* at pp 454, 458, 462-464, AG Darmon reviewed access/confidentiality issues and strongly criticised DGIV's manifest non-observance of defence rights. In *SIV*, at p 1444, DGIV attempted to justify the widespread distortion of evidence on grounds of confidentiality. See also *LdPE* at p 384, *VBBB* at p 59, *Van Landewyck* at pp 3236-3237.

183 *Hercules* at p 267. In the same case, AG Vesterdorf at p 116, stated that defendants must show that the undisclosed documents were of real and specific importance before annullment could be granted. In *Cement, SA Cimenteries* [1993] 4 CMLR 243 at pp 250-255, where the defendants lodged an interim appeal relating to SO and access, the defendants were required to establish that their claim was not manifestly inadmissible.

184 See the interim appeal im *Cement, SA Cimenteries* [1993] 4 CMLR 243 at p 257, *Polypropylene* at p 267, *VBBB* at p 59, *LdPE* at p 403, *Van Landewyck* at pp 32-37. For the problems facing defendants, see Written Submission by Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 15.

185 In *SIV* at p 1444, the CFI rejected DGIV's explanation that extracts of documents were used in deference to the requirements of confidentiality, stating that the Commission had provided no "objectively justifiable reason" for the extensive distortion of evidence.

186 The effect of inconsistencies between SO and decisions and the effect on the right to be heard will be dealt with in 'Trial' section.

187 *Polypropylene* at pp 95-96. Similar complaints were made in *SIV* at p 1442, *Woodpulp II* at pp 444, 452-463, *VBBB* at p 32 and *Cement* in *SA Cimenteries* [1993] 4 CMLR 243 at p 255. The JWP's Written Submission to the House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at para 27 criticised the fact that the standard of the SO varies considerably and insisted that it was essential that the SO clearly set out the case against the defendant.

188 See *Cement* in *SA Cimenteries* [1993] 4 CMLR 243 at p 250. Here the President of CFI extended the time limit for the defendant's reply. Similar complaints were made in *Polypropylene* at p 95 and *SIV* at p 1434.

189 See *Woodpulp II* at pp 454, 569-570. Part of the decision in *SIV* and decisions in some of the *Polypropylene* cartel cases were also annulled.

190 See 12th Report on Competition Policy 1982 and Joshua 'Balancing the Public Interest', who on a number of occasions, points out that disclosure must be tailored to the requirements of Reg.17. The attitude of the CFI indicates that DGIV will not be allowed renege on this expectation.

191 *Timex* [1985] ECR 849 and *Hoffman La Roche* [1979] 461.

192 As occurred in *Polypropylene*.

193 See criticism by Lasok *The European Court of Justice* at p 345.

194 See Vaughan 'Access to the File and Confidentiality' at pp 173-174, for further discussion of these issues.

195 See *Hercules* and *BPB Industries and British Gypsum* [1993] 4 CMLR 143.

196 For further discussion of this aspect, see Written Submission by Forwood to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 208 ; Doherty 'Playing Poker with the Commission' at p 14. Indeed, DGIV's approach in competition proceedings is at odds with other areas of Community law. In staff and anti-dumping cases, the Commission cannot refuse access. See Doherty ibid at p 14 for further on this.

197 See Written Submission by Ehlerman to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 107.

198 See Written Submissions by JWP, Lever, Van Bael, Duffy and Forewood to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at paras 22-27 and pp 60, 83 : at para 161 ; at p 220 ; at para 23 and at p 208 respectivly.

199 The Court have often taken this view, see *Hoffman La Roche* [1979] ECR 461 ; *Distillers* [1980] ECR 2229, *Van Landewyck* at pp 3237, 3239 ; *Michelin* [1983] ECR 3461. The Court's narrow interpretation - Art.173 Treaty of Rome 1957 refers to "essential" procedural requirements - and their inconsistent application of the rules has been criticised. See Schwarze 'Protection of Human Rights' ; AG Warner in *Distillers* at p 2297 ; Doherty 'Playing Poker with the Commission' at pp 13-14. As a result of this approach, the Court will not necessarily order disclosure.

200 See Doherty 'Playing Poker with the Commission' at pp 8,15.

201 House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at pt 13 and pp 11-15.

202 See *Hercules* at pp 117,167 and *Hoechst* [1992] ECR 629 at pp 657 660, who argued that the whole of the Commission's reasoning was based on conclusions unfavourable to the defence and suggested the entire prosecution was based on a presumption of guilt. In *CRAM* at p 1690, it was argued that DGIV's erroneous legal assessment was based on a presumption of guilt. The Commission expected something sinister and found it.

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[203] See *Woodpulp II* at pp 492, 494, 498-99. This was also argued in *Polypropylene*.

[204] Presumably here a presumption of guilt legitimised, at least in the Commission's eyes, the doctoring of evidence. See *SIV at* pts 90-94.

[205] This was the main thrust of DGIV's justification for the discrepancies and deficiencies in its *PVC* decision. See *BASF* at pp 367, 373, 379, 384, 388 particularly.

[206] 20th Report on Competition Policy 1990 at p 71.

CHAPTER FIVE

THE CRIMINAL/CRIMINOLGICAL EVALUATION OF HORIZONTAL CARTELS - INFORMAL RESOLUTIONS

"I am the inferior of any person whose rights I trample underfoot." [1]

A)INTRODUCTION

This chapter will consider DGIV's approach to the informal resolution and individual exemption of horizontal agreements, evaluating the Commission's characterisation and assessment of these cases.

B)PROCESS AND SUBSTANCE - INFORMAL RESOLUTIONS - COMMISSION POWERS

1)Types of Informal Resolution [2]

Two main types of informal resolution exist ; comfort letters and negotiated settlements. Comfort letters are administrative letters closing the file, with the proviso that it may be re-opened if circumstances change, on the basis that the notified agreement either does not infringe Art.85(1), or is of a type that would qualify for Art.85(3) exemption [3]. Negotiated settlements are the resolution of more complex cases. Here the Commission may have opened formal proceedings, but decides to close the file and terminates, or suspends, proceedings because the parties have agreed to modify their agreement to conform with competition rules [4]. Negotiated settlements sometimes take the form of a plea-bargain. Plea-bargained resolutions occur in the course of formal proceedings, where in return for a waiver of procedural rights or the provision of undertakings as to future behaviour, sanctions are reduced. No formal provision for such mitigated settlements exists [5].

2)The Commission's Approach to Informal Resolutions

This section intends to examine DGIV's resolution of horizontal cartels. It will consider whether the Commission characterises, constructs and analyses these cases differently from those formally prosecuted, resulting in a different method of enforcement [6].

Reg.17 provides no criteria guiding the use of informal settlements and makes no consultation requirements with third parties or the Advisory Committee. Moreover, publication requirements are limited [7]. Despite their importance to the enforcement process, little other information is available on negotiated resolutions [8]. The vast majority of settlements receive no mention whatsoever. This low visibility has provided considerable speculation regarding the number and nature of such cases and DGIV's reasons for keeping quiet about them [9]. Nevertheless, informal resolutions are of undoubted importance to the enforcement process ; 96% of cases are informally resolved [10]. The scarcity of information on informal settlements makes exposition of the Commission's approach problematic. Nevertheless, this section will attempt to evaluate DGIV's approach and identify influencing factors.

a)Classification and Analysis of Informal Resolutions

In the study, three acknowledged plea-bargains exist [11]. From these, it seems that DGIV still regards settled/plea-bargained cases as criminal and undertakes a limited legal/economic evaluation under an 'object' format of analysis [12].

b)Influencing Factors

Problems arise however, on examination of the factors underlying settlements. From the study, it is unclear why certain cases are settled whilst similar ones are formally prosecuted. For instance, Gyselen suggests that complex structural cases are good subjects for negotiated settlements [13]. This is true to a limited extent in three cases in

the study ; *Zinc Producers*, *Welded Steel* and *Cast Iron and Steel.* These cases were classified and formally prosecuted as criminal cases but received reduced fines because of a structural crisis in the industry [14]. However, similar structural arguments were advanced in many of the petrochemical and glass cases and were dismissed outright [15].

Comments made in Annual Reports suggest that termination or modification of the practice should enable a settlement [16]. Yet, in *Aluminium* and *Benelux Flat Glass*, despite termination of the infringement, decisions were issued and fines imposed [17]. Moreover, several cases in the study offered to modify their agreements but their attempts at negotiation were rejected by DGIV [18]. This contrasts with *Zinc Producers* and *FWA* where there was no clear termination of the violation, yet plea-bargained settlements occurred [19].

Nor does the type of violation seem to control the likelihood of a settlement. Despite the Commission's antipathy to horizontal cartels, there are many examples of settled horizontal cases [20]. Notification may be a further factor influencing the Commission's choice of enforcement method [21]. The weight of this factor is dubious. Lack of notification does not seem to preclude a conciliatory attitude towards fining. In *Dutch Cigarettes*, several unnotified agreements were considered inappropriate for fining [22].

Another factor which seems particularly relevant to horizontal cartels is what DGIV describes as a 'constructive attitude'. Here assistance with the prosecution case, relinquishing the right to a hearing and a willingness to take remedial action may significantly affect the amount and type of sanction imposed. In the case study, there are three such instances of plea-bargaining settlements [23]. Elsewhere, whilst no clear plea-bargaining exists co-operation has earned a reduction in fines [24]. However, a co-operative attitude does not always attract some form of settlement. The co-operation of several firms in the study went unrewarded [25].

It has been suggested that political factors may affect DGIV's willingness to settle. Several critics have argued that the private nature of settlement may allow undue political influence to go undetected resulting in distributive injustice [26]. The issue

of political lobbying has been raised before the European Parliament. The Commission's reply made it clear that it did not consider lobbying a problem and had no intention of questioning the motivation behind it [27]. Evidence of lobbying is difficult to acquire. No clear proof of it exists in the study. But, it is known to have occurred in the *IBM* settlement where certain high ranking US politicians made their views known to the Commission [28]. Given this sanguine approach to political influence, it is not surprising to discover charges of discrimination between MS and particular industries [29]. Whilst Harding dismisses such allegations as "rash", it is true to say that a conciliatory approach by DGIV towards the petrochemical and glass industries is unimaginable [30]. DGIV's discrimination against Dutch and Belgian cartels is equally obvious [31]. Moreover, there is a tendency within the Commission to impose larger fines on non-EC firms [32]. Finally, there is open acknowledgement by Commission officials that the likelihood of arriving at a negotiated settlement depends very much on the temperament of the official involved [33]. Despite the lack of clarity and charges of political bias and discrimination, the Court have been very sympathetic to DGIV's administrative need for negotiated settlements [34].

C)PROCESS AND SUBSTANCE - DEFENCE RIGHTS [35]

It is now necessary to examine the existence and scope of defence rights in informal prosecution [36]. The informal nature of settlements means that defence rights in such situations are not mentioned in Reg.17 and little relevant caselaw exists. Thus, it is intended to evaluate defendants' rights and the effect on them of both DGIV's choices and the private nature of settlements by assessing the legal value of informal resolutions [37].

The legal authority of negotiated settlements is extremely limited. They are not decisions and are therefore not capable of review by the Court. They do not bind the Commission, national courts, competition authorities nor third parties - only the

defendant [38]. Moreover, negotiated settlements often suspend rather than terminate proceedings [39]. Thus, DGIV is free to re-open the case whenever it wishes [40]. Furthermore, firms accepting negotiated settlements may be placed under constant review for the period of the arrangement which may be of indefinite duration. Undertakings given in *Woodpulp* were to run for a minimum period of four years and placed defendants under the supervision of DGIV [41]. Whilst these undertakings were made terminable at the option of the defendant, it must be remembered that firms withdrawing from an undertaking risk finding themselves the subject of formal proceedings. Nevertheless, firms may be placed under considerable political and economic pressure to settle. In the study, defendants in *GCB* and *Woodpulp II* complained that threats of formal prosecution had been used to obtain concessions from them [42]. Pressure to settle may come from other sources. The wide construction of the offence, DGIV's practice of limiting access to evidence, the threat of substantial fines, the personal prejudices of the negotiating official and other undisclosed political influences may combine causing firms to believe that they have no option but to accede to the Commission's demands. Both *Woodpulp II* and *GCB* complained that duress by DGIV caused them to concede greater concessions than necessary [43].

The limited legal value of informal resolutions revealed by this evaluation signals a lack of procedural safeguards governing the negotiation process. The result is that settlements may be reached in conditions which are very advantageous to DGIV and very disadvantageous to the defendant.

The advantages to the Commission are extensive. Its monolithic role means that DGIV has enormous bargaining power. It investigates, frames and decides the case. It controls the defendant's access to information and may exert various other political and economic pressures on the defendant to settle. The private nature of negotiation and the absence of guidance, consultation and publication requirements further enhances DGIV's power allowing political and pragmatic goals to be achieved without anyone reviewing or even knowing about the settlement [44]. Not only is informal resolution administratively convenient, allowing DGIV's limited resources to deal expeditiously with a large volume of cases, but it also enables DGIV to retain full

control of antitrust enforcement [45]. Overall, informal proceedings are of immense value to the Commission enabling it, in the vast majority of cases, to dispense with defence rights and impose the settlement it requires [46].

The outlook for the defendant is somewhat bleaker. In contrast with DGIV's mastery of the process, the defendant's negotiating position is weak and his procedural safeguards non-existent. The defendant has no right to be heard and the only evidence at his disposal is the information the Commission permits him to have [47]. His case is not assessed by an independent tribunal. It is during informal prosecution that DGIV's monolithic role as police, prosecutor and judge attains the zenith of its influence. Yet, the decision the Commission reaches cannot be appealed. It is under such circumstances that the defendant is subject to a range of political and economic constraints and may be exposed to discriminatory treatment and pressure from the tribunal deciding his case. All this may culminate in the defendant acquiescing to a settlement considerably more onerous than his conduct warrants. In return for minimal publicity and speedy resolution, the defendant surrenders all due process safeguards and finds himself bound by an agreement against which he cannot appeal, yet which leaves him open to attack on all sides.

Whilst most commentators recognised the need for negotiated settlements, there is concern over DGIV's conduct of informal prosecution [48]. The most potent criticisms relate to the combination of the Commission's monolithic role and the "cloak of secrecy" surrounding negotiations[49]. The greatest concern is that the blend of unreviewable discretion and undue political influence will tempt DGIV to place expediency before justice routinely, in circumstances where there is a complete absence of procedural safeguards [50]. Van Bael argues that it is manifestly wrong that DGIV should be able to set aside due process rights simply by choosing informal resolution [51]. Both the European Parliament and the House of Lords Select Committee have criticised the Commission's conduct of negotiated settlements and warned against a "proliferation of informal practices" [52]. Despite these concerns, no immediate reform qppears imminent and negotiated settlements continue to form the central plank of EC antitrust enforcement [53].

D)CONCLUSION - INFORMAL RESOLUTIONS

From the above evaluation, it seems clear that settled cases are regarded as criminal, are broadly constructed and receive little legal and economic analysis. Thus, the criminality of the offence continues to control the construction and assessment of the violation and the *need* for enforcement. Only the *method* of enforcement differs. The case study shows that the informal resolution of horizontal cases will most often take the form of a plea-bargain. DGIV's extensive prosecutorial discretion enables it to select informal prosecution whenever expedient, but the basis of this selection is unclear. At every point, the Commission's choices appear to be characterised by inconsistency and discrimination. Often the reasons underlying a settlement are the same as those encouraging formal prosecution. DGIV's attitude towards political influence and its open acknowledgement of the role of personal whim are particularly concerning. This is especially so given the absence of formal due process in negotiated settlements. The study has shown that their very essence is characterised by a lack of substantive defence protections. Any residual defence rights are based inevitably on the Commission's sense of 'fair play'. It is in this context, that DGIV may employ its penal powers to impose settlements on defendants.

Yet, there are considerable advantages for the Commission. Specifically, it permits DGIV to use the 'law as a resource' to serve enforcement needs. The lack of transparency surrounding informal resolutions enhances DGIV's discretion, enabling it to negotiate as political or pragmatic a settlement as it wishes [54]. Here DGIV's wide construction of offences may be used as a bargaining chip. Firms may be faced with the choice of accepting the settlement offered or facing formal prosecution and a significant fine [55]. The lack of enunciated criteria also benefits the Commission as it means there is no clear standard against which to assess its behaviour. This has been recognised and criticised by the European Parliament [56]. The absence of clear defence safeguards means that defendants can do little to challenge DGIV's actions. Again, the contrast between the Commission's considerable enforcement powers and

the limited nature of defence rights is manifest. Harding asserts that DGIV's policy is to maintain maximum procedural flexibility and to rely on appeals to ensure 'fair play' [57]. But, given DGIV's apparent willingness to distort evidence and curtail defence safeguards during reviewable formal prosecution, one must question whether a right of appeal in the 4% of formally prosecuted cases can really ensure the integral fairness of the remaining 96%

Whilst this manipulation of the law makes it difficult to reconcile individual informal settlements on the basis of predictable, qualitative criteria, all resolutions appear to be entirely consistent with DGIV's political and pragmatic objectives. The pragmatic value of negotiated resolutions is openly confessed by Commission, Court and critics alike as being vital to EC antitrust enforcement [58]. Moreover, the plea-bargaining of horizontal cartels combines the advantages of high visibility prosecution with speedy settlement serving both political and administrative goals. Nevertheless, which method of enforcement will be employed in any given situation is largely unpredictable. It seems that the reason for this unpredictability is that DGIV's prosecutorial choices are grounded in expediency rather than sound qualitative criteria. In a changing world, this means that qualitatively similar cases are often treated differently. As such, this approach risks discrimination and confusion.

E)PROCESS AND SUBSTANCE - ART.85(3) - COMMISSION POWERS [59]

This section intends to consider the Commission's use of its extensive enforcement powers in granting individual exemptions to horizontal cartels. Particular consideration will be given to DGIV's approach to crisis cartels, examining whether the Commission classifies and treats them differently from other horizontal cartels and why. It is intended to use as the main basis for examination those cases in the study where individual exemptions were granted [60]. These ten cases constitute the full list of all

such cartels recently examined by the Commission. Thus, the information obtained from this evaluation will be numerically complete. In recent years, there has been some criticism of DGIV's approach to crisis cartels. Two particular concerns have arisen. Firstly, there is considerable legal uncertainty regarding the difference in constitution between price-fixing/market division cartels, which are vehemently opposed and heavily sanctioned, and restructuring cartels, which despite employing similar market strategies, have been granted individual exemption [61]. Secondly, there has been criticism that no proper restrictive practices legislation dealing with restructuring cartels exists and that the use of Art.85(3) as a means of dealing with such issues is inadequate and unsatisfactory [62]. Thus, it is intended firstly to consider problems relating to the definition of a crisis cartel and then to examine the application of Art.85(3) to these agreements, noting both enforcement problems and the existence and scope of defence rights in this context.

1)The Commission's Definition of a Crisis Cartel

a)Background to the Commission's Approach

Broadly, the central problem in relation to restructuring cartels is the extent to which firms are allowed to, and DGIV is prepared to, intervene in the competitive process in order to effect structural change. For many years, the Commission refused to be involved in the problem and continued to strictly enforce competition rules, even in times of crisis, whilst simultaneously advocating the restructuring of industry by way of self-regulation [63]. The continuing failure to solve these problems forced DGIV to recognise that competition alone could not achieve the rationalisation of industry and required a change in the Commission's enforcement policy [64]. This change in approach materialised in the Commission's 12th Report, where DGIV outlined an intention to deal with crisis cartels more leniently and, where appropriate, issue individual exemption or comfort letters [65].

b)The Commission's Current Approach

The 12th Report provides that sectoral or multi-lateral agreements aimed solely at achieving a *co-ordinated reduction of structural overcapacity* will be eligible for exemption under Art 85(3). It is essential that the rationalisation programme does not entirely eliminate *effective competition*[66]. The following discussion intends to examine these criteria further, considering DGIV's application of these guidelines to recent cases before it, thereby highlighting the ambiguity and flexibility of these criteria and revealing that the guidance provided for by the 12th Report is not as clear as may first appear[67].

i)Structural Overcapacity

To come within the Commission's guidelines, a crisis must be structural not cyclical. However, it is often difficult to establish whether overcapacity has purely structural causes or has cyclical sources also [68]. Detailed market analysis is required. Unfortunately, whilst all cases in the study emphsise the need to reduce structural overcapacity, most fail to undertake thorough economic analysis or provide further clues as to how *structural* overcapacity may be identified[69]. Van Grevenstein criticises the Commission's tendency to simply list the problems of a structural crisis and failure to provide further guidance on how structural overcapacity may be identified and indeed rectified. He argues that it would be helpful if firms were required to demonstrate market failure by showing a permanent decline in supply resulting from a lasting drop in demand[70]. These suggestions are very similar to the German approach to restructuring cartels which has been criticised extensively by Joilet as being of narrow application and debatable economic value[71], Joilet also argues that a reduction in structural overcapacity is very difficult to achieve. Moreover, problems exist in assessing whether excess capacity has actually been reduced as the line between scrapping plant excess capacity and simply not using it is a particularly fine one[72]. To add to the confusion, Vogelaar asserts that whether a crisis is structural depends very much on the individual facts of the case. Moreover, despite the enormous stress

placed on the structural nature of the problem, it seem that, even if structural overcapacity is identified, this is not in itself sufficient. Whilst all cases in the study emphasised the importance of a reduction in structural overcapacity, there are a number of other cases where a manifest structural crisis has been identified, yet they have elicited little sympathy from DGIV and have been formally prosecuted [73].

This evaluation demonstrates the lack of clarity over what constitutes structural overcapacity. Moreover, uncertainty exists over whether a reduction in structural overcapacity is achievable and recognisable and therefore an appropriate focus for the assessment of crisis cartels. Finally, despite the emphasis on the structural nature of the crisis, this study shows that even where such overcapacity is identified, it is not itself sufficient to obtain DGIV's sympathy. This results in both substantial legal uncertainty and flexibility within the law giving the Commission ample space to exercise its discretion.

ii)Co-ordinated Reduction

Furthermore, DGIV requires that there must be a co-ordinated reduction aimed solely at rationalisation which must not be achieved by "unsuitable means" [74]. As already noted, problems in determining whether or not excess capacity has actually been reduced or simply 'mothballed' makes it problematic to assess whether an arrangement is aimed solely at rationalisation [75]. The Commission's 12th Report considers that price-fixing, quota arrangements and some information exchanges constitute "unsuitable means" [76]. Thus, problems again exist both in determining whether an arrangement is an acceptable co-ordinated reduction or a forbidden solution, and in achieving rationalisation in the face of the limited means available [77].

In the study, the majority of acceptable solutions took the form of joint ventures or specialisation agreements [78]. Here DGIV showed considerable tolerance regarding the extent of co-ordination of production, distribution and sales it was prepared to allow [79]. Elsewhere, in wider cartel agreements, buying pools, market sharing and production quotas have been allowed [80]. In contrast, there have been a number of other cases where the co-ordinated solution to a structural crisis has involved similar solutions but has been condemned by the Commission [81]. It is clear

from the study that a substantial difference in DGIV's attitude exists between the tolerance accorded to joint ventures and specialisation agreements aimed at rationalisation and the outright condemnation of co-ordinated solutions in other crisis situations. But, DGIV's approach leaves it uncertain whether or not a particular means will be considered acceptable in a given situation [82]. Though it is true to say that price/quota fixing, and information exchanges are always open to condemnation. The real problem here is that rationalisation is difficult to achieve without such means [83]. This situation has been criticised by Joilet who argues that DGIV is prepared to accept the end but not the means to restructuring [84]. Again, examination reveals that the scope of the Commission's guidance is ambiguous and the limits placed upon the means available make the acceptable co-ordinated reduction of overcapacity difficult to achieve.

In summary, the above discussion illustrates the imprecision and problems inherent in DGIV's guidance. The evaluation demonstrates that it is still not entirely clear when a cartel is a crisis cartel. It also demonstrates that bringing conduct within the Commission's criteria is not readily achievable and, given the limits placed on acceptable methods, may not be economically feasible [85]. Whilst this situation may cause problems for undertakings, the flexibility in the law provides DGIV with considerable discretion over which crises it chooses to assist.

2)The Commission's Application of Art.85(3) to Crisis Cartels

The Commission has the sole power to grant exemptions under Art.85(3) [86]. In order to obtain an exemption, the restructuring agreement must fulfil the four requirements set out in Art.85(3) [87]. The following section will discuss how DGIV approaches the exemption of crisis cartels noting any problems encountered. Next, defence rights under Art.85(3) will be assessed. This evaluation will enable an assessment of whether the Commission classifies and treats crisis cartels differently to other horizontal cartels to be made.

a)Benefit of the Agreement

Here the benefits in production/distribution must outweigh any reductions in competition. The problem is that it is inherent in the nature of restructuring cartels to limit output, making this criterion difficult to satisfy, at least in the short term. DGIV has indicated that this criterion will be fulflled if capacity reductions lead to long-term improvements, providing overcapacity is irreversibly dismantled and no new capacity is created [88]. Joilet asserts that it is difficult to envisage how production could be improved by reducing production capacity and curtailing new investment [89]. Moreover, improvements may be difficult to achieve and to monitor given the limited means permitted [90]. In the study, the benefits identified by DGIV were rather vague. Often, DGIV simply stated that the improvement lay in rapid rationalisation of the situation which could be achieved better by co-ordination than market forces [91].

b)Consumer Benefit

This condition is equally difficult to satisfy as crisis cartels aim to protect producers' rather than consumers' interests [92]. DGIV has solved this conflict by stating that this condition will be satisfied if the restructuring arrangements promote the maintenance of effective competition [93]. All the cases in the study viewed consumer benefits in precisely these terms and regarded the benefits accruing to producers from production and distribution improvements as consumer benefits [94]. This failure to distinguish between consumer and producer benefits has met with criticism [95]. Joilet argues that because restructuring agreements raise prices, they provide no consumer benefits whatsoever [96]. Three cases in the study openly admitted that the agreements would lead to price increases, but justified this by finding that long-term benefits would accrue [97]. Parties who have complained about such problems have been dimissed by DGIV [98]. Van Grevenstein points out that the vagueness of Art.19(3)/Reg.17 notices makes it difficult for parties to assess the justification for the agreement and reduces the likelihood of complaints [99].

c)Indispensability

Restrictions are considered indispensable if they are aimed solely at reducing overcapacity and are of limited duration [100]. Fulfilling this condition may pose problems requiring DGIV to apply the provision liberally. The difficulties encountered in assessing whether restrictions are aimed solely at reducing capacity, and therefore indispensable, have already been noted [101]. In addition, Van Grevenstein argues that in sectoral crises otherwise dispensable restrictions may need to be allowed in order to obtain the co-operation of an entire sector [102].

In the study, DGIV regarded as indispensable restrictions relating to technical co-operation or agreements permitting some independent market conduct to be maintained [103]. The duration of the agreement must also be limited to the period necessary to achieve rationalisation [104]. In the study, the length of the arrangements varied considerably from 15 years to two years [105]. Van Grevenstein has criticised the extensive period of some of these agreements, suggesting that effective results could have been achieved in shorter periods [106]. Moreover, the limited duration of the agreements should negative any renewal of the arrangement. However, this is not necessarily the case. Both *National Sulphuric Acid* and *Transocean* have been renewed more than once [107].

d)Competition not substantially eliminated

The problem with this provision is that, particularly in sectoral arrangements, in order to make rationalisation effective, competition must be substantially eliminated [108]. DGIV circumvents this problem by focusing on the long-term maintenance of effective competition and by arguing that workable competition is not eliminated because orderly restructuring allows a degree of independence to be retained, and external competition from non-participationg firms still exists [109]. These themes are repeated in the study. Despite considerable reductions in competition and co-ordination between major producers, DGIV asserted that workable competition was guaranteed because

of competition from external sources [110]. Moreover, verifying that competition is not eliminated requires thorough market analysis. Generally, this does not seem to have occurred in the study [111].

e)Weighing of Advantages and Disadvantages

This provision involves a balancing of the economic benefits of rationalisation against the disadvantages deriving from restrictions of competition. The non-justiciable issues involved in this balancing of interests have resulted in criticism [112]. In the study, little attention has been paid to this balancing of interests. Only three cases explicitly undertook any evaluation and even then only in the most general of terms [113].

f)Notification

In order to obtain an exemption under Art.85(3), agreements must be notified [114]. All ten cases in the study were notified. This may be contrasted with those cases examined earlier who failed to achieve recognition as crisis agreements, none of which was notifed [115]. This may shed some light on the issue of when is a cartel a crisis cartel. It seems that the answer is when it is notified.

This evaluation demonstrates that the width of Art.85(3) and DGIV's sole discretion to exempt which enables it to conceal any difficulties it faces in bringing restructuring arrangements within Art.85(3). But, the justifications employed are sometimes unconvincing [116]. That DGIV has to resort to such measures does indeed suggest that Art.85(3) may be an inappropriate basis for the legal control of restructuring agreements.

F)PROCESS AND SUBSTANCE - DEFENCE RIGHTS

This section will examine the existence and scope of defence rights when obtaining an individual exemption of a rationalisation agreement. It is important to appreciate that many Art.85(3) agreements are negotiated settlements and, following notification, the Commission consults with the undertakings to obtain a suitable settlement [117]. The informal nature of these resolutions has a profound effect on defence rights. As with other defendants informally negotiating with DGIV, defence rights may be curtailed to the Commission's advantage [118]. Certainly, DGIV is very much in control of the process, and is able to impose conditions on the exemption and to monitor future conduct [119]. In several cases in the study, reporting conditions were imposed on the undertaking [120]. In *Synthetic Fibres* and *Stitching Baksteen,* a prohibition was placed on informal exchanges relating to individual output and deliveries [121].

The fact that exemptions are informal compromises reduces the likelihood of appeals, though the value of any review is limited. The Court have repeatedly upheld DGIV's absolute discretion to grant exemptions and confined themselves to reviewing the factual and legal basis of the decision [122]. Thus, the process is very much in the control of the Commission who can dictate terms to its advantage. Defendants who refuse DGIV's conditions are unlikely to receive an exemption [123]. This is reflected in the study where there was little obvious evidence of problems associated with defence rights. However, in *Transocean*, the Court did uphold defence rights on appeal, ruling that, where DGIV imposed conditions in granting an exemption, it must give the firm an opportunity to be heard [124].

G)CONCLUSION - ART.85(3)

It is now time to make an overall assessment of whether DGIV classifies and treats crisis cartels differently from other cartels. The Commission's classification of

rationalisation agreements is unclear. A lack of information in the cases makes it difficult to assess the true characterisation of these arrangements. DGIV is certainly more suspicious of sectoral arrangements and inclined to characterise them as, at least, potentially criminal. However, the bilateral agreements in the study were viewed considerably more reasonably. Like other horizontal cartels, the Commission's evaluation of these arrangements is limited. Nevertheless, those cases who succeed in qualifying as restructuring arrangements treated to a more reasonable, conciliatory approach than other cartels. This is particularly evident in DGIV's willingness to interpret the provisions of Art.85(3) in the undertaking's favour. What does remain unchanged is the limited scope of defence rights, which are constrained here by the negotiated nature of exemptions. Once again, a contrast between the Commission's command of the process and the defendant's lack of protection is evident.

This present enforcement policy produces substantial legal uncertainty. Ambiguity regarding the scope of the criteria governing qualification as a rationalisation arrangement makes it difficult to know whether a particular agreement will qualify. Moreover, uncertainty exists regarding whether DGIV's criteria are achievable or recognisable. As such, this casts doubt on the appropriateness of the Commission's guidance as a basis for regulation. Equal uncertainty exists over the application of Art.85(3). The inherently collusive nature of crisis cartels creates difficulties in justifying their exemption. The fact that these difficulties can only be circumvented because the Commission's monolithic discretion enables it to exempt on the basis of sometimes insufficient or unconvincing reasoning indicates that Art.85(3) is an unsatisfactory, and possibly unfair, means of regulating restructuring arrangements.

Whilst the guidance gives defendants little indication of the precise factors controlling the definition and exemption of crisis cartels, it provides DGIV with the scope to promote those specific agreements of which it approves. The ambiguity inherent in the enforcement process makes thorough review of DGIV's activities impossible[125]. This lack of transparency permits the Commission to pursue its political and pragmatic objectives unhindered. The negotiated nature of exemptions enables

DGIV to exact a pragmatic advantage. Exemption is on the Commission's terms. There are also political rewards. DGIV can and will uphold otherwise anti-competitive agreements where politically desirable [126]. However, it is questionable whether the principles of antitrust should be so readily set aside for political advantage.

H)CONCLUSION - ALL PROSECUTION METHODS

Whilst DGIV's approach to the prosecution of horizontal cartels may vary, there is much common ground. Above all, the influence of political and pragmatic objectives is detectable at every point. The study has shown that the vast majority of horizontal agreements are characterised as criminal and that this classification is rooted in the EC's political and pragmatic goals. Criminality appears to control the construction and assessment of these violations, resulting in limited legal and economic evaluation. But, it does not seem to dictate the type of enforcement approach employed. The Commission has vowed to take "appropriate action" and prosecute with vigour all serious infringements [127]. However, what is deemed "appropriate" varies considerably. Some cases are subject to formal prosecution. These cases receive stern treatment and face the prospect of significant fines. Recidivists in the petrochemical and glass industries regularly receive such treatment. In contrast, other horizontal cartels encounter more reasonable handling and are resolved informally, or are exempted despite their apparently anti-competitive nature. However, the criteria underlying DGIV's prosecution choices are far from clear. Many instances of apparently similar cases receiving different treatment exist, indicating that undisclosed considerations may control DGIV's prosecutorial decisions. This study has suggested that it is the Commission's pursuit of political and pragmatic goals which controls these enforcement decisions. Thus, it seems that political and pragmatic objectives impact upon both the classification of violations and DGIV's choice of enforcement method.

But, the capricious nature of these objectives means that the way in which they affect each aspect of decision-making is different and unpredictable. So whilst DGIV's choices may serve political and pragmatic goals, they do so at the price of consistency. The fickle nature of these goals raises concerns that DGIV's behaviour will generate only uncertainty and injustice.

The Commission's characterisation of horizontal offences and subsequent enforcement choices have a significant effect on defence rights. DGIV's clear policy is to base defence protections on the concept of integral fairness, allowing the Commission to control the number, nature and effectiveness of procedural safeguards. Invariably, defendants' rights are subordinated to effective enforcement. In particular, DGIV's practice of limiting the defendant's access to information makes the formulation of a defence problematic and conviction more probable. Moreover, in negotiated settlements, the defendant is even more vulnerable. The lack of due process, the defendant's weak bargaining position and the private nature of settlements do little to encourage the Commission's sense of 'fair play'. DGIV's attitude to defence rights has provoked numerous appeals and trenchant criticism that the Commission's behaviour discloses a fundamental disrespect for natural justice.

DGIV's incremental use of the 'law as a resource' and the resulting paramouncy of Reg.17 is evident in all DGIV's prosecution choices. By introducing ambiguity into the interpretation and application of Art.85 and controlling defence rights, DGIV augments its own authority whilst constraining the defendant's position. The previous two chapters have illustrated both the breadth and apparently arbitrary nature of DGIV's discretion and the profound impact this has had on defendants. Overall, this policy significantly enhances successful prosecution and thus the attainment of political and pragmatic goals. It also raises concerns over the propriety and equity of such practices when undertaken by a monolithic institution like the Commission. Ultimately, the resulting legal uncertainty leaves firms with insufficient indication of which form of enforcement they are likely to encounter.

Having reviewed DGIV's approach to the prosecution of horizontal argeements, it is now necessary to draw a criminological analogy.

I)CRIMINOLOGICAL ANALOGY [128]

This section will first examine the ambit and use of criminal prosecution powers and the effect on defence rights, considering the problems and consequences of the current approach. Then, this will be compared and contrasted with DGIV's approach to prosecution.

1)Prosecution Powers

In England and Wales, prosecution in undertaken by the Crown Prosecution Service (CPS) who have a wide discretion to prosecute [129]. Despite a presumption against prosecution, both the police and the CPS display a strong tendency towards prosecution [130]. Some guidance on the exercise of prosecutorial discretion is provided. Prosecution should occur where a "realistic prospect" of conviction exists [131]. But, the Code has been extensively criticised as providing insufficient guidance because of its vague and malleable nature [132]. The flexibility of this guidance and the focus on conviction prospects ensures that prosecutorial discretion is not constrained. Indeed, this situation encourages the strengthening of weak cases by case construction [133]. Here too, case construction involves the selection, creation and presentation of evidence making a case appear more cogent than it really is [134]. Case construction occurs by various means. The use of forensic evidence, interrogation techniques to elicit confessions, police case summaries, the non-disclosure of evidence and even the fabrication of evidence may be used to promote the prosecutor's view of the case [135]. Perhaps the most important of these techniques is the use of police case summaries. In practice, both prosecution and defence rely extensively on these summaries for their information on the case. As such, they form a definitive account of events upon which all later decisions are based. Yet, the police enjoy considerable latitutde in the way in which they characterise both the offence and suspect and in the selection of evidence when compiling these summaries [136]. Indeed, much evidence contained in the summary

is provided by the police themselves [137]. However, despite the effect case construction may have on disposal, the inaccuracy of these summaries has long been acknowledged and criticised [138].

The domination of the criminal process by the police, noted at investigation stage, continues throughout the prosecution stage. This control enables them to exploit the flexibility of the law and construct cases, thereby ensuring that their view continues to prevail despite prosecution being in the hands of another agency. Their wide criminal powers allow the police to choose and present evidence in a way which strengthens their construction of events, whilst avoiding evidence which may cast doubt upon their interpretation. This ability to control the process and construct cases means that in many cases "conviction is made highly probable" [139].

2)Defence Rights

At prosecution, the principal defence right is that the defendant is made aware of the case against him so that he may prepare his defence. The prosecution's duty of disclosure is an important facet of this right. This obligation is governed by the *Attorney General's Guidelines 1981* which lay down a broad presumption in favour of the disclosure of all unused materials [140]. However, problems relating to the status and scope of these *Guidelines* limits the effectiveness of the extensive access they provide and thus the defendant's ability to prepare a defence [141]. First, the legal status of the *Guidelines* is unclear. Substantial conflict exists between them and previous caselaw [142]. However, the Court of Appeal have been willing to quash convictions where the *Guidelines* have been breached [143]. Nevertheless, recent cases have seen a retreat from this position because of the unreasonable burden it places upon the prosecution [144].

In addition, the *Guidelines* themselves place limitations upon the extent of disclosure by giving prosecutors a discretion to withhold disclosure of sensitive information [145]. The vague and subjective approach encouraged by this discretion leaves the precise extent of these limitations unclear and allows prosecutors to control the quality and quantity of information available to defendant[s] [146]. Moreover,

information should be disclosed to the defendant in adequate time for its value to be assessed [147]. This guidance is regularly disregarded, making the preparation of a defence problematic [148]. Finally, the *Guidelines* do not provide for any procedure allowing courts to order disclosure or monitor compliance with their orders, making it difficult for the defence to challenge the prosecution's decisions on disclosure.

In case preparation, an acknowledged imbalance between prosecution and defence resources exists [149]. This is compounded by the prosecution's monopoly on the collection and dissemination of evidence and vagueness regarding the extent of the duty to disclose. This situation allows the prosecution to use its wide criminal powers to restrict disclosure, and therefore defence safeguards, in accordance with prosecution needs. The failure to disclose assists case construction by increasing the apparent cogency of the prosecution case and limiting the defendant's ability to mount an effective defence. On occasion, this has resulted in the conviction of the innocent [150].

3)Plea-Bargaining [151]

Whilst plea-bargaining has long been a controverisal practice, it has received some tacit support [152]. However, guidance on the conduct of negotiations is limited [153]. The absence of clear rules controlling plea-bargaining and the informality of the negotiation procedure mean that negotiations take place in a situation very much under the prosecutor's control. This has resulted in widespread concern regarding the means employed and the circumstances surrounding negotiation. In particular, critics assert that plea-bargaining undermines the criminal process by using bids, deals and threats to coerce the innocent to plead guilty [154]. Moreover, the informality of the process means that these practices take place in the absence of procedural safeguards [155]. Thus, plea-bargaining enables the prosecutor to use his wide criminal powers, his control of the process and any advantages obtained through case construction to exert pressure on defendants to plead guilty. It is this strong connection with guilty pleas which makes plea-bargaining of immense value to prosecutors enabling them, in the majority of

cases, to circumvent the expense, delay and uncertainty of trial and replace it with cost-effective prosecution [156]. Whilst plea-bargaining is of some value to defendants, reducing uncertainty and delays, these advantages are obtained at a considerable price. In return, defendants must relinquish all procedural safeguards and any residual control over their immediate future and place themselves at the disposal of the prosecution. Invariably, this process results in defendants feeling coerced into accepting a plea-bargain and, on occasion, with the innocent being bluffed into pleading guilty. Yet, research reveals that prosecutors rarely possess sufficient evidence to substantiate their bluffs [157].

4)Conclusion - Criminological Analogy

The above evaluation reveals that the police and prosecutors are very much in control of events. Their wide criminal powers enable them both to construct an effective case against the defendant and to restrict his ability to defend himself by curtailing disclosure. These tactics serve to encourage defendants to plead guilty, ensuring conviction. Many similarities exist between the approach of the criminal process and that of DGIV's to prosecution. Both possess a discretion to prosecute and both invariably exercise that discretion in favour of prosecution. Both employ the flexibility of the law to select, create and present evidence in a way which ensures their desired outcome [158]. To further this objective, both systems take steps to control the quantity and quality of information available to defendants, both in terms of information contained in case summaries/SOs and by disclosure. In both processes, disclosure is limited on the same public interest ground of confidentiality/sensitivity. Presumptions in favour of broad disclosure appear to carry little weight. Moreover, both jurisdictions display an overwhelming preference for cost-effective informal resolutions. On this point, the Commission has asserted that it does not plea-bargain and that the use of such a term is inappropriate as competition law is administrative not criminal in nature [159]. As already illustrated, DGIV's classification of antitrust here is questionable. Moreover, the similarities identified here in the way both systems

approach negotiated settlements leaves it in no doubt that the Commission plea-bargains. Whilst DGIV's individual exemptions under Art.85(3) have no strict criminological analogy, the Commission's attitude to exempted cases discloses that they are a form of negotiated resolution. Moreover, DGIV's approach to case construction and defence rights in these cases bears considerable similarity to the enforcement of other more formally prosecuted cases - only the *method* of enforcement differs. Overall, both DGIV and the English criminal process employ their considerable powers to dominate the process and ensure that neither the substantive law nor defence safeguards fetter enforcement. Yet, in neither system is it clear which method of prosecution will prevail in any given case.

The problems and consequences of this approach will now be briefly summarised and analysed. Research reveals that increasing the apparent cogency of cases by case construction leads to the routine prosecution and conviction of weak cases and the factually innocent [160]. Several major miscarriage cases have directly linked the prosecution's failure to disclose relevant information with wrongful convictions [161]. Research demonstrates a similar connection between plea-bargaining and a improper conviction [162]. As Sanders and Young argue, case construction is an acceptable feature of many law enforcement systems and is not inherently wrong providing defendants have similar resources and techniques available to them. However, in the criminal process, prosecution powers are maximised at the expense of the defence. It is this blatant mismatch of resources and rights which produces the inequity [163]. Nevertheless, the present approach by the courts to disclosure problems would seem to indicate that fewer rather than more restrictions will be placed on the prosecution's ability to case construct [164]. On analysis, the criminal process's prosecution methods clearly resemble the crime control model. The prosecution's wide powers and control of the system are used to promote methods ensuring a high rate of guilty pleas. Case construction, restrictions on defence rights and a preference for plea-bargaining all serve this end, promoting enforcement needs over due process. In particular, the attitude towards plea-bargaining and the sanguine acceptance that, on

occasion, the innocent will be convicted in the name of cost-efficiency is based entirely on crime control beliefs.

For the Commission too, the end justifies the means. The promotion of political and pragmatic goals legitimises DGIV's domination of the system and the use of its powers to maximise conviction prospects and minimise or discourage defence opportunities for challenge. Similar means - case construction, restrictions on access rights and plea-bargaining - are employed to render conviction virtually inevitable. In particular, the Commission's preference for broad concepts, like complex infringement and collective responsibility, which contain few elements requiring proof, assist conviction. Similarly, DGIV's manipulation of the quality and quantity of evidence permits DGIV to make weak case strong where political and pragmatic aims require it. Both tactics are consistent with the crime control perspective. Both make prosecution and conviction substantially easier[165]. Clearly, for DGIV, crime control is paramount. In the long term, this may mean that similar consequence to those seen in the criminal justice system are equally inevitable.

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1 Robert Ingersoll.

2 For background information, see : Van Bael 'The Antitrust Settlement Procedure of the EC Commission' *CMLR* [1986] 61 ; Van Bael 'Transparency of EC Commission Proceedings' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 192 ; Green *Commercial Agreements and Competition Law : Practice and Procedure in UK and EEC* Graham and Trotman (1986) at pp 304-315 ; Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards : Is Regulation 17 Falling into Abeyance?' *ELR* [1986] 268 ; Bourgeois 'Undertakings in EC Competition Law' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 90 ; Temple Lang 'The Procedure of the Commission in Competition Cases' *CMLR* [1977] 155 ; Whish *Competition Law* Butterworths (1993) at pp 311-312 ; Kerse *EC Antitrust Procedure* (3rd Edn) Sweet and Maxwell (1994) at paras 6.53-6.63 ; Harding *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) Ch6.

3 In 1982, following criticism of the poor declaratory value of comfort letters and problems with third party rights, the Commission introduced 'formal' comfort letters. These are rarely used. In 1990, only three were issued ; in 1991, five were issued and in 1992, eight letters were issued. See Annual Reports on Competition Policy 1990, 1991 and 1992 respectively. For further discussion of this procedure, see 12th Report on Competition Policy 1982 at pt 30 ; Practice Note OJ [1982] C 343/4 ; Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards'. See also Appendix B, Table 8 for further statistics of Commission enforcement decisions.

[4] Negotiated settlements are provided for under Art.3(3)/Reg.17, though they are not strictly defined. In many cases, settlements occur without the issuance of formal proceedings. This is of immense value to DGIV as it obviates the need to expend resources preparing the SO. For discussion, see Harding *EC Investigations and Sanctions* Ch6 ; Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards'.

[5] Such settlements, which may also involve an admission of guilt by the defendant, are discussed by Harding *EC Investigations and Sanctions* Ch6 ; Kerse *EC Antitrust Procedure* at paras 6.61-6.62.

[6] As comfort letters are rarely used in horizontal cases, examination of informal resolutions here will be restricted to negotiated/plea-bargained settlements. Comfort letters are more relevant to vertical agreements and will be discussed in greater depth in that context. See Ch8 infra.

[7] See Art.21/Reg.17. This aspect is discussed by Kerse *EC Antitrust Procedure* at paras 6.53-6.55 and Van Bael 'Transparency of EC Commission Proceedings' at p 192.

[8] Annual Competition Reports mention only a few of the settlements made. On this, see discussion by Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at p 62 ; Whish *Competition Law* at pp 311-312 ; Green *Commercial Agreements and Competition Law* at p 304. In addition, DGIV may issue a press release in cases of importance. However, press releases are rare. Only one settlement - IBM - has ever been fully published. For further discussion of these points, see 6th Report on Competition Policy 1976 at pt 11 ; Mr. Andriessen's comments in OJ [1984] C225/20 ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at p 65.

[9] The most trenchant criticism has come from Van Bael in a series of articles, eg Van Bael 'Comments on EEC Antitrust Settlement Procedure' *Swiss Review of International Competition Law* [1984] 67 ; Van Bael 'Transparency of EC Commission Proceedings' ; Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 219-220. The most potent of these criticisms relates to the legal value and lack of procedural safeguards of these measures.

[10] Green *Commercial Agreements and Competition Law* at p 304. In 1990, the Commission took 15 decisions, issued 158 comfort letters and reached 710 informal resolutions. In 1992, the figures were 20, 176 and 553 respectively. This compares with 1989 when nine decisions were issued and 183 cases were informally resolved. Derived from Reports on Competition Policy 1989,1990,1992. See Appendix B, Table 8 for further statistical details

[11] See *Zinc Producers*, *Woodpulp* and *FWA*. In the study, whether a plea-bargain has occurred in a individual case is based on existence of some or all of the following features common to plea-bargained cases ; admission of guilt, co-operation with prosecution, the giving of undertakings as to future conduct and a concomitant reduction in fines. On this basis, see *Zinc Producers*, at pp 135-136, where the firm's co-operation was rewarded with a reduced sanction. In *Woodpulp* at pp 516, 524-527 and *FWA* OJ [1992] L134/1 at L134/23, undertakings as to future behaviour earned reduced fines. There are other cases in the study where limited plea-bargaining may have occurred, but it is unclear from the text whether this is in fact so. In *Polypropylene, LdPE* and *Peroxygen*, there was co-operation by certain defendants. In *Polypropylene*, Hercules at pp 327-329, complained that no mitigation of fines had resulted despite co-operation. In *LdPE* at p 390, ICI co-operated and identified participating firms in the face of other defendants outright refusal to co-operate. In *Peroxygen*, at pp 492, 507, 510, co-operation was given by Laporte, who although a major participant, received only a 2m ECU fine in contrast with other main participants' fines of 3m ECU. In *Cast Iron and Steel* and *Welded Steel*, fines were reduced because they were crisis cartels - the former instance being described at p 717, as a "special case". There is further evidence of the possibility of the Commission's refusal to negotiate in *Benelux Flat Glass, Dutch Builders, IAZ, VBBB and GCB*. These cases will be examined further in the course of the discussion.

[12] Here criminality is assessed on the same basis as in the previous chapter. On this basis, see *Zinc Producers*, where at pp 110, 135, the infringements were described as "particularly serious" and as "striking at the very foundations of the Community". See also similar comments in *Woodpulp II* at p 571 and *FWA* 22nd Report on Competition Policy 1992 at p 99. In the other cases in the study where limited plea-bargaining may have occurred, all such cases were classified as criminal and evaluated under the 'object' format of analysis. For further on this aspect, see the previous chapter on formally prosecuted cases.

[13] See comments made by Gyselen at the Leiden Seminar 1992 in 'Discussion : "Undertakings" and Time-Limits' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 125.

[14] See *Zinc Producers* at pp 135-136, *Welded Steel* at p 81 and *Cast Iron and Steel* at pp 716-717. In addition, *Zinc Producers* were particularly co-operative and the conciliatory tones adopted by the Commission in the latter stages of this case are in marked contrast with its condemnation of the agreement in the earlier stages of the procedure. This contrast clearly marks the point of which the settlement was reached. *Cast Iron and Steel* was described at p 717, as a "special case".

[15] Eg *PVC*, *LdPE* and *SIV*. In addition, industry problems caused by national legislation received little sympathy from DGIV. See eg DGIV's attitude in *Fedetab* and *ANSEAU*.

[16] See 14th Report on Competition Policy 1984 at p 50.

[17] *Aluminium* [1981] 3 CMLR 813 ; *Benelux Flat Glass*.

[18] See *Dutch Builders*, *IAZ*, *GCB* and *VBBB*. In *Dutch Builders* at p 82, SPO complained that DGIV had refused to help them find a means of modifying their agreement so that they could obtain an exemption. *IAZ's* offer at p 3379, to modify their agreement failed because the Commission doubted the firm's sincerity. In *GCB* at p 93, a case which concerned the renewal of an Art.85(3) exemption, the defendant complained that, despite considerable concessions, DGIV had pursued formal prosecution. See also *VBBB* at p 53. In contrast, *FIEC/CEETB*, OJ [1988] C52/2, a collusive tendering case like *Dutch Builders*, was settled in return for modification of the agreement.

[19] In *Zinc Producers* at p 133, a presumption in favour of cessation operated in the defendant's favour. In *FWA*, no evidence of termination existed. These two cases may themselves be contrasted. *Zinc Producers* were particularly co-operative in return for a plea-bargain, whilst *FWA* received a plea-bargain despite their non-cooperation.

[20] Eg *FIEC/CEETB* OJ [1988] C52/2 - cf DGIV's treatment of *Dutch Builders*. Van Bael in 'The Antitrust Settlement Procedure of the EC Commission' at p 67, quotes 23 such cases, the most recent of which is *Air Forge* EC Bull. 1982 No.11. Harding in *EC Investigations and Sanctions* at pp 99-102, lists ten such cases.

[21] According to Harding *EC Investigations and Sanctions* at p 100, this indicates good faith and willingness to be investigated.

[22] *Dutch Cigarettes* at p 756. This is in contrast with *ANSEAU* and *Meldoc* whose unnotified agreements were formally prosecuted and fined. Moreover, notification precludes fining and, as it is considered more cost-effective to settle than pursue to a formal conclusion, DGIV are left with little option but to negotiate a settlement.

[23] See *Zinc Producers*, *Woodpulp* and *FWA*. In *Zinc Producers* and *Woodpulp*, their co-operative attitude in establishing the prosecution case was rewarded. In *Woodpulp* and *FWA*, parties gave undertakings as to their future behaviour as part of the plea-bargain. Discussed further at Kerse *EC Antitrust Procedure* at paras 6.61-6.62.

[24] See *Peroxygen* at p 510, *ICI* [1992] ECR 1021 in the *Polypropylene* cartel, and possibly *LdPE*. In the latter case, it is unclear here whether ICI's co-operation earned a reduction in fine. In *Polypropylene*, ICI's fine was reduced by 10% because of its co-operation in identifying other members of the cartel. On appeal, the CFI increased this rebate to 20%.

[25] In *Benelux Flat Glass*, despite waiving their right to a hearing, no plea-bargain was forthcoming. *VBBB's*, *Dutch Builders'* and *IAZ's* willingness to co-operate in modifying their agreements was similarly rejected by DGIV. In *Polypropylene*, Hercules at p 327-329, despite co-operating during prosecution and instituting a compliance programme, received no reduction in fine. This is in stark contrast to the treatment received by ICI who were involved in the same cartel, and moreover a major player, but whose co-operation was rewarded.

[26] Green *Commercial Agreements and Competition Law* at p 314 ; Harding *EC Investigations and Sanctions* at pp 73-74 ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' ; Van Bael 'Transparency of EC Commission Proceedings' ; Van Bael's Written Submission to House of Lords Select Committee on the European Communities *1st Report*,

Enforcement of Community Competition Rules HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 220 ; Kerse *EC Antitrust Procedure* at para 6.63.

27 DGIV seemed to consider that the enforcement process contained sufficient safeguards of independence and objectivity to protect it from undue political influence. See Commission Answer to WQ 306/84, OJ [1984] C225/20.

28 *IBM* [1984] 3 CMLR 147. Discussed by Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at pp 70-75 ; Green *Commercial Agreements and Competition Law* at p 314. In *BAT and Reynolds v Commission* [1987] ECR 4487, allegations of undue political influence on the Commission were made. However, the high burden of proof imposed on the defendant meant that the allegations were never substantiated. See Kerse *EC Antitrust Procedure* at para 6.63.

29 Van Bael 'The Antitrust Settlement Procedure of the EC Commission'.

30 Harding *EC Investigations and Sanctions* at p 74. This is certainly true of several cases in the study, see DGIV's attitude in *PVC*, *Polypropylene*, *LdPE*, *Benelux Flat Glass* and *SIV*. With the notable exception of ICI, co-operation by these firms has been rejected outright by DGIV. In contrast, Whish *Competition Law* at p 233, notes that price-fixing in service industries, particularly banking, tends to be treated more generously. Here negotiated settlements are far more likely.

31 The co-operative attitude of Dutch/Belgian firms in the case study was ignored by the Commission. See particularly, *Benelux Flat Glass*, *ANSEAU*, *VBBB* and *Dutch Builders*. This phenomenon is noted by Harding *EC Investigations and Sanctions* at p 101. In addition, Van Bael in 'The Antitrust Settlement Procedure of the EC Commission' at p 67, points out discrimination between Italian/British car manufacturers, comparing DGIV's treatment of Fiat and Alfa Romeo with that of British Leyland.

32 In the case study, *Woodpulp II* at pp 558-560, alleged discriminatory fining. In *Cast Iron and Steel*, the Swedish firm involved received one of the largest fines imposed here, despite a general reduction in fines because of a structural crisis in the industry. See also the US firm of *John Deere* [1985] 2 CMLR 554, discussed by Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at p 66.

33 Presumably, this would also influence the actual substance of the settlement. See comments made by Faull (Head of Division in DGIV) and Gyselen (Asst. to DG of DGIV) at the Leiden Seminar 1992 in 'Discussion : "Undertakings" and Time-Limits' at pp 124-126.

34 See comments made in *VBBB* and *BAT and Reynolds* [1987] ECR 4487. However, in *Woodpulp II* pp 591-592, the ECJ annulled parts of the defendants' undertakings, ignoring DGIV's claim that the undertakings were unilateral acts which the Court had no jurisdiction to review.

35 For background information, see : Green *Commercial Agreements and Competition Law* at pp 304-315 ; Harding *EC Investigations and Sanctions* Ch6 ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' ; Van Bael 'Transparency of EC Commission Proceedings' ; Kerse *EC Antitrust Procedure* at paras 6.53-6.63 ; Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards' ; Bourgeois 'Undertakings in EC Competition Law' ; Whish *Competition Law* at pp 311-312.

36 Primarily these are ; the right to be heard, the right to an independent tribunal and the presumption of innocence, though, for the sake of convenience, they will be dealt with here under the general umbrella of defence rights.

37 The legal value of comfort letters will not be discussed in detail here as they are more relevant to vertical agreements. Briefly, comfort letters do not bind the Commission, national courts, competition authorities or third parties. They are not decisions and therefore are not capable of review by the Court (Commission Notice OJ [1983] C295/7), though arguably they are reviewable as acts under Art.173(2) of the Treaty. For further discussion, see Green *Commercial Agreements and Competition Law* at pp 309-310 ; Kerse *EC Antitrust Procedure* at paras 6.56-6.59 ; Korah 'Comfort Letters - Reflections on the Perfume Cases' *ELR* [1981] 14 ; D.Stevens 'The Comfort Letter : Old Problems, New Developments' *ECLR* [1994] 81.

38 The Commission has long admitted the limited legal status of settlements, see eg 5th Report on Competition Policy 1975 at p 9. It should be noted that the informal nature of the arrangement

does not preclude it from being a decision. In *Cimenteries* [1961] ECR 75, the Court held that the test was one of substance not form. In *Woodpulp II*, the ECJ examined and partially annulled the undertaking given by defendants. Nevertheless, Kerse *EC Antitrust Procedure* at para 6.56, considers it unlikely that settlements constitute decisions and bind the Commission. Moreover, as many resolutions are reached at 'official' level within DGIV, they may well not bind the Commission, and indeed may be set aside for lack of authority. See *Frubo v Commission* [1975] ECR 563, where a written assurance by a high ranking official was later overturned by the the Commission. In *Aluminium* [1987] 3 CMLR 813, the defendants argued unsuccessfully that the principle of estoppel precluded DGIV from denying the validity of the settlement. For further discussion of these points, see Kerse *EC Antitrust Procedure* at paras 6.56-6.60 ; Green *Commercial Agreements and Competition Law* at pp 305-315 ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at pp 80-81 ; Bourgeois 'Undertakings in EC Competition Law' at pp 95-96 and Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards' at pp 269-272.

[39] On this, see Kerse *EC Antitrust Procedure* at para 6.60 ; Bourgeois 'Undertakings in EC Competition Law' at p 94. See also *IBM Settlement* EC Bull. 1984 No.10.

[40] Though in the absence of 'bad faith' this may constitute a breach of legitmate expectations. See Lord McKenzie Stuart ' Legitimate Expectations and Estoppel' *LIEI* [1983] 53 ; Sharpston 'Legitimate Expectations and Economic Reality' *ELR* [1990] 103.

[41] See *Woodpulp* at pp 524-526/*Woodpulp II* at pp 557-558,591. In *Woodpulp*, the undertaking came into force in 1985 and was required to run until at least 1989. Thereafter, it would remain in force until one year after notice of termination was given by a firm. See also, *FWA* where informal undertakings aimed at opening the market to greater competition were given as part of the plea-bargain. Firms in both cases were required to retain transaction documents and make them available for Commission inspection. See also Commission Answer to WQ 457/84 and WQ 695/84 OJ [1984] C344/2.

[42] In *GCB* at p 93, the defendant complained that DGIV had abused its power by using the procedure relating to the Helsinki Agreement ot compel Eurocheque to accept substantial amendments to the Package Deal Agreement. In *Woodpulp II* at pp 437-438, 557-558, defendants claimed that the Commission had acted improperly and had placed them under considerable pressure to accept the undertaking by informing them that the only way to avoid a formal decision against them was to sign the undertaking there and then. Defendants claimed that they later discovered that at the time of signing DGIV had already decided to proceed with a formal decision. In *IBM*, formal and informal prosecutions ran simultaneously. It has been suggested that the Commission did this as a means of encouraging a settlement. See Press Release IP(84) 290 of the Commission dated 2/8/85 ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at p 74 and Hughes 'Commission of the European Communities Suspends Proceedings against IBM' *Harvard International LJ* [1985] 189.

[43] *Woodpulp II* at pp 437-438, *GCB* at pp 93-94, In *IBM*, the undertakings were considered wider than the charges in the SO. See also discussion of these pressures by Harding *EC Investigations and Sanctions* at pp 72-75 ; Vogelaar at the Leiden Seminar 1992 in 'Discussion : "Undertakings" and Time-Limits' at p 125, who discusses the problems involved in negotiatons, in particular rapporteurs' inablility to suggest creative solutions to problems.

[44] The lack of transparency in DGIV's settlement procedure has been one of the central themes of Van Bael's criticism. He is particularly concerned that it may mask discriminatory and inconsistent practice. See Van Bael 'Transparency of EC Commission Proceedings' ; Written Submission by Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 219-220. See also Harding *EC Investigations and Sanctions* at p 73. Van Bael has often suggested the adoption of legislation similar to the Antitrust Procedures and Penalties Act 1974 (APPA), a US statute, as a means of reforming the process. The scope of this statute is discussed further in the evaluation of US antitrust at Ch10 infra.

[45] DGIV views this as crucial to achieving market integration. The Commission's use of suspension rather than termination of proceedings augments its control, providing DGIV with greater leverage over defendants and excluding issues from the control of national authorities. See Harding *EC Investigations and Sanctions* at p 72 ; Hughes 'Commission of the European Communities Suspends Proceedings against IBM' ; Korah 'EEC Competition Policy - Legal Form or Economic Efficiency' *CLP* [1986b] 85.

[46] Moreover, statistics reveal the increasing importance of formal prosecutions to DGIV's antitrust policy. Over the last 15 years informal resolutions have increased from 183 per annum

in 1980 to 710 per annum in 1990. See 10th and 20th Reports on Competition Policy 1980 and 1990 respectively.

47 The only way that defendants could exercise a right to comment is to submit fully to formal prosecution. However, many defendants relinquish the right to be heard in return for a plea-bargain. Given DGIV's inclination to limit and distort the evidence available to the defendant in formal prosecution, it is most unlikely that fuller disclosure will be granted under informal prosecution.

48 See Harding *EC Investigations and Sanctions* ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' ; Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards'.

49 See Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at p 90 ; Harding *EC Investigations and Sanctions* at pp 74-77.

50 Van Bael 'Transparency of EC Commission Proceedings' at pp 194-195 ; Written Submission by Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 219-220 ; Harding *EC Investigations and Sanctions* at pp 72-75.

51 See Van Bael 'Transparency of EC Commission Proceedings' at p 195. Harding in *EC Investigations and Sanctions* at p 75, identifies further problems of negotiated settlements in that many recidivists will simply learn to 'play the system', ultimately reducing the effectiveness of enforcement. Bourgeois in 'Undertakings in EC Competition Law' at p 99, is also concerned that DGIV's informal resolution process ignores third party rights.

52 Resolution on the 13th Report on Competition Policy 1983 in OJ [1985] C12/101 at p 102. See also its comments on the 10th Report on Competition Policy 1980 in OJ [1982] C11/73 and 18th, 19th and 20th Reports on Competition Policy 1988, 1989 and 1990 respectively. Similarly, the House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO and the House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, have both expressed concern over the absence of procedural safeguards and the secret nature of such settlements.

53 See Written Submissions from JWP and Elherman to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence p 66 and p 112 respectively.

54 See Van Bael in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 219, who expressed concern that DGIV was shaping an enforcement policy devoid of procedural safeguards. He asserted that it is imperative in these circumstances that the procedure is sufficiently transparent to enable public and judicial scrutiny.

55 This was the case in *IBM*. See Van Bael 'The Antitrust Settlement Procedure of the EC Commission' at pp 70-73.

56 See Parliament's Resolution on the 10th Report on Competition Policy 1980 in OJ [1982] C11/78 and 20th Report on Competition Policy 1990 at pp 249-250, calling for more published information on the principles and criteria guiding informal settlements.

57 Harding *EC Investigations and Sanctions* at p 74.

58 Even Van Bael, the most stern critic of the Commission's settlement procedure, admits the need for informal resolutions. See his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 219.

59 For background information on this section, see : Whish *Competition Law* at pp 227, 369, 450-459 ; Vogelaar 'The Impact of the Economic Recession on EEC Competition : Part Two : Crisis Cartels' *Swiss Review of International Competition Law* [1985] 35 ; Van Grevenstein 'Restructuring Arrangements under EEC Competition Law' *ECLR* [1985] 57 ; Sharpe 'The Commission's Proposals on Crisis Cartels' *CMLR* [1980] 15 ; Joilet 'Cartelisation, Dirigism and Crisis in the European Community' *The World Economy* [1981] 403 ; Hornsby 'Competition

Policy in the 80s : More Policy, Less Competition' *ELR* [1987] 79 ; Stockman 'The Role of Antitrust in the Face of Economic Recession - Recent Developments in Germany' *ECLR* [1984] 82 ; Faull 'Crisis Cartels' *ELR* [1986] 64 ; de Wilmars and Steenberger 'The ECJ and Governance in an Economic Crisis' *Mich LR* [1984] 1377 ; Kerse *EC Antitrust Procedure* at paras 6.27-6.40 ; Green *Commercial Agreements and Competition Law* at pp 650-656.

60 See Appendix B, Table 1, Cases 23 to 32, ie :
1)Transocean Marine Paint [1967] CMLR D9, [1974] ECR 1063 (hereafter referred to as *Transocean*) ;
2)National Sulphuric Acid Association Ltd [1980] 3 CMLR 429 (hereafter referred to as *National Sulphuric Acid*);
3)Synthetic Fibres [1985] 1 CMLR 787 (hereafter referred to as *Synthetic Fibres*);
4)BPCL/ICI [1985] 2 CMLR 330 (hereafter referred to as *BPCL/ICI* or *BP/ICI*);
5)Enichem/ICI [1989] 4 CMLR 54 (hereafter referred to as *Enichem/ICI*);
6)Bayer/BP [1989] 4 CMLR 24 (hereafter referred to as *Bayer/BP*) ;
7)ENI/Montedison [1988] 4 CMLR 444 (hereafter referred to as *ENI/Montedison*);
8)EMC/DSM OJ [1988] C18/3 (hereafter referred to as *EMC/DSM*);
9)Stichting Baksteen [1993] 4 CMLR 385, [1995] 4 CMLR 646 (hereafter referred to as *Stichting Baksteen*);
10)Shell/AZKO 14th Report on Competition Policy 1984 p 85 (hereafter referred to as *Shell/Azko*).
Some cases here were not individually exempted but obtained comfort letters. In the study, two cases, *Shell/Azko* and *EMC/DSM*, were issued formal comfort letters. However, as all of the cases were rationalisation agreements or were situations where special circumstances prevailed, eg *Transocean* and *National Sulphuric Acid*, they will be dealt with together. Other formally prosecuted cartels which advanced structural crisis or similar arguments will also be referred to where appropriate. Principally, these are: *PVC*, *LdPE*, *Polypropylene*, *Welded Steel*, *Cast Iron and Steel*, *Belgian Flat Glass*, *Zinc Producers*, *Peroxygen*, *SIV* and *SSI* and other "government compulsion" cases like *Van Landewyck* and *Belasco*.

61 See Vogelaar 'Crisis Cartels' ; Van Grevenstein 'Restructuring Arrangements' ; Joliet 'Cartelisation, Dirigism and Crisis'. Indeed, on occasion, cartels have been labelled initially as a crisis cartel by DGIV only to conclude by being sanctioned as a market division cartel and vice versa eg *LdPE*, *PVC*, *BPCL/ICI*, *Synthetic Fibres*.

62 Sharpe 'The Commission's Proposals on Crisis Cartels' at p 89 ; Hornsby 'Competition Policy in the 80s' at p 92 ; Van Grevenstein 'Restructuring Arrangements' at pp 63-72 ; Joliet 'Cartelisation, Dirigism and Crisis' at pp 412-416, all note the inadequacies and internal conflicts of the Commission's approach to crisis cartels under Art.85(3). For a contrasting view, see Vogelaar 'Crisis Cartels' at p 48, who considers that Art.85(3) gives DGIV sufficient room to deal with these situations.

63 Early examples of a strict application of Art.85(1) in times of crisis include : *White Lead* [1979] 1 CMLR 464 ; *Italian Cast Glass* [1982] 2 CMLR 61 and *Cimbel* [1973] CMLR D167. Regarding DGIV's preference for self-regulation, see Written Answer to WQ No 104/78 OJ [1978] C161/44.

64 For discussion of the background to this, see Van Grevenstein 'Restructuring Arrangements' at pp 56-88 and Joliet 'Cartelisation, Dirigism and Crisis', who gives a full account of the Commission's early attitude and the proposed special Regulation on Crisis Cartels which was eventually abandoned.

65 See 12th Report on Competition Policy 1982 at pts 38-41. The possibility of granting exemptions to restructuring cartels is also discussed in other Commission Reports. See 7th Report on Competition Policy 1977 at pp 9, 148 ; 8th Report on Competition Policy 1978 at p 49 ; 11th Report on Competition Policy 1981 at p 41 ; 13th Report on Competition Policy 1983 at p 53 and 14th Report on Competition Policy 1984 at pp 69-72.

66 12th Report on Competition Policy 1982 pts 39, 40. The criteria emphasise that :
a)the rationalisation must restore profitability and competition to the market by means of an *irreversible* reduction in capacity ;
b)the agreement should focus *solely* on the reduction of overcapacity and be of limited duration, and ;
c)the consumer benefit in rationalisation should focus on the promotion of a more competitive structure.
The 12th Report envisages not only sectoral agreements, but also multi-lateral agreements between two or more undertakings which may involve only part of the market. Such agreements would normally take the form of reciprocal specialisation agreements and joint ventures. DGIV's

criteria may be compared with the German approach to crisis cartels which defines them as "a cartel which has been approved by the Federal Cartel Authority, after a decline in sales brought about by a lasting change in demand, for the purpose only of bringing about the appropriate adaption of capacity to meet the revised demand" : see s.4 Act Against Restraint of Competition. For further discussion and criticism of the German law, see : Sharpe 'The Commission's Proposals on Crisis Cartels' ; Stockman 'The Role of Antitrust in the Face of Economic Recession' ; Vogelaar 'Crisis Cartels' ; Joilet 'Cartelisation, Dirigism and Crisis'. Joilet notes that DGIV's approach is based on German law and thus open to the same criticisms. These will be discussed further below. It should also be noted that, unlike Art.85, Art.58 of the ECSC Treaty 1951 provides for specific legislation relating to "manifest crisis situations". However, it also fails to define a manifest crisis. For further on this, see Vogelaar 'Crisis Cartels' at p 39 ; Joilet 'Cartelisation, Dirigism and Crisis' at pp 421-425 ; Mestmacker 'The Applicability of the ESC Cartel Prohibition (Article 65) During a Manifest Crisis' *Mich LR* [1984] 1399.

67 The criteria relating to the elimination of competition will not be dealt with here as it forms one of the conditions for exemption under Art.85(3). Thus, it is more appropriate to deal with it at that point.

68 Van Grevenstein 'Restructuring Arrangements' at p 60.

69 Eg *Shell/Azko* at p 72, *Enichem/ICI* at p 56, *Bayer/BP* at p 27, *ENI/Montedison* at p 448, *EMC/DSM* at C18/3, *BP/ICI* at p 334, *Stichting Baksteen* at p 649 and *Transocean* at D13. These cases simply state that the sector is currently facing considerable structural overcapacity. *Synthetic Fibres* at pp 789-790 and *National Sulphuric Acid* at pp 430-434, both give a more thorough analysis. The latter case is not strictly a crisis cartel but a joint buying pool organised to counteract US competition and given an individual exemption.

70 Van Grevenstein 'Restructuring Arrangements' at p 61. He suggests that phrase used in the Commission's 11th Report on Competition Policy 1981 at p 13 "an irreversible disparity between production capacity and demand" would be a suitable basis.

71 See Joilet 'Cartelisation, Dirigism and Crisis' at pp 405-411. It is also similar to Art.58 ECSC. Joilet at p 411, asserts that the approach is necessarily limited because a structural crisis of an entire sector is an exceptional situation. In this context, he notes DGIV's tendency to define a market in terms of the EC market alone. This is certainly true of a number of cases in the study. See *BP/ICI* at p 334, *National Sulphuric* at p 439 and *Synthetic Fibres* at p 790.

72 Joilet 'Cartelisation, Dirigism and Crisis' at pp 408, 411. For these reasons few cartels coming before the German Federal Cartel Authority are actually condoned. See also Stockman in 'The Role of Antitrust in the Face of Economic Recession' for discussion of the German situation.

73 Both the case study and authors alike have stressed the great importance of the structural nature of the crisis. See Vogelaar 'Crisis Cartels' at p 41 ; Joilet 'Cartelisation, Dirigism and Crisis' at pp 406-407 ; Van Grevenstein 'Restructuring Arrangements' at p 342 ; *Enichem/ICI* at p 65 ; *Bayer/BP* at p 30 ; *ENI/Montedison* at p 450 ; *Stichting Baksteen* at p 646 and *Synthetic Fibres* at p 796. These cases may be compared with the formally prosecuted cases of *Peroxygen, Cast Iron and Steel, Zinc Producers, LdPE, Benelux Flat Glass, Welded Steel* and *SSI*. The Commission seems particularly unsympathetic towards arguments relating to the need to protect the 'home market' and the defence of 'government compulsion'. However, it should be noted that in some of these cases DGIV reduced fines because of the industry crisis. Also of interest is the fact that the *Welded Steel* cartel is the only restructuring cartel in Germany to be authorised under German Law, yet in the EC context it was fined substantially by DGIV, largely because of the supporting measures taken on other national markets. This case is currently on appeal. Discussed by Stockman 'The Role of Antitrust in the Face of Economic Recession' at pp 86-87 ; Vogelaar 'Crisis Cartels' at pp 40, 44 ; Van Grevenstein 'Restructuring Arrangements' at p 60.

74 12th Report on Competition Policy 1982 at pt 39.

75 See Joilet 'Cartelisation, Dirigism and Crisis' at pp 408, 411.

76 12th Report on Competition Policy 1982 at pt 39. The arrangements should not affect the undertaking's freedom to determine output/deliveries and the information exchange must not be used to co-ordinate production/sales policies.

77 Van Grevenstein 'Restructuring Arrangements' at p 62.

78 Six of the ten cases under consideration were JV/specialisation agreements, ie : *BP/ICI*, *Enichem/ICI*. *Bayer/BP*, *ENI/Montedison*, *EMC/DSM*, *Shell/Azko*. Vogelaar 'Crisis Cartels' at p 48, has also noted DGIV's preference for bi-/multi-lateral agreements over sectoral arrangements.

79 Particularly in *Shell/Azko* where the joint ventures covered production, distribution, sales and exports. See also similar agreements in *Enichem/ICI*, *Bayer/BP* and *ENI/Montedison*. *BP/ICI* entailed a specialisation agreement covering reciprocal sale of plant, assets and goodwill and *EMC/DSM* was a joint venture co-ordinating PVC production.

80 See *National Sulphuric Acid*, *Transocean*, *Synthetic Fibres* and *Stichting Baksteen* respectively. In the latter case, production quotas were to be individually determined and a trustee body was to oversee the arrangement. In each case, political factors prevailed. In *Transocean*, the promotion of SMEs was at the fore. In *National Sulphuric Acid*, the agreement was aimed at counteracting US competition and so protecting the EC market. Finally, in *Synthetic Fibres*, a cartel also aimed at sheltering the EC market from outside competition, what was described in a *Agence Europe* report as "consideration(s) of economic and social expedience" prevailed. See *Agence Europe Report* 10/11/1978, discussed by Joilet 'Cartelisation, Dirigism and Crisis' at pp 413-415. See also, *Stichting Baksteen*, a restructuring cartel of the Dutch brick industry, where a penalty system for non-compliance with reductions in plant and production quotas was permitted.

81 Here attempts at 'orderly marketing' by way of information exchange, market sharing and price/quota fixing have met with a substantially less tolerant attitude. See *IFTRA Rules for Aluminium* OJ [1975] L228, *Zinc Producers*, *Benelux Flat Glass*, *Polypropylene*, *Welded Steel*, *Cast Iron and Steel* and *SSI*. Many other earlier examples also exist, see Vogelaar 'Crisis Cartels' at pp 43-46 for examples.

82 Here the part played by political influence is of particular concern.

83 This is particularly true of information exchange as orderly rationalisation necessitates the exchange of information on output and sales etc. The 12th Report on Competition Policy 1982 at pt 39, however, insists that information exchanges are only permissible providing they do not assist in the co-ordination of remaining capacity or sales conditions. See discussion by Van Grevenstein 'Restructuring Arrangements' at p 66.

84 Joilet 'Cartelisation, Dirigism and Crisis' at p 416. See also, Van Grevenstein 'Restructuring Arrangements' at p 62, who also argues that quotas/information exchanges etc. are essential in ensuring that restructuring is economically valid and thus successful.

85 Vogelaar 'Crisis Cartels' at p 48.

86 See Art.9(1)/Reg.17.

87 It is not proposed to discuss in detail the substantive law relating to Art.85(3) here. More thorough treatment of such issues may be found in Whish *Competition Law* at p 227 et seq ; Kerse *EC Antitrust Procedure* at para 6.27 et seq and Green *Commercial Agreements and Competition Law* at pp 290-298. See Appendix A infra for text of Art.85(3).

88 12th Report on Competition Policy 1982 at p 43.

89 Joilet 'Cartelisation, Dirigism and Crisis' at p 416.

90 Van Grevenstein 'Restructuring Arrangements' at p 63.

91 See *Enichem/ICI* at p 65, *Bayer/BP* at p 33, *ENI/Montedison* at p 454, *Stichting Baksteen* at p 653. Others were equally vague, eg *Shell/Azko* at p 72, which claimed that a healthier structural situation would result. In *BP/ICI* at p 342, increased production efficiency was claimed. In *EMC/DSM*, the justification was that, according to the parties(!), co-ordination permitted better capacity utilisation. In *National Sulphuric Acid* at pp 439-440, the buying pool enabled flexibility of distribution, security of supply and a price advantage to be gained.

92 This has been noted and criticised by several commentators : Sharpe 'The Commission's Proposals on Crisis Cartels' at p 81 ; Hornsby 'Competition Policy in the 80s' at p 92 ; Joilet 'Cartelisation, Dirigism and Crisis' at p 416 ; Van Grevenstein 'Restructuring Arrangements' at p 64.

93 12th Report on Competition Policy 1982 at p 44.

94 *BP/ICI* at p 343, *Shell/Azko* at p 72, *Stichting Baksteen* at p 654, *EMC/DSM*, *ENI/Montedison* at p 454, *Bayer/BP* at p 34, *National Sulphuric Acid* at p 440, *Enichem/ICI* at p 67, *Synthetic Fibres* at p 794, *Transocean* at D17.

95 See Sharpe 'The Commission's Proposals on Crisis Cartels' ; Joilet 'Cartelisation, Dirigism and Crisis' ; Hornsby 'Competition Policy in the 80s' ; Van Grevenstein 'Restructuring Arrangements'.

96 Joilet 'Cartelisation, Dirigism and Crisis' at p 420 ; Hornsby 'Competition Policy in the 80s' at p 92 and Van Grevenstein 'Restructuring Arrangements' at p 65, make similar comments. A.Evans in 'EC Competition Law and Consumers : The Article 85(3) Exemption' *ECLR* [1981] 425, asserts that DGIV is routinely careless of consumers' interests in its application of Art.85(3).

97 Ie the maintenance of effective competition. See comments in *Synthetic Fibres* at p 798, *Stichting Baksteen* at p 654 and *BP/ICI* at p 344. In contrast, *National Sulphuric Acid* at p 440, argued that price benefits would accrue. In general, the Commission shows a tendency to see consumer benefits in the long term, eg *Bayer/BP* at p 34, *ENI/Montedison* at p 455.

98 See eg *Synthetic Fibres* at p 797 and *Enichem/ICI* pp 61-62, 67.

99 Van Grevenstein 'Restructuring Arrangements' at p 71. In addition, Sharpe in 'The Commission's Proposals on Crisis Cartels', has questioned whether it is proper to consider social issues like unemployment under Art.85(3). The mitigation of the effects of mass redundancies was an argument advanced in *Synthetic Fibres.*

100 12th Report on Competition Policy 1982 at p 44.

101 See the earlier discussion regarding co-ordinated reductions.

102 Van Grevenstein 'Restructuring Arrangements' at p 66.

103 Eg *Enichem/ICI* at p 68, *Bayer/BP* at p 35. *BP/ICI* at p 345, *Synthetic Fibres* at p 798 and *Stichting Baksteen* at p 654. Others were even more vague. In *ENI/Montedison* at p 456, the indispensability of the agreement was justified by noting that co-ordination was in the general interests of Community petro-chemical industry. In *EMC/DSM*, no mention of indispensability was made.

104 12th Report on Competition Policy 1982 at p 44. In addition, Art.8(3)/Reg.17 requires that an exemption must be granted for a specified period. See Kerse *EC Antitrust Procedure* at para 6.35.

105 Eg *BP/ICI* and *ENI/Montedison* : 15 years ; *Bayer/BP* : 12 years ; *Natiional Sulphuric Acid* : 8 years ; *Stichting Baksteen* and *Enichem/ICI* : 5 years and *Synthetic Fibres* : 3 years.

106 Van Grevenstein 'Restructuring Arrangements' at p 69.

107 The *National Sulphuric Acid* arrangement has been operating since 1956 and was notified to the Commission in 1973. It was given an exemption in 1980 which was subsquently renewed in 1989, see *National Sulphuric Acid* [1990] 4 CMLR 612. Similarly, *Transocean* was originally exempted in 1967 and has since been renewed three times the last occasion being *Transocean* [1989] 4 CMLR 621.

108 See Joilet 'Cartelisation, Dirigism and Crisis' at p 416 ; Van Grevenstein 'Restructuring Arrangements' at pp 67-68 ; Whish *Competition Law* at p 232. Rationalisation may also result in the division of market, equally disliked by the Commission.

109 12th Report on Competition Policy 1982 at p 44.

110 *ENI/Montedison* at p 457, *Enichem/ICI* at p 69, *Bayer/BP* at p 36, *EMC/DSM*, *Stichting Baksteen* at p 653, *BP/ICI* at p 346, *Synthetic Fibres* at p 798.

111 Eg *Shell/Azko*, *ENI/Montedison*, *EMC/DSM*, *Stichting Baksteen*. In *Enichem/ICI* and *Bayer/BP*, DGIV attempted to deal more thoroughly with analysing whether competition was not eliminated. See discussion in Whish *Competition Law* at p 232.

112 See Neale and Goyder *The Antitrust Laws of the USA* (3rd Edn) Cambridge Unv. Press (1980) at p 483, who argue that such issues form an inappropriate basis for the making of legal decisions under Art.85(3).

113 See *BP/ICI* at p 432, *ENI/Montedison* at p 454, *Enichem/ICI* at p 65. Whilst the first case goes into the greatest depth, all cases simply state that the benefits of rationalisation outweighed restrictions of competition.

114 Art.4/Reg.17.

115 Most prominently, *Zinc Producers* and *LdPE*. Cases like *SSI* involved both notified and non-notified agreements.

116 Whish *Competition Law* at p 228, notes this as a general problem of the application of Art.85(3) by DGIV.

117 Discussed by Whish *Competition Law* at p 235.

118 The constraints placed on defendants and the advantages accruing to DGIV during informal settlements have already been discussed in depth, see 'Defence Rights/Informal Resolutions' supra.

119 Art.8(3)/Reg.17.

120 See *BP/ICI* at p 345-347, *ENI/Montedison* at p 458, *Enichem/ICI* at pp 70-71, *Bayer/BP* at p 37, *National Sulphuric Acid* at p 443, *Transocean* at D23. Parties were also required to inform DGIV of any changes in their agreement.

121 *Synthetic Fibres* at p 799 and *Stichting Baksteen* at p 656.

122 *Consten and Grundig* [1966] ECR 299 ; *Metro I* [1977] ECR 1875.

123 Whish *Competition Law* at pp 235-236.

124 *Transocean* [1974] ECR 1063 at p 1063. Here the Commission had attempted to impose new conditions on renewal. Discussed further by Schwarze 'The Administrative Law of the Community and the Protection of Human Rights' *CMLR* [1986] 401 at p 411. In addition, an appeal in the *Synthetic Fibres* case, not from defendants but from third party complainants, was dropped before it reached Court.

125 Joilet 'Cartelisation, Dirigism and Crisis' at p 405.

126 See *National Sulphuric Acid, Transocean* and *Synthetic Fibres*. In each case, political factors prevailed. In *Transocean*, the promotion of SMEs was at the fore. In *National Sulphuric Acid*, the agreement was aimed at counteracting US competition and so protecting the EC market. Finally, in *Synthetic Fibres*, a cartel also aimed at sheltering the EC market from outside competition, what was described in a *Agence Europe* report as "consideration(s) of economic and social expedience" prevailed. See *Agence Europe Report* 10/11/1978, discussed by Joilet 'Cartelisation, Dirigism and Crisis' at pp 413-415.

127 See WQ No 2006/82 OJ [1983] C118/21.

128 For background information on this section, see: Sanders and Young *Criminal Justice* Butterworths (1994) Ch5 ; McConville and J.Baldwin *Negotiated Justice* Martin Robertson (1977) ; McConville and J.Baldwin *Courts, Prosecution and Conviction* Clarendon Press (1981) Ch6 ; McConville, Sanders and Leng *The Case for the Prosecution* Routledge (1991) Chs 7, 8, 9 ; Ashworth *The Criminal Process : An Evaluative Study* Clarendon Press (1994) Ch6 ; Mansfield and Peay *The Director of Public Prosecutions : Principles and Practices for the Crown Prosecutor* Tavistock (1987) ; Moody and Toombs *Prosecution in the Public Interest* Scottish Academic Press (1982) ; O'Connor 'Prosecution Disclosure : Principle, Practice and Justice' in WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) p 101 ; J.Baldwin *Pre-Trial Criminal Justice* Blackwell (1985).

129 Established and controlled primarily the the Prosecution of Offences Act 1985 (POOA). For further discussion of the Crown Prosecution Service, see eg Ashworth *The Criminal Process* Ch6 ; Bennion 'The Crown Prosecution Service' *Crim LR* [1986] 3 ; Sanders 'An Independent Crown Prosecution Service' *Crim LR* [1986] 16.

130 See Sanders and Young *Criminal Justice* at p 218 ; McConville, Sanders and Leng *The Case for the Prosecution* at p 126. The presumption against prosecution is contained in the Code for Crown Prosecutors issued under s.10 POOA 1985 (hereafter referred to as the Code). This tendency towards prosecution may be compared with the attitude of other regulatory agencies who prefer to exercise their prosecutorial discretion in favour of not prosecuting. See Sanders and Young *Criminal Justice* at pp 240-246 ; Hawkins '"Fatcats" and Prosecution in a Regulatory Agency : A Footnote on the Social Construction of Risk' *Law and Policy* [1989] 370 ; Hawkins and Hutter 'The Response of Business in England and Wales : An Enforcement Perspective' *Law and Policy* [1993] 199 ; McBarnet and Whelan 'The Elusive Spirit of the Law : Formalism and the Struggle for Legal Control' *MLR* [1991] 848.

131 See s.4 of the Code. This test requires a balancing of evidential sufficiency and public interest issues. Discussed further by Samuel 'Prosecution in the Public Interest' *JP* [1987] 361 ; Samuel 'The Responsibility of the Prosecutor for the Police' *JP* [1988] 91 and Ashworth 'The Public Interest Element in Prosecution' *Crim LR* [1987] 595.

132 For instance, Ashworth 'The Public Interest Element in Prosecution' ; Elliman 'Inadequate Guidance in the Code' *NLJ* [1990] 14 ; Sanders 'Some Dangers in Policy Orientated Research : The Case for the Prosecution' in DENNIS (Ed) *Criminal Law and Justice - Essays from the W.G. Hart Workshop* Sweet and Maxwell(1987) ; McConville, Sanders and Leng *The Case for the Prosecution* at pp 136-137.

133 See Sanders and Young *Criminal Justice* at p 220, who note that the focus is not on the likelihood of guilt, but on conviction. Also discussed by McConville, Sanders and Leng *The Case for the Prosecution* at p 126. As police dominate and control the process and the CPS are repeatedly subordinated to police views, this case construction is geared to police objectives and their view of guilt. On this, see particularly, McConville, Sanders and Leng *The Case for the Prosecution* at pp 133, 141-143.

134 For further discussion of case construction, see McConville, Sanders and Leng *The Case for the Prosecution* at pp 11-13 ; Sanders and Young *Criminal Justice* at p 222.

135 Discussed in particular by Sanders and Young *Criminal Justice* at pp 223-226. Roberts and Willmore in *The Role of Forensic Science Evidence in Criminal Proceedings* (Royal Commission on Criminal Justice Research Study No.11) HMSO (1993), note how hard scientific facts may be manipulated in the prosecution's favour. The fabrication of evidence has been a feature of a number of miscarriage cases, eg the Guildford Four case. This aspect is discussed by Rozenberg 'Miscarriages of Justice' in STOCKDALE and CASALE (Eds) *Criminal Justice Under Stress* Blackstone Press (1992) p 91.

136 McConville, Sanders and Leng *The Case for the Prosecution* at pp 126, 133-136. Construction occurs both in terms of what is included and excluded from the summary. Moreover, the scope for construction is enhanced where proof depends on a qualitative evaluation of a particular element of an offence.

137 McConville, Sanders and Leng *The Case for the Prosecution* at p 134. McConville and J.Baldwin in *Courts, Prosecution and Conviction* at p 107, note the same finding. In that study, 40% of cases relied entirely on police evidence.

138 Sanders and Young *Criminal Justice* at p 224 ; Sanders 'Constructing the Case for the Prosecution'.

139 McConville, Sanders and Leng *The Case for the Prosecution* at p 167.

140 [1982] All ER 734 paras 2, 9. Hereafter referred to as the *Guidelines*.

141 Sanders and Young *Criminal Justice* at pp 224-226.

142 Neither Parliament nor the courts have ever considered whether the *Guidelines* promote defence rights. The conflict with caselaw is discussed more fully by O'Connor 'Prosecution Disclosure' at pp 107-109.

143 Eg *Lawson* (1989) 90 Cr App R 107 and *Ward* [1993] I WLR 619 where strict rules on disclosure were laid down.

144 See eg *Johnson* *Crim LR* [1993] 689 - a move supported by the Runciman Commission. Discussed by Ericson 'The Royal Commission on Criminal Justice System Surveillance' MCCONVILLE and BRIDGES (Eds) *Criminal Justice in Crisis* Edward Elgar (1994) p 113 at pp 121-124 ; Sanders and Young *Criminal Justice* at p 226.

145 Under paras 6 and 7C of the *Guidelines*, information relating to national security and the identity of an informant or information which may lead to the intimidation of a witness may be withheld.

146 O'Connor 'Prosecution Disclosure' at pp 110-111, cites evidence showing that prosecutors are able and willing to do this. He gives examples of extensive disclosure at subsequent civil trials relating to the same matter and information not disclosed during criminal proceedings.

147 Paras 2, 3 of the *Guidelines*.

148 Often disclosure may not occur until the first day of the trial. Lack of resources and low priority are often blamed. For further discussion of the problems, see J.Baldwin 'Problems of Advance Disclosure' *JP* [1988] 259 ; O'Connor 'Prosecution Disclosure' at p 109. Indeed, at summary trial, there is no right to disclosure. Here disclosure is only required for offences which are triable either way, see Magistrates' Courts (Advance Information) Rules (S1 1985 No.601). However, disclosure may be available in summary only trials where courts have adopted pre-trial review procedures. For further discussion, see Mulcahy, Brownlee and Walker *Pre-Trial Reviews in the Magistrates' Courts* (33 Home Office Research Bulletin 10) HMSO (1993).

149 This problem is dealt with in greater depth by O'Connor 'Prosecution Disclosure' at pp 101-102 ; Ericson 'The Royal Commission on Criminal Justice System Surveillance'.

150 Eg Confait, Ward, Kisko and Bridgewater Four cases where failure to disclose led to wrongful convictions.

151 McConville and J.Baldwin *Courts, Prosecution and Conviction* at pp 204-207 ; Bottoms and McClean *Defendants in the Criminal Process* Routledge and Kegan Paul (1976) at pp 123, 134 ; Moody and Toombs *Prosecution in the Public Interest* ; J.Baldwin *Pre-Trial Criminal Justice* ; McConville and J.Baldwin *Negotiated Justice* ; McConville and Mirsky 'Redefining and Structuring Guilt in Systematic Terms : The Royal Commission Recommendations Regarding Guilty Pleas' in MCCONVILLE and BRIDGES (Eds) *Criminal Justice in Crisis* Edward Elgar (1994) p 264.

152 See ss.7, 11 of the Code. It has also been endorsed by the Runciman Commission. For discussion and criticism of this, see McConville and Mirsky 'Redefining and Structuring Guilt in Systematic Terms' at p 264 et seq. Typically, plea-bargaining involves pre-trial negotiations over the number and level of charges in return for a guilty plea or simply a guilty plea in return for a reduced sentence.

153 Neither the Code nor caselaw provide much guidance. The main cases are: *Turner* (1970) 54 Cr App R 352 ; *Cain* *Crim LR* [1976] 464 ; *Inns* (1975) 69 Cr App R 231, and more recently, *Pitman* (1990) *The Times* 30/10/90 and *Smith* (1990) 90 Cr App R 413. Whilst all cases discourage negotiations over plea and sentence between judge and counsel, little other guidance is given. For further discussion, see Ashworth *The Criminal Process* at pp 266-68 ; McConville and J.Baldwin *Courts, Prosecution and Conviction* at pp 204-207.

154 McConville and Mirsky 'Redefining and Structuring Guilt in Systematic Terms' at pp 266-267, argue that this system destroys the importance of the prosecutor's legal burden of proof and instead focuses on cost-efficient reasons for not contesting legal guilt. Literature on this subject is extensive, see eg McConville and J.Baldwin *Negotiated Justice* ; J.Baldwin *Pre-Trial Criminal Justice* ; McConville, Sanders and Leng *The Case for the Prosecution* ; McConville and Bridges 'Convicting the Innocent' *NLJ* [1993] 160. Particular concern is expressed about the influences of the judge/prosecutor's personality on the willingness to bargain and the outcome of negotiation and the tendency of prosecutors to use a multiplicity of charges to induce a bargain.

155 Indeed, research regularly reports that the entire system is geared against the defendant and towards informal resolution with defence lawyers regularly agreeing unnecessarily to bargains and then 'persuading' their clients to accept the deal. Moreover, many complain that these bargains occur very late in the process. It is not uncommon for deals to be struck quite literally outside the court doors. See discussion by McConville, Sanders and Leng *The Case for the Prosecution* at pp 168-169 ; J.Baldwin *Pre-Trial Criminal Justice* at pp 32, 48, 87 ; Moody and Toombs *Prosecution in the Public Interest* at pp 305-306.

156 McConville, Sanders and Leng *The Case for the Prosecution* at pp 165-167 ; Ashworth *The Criminal Process* at pp 268-269.

157 Zander and Henderson *Crown Court Study* (Royal Commission on Criminal Justice Research Study No.19) HMSO (1993) at pp 138-142, found 11% of guilty pleas claimed innocent. In Bottoms and McClean's study, *Defendants in the Criminal Process* at p 126, the figure was 18% - cf McConville and Bridges 'Convicting the Innocent' and McConville and J.Baldwin *Negotiated Justice*. Moreover, the numbers at summary trial, where over 90% of defendants plead guilty, may be even greater On this, see Sanders and Young *Criminal Justice* Ch6 and also the discussion in McConville, Sanders and Leng *The Case for the Prosecution* at pp 142-146, 151-156 and also p 166, where they argue that "Bluff and tactics - rather than Truth, Justice, Guilt or Innocence - are what 'good' prosecution is all about".

158 In both jurisdictions, this outcome would be conviction, though in the context of individual exemption it would mean the negotiation and modification of agreements.

159 See WQ No 2006/82 OJ [1983] C118/21.

160 For further on this, see Sanders and Young *Criminal Justice* at pp 220, 225.

161 Eg the Confait, Kisko and Ward cases. These cases are discussed in O'Connor 'Prosecution Disclosure' at pp 117-119.

162 Nevertheless, the Runciman Commission accepted that miscarriages because of plea-bargaining were within socially acceptable limits given the advantage of cost-effect prosecution that they provided. See discussion in McConville and Mirsky 'Redefining and Structuring Guilt in Systematic Terms' at p 270 et seq.

163 See comments on this by Sanders and Young *Criminal Justice* at pp 222-223 ; McConville, Sanders and Leng *The Case for the Prosecution* at pp 11-13.

164 Sanders and Young *Criminal Justice* at p 226.

165 The use of the substantive law as a crime control method is discussed in detail by Sanders and Young *Criminal Justice* at p 379 et seq.

CHAPTER SIX

THE CRIMINAL/CRIMINOLOGICAL EVALUATION OF HORIZONTAL CARTELS - TRIAL AND SENTENCE

"It is a matter of regret that many low, mean suspicions turn out to be well founded." [1]

A)INTRODUCTION

The Commission's enforcement process culminates in the taking of a final decision and the imposition of sanctions. Here, DGIV acts as judge rather than prosecutor or investigator. Thus, this chapter intends to consider how the Commission exercises these powers and examine whether the criminal classification of the violation and DGIV's ability to construct cases at the prosecution stage have any impact on the final decision and the type and level of sanction imposed. Consideration will also be given to whether the mismatch between DGIV's extensive enforcement powers and limited defence rights is as evident at trial stage as at previous stages. First, the conduct of the hearing and then the Commission's imposition of sanctions will be discussed. Finally, the scope of defence rights will be evaluated.

B)PROCESS AND SUBSTANCE - TRIAL AND SENTENCE - COMMISSION POWERS [2]

1)The Oral Hearing

Following the Defence Reply to the SO, defendants are entitled to request an oral hearing [3]. The procedure is inquisitorial. Hearings rarely last for more than one day and are held *in camera* [4]. DGIV has no powers at the hearing to order attendance or take evidence on oath and cannot impose fines for perjury [5]. Parties appearing at oral

hearings may be legally represented [6]. Whilst defendants may be called into the hearing separately, the Commission normally hears parties together, allowing some opportunity to challenge points raised by other parties and to test evidence by expert opinion and corroboration [7]. Officially, oral hearings are viewed merely as supplementary proceedings intended to clarify issues. They are not seen as the culmination of the enforcement process and thus should not be equated with a trial in a domestic court [8]. What is more important to note at this point is that DGIV regards itself very much as the master of the process, and certainly its powers leave it very much in control of the hearing [9].

After the hearing, the Commission drafts its final decision. Before formally adopting the decision, the draft and the most important documentary evidence are submitted to the Advisory Committee for its opinion [10]. After this, DGIV may formally adopt its decision and impose fines.

2)Sanctions

Sanctions fall into two main categories ; decisions and fines. Each will be discussed in turn, examining DGIV's classification and use of its sanctioning powers in relation to horizontal cartels. It will be seen that DGIV's penal powers provide it with considerable discretion over the type and level of sanction imposed [11].

3)Decisions

a)Types of Decision

Art.3 gives the Commission the power to order the termination of an infringement [12]. In practice, this power enables DGIV to take a wide range of decisions. But, Reg.17 provides no guidance on which type of order is most appropriate in a given case : the matter is entirely discretionary. Cease and desist orders may be positive or negative in character and are most often used where the parties deny the violation and it is unclear

whether the cartel has ended [13]. In the past, DGIV has taken the opportunity to order a wide variety of measures under Art.3 [14]. In addition, the Commission may issue a 'like effect' order restraining parties from undertaking similar practices in the future. Where a practice has already been terminated, DGIV may simply issue a declaratory decision [15].

In the case study, the Commission made consistent use of its Art.3 powers imposing a combination of cease and desist/like effect orders in 16 of the 22 formally prosecuted cases [16]. In *Dutch Cigarettes* and *ANSEAU*, DGIV took the opportunity to impose additional conditions [17].

Art.3 provides the Commission with extensive freedom of choice in its decision-making. It is evident from the study that DGIV consistently chooses to use this discretion to secure long-term control over firms involved in horizontal cartels. This ability to control the future behaviour of undertakings is clearly penal in both character and scope. The impact of the violation's criminal characterisation and DGIV's case construction on the finding of an offence and the type of order subsequently imposed is difficult to establish. But, it seems likely that its effect would be to increase the likelihood of conviction and the gravity of the offence with a concomitant effect on the type of order imposed [18].

4)Fines

Art.15 provides DGIV with the power to impose substantial fines for intentional or negligent infringements of Art.15 [19]. Whilst Art.15(4) insists that fines are not "of a criminal law nature", many have noted the penal quality of the Commission's fining power [20]. Thus, the ensuing sections intend to examine DGIV's classification and use of its fining power noting the factors influencing the Commission's assessment of fines. Specifically, the impact of case construction on the level of fines will be evaluated.

a)Guidance on Fining

Beyond requiring the Commission to take account of the gravity and duration of the infringement, Reg.17 provides no guidance on the assessment of fines. However, a considerable body of caselaw has developed on the issue[21]. The leading case, *MDF*, indicated a wide range of factors which should be taken into account when assessing fines[22]. Unfortunately, the Court provided little guidance on the precise weight to be attributed to each factor. Indeed, they acknowledged the individual nature of the assessment and that the relative weight of each factor would vary from case to case[23]. Whilst such an approach may be fair to the undertaking involved, the broader concern is that it undermines the legal certainty of the sanctioning assessment. Consequently, the guidance controlling DGIV's fining powers allows it extensive freedom in the choice and weight of factors it should take into account in the evaluation of fines, and thus in the amount of fine imposed.

b)Factors influencing Fining

i)Intention/Negligence[24]

Art.15 requires that violations must have been committed "intentionally or negligently". Intention seems to involve a readiness to carry out the practice despite an awareness of its anti-competitive nature, whilst negligence may be inferred where a party ought to have known of the restrictive nature of the behaviour [25]. Clearly, intentional behaviour will be regarded as more serious and attract a larger fine[26]. In practice, DGIV does not always clearly distinguish whether an offence is intentional or negligent. Instead, it adopts a 'play safe' formula, finding that the violation has been committed "intentionally or negligently"[27]. In the study, this formula was employed on four occasions[28]. But, in most cases, DGIV clearly stated the intentional nature of the infringement [29]. Whichever formula the Commission chooses, it invariably has the support of the Court. Only in two cases in the study did the Court alter the formula[30]. Whilst some degree of culpability is required for the imposition of a fine, explicit

evidence of intention can be difficult to obtain. These evidential problems have been circumvented by both the Commission and the Court taking a robust approach and imputing intention from the circumstances surrounding the case [31]. On 17 occasions in the study, DGIV held that it was sufficient that the parties could not have been unaware of the anti-competitive nature of their behaviour to support both findings of 'intent' and 'negligence' [32]. This approach has been upheld by the Court on several occasions [33]. DGIV has employed a range of evidence to establish anti-competitive awareness. Evidence of covert behaviour or the institutionalised nature of the infringement is particularly damming [34]. The existence of an alarm or penalty system has also been used as evidence that the undertakings were given legal advice indicating the anti-competitive nature of their behaviour [35].

Clearly, the study indicates that a general awareness of the restrictive nature of the behaviour will be sufficient to attract liability. But, this finding may be based on DGIV's criminal classification of the offence rather than substantive evidence. Having decided at the prosecution stage that such violations necessarily have an anti-competitive object, it is easy at sentencing to arrive at a conclusion that there was anti-competitive awareness with little additional evidence being required to support a finding of intention/negligence.

ii)Gravity

Art.15 requires that the gravity of the offence be taken into account. Harding notes that factors indicating the gravity of the offence fall into two broad categories ; the behaviour of the parties and the anti-competitive impact of the infringement [36]. Thus, it is intended here to examine how these two factors have affected the assessment of the gravity of the offences in the case study. Particular attention will be paid to how DGIV's case construction affects this evaluation.

As far as the behaviour of the parties is concerned, this factor may be subdivided into a number of elements all of which are regarded as aggravating features increasing the gravity of the offence. Generally, these factors all serve to demonstrate a determined willingness to evade antitrust rules and include the knowledge, conduct and role of each party, the systematic nature of the offence and repeat offending [37].

In the study, these factors were regularly alluded to, but invariably, they were simply noted with little discussion of the precise effect on the assessment of the fines [38]. This makes evaluation of DGIV's assessment problematic. However, there were several recurring features. These will be discussed below.

The firm's knowledge that the behaviour was anti-competitive seems to significantly increase the gravity of the offence. As discussed above, in many cases in the study, DGIV referred explicitly to the deliberate nature of the offence and the parties awareness of wrongdoing [39]. Recidivism also seems to be a particularly exacerbating feature [40]. The Commission insists that recidivism is not punishable per se but merely serves to reinforce a finding of anti-competitive awareness [41]. However, it is of concern that the deliberate and recidivist nature of offences substantially increases the perception of gravity as, particularly in the cases of 'intention', the study has already demonstrated that this is a finding based on a pragmatic approach to evidential requirements rather than explicit evidence.

The extent of participation, both in terms of the role played and the duration of a firm's involvement, are regular features of the Commission's assessment [42]. Unfortunately, DGIV is also routinely vague in its discussion of this issue, often simply listing the factors involved [43]. However, on several occasions ringleaders were singled out for heavier fines [44]. There is also evidence that DGIV's case construction affects the assessment of the extent of involvement, and therefore, the gravity of the offence. In several cases, DGIV linked the concept of collective responsibility to its discussion of the role and extent of participation and employed it to make the parties fully liable for all aspects of the infringement, including those in which they did not directly participate. This served to increase the extent of their participation, and thus, the seriousness of the violation [45]. *PVC* is particularly concerning. Here, DGIV admitted that an absence of information made an assessment of the extent of each party's participation impossible. Nevertheless, the notion of collective responsibility enabled DGIV to establish involvement, both in terms of the liability and gravity of the offence, in the absence of substantive evidence [46]. As acknowledged earlier, DGIV may have little option but to rely on circumstantial proof. But, the possibility of alternative

interpretations of this evidence requires that DGIV's construction be supported by thorough market analysis which does not generally occur.

A further aggravating feature is a firm's refusal to co-operate with DGIV, both in terms of submission to investigation and spontaneous termination of the infringement [47]. In eight study cases, the Commission treated this as exacerbating [48].

The covert and/or institutionalised nature of the offence is particularly aggravating [49]. Ten cases were criticised by DGIV on this ground [50]. *LdPE* is typical. Here, DGIV found that the undertakings had "deliberately set up and operated a secret and institutionalised system" [51]. Elsewhere, alarm or penalty systems have indicated the covert or systematic nature of the violation [52]. Again, the Commission's case construction appears to impact upon its evaluation of gravity. In eight cases, the deliberate, institutionalised character of the offence was connected to the complex nature of the infringement [53]. By linking discussion of this feature with the concept of complex infringement, DGIV's case construction inevitably augments the perception of both the calculated and the institutionalised nature of the offence. The criminal character of the infringement is further reinforced by the concept of collective responsibility. Here the sheer weight of the number of firms involved increases the severity of the violation [54].

Several firms have appealed against DGIV's evaluation of their behaviour. In *Polypropylene*, Hercules complained of the Commission's use of the concept of collective responsibility and the resulting lack of individualisation in assessing its role, and therefore the amount of fine imposed. The CFI upheld DGIV's approach [55]. Elsewhere, the Court have affirmed the Commission's assessment, reaffirming DGIV's discretion in the choice and weight of factors it takes into account [56].

The harm caused by the anti-competitive practice is a further important element in evaluating gravity [57]. Here, gravity is assessed by setting the violation in its legal and economic context, thereby allowing the totality of the harm to be assessed [58]. Relevant factors include ; the nature of the infringement, the importance of the product and the legislative and economic context of the violation [59]. Again in the study, DGIV tended to note that these were relevant components, but provided little

additional information on their role in the evaluation [60]. However, it is clear that the nature of the infringement has a significant impact on DGIV's assessment of gravity. In particular, violations whose object is to harm competition are regularly condemned [61]. In 20 cases, DGIV made its antipathy towards price-fixing/market sharing cartels clear, describing them as "among the most serious infringements prosecuted, prohibited and penalised by the Commission" [62]. DGIV must also consider whether the violation had a significant effect on the market. Examination of market context involves a range of factors. The importance of the product, the market status of those involved and the impact of the restriction on the market all affect the gravity of the offence. The fact that the violation concerns a major industrial product and involves the entire market or, at very least, the major producers clearly influences DGIV's assessment of gravity in most cases. In *PVC*, the Commission found that, not only was PVC a major industrial product, but that the cartel involved most producers on the market [63]. The impact of the violation on the market also affects DGIV's evaluation. The Commission has been particularly concerned where consumers have suffered anti-competitive harm as a result of price increases caused by the violation [64].

The validity of DGIV's evaluation of market impact on the gravity of the offence is of serious concern. It is vital to appreciate the impact of DGIV's choices here. Assessing the precise economic effect of an infringement is always problematic. Here, this is necessarily exacerbated by DGIV's limited economic evaluation under the 'object' format of analysis. Moreover, the Commission's clear antipathy towards this type of infringement permits the anti-competitive object to be substituted for anti-competitive impact. Thus, just as at prosecution a finding of an anti-competitive object obviates the need to assess anti-competitive effect, so at sanctioning, the finding of an anti-competitive object is substituted for proof of anti-competitive impact without further consideration. In addition, the interdependence of the factors involved in assessing gravity means that the seriousness of the anti-competitive impact will have been affected by the Commission's evaluation of the parties' behaviour. Yet, it has already been demonstrated that this assessment is based on DGIV's criminal

classification of horizontal offences and its construction of cases. Nevertheless, the Commission appears unconcerned. In *FWA*, DGIV admitted that it had insufficient evidence to assess the exact economic consequences of the behaviour, but despite this, it could be concluded that the undertakings involved had profited from their anti-competitive behaviour [65]. Here, the gravity is clearly based not on a qualitative evaluation of market effects, but simply on the anti-competitive object of the agreement [66]. In other words, DGIV's perception of criminality is allowed to govern the gravity of the offence.

The legislative and economic context of the violation is also significant in evaluating the gravity of the violation [67]. As regards the economic context, there were several cases in the study where a serious crisis in the industry was taken into account as mitigating [68]. The fact that the market structure has been affected by Community or domestic legislation has also been considered [69]. But, the legislative context does not always mitigate an offence. DGIV's sympathetic approach in these cases may be contrasted with its rejection of the defendant's arguments relating to the Community's directives on public procurement in *Dutch Builders* [70]. Finally, "a deliberate effort to thwart one of the main aims of the Treaty, namely the creation of a single market" significantly increased the gravity of the offence in 12 cases in the study [71]. These cases demonstrate that the Commission's political objectives directly influence its evaluation of gravity.

Overall, the study indicates that gravity is as much a matter of DGIV's perception of the criminality of the offence as a qualitative assessment of the legal and economic context of the violation. DGIV's criminal characterisation of horizontal offences both directly, and indirectly through case construction, influences its evaluation of the behaviour of the parties and the deliberate nature and anti-competitive effect of the infringement.

iii)Duration

Not only must DGIV take account of the gravity of the offence, it must also assess its duration. However, the interdependence of these two factors can make evaluation problematic [72]. Kerse notes that, in practice, the longer the duration of the

infringement, the greater the fine imposed [73]. To an extent, this is reflected in the case study. In *Soda Ash*, a 17 year offence received an 18m ECU fine. But, a number of inconsistencies exist [74]. *Soda Ash* and *Peroxygen* involved similar offences over a similar period of time yet the fine in *Soda Ash* is twice that in *Peroxygen* [75]. Similarly in *Dutch Builders*, a 12 year offence was fined 22.5m ECU, whilst in *Cement*, a 11 year violation, a record 248m ECU fine was imposed [76]. The cases of *Benelux* and *Italian Flat Glass* may also be contrasted. Both involved similar offences, of similar duration covering a national market, but the fines differed substantially. In the former case, a fine of 4m ECU was imposed, whilst in the Italian case, a 13.4m ECU fine was levied [77]. Nor does it follow that a very short duration will attract a much smaller fine. In *Dutch Cigarettes*, a violation lasting only three-five months was fined almost 1.5m ECU. This can be contrasted with *Belgian Roofing Felt*, where a six year offence received a 1m ECU fine [78]. Reasons for these differences are difficult to discern, not least because of the frequent brevity of DGIV's fining assessment.

DGIV's case construction also appears to have an effect on its assessment of the duration of the offence. In seven cases, the notion of a complex infringement was used to circumvent the limitation period for imposing fines, thus increasing the overall duration of the offence and the ultimate amount of fine imposed [79]. Like gravity, the Commission's evaluation of the duration of the offence seems to be influenced by the criminality of the violation through DGIV's case construction. The interdependence of the duration and gravity of the infringement means that any extension of the length of the violation also increases its seriousness. This has a significant impact on the amount of fine levied. Yet, the Commission's failure to articulate the precise relevancy of the duration of offences makes its full impact impossible to assess.

iv)Mitigation [80]

As already noted, an economic crisis in the industry or the influence of Community/domestic legislation may act as a mitigating factor [81]. On these occasions, DGIV has made it clear that, whilst such factors may reduce culpability, they will not exonerate parties completely [82]. DGIV's approach here is not entirely consistent. In *Belgian Roofing Felt*, the Commission chose not to impose fines on unwilling non-

member participants. Inconsistency also exists in DGIV's attitude towards first offenders. In *GCB*, *Woodpulp* and *Dutch Builders*, fines were reduced on the basis that it was the first instance of a Commission fine in that particular sector [83]. These cases may be contrasted with the substantial fine levied against *FWA*, where DGIV held that as the firms involved were fully aware of their antitrust obligations, they were not entitled to any reduction in fine [84]. The fact that firms have already been fined for related offences may mitigate the fine imposed [85]. The Commission's approach to economic effects is equally variable. In *Polypropylene*, the fact that price initiatives did not fully achieve their objective was not considered to mitigate the offence [86]. This may be contrasted with *Zinc Producers*, where the fact that the infringement did not completely eliminate competition mitigated the fine [87].

Co-operation with the investigation, voluntary termination of the practice and the institution of a compliance programme may also reduce the amount of the fine [88]. In several cases, the firm's co-operative attitude was noted [89]. This co-operation has resulted in significant reductions in sanctions in bargained cases, particularly where firms also gave undertakings as to future behaviour [90]. But, co-operation is not always rewarded as the firms in *Benelux Flat Glass* discovered [91].

The Court's attitude to DGIV's assessment of mitigating factors is exemplified in *Polypropylene*. Here, Hercules challenged DGIV, arguing that it had failed to take into account the crisis in the industry or the firm's constructive attitude [92]. The CFI ruled that the Commission was not obliged to take co-operation into account in precisely the same way in every case, nor was it required to articulate exactly how mitigating factors had been weighed [93].

Overall, this evaluation demonstrates that the choice and weight of mitigating factors is very much at DGIV's discretion. This has led to several examples of disparate treatment in similar cases.

c)Fining Policy

This section will examine the actual level of fines imposed, considering the classification and the consistency of the Commission's application of its fining powers.

i)Deterrence

The deterrent effect of sanctions is an important aspect of the Commission's fining policy. In its 13th Report, DGIV noted the inadequacy of current levels of fines and its intention to reinforce their deterrent effect by increasing the overall level of sanctions for serious offences [94]. This sterner attitude received the support of the Court in *MDF* [95].

ii)Tariff

Art.15(2) does not provide a tariff of fines. Instead it merely states an upper and lower limit for fines [96]. In assessing the upper limit of fines, Art.15(2) is ambiguous as to whether global or EC turnover only should be taken into account. In *MDF*, the ECJ confirmed that the assessment involved a balancing of relevant factors in which global turnover may be considered [97]. Gyselen notes that this approach means that single product firms will be penalised more heavily because their global turnover will coincide with their relevant turnover [98]. An example of this balancing act occurred in *Soda Ash*, where each party's respective turnover in soda ash sales was balanced against their total turnover in all products [99]. Reynolds notes that, in practice, DGIV uses the EC turnover as a starting point and then other aggravating and mitigating factors are applied [100]. In many cases in the study, DGIV did not explicitly refer to turnover. Where it did, it was in relation to EC turnover, or turnover on the national market affected [101]. However, DGIV does not always follow this approach. In *Benelux Flat Glass*, the total turnover in that sector of the two recidivists BSN and St Gobain was taken into account. The other firms involved had only their turnover on the Benelux markets assessed [102]. Where associations' of undertakings are involved DGIV takes into account the total turnover of all members [103].

In assessing fines the Commission also takes into account any profits gained from the offence [104]. DGIV adopted this approach in both *GCB* and *FWA* [105].

iii)Fines in the Case Study

Prior to 1969, the Commission did not exercise its fining powers. Since then, the frequency and amount of fines has increased substantially. Examination shows that the level of fines has indeed increased throughout the duration of the case study [106]. In the early 1980s, the general level of fines was approximately 1m ECU. Ten years later, fines of tens of millions of ECUs are commonplace [107]. This trend does not just apply to major EC-wide cartels, but also to those covering a single domestic market [108]. The major petrochemical cartels have attracted even greater fines [109]. This trend has recently culminated in a 248m ECU fine in *Cement*. With fines of this magnitude, the penality of the Commission's sanctioning is beyond argument.

Overall, 20 of the formally prosecuted cases in the study had fines imposed upon them [110]. But, inconsistencies exist. In 1991, *Belgian Roofing Felt* was fined 1m ECU for its infringement, whilst two years later, *Dutch Builders* had a 22.5m ECU fine imposed [111]. Plea-bargaining also has a dramatic effect on the level of sanction imposed. For instance, *Woodpulp's* plea-bargain incurred only a 4.125m ECU fine, whilst *Polypropylene* received a 57.85m ECU fine [112]. Not all plea-bargains are treated so leniently. *FWA* received a 15.3m ECU sanction for a five year offence, despite giving undertakings as to future behaviour [113]. In addition, other discrepancies in DGIV's fining policy regarding the relationship between the duration of offences and level of sanction and the mitigation of first offences has already been discussed [114].

The Commission's case construction also appears to have had a significant impact on the level of fines in the study. Certainly, cases where DGIV employed the concepts of complex infringement and collective responsibility received some of the largest fines imposed [115]. Unfortunately, the lack of transparency in DGIV's assessment makes it impossible to state with certainty that these increases are the result of case construction alone. All that can be said is that they are consistent with the Commission's use of the 'law as a resource'.

Overall, this assessment of the fines imposed reveals that sanctions have increased in severity over the period of the study. But, DGIV's attitude is inconsistent,

fining similar cases widely differing amounts. What is not in any doubt is the penal nature of the Commission's fining policy.

5)Conclusion - Commission Powers

DGIV's enforcement powers at trial and sentence are based on extremely broad guidance, providing the Commission with formidable choice regarding the type of decision and level of fine it imposes. Moreover, DGIV has enormous discretion over the precise selection and weight of factors influencing these sanctioning powers. Its choices ensure that both the scope of the decision and the level of fines imposed have a long-term impact upon undertakings. Whatever Reg.17 says, the study demonstrates that DGIV's interpretation and use of its sanctioning powers is penal in both character and scope.

The effect of the Commission's criminal classification of horizontal offences and its incremental use of the 'law as a resource' have a crucial impact. At every point, they influence the evaluation of the intention, gravity and duration of a violation. DGIV's penal characterisation of horizontal offences as necessarily possessing an anti-competitive object makes it easy for the Commission to establish anti-competitive awareness, and therefore, sufficient intention/negligence to warrant the imposition of a fine. This approach has been assisted by both DGIV's and the Court's pragmatic approach to evidential requirements. This finding of deliberate, anti-competitive behaviour in turn increases the gravity of the offence by emphasising the criminality of the defendant's behaviour. The Commission's use of 'law as a resource' also augments the evaluation of gravity. DGIV's case construction, specifically its use of the concepts of complex infringement and collective responsibility, reinforce the criminal and systematic nature of the offence thereby increasing its breadth and depth. The evaluation of anti-competitive impact is also affected. By underlining the widespread, criminal nature of the defendant's behaviour, DGIV's case construction also increases the impression of serious anti-competitive harm. Moreover, the penal characterisation of horizontal violations enables a finding of an anti-competitive object to be

substituted for thorough market evaluation. Anti-competitive impact is merely assumed. Similarly, the concept of a complex infringement regularly affects DGIV's assessment of the duration of the offence by allowing it to circumvent the limitation period for the imposition of fines, increasing the duration, and thus, the gravity of the violation. Overall, the study suggests that DGIV's criminal classification of horizontal offences and its ability to manipulate the legal framework, significantly influence the evaluation of sanctioning factors, having a major impact on the ultimate amount of fine imposed.

The Commission's approach may be criticised on several grounds. Whilst DGIV must arrive at a fine by balancing aggravating and mitigating factors, the precise choice and weight of relevant factors lacks clarity. The Commission's repeated failure to articulate the interrelation of these elements makes it impossible to understand fully or review DGIV's evaluation. This lack of transparency has attracted criticism from many quarters and an insistence that the Commission should be required to explicitly detail its evaluation of individual fines [116]. Nevertheless, the complex and individual nature of the sanctioning assessment has been upheld [117]. This approach however leaves considerable room for inconsistency. Indeed, the study has revealed several such anomalies in DGIV's imposition of fines. Overall, the anbiguity, the inconsistency and the individualised character of the Commission's approach all serve to promote legal uncertainty. This suggests that DGIV's evaluation of fines is, at best, questionable. The problems do not end there. The Commission's use of the 'law as a resource' means that much of DGIV's evaluation appears to be based on its criminal classification of horizontal cartels rather than on searching analysis. Increasing the gravity of offences by substituting case construction for substantive proof is concerning in itself, but to impose draconian fines on this basis is manifestly unjust. To exacerbate matters, successful appeals against fines are difficult to achieve. The burden on defendants to prove DGIV's unfair assessment of fines is difficult to discharge. Invariably, the Court merely affirms the Commission's discretion [118].

Nevertheless, DGIV's approach clearly demonstrates that it possesses criminal sanctioning powers and is prepared to use them to their fullest extent. At each stage in

the fining evaluation, DGIV uses its enforcement powers to reinforce the criminality of the offence and justify the imposition of punitive sanctions. Similarly, DGIV's wide powers over the type of decision adopted provide it with long-term control over the firms involved. Case construction has a significant impact on DGIV's sanctioning powers, particularly the level of fines, both increasing the criminality of the violation whilst making it easier to prove. This serves both political and pragmatic goals. The overall result of this penal approach is to increase the deterrent effect of DGIV's sanctions, providing a powerful tool with which to secure Single Market integration by the most cost-efficient route.

C)PROCESS AND SUBSTANCE - DEFENCE RIGHTS

1)Independent Tribunal [119]

The right to an independent tribunal is one of the central tenets of natural justice [120]. Some concern exists regarding whether, because of its monolithic character, the Commission can fulfil the requirement of an independent tribunal. The defendant's right to an independent tribunal is not explicitly stated under Reg.17 [121]. However, under Art.6(1) ECHR, parties are "entitled to a fair and public hearing ... by an independent and impartial tribunal". Several study cases challenged DGIV on this basis. For example, in *Polypropylene*, Shell claimed that the Commission's combined role of investigator, prosecutor and judge resulted in a biased and unbalanced decision and therefore breached Art.6 ECHR [122]. Both DGIV and the Court have tackled this issue by arguing that the Commission is not a 'tribunal' under Art.6 ECHR and is merely expected to observe the general procedure safeguards required by Community law [123]. In *Van Landewyck*, the defendant's concerns regarding DGIV's lack of independence were dismissed as "irrelevant" [124]. Invariably, the Court have held that

the defence has failed to discharge its burden and prove how DGIV's monolithic role has infringed defence rights [125].

On occasion, the Commission has used the latitude afforded by the Court's approach to select which witnesses will be allowed to attend the oral hearing [126]. Both *VBBB* and *Van Landewyck* complained that DGIV's refusal to hear certain witnesses curtailed their ability to defend themselves [127]. In both cases, the Court dismissed the submission - the high burden imposed upon the parties meant they were unable to establish that the Commission's refusal had restricted their rights [128].

This approach raises a number of issues. Van Overbeek argues that, in *Orkem*, the ECJ held that Art.6 ECHR may be relied on by undertakings subject to competition investigations, rendering redundant previous caselaw stating that the Commission is not a 'tribunal' [129]. In addition, given the attitude of recent ECHR cases of *Stenuit* and *Funke*, a review of the Commission's status seems appropriate. Moreover, the fact that DGIV's hearings are held *in camera* infringes Art.6 ECHR on the grounds that the Article requires a public hearing [130]. Furthermore, the present focus on whether the Commission is a tribunal appears to be another attempt to fudge issues with semantics. It bears considerable similarity to DGIV's insistence that antitrust is an administrative rather than penal matter. What is important is the quality and effect of its decision-making, not the label attached to it. Indeed, the Commission's classification as a tribunal is not necessarily the issue. DGIV is still required to observe the Community's procedural safeguards. Kerse argues that, particularly where large fines are involved, the Commission cannot simply disregard the natural justice requirements of Art.6 ECHR [131]. The value of requiring the Commission to observe such rights is questionable. The study has illustrated already DGIV's marked ability to interpret and curtail such safeguards to its own advantage. As such, defendants are afforded little or no protection. Appeal to the Court at a later date cannot be sufficient redress, particularly in the light of the onerous burden placed upon defendants at appeal. This lack of respect for natural justice has attracted considerable criticism particularly from practitioners [132].

From the above review it is evident that the Commission has used its powers to curtail both the characterisation and scope of the defendant's right to an independent tribunal. DGIV has successfully argued that this safeguard is based on procedural fairness alone. The repeated support of the Court on this issue allows the Commission to act as judge of its own cases, in the absence of any real accountability. As a result, the defendant's ability to insist upon an independent arbiter is virtually non-existent. DGIV's ability to control the enforcement process and its vested interest in conviction [133] leaves the scope of this protection entirely at the discretion of the Commission's enforcement needs. Again, significant inequality between the defendant's procedural safeguards and DGIV's control of the process is apparent. This disparity provides the Commission with the freedom to convict on demand.

2)The Right to be Heard

This section will specifically consider how the Hearing Officer (HO), the Advisory Committee and differences between the SO and decision affect the defendant's right to comment. Each issue will be discussed in turn.

a)Hearing Officer [134]

The position of HO was introduced in 1982, following trenchant criticism of DGIV's conduct of proceedings [135]. Broadly, his function is to ensure a fair hearing and respect for defence rights. But, he must balance this against the need for effective enforcement of Art.85 [136]. To this end, the HO presides over oral hearings, controls the admissibility of evidence, decides which parties will be admitted and whether those parties will be heard together or individually [137]. The independence of the HO is seen as crucial. Consequently, he has direct access to the Commissioner responsible [138]. Evidence suggests that this office has been successful - to a partial extent. The HO has proved willing and able to prevent unfair questioning by DGIV and his supervision of the minutes of the hearing has resulted in less selectivity in their compilation by

DGIV [139]. Several study cases praised the efforts of the HO, but expressed concern at his limited terms of reference [140].

It is such concerns that have cast doubt on whether the HO provides sufficient protection of defence rights. A number of critics have noted the low status of the HO and lack of weight DGIV attaches to his Report [141]. This inevitably reduces his ability to protect defendants. Moreover, his willingness to curtail improper Commission questioning is limited by his inability to make formal decisions which may be appealed [142]. Whilst permanent HOs have been praised for their independence, on occasion, the use of temporary HOs has resulted in criticism that they have acted more as part of the prosecution team [143].

The most serious limitation is the non-disclosure of the HO's Report to defendants [144]. This has proved a particularly contentious issue. In *Polypropylene*, the defendants asserted that the decision breached the requirements of Art.190 because it contained no reference to the HO's Report [145]. Moreover, they argued that his Report should be disclosed because non-disclosure infringed defence rights as it resulted in the defendants being unaware of the full case against them [146]. DGIV insisted that the Report was a purely advisory, internal document and thus protected as confidential [147]. In response, the CFI held that defence rights were respected to the requisite legal standard where the institutions concerned were informed fully of both the Commission's evidence and the firms' arguments and that disclosure of the HO's Report was not essential for this. Moreover, the Court held that, as it was not mandatory that the Report be placed before the Advisory Committee, Art.190 was not breached because the decision did not refer to the Report [148]. The non-publication of the Report and the HO's inability to insist that it be forwarded to the Advisory Committee seriously impairs his status, and thus, his ability to safeguard defence rights. This problem is exacerbated by the fact that the HO rarely exercises his right to report to the Commissioner directly· Even when he does so, this may be of little assistance to defendants. Johannes states that, in 60% of cases, the HO's report is a formality, and only in 5% of cases, has the HO found no infringement of competition rules or a procedural defect [149]. Non-disclosure of the Report to the defendants

necessarily limits the scope of their right to know the case against them. DGIV's classification of the HO's Report as confidential and the high burden imposed upon disclosure of internal documents, means that it is virtually impossible for defendants to discover its contents. This results in the curious situation of the HO, whose task it is to protect defendants, actually infringing defence rights by his terms of reference [150].

The final problem with the HO's role is that he is effective only in the latter stages of the procedure. Thus, he can do little to rectify procedural problems occurring earlier in the process [151]. These limitations on the HO's role have led to various calls that he be accorded higher status and wider functions [152]. All such suggestions have been rejected by DGIV. Whilst agreeing that the HO's jurisdiction could be extended, the Commission has made it clear that this reform is dependent on financial considerations. Moreover, DGIV continues to insist that the HO performs a purely advisory role and should not be allowed to make formal decisions nor have his Report published [153].

It is clear from the above evaluation that the HO provides only minimal protection for defendants and that DGIV intends to maintain this situation. The Commission has used its penal powers to curtail the effectiveness of the HO at every point. By limiting the HO's jurisdiction to the final stages of the proceedings, the Commission has free rein over procedural matters for most of the process. By relegating the HO to an advisory position, DGIV curtails his formal decision-making ability. As a result, the HO's procedural decisions cannot be appealed, nor can he insist that his views are heeded later in the decision-making process. Indeed, by classifying his Report as confidential, DGIV ensures his opinion is effectively redundant. The HO is powerless to prevent this curtailment of his role. If the HO cannot protect himself from the Commission's potency, his capacity to safeguard others is necessarily arguable. The HO's Terms of Reference require that defence rights be balanced against effective enforcement. DGIV's interpretation of this office has ensured that the HO's impact on enforcement is more "cosmetic than real" [154]. Reg.17 remains paramount.

b)Advisory Committee on Restrictive Practices and Monopolies[155]

Before the Commmission finally adopts a decision, it is required to submit its draft decision and the most important documents relating to it to the Advisory Committee for its opinion [156]. Some disquiet exists regarding the precise role of the Commmittee, particularly its effect on defence rights. The most controversial issue is the non-disclosure of the Committee's opinion [157]. This failure to disclose the opinion to undertakings has led to widespread criticism that this infringes defence rights. In *Distillers*, AG Warner expressed concern over the secrecy surrounding the Advisory Committee and the risks of injustice that this entailed [158]. Nevertheless, in *MDF*, the ECJ clearly rejected the argument that non-disclosure breached defence rights to a fair hearing. In the study, a similar conclusion was reached in *Van Landewyck* [159]. Few other cases in the study complained directly of the non-disclosure of the Committee's report, though several cases raised other issues regarding the Advisory Committee which will be discussed below [160]. Concerns over the effect on defence rights are exacerbated by the fact that the precise weight of the Committee's opinion is unclear. Whilst its views are not binding, the Committee may exert influence over the assessment of the gravity of the violation and the type and level of sanction imposed. Yet, the extent of this influence in individual cases cannot be guaged because of the secrecy surrounding the Committee's procedure [161].

The unreviewable nature of the Committee's opinion makes it difficult to assess its impact on defence rights. Harding argues that if the Committee's opinion does not materially affect individual outcomes, as implicit in *MDF*, then secrecy is unwarranted. Conversley, if it is relevant, then the opinion should be disclosed to undertakings. He argues that, at present, the situation rests on the Court's presumption that DGIV will not take into account issues not disclosed to defendants [162]. However, the Court's faith may be misplaced. If DGIV is prepared to distort evidence elsewhere to obtain convictions, whether it can be trusted not to take into account undisclosed factors is debateable. Concerns over the potential harm led the House of Lords Select

Committee to recommend several reforms including the publication of the Committee's opinion. Over a decade later, none of these reforms has been implemented [163]. DGIV has made its position clear. Whilst it favours greater transparency, the recommended reforms would require the amendment of Reg.17 which the Commission does not regard as a priority [164]. Until such reforms occur, defendants' rights are at risk.

The quality of the Committee's decisions has also been questioned on several grounds. First, concerns exist over the adequacy and accuracy of the information placed before the Committee. In *Distillers*, questions arose as to which documents were "important documents" and thus required to be placed before the Committee [165]. Such documents seem to include the SO, the Defence Reply and the minutes of the hearing [166]. The accuracy of the minutes of the hearing has been questioned by two cases in the study. In both instances, the Court made it clear that such irregularities will only vitiate the decision if they are "misleading in a material respect" [167]. The high burden imposed on defendants by this test is rarely discharged [168]. Combined with the secrecy of the Committee's deliberations, this onerous burden means that many procedural irregularities may never come to light. The quality of the Committee's opinion is also limited by evidence suggesting that competent authorities often send junior officials to Advisory Committee meetings and are provided with inadequate information on the matter under discussion [169]. Even more disturbing is evidence of a partisan appraoch by MS [170]. The degree of political bias is unclear. Certainly, this forum is capable of serving as an effective route by which MS can influence EC competition law.

Overall, the clandestine nature of the Committee's procedure makes evaluation of the exact scope and value of the Committee's influence problematic. No evidence exists suggesting that the Committee safeguards due process [171]. But, the Committee is able to influence defence rights. The extent to which this occurs is obscure. Yet, the possibility of unreviewable political bias is disquieting. Whatever the case, DGIV has used its control of the process to ensure that the Advisory Committee is an unknown quantity. Its attitude to reform discloses that the Commission is in no hurry to change this situation.

c)Problems relating to the SO and Decision [172]

It has already been illustrated at prosecution stage that the vagueness of the SO and access problems may severely impair the defendant's ability to comment effectively on the case against him. Here, it is intended to evaluate problems relating to inconsistencies between the SO and decision and resulting inadequacies in the reasoning of the final decision and their effect on defendant's right to be heard.

Art.190 requires that the Commission's decision clearly states the factual and legal considerations upon which it relies. The reasoning may be succint and the Commission is not required to discuss all issues raised. But the grounds for the decision must be sufficiently stated to enable the Court to review the legality and allow the defendant to assess whether the decision is valid [173]. In *Quinine*, the Court discussed the relationship between SO and decision, stating that they need not be identical. Defence rights were observed if the decision only considered facts upon which the defendant had been allowed to comment [174].

The breadth of Art.190 has provoked complaints. Almost half of the formally prosecuted cases in the study complained that defence rights had been infringed as a result of both discrepancies between the SO and decision and insufficiently reasoned decisions [175]. Changes in the legal characterisation of the offence have proved a particular problem. In *Woodpulp II*, the parties alleged that the SO and decision contained differences in the number, type and duration of offences. Moreover, the Commission had relied on evidence obtained after the SO was issued [176]. Similar problems were encountered in *Polypropylene* and *GCB*. In *Polypropylene*, DGIV altered its legal assessment from that of a series of separate violations to that of a complex infringement. Whilst in *GCB*, the definition of the geographical market was changed [177]. Elsewhere, a lack of individualisation in the decision has been criticised. In *Woodpulp II*, AG Darmon considered that, where penal sanctions were imposed, it was essential that the defendant had a clear picture of the case against him [178]. Invariably, such complaints receive little sympathy from the Court who have been particularly unwilling to support claims of changes in legal classification. In most

cases, the Court have reiterated the requirements of Art.190 and found the SO/decision entirely consistent and the decision adequately reasoned [179]. However, there have been several cases where the problems have been so extensive that the Court have annulled DGIV's decision [180]. In *Woodpulp II*, the ECJ held that the inconsistencies between the SO and decision and the Commission's reliance on undisclosed evidence infringed defence rights and they annulled much of DGIV's decision [181]. In *PVC*, the discrepancies in the text of the decision were so great that the CFI declared the decision non-existent in law [182].

The broad scope of Art.190 and the Court's willingness to affirm the Commission's approach provide little effective protection for defence rights. Not only do the requirements of Art.190 exercise little accountability over the adequacy of DGIV's evaluation/decision-making, but they also provide the Commission with the freedom to alter the legal classification of the offence.

This ability to shift the goal posts makes the preparation of an effective defence problematic, regardless of the amount of access granted. Permitted inconsistencies between the SO and decision mean that the case that the defendant comments upon and the one he is convicted upon are not necessarily the same. Under such conditions, the right to be heard is largely ineffective.

Whilst DGIV recognises a right to be heard, its control of the process serves to limit the value of this protection in several ways. The Commission's treatment of the HO is typical. DGIV has taken every opportunity to curtail the HO's ability to safeguard defence rights. DGIV's current interpretation of the HO's function guarantees his low status, limited jurisdiction and his inability to demand respect for due process. In particular, the Commission's classification of his Report as 'confidential' and the Court's support for this approach ensures that the HO's views are concealed, and therefore, ineffective. This approach undermines the defendant's right to be fully informed of the case against him. Yet, the HO is impotent to prevent it and DGIV may pursue its enforcement needs unfettered. In such circumstances, the HO's

protection of defence rights is a case of too little, too late. The Commission's attitude to reform suggests that no immediate change can be expected.

Problems relating to the role and value of the Advisory Committee paint a similar picture. DGIV's dominance of enforcement allows it to ensure that the consultation process serves its needs alone. DGIV is able to dictate the identity and content of documents going before the Committee and thus exert some influence over the Committee's views. The clandestine nature of proceedings and the onerous burden demanded of defendants ensures that this influence remains concealed and unreviewable. The non-publication of the Committee's opinion leaves the quality and scope of its influence ambiguous. As a result, the Committee fails to protect defence rights, and indeed may pose a considerable, but unreviewable, threat to the defendant's right to know and comment upon the case against him. The possibility of unchecked political bias is particularly disquieting. Again, the limits place upon the Committee's role enable DGIV to pursue its chosen enforcement policy unhindered. Again, DGIV's reluctance to introduce reforms bringing greater transparency into proceedings is evident.

Problems relating to discrepancies between the SO and decision also undermine defence rights. The width of Art.190 exercises little accountability over the Commission's justification of decisions. Rather, it allows DGIV to alter its construction of the offence to meet enforcement needs. Combined with earlier restrictions on access, this seriously impairs the defendant's right to comment.

Clearly, neither the HO, the Advisory Committee nor the provisions of Art.190 effectively safeguard the defendant's right to be heard. Indeed, in many respects they may undermine this safeguard. Yet, the limitations placed upon the defendant's right do serve a purpose : they allow the Commission to retain full control of enforcement unimpeded by the opinions of other parties involved in the process, whilst paying lip-service to due process. The influence of political and pragmatic goals is evident both in the curtailment of this right and in DGIV's sanguine approach to reform. Subjecting changes in the HO's function to financial considerations places pragmatism before due process. Whilst reluctance to introduce greater transparency into the Advisory

Committee's procedures subordinates defence rights to enforcement needs. In consequence, the defendant's right to be heard at trial stage is limited in both character and scope. Clearly, it is viewed by DGIV as little more than a procedural obstacle to be overcome.

D)CONCLUSION - TRIAL AND SENTENCE

It is now necessary to summarise the nature and scope of DGIV's powers and defendants' rights at this stage and their respective value as enforcement resources. Most importantly, the evaluation has revealed DGIV's continuing domination of enforcement. At trial and sentence, this mastery comes to fruition, permitting the conviction and punishment of conduct threatening political and pragmatic goals. The lack of detailed guidance on sanctioning gives the Commission enormous choice over both the type and level of sanction imposed and the factors affecting its assessment. At every point, DGIV has employed this latitude to maximum penal effect. The decisions it adopts exercise long-term control over offenders. The level of fines it imposes have a similar impact. Moreover, the Commission has used its discretion to reinforce the criminality of the offence and justify the imposition of criminal sanctions. The discussion has demonstrated that DGIV's assessment of aggravating and mitigating factors is as much a matter of the criminal classification of the offence as an objective evaluation of its legal and economic context. DGIV's case construction has influenced its evaluation of the intention, gravity and duration of the violation. This use of the 'law as a resource' has a major impact on enforcement, significantly increasing the likelihood of finding an offence, the seriousness of that infringement, and thus, the amount of fine imposed. Whilst DGIV's refusal to clarify the exact choice and weight of these influencing factors ensures that its sanctioning decisions are never subject to incisive scrutiny.

DGIV also exerts considerable influence over defence rights and others involved in the enforcement process. All find that they are subordinated to the Commission's enforcement needs. DGIV has successfully argued that the defendant's right to an independent tribunal is entirely a matter of procedural fairness. The Court's repeated support on this issue has allowed the Commission to act as judge of its own prosecutions, in the absence of effective review. As a result, the defendant is unable to insist upon judgement by an independent arbiter.

The classification and scope of the defendant's right to be heard is similarly curtailed. DGIV's ability to alter the character of the violation during the course of proceedings renders the right to comment nugatory. Moreover, the Commission has employed its control of the process to ensure that neither the HO nor the Advisory Committee interferes with its interpretation of defence rights. Their elimination as effective methods of accountability allows DGIV alone to dictate the width and effectiveness of the defendant's right to know and comment upon the case against him.

Overall, neither in classification nor scope are defence rights of criminal law standard. DGIV's interpretation of these procedural safeguards requires only superficial adherence to due process. In contrast, DGIV is able and willing to impose formidable criminal sanctions. The disparity between the Commission and the defendant's position in the process is obvious. The advantages to the Commission of this situation are equally clear. Again, the situation allows DGIV to manipulate the legal and procedural requirements as political and pragmatic objectives demand. In so doing, it completes the final stage in DGIV's incremental use of the 'law as a resource', increasing conviction prospects significantly and facilitating the punishment of behaviour threatening these objectives.

E)CRIMINOLOGICAL ANALOGY [183]

1)Sanctioning Powers

As with DGIV, this section will concentrate on the sanctioning powers available. Traditionally, English sentencers enjoy extensive discretion regarding the type and level of sentence they impose [184]. In the past, this wide discretion has resulted in a number of problems, particularly disparate and inconsistent sentencing and increasing overcrowding in prisons [185]. These problems led to direct legislative intervention in sentencing policy, providing guidance aimed at achieving a coherent approach to sanctioning [186]. Current guidance for sentencers is primarily contained in the Criminal Justice Act 1991 (CJA). The Act is based on a policy of 'just deserts' whereby the punishment must be proportional to the crime [187]. Central to this policy is the notion of offence gravity. The legislation does provide some guidance on its assessment and on the appropriate type of punishment [188], but this guidance is broad ; the expectation being that the Court of Appeal will provide detailed caselaw guiding lower courts' approach [189]. Not only is little guidance provided on evaluating offence gravity, but the precise nexus between gravity, mitigating and aggravating factors and appropriate sentence remains imprecise [190]. Consequently, sentencers retain considerable discretion regarding both the type and level of sentence they impose and the choice and weight of factors influencing their assessment [191]. In the wake of the Act's emphasis on 'community sentencing', this discretion has been used to impose a wide range of sentences, though how sentencers arrive at their decisions remains unclear [192]. However, evidence exists suggesting that this evaluation may be subject to bias from extra-legal variables [193]. In particular, the effects of the prosecution's case construction are evident. Difficulties encountered in scrutinising the prosecution case at trial and the lack of sentencing guidance allow the prosecutor's version of events, and therefore their evaluation of offence gravity, to prevail, affecting both outcome and type and level of sanction [194].

The domination of the process by the police, seen at earlier stages, is again apparent. This continuing control enables them to exploit the flexibility of the law, ensuring that their construction of the case comes to fruition, both in terms of outcome and sanction, despite the fact that the actual decision-making is in the hands of other parties.

2)Defence Rights

a)Independent Tribunal

Depending on the seriousness of the offence, the case will be tried at Crown Court by a judge and jury, or at summary trial by magistrates. The following section will consider the ability of these parties to provide a fair trial for defendants.

There are a number of problems which may cast doubt on a judge's impartiality and the quality of his decision-making. Concerns have long existed in some quarters over the appointment of judges. As judges are drawn from a very narrow range of class, gender and race, it is often felt they are out of touch with reality [195]. Some critics are concerned that judges have insufficient powers to dismiss weak cases, arguing that the *Galbraith* ruling leaves judges with little room to maneouvre [196]. Whilst judicial independence from the adversarial conflict is stressed in theory, little attempt is mode to enforce this ideal [197]. The result is that judges tend to question witnesses more extensively than is necessary to clarify the evidence and, in summing up, have abused their right to comment by making biased and sometimes inaccurate statements [198]. Although it is difficult to assess the precise influence of judicial comments, such partiality may affect the jury's decision and there are a number of miscarriage cases in which judges have displayed such bias [199].

The jury trial has long been regarded as a significant constitutional safeguard [200]. It is traditionally held that juries provide a better chance of acquittal for defendants. Advocates of the jury system argue that the random selection of juries ensures impartiality, and moreover, unlike magistrates, they are not prejudiced by

hearing inadmissible evidence [201]. Recent evidence challenges these beliefs. Baldwin and McConville have raised doubts over whether juries are more sympathetic to defendants. Moreover, there is considerable concern over the jury's ability to decide complex cases [202]. Similarly, the independence guaranteed by random selection has been limited by Government measures increasing the prosecution's opportunities to control jury composition, whilst limiting the defendant's ability to do so [203]. Research also suggests that ethnic minorities are under-represented on juries [204]. Moreover, it has already been demonstrated that the quality of jury decisions may be improperly influenced by the judge's comments at trial. The final problem is the lack of information on jury behaviour. This makes assessment of their importance to the process problematic [205].

Most importantly, all the factors noted above represent situations where the law has been interpreted and operated in the prosecution's favour, thus curtailing the independence and reliability of both judge and jury decisions and therefore limiting their effectiveness in ensuring the defendant's right to an independent tribunal.

Similar problems are evident in magistrates' courts. Most defendants receive a summary trial, yet there are increasing doubts regarding magistrates' ability to provide a fair trial [206]. Several critics have questioned the fairness of the selection of magistrates [207]. Added to these concerns over the representativeness of magistrates are further questions regarding their independence and impartiality. Much research indicates magistrates' tendency to become 'case-hardened' and their over-willingness to accept police evidence at face value [208]. Moreover, as magistrates are triers of both fact and law, there is the risk that they may be influenced by evidence they have ruled inadmissible [209]. Both the composition and attitudes of magistrates' courts means that they may provide questionable protection for defendants, yet the pragmatic advantages accruing from the large number of guilty pleas at summary trial have encouraged the Government to place increasing emphasis on magisterial justice. In so doing, cost-efficient conviction is achieved at the expense of defence rights [210].

Finally, case construction may affect the independence and quality of decisions made by all criminal courts, whatever their composition. Zuckerman argues that

whilst constitutionally important, the calibre of decision-making by criminal tribunals is debateable. He asserts that too much relies on the quality and reliability of the case prepared by the police and prosecutor [211]. The present pre-ponderance of guilty pleas in the system means that invariably the police construction of reality goes unchallenged increasing its apparency cogency and resulting in conviction. The sum of the problems noted in this section indicates that the criminal process does not, in practice, guarantee the defendant's right to a fair trial. Invariably, the safeguard is curtailed in the interests of enforcement.

b)Right to be Heard

Previous chapters have noted that disclosure problems curtail the defendant's knowledge of the case against him, limiting his ability to comment. At trial, further restrictions are placed on this right.

First, there are problems relating to the disparity of resources between the prosecution and defence. This imbalance is particularly evident in relation to legal representation and forensic evidence [212]. Particularly at summary trial, the availability of legal representation varies considerably depending on the offence and the disposition of the Court [213]. This has led to significant doubts as to whether defendants are properly equipped to challenge the prosecution case [214]. An imbalance also exists regarding the parties' relative ability to evaluate forensic evidence. Defendants rarely have early access to such information and lack the resources to adequately analyse such evidence [215]. This disparity of resources necessarily limits the defendant's ability to mount an adequate defence. Indeed, the courts have acknowledged that this imbalance has been an important cause of past miscarriages [216].

There are a number of problems relating to evidential rules primarily designed to protect defendants [217]. Recent legislative changes have reduced the effectiveness of these safeguards. The defendant's right to silence at trial is enshrined in Criminal Evidence Act 1898 [218]. Over the last thirty years, this protection has been whittled away to the point where it is now virtually non-existent [219]. Most recently, the

Criminal Justice and Public Order Act 1994, allows adverse inferences to be drawn, during investigation, and in court, where a defendant fails to co-operate with the investigation [220]. In addition, shifting evidential burdens during the course of the trial and variations within the criminal standard of proof exacerbate matters, limiting the protection afforded by the presumption of innocence and its corollary the right to silence [221]. This diminution of the right of silence effectively reverses the burden of proof by focusing attention of the defence rather than the prosecution case. Jackson asserts that this is unjustified, particularly as the lack of resources means that defendants are ill-equipped to test the case [222]. As a result of these pressures, defendants may feel compelled to comment, but in so doing, may run foul of the Criminal Evidence Act 1898. Ordinarily, courts are not informed of the defendant's previous record. However, certain defence strategies may result in the loss of this immunity [223]. Thus, in exercising the right to be heard defendants face an awkward choice. Where they remain silent, they risk adverse inferences being drawn ; where they actively mount a defence, they risk the prejudicial impact of evidence revealing their bad character.

A further problem is that evidential rules are not always effective in protecting defendants from certain types of unreliable evidence. Most frequently, problems arise in connection with identification, forensic and confession evidence. The *Turnbull* guidelines controlling the admissibility of identification evidence have been narrowly construed. As a result, they have proved ineffective in preventing miscarriages of justice [224]. Equally, the corroboration provided by forensic evidence has sometimes been of dubious quality and has resulted in criticism of the Court's approach to the admissibility of such evidence [225]. The greatest controversy surrounds unreliably obtained or fabricated confessions. Under s.76 PACE, confession evidence may be excluded where it has been obtained oppressively or in situations rendering it unreliable. However, the interpretation the courts have placed on this rule and problems relating to the recognition of unreliable confessions have rendered this safeguard largely ineffective [226]. Moreover, defendants challenging the reliability of confession evidence would automatically lose their immunity under Criminal Evidence

Act 1898 [227]. Despite the fact that fabricated confessions have been a particular feature of several notorious miscarriage cases, confessions are still considered to be the most reliable form of evidence [228]. Section 78 PACE 1984 also provides for the exclusion of unfairly obtained evidence [229]. The courts have proved reluctant to exercise their discretion to exclude evidence and have made it clear that not every procedural breach requires the exclusion of evidence [230]. However, the application of s.78 has been criticised as confused and inconsistent and thus providing little protection for defendants [231].

Overall, evidential rules neither enable defendants to freely exercise their right whether or not to comment, nor protect them from unreliable prosecution evidence. Indeed, the law provides powerful incentives not to challenge the prosecution case by penalising those who do and rewarding those who co-operate and plead guilty. In practice, this may limit the defendant's right to comment solely to admissions of guilt.

3)Conclusion - Criminological Analogy

This evaluation demonstrates that the police and prosecution's domination of the process continues throughout the trial stage. The State's wide criminal powers allow extensive discretion over the type and level of sanction imposed, whilst enabling it to dictate the ambit of both the defendant's right to a fair trial and his right to comment to serve enforcement needs.

Many similarities of approach exist between the English criminal justice system and DGIV. Both dominate enforcement and use their criminal powers to interpret and operate legal rules to meet enforcement needs. Both possess wide sanctioning powers and wield extensive discretion over the choice and weight of aggravating/mitigating factors influencing sanctioning decisions. Both choose to employ their powers to their fullest extent and sanctioning assessments are subject to bias from a range of non-legal variables, resulting in the inconsistent application of sanctioning powers. Moreover, both processes reveal that case construction affects the evaluation of offence gravity with significant impact on outcome and the level of sanction imposed. Finally, in both

jurisdictions, a lack of coherent sanctioning guidelines and the effects of case construction shield the sanctioning assessment from effective review.

Both jurisdictions disclose similar attitudes towards defence rights. In each jurisdiction, the scope of the defendant's right to an independent tribunal is entirely at the system's discretion. In each process, the composition, the approach of the tribunal and the effects of case construction limit the tribunal's impartiality and the quality of its decision-making, so that in neither jurisdiction are defendants guaranteed trial by independent tribunal. As regards the right to be heard, both jurisdictions compound earlier disclosure problems by taking every opportunity to further curtail this safeguard. Both systems construct and apply legal and evidential rules to their advantage and the defendant's disadvantage. Both insist upon the defendant's co-operation punishing any failure to comply, whilst discouraging challenges to the prosecution case and rewarding the defendant's assistance with his own conviction. In each jurisdiction, there exists a marked reluctance to exclude probative evidence, however obtained. In each, the end justifies the means. Moreover, neither system places a high value on procedural integrity. Courts in both jurisdictions regularly refuse to annul decisions or exclude evidence on the basis of procedural impropriety. In short, the defendant's right to be heard is entirely on the prosecution's terms and exists only to serve enforcement requjirements. Once again, in both systems, the disparity between wide enforcement powers and restricted defence safeguards is clearly illustrated.

The problems and consequences of this approach are considerable. Much research has criticised the sanctioning assessment as too vague and placing excessive reliance on the personal opinions of sentences [232]. These problems are exacerbated by case construction. The case before the sentencer represents merely one version of events, constructed by agencies within the process and consistent with their personal notions of justice [233]. This approach has produced punitive, cumulative sentencing and a lack of coherence to the point where English sentencing has been described as "a disgrace to the common law tradition" [234]. Curtailment of defence rights has also had a detrimental effect on the criminal process. The biased nature of tribunals has been a

feature of miscarriage cases - most notably the Birmingham Six and Maguire Seven cases. The imbalance of prosecution and defence resources and the lack of protection afforded by evidential rules has already been noted as a major cause of many notorious miscarriages [235].

Overall, these problems have combined to produce mounting disrespect and non-compliance with the justice system. Recent years have witnessed rising crime rates and prison riots, whilst the system's failure to allay fears over miscarriages of justice means that the sense of penal crisis continues unabated [236].

On examination, the justice system's approach to trial and sentence displays important crime control features. At each point, the prosecution's control of the process is used to maximise conviction prospects and minimise defence opportunities for challenge. The model's emphasis on the repression of criminal conduct is revealed in the justice system's extensive use of its sanctioning powers and increasing prison population. Similarly, crime control places little value on defendant's due process protections. This approach is evident in the process's unwillingness to guarantee an independent tribunal and its refusal to promote the defendant's right to comment. Crime control's reliance on speedy, efficient conviction and preference for informal processes can be seen in the greater use of summary rather than Crown Court trial. This policy has been assisted by magistrates' willingness to believe police evidence, the re-classification of serious offences as summary matters and the system's ability to control the composition of tribunals, ensuring that they produce the verdict the process requires. Consistent with crime control, every opportunity is taken to limit the defendant's right to comment. Essential to this model is the replacement of the right to silence with the defendant's duty to co-operate. As already illustrated, the gradual attrition of this right in the criminal justice system has recently culminated in its virtual abolition, completing crime control's campaign against this safeguard. This effectively reverses the burden of proof ; a position entirely consistent with crime control's presumption of guilt. Evidential rules have also been subject to crime control's influence. The model's emphasis on speed and efficiency requires that evidential rules are interpreted and applied in a way which facilitates conviction and deters defendants

from challenging the prosecution case. Many instances of this have been noted above. Equally, the justice system's insistence that the only test of admissibility is the credibility of the evidence is an entirely crime control perspective. The purpose of the process is to establish guilt ; evidence which assists this objective, however obtained, is admissible. This examination has shown that evidential rules are operated with this in mind. Finally, the high rate of guilty pleas within the system reveals its inherently crime control nature. As a result, many due process protections simply never come into play. Most important for crime control, the prosecutor is not required to establish guilt beyond reasonable doubt before an independent tribunal.

A similar crime control approach is evident in the Commission's use of its enforcement powers. It too, employs its sanctioning powers to maximum punitive effect and uses its control of the system to ensure that all decision-making within the process is consistent with its political and pragmatic aims. Thus, cases are not decided by an impartial tribunal and other agencies within the process are not permitted to impede the prosecution momentum by promoting defence rights above enforcement needs. Crime control requirements mean that all possible limitations are placed on the defendant's right to comment. Thus, DGIV uses its ability to alter the characterisation of offences to impede any defence challenges to its case construction and render conviction easier. Finally, EC competition law's attitude towards procedural matters demonstrates the paramouncy of the crime control rationale that the end justifies the means. A marked reluctance to annul decision on grounds of procedural impropriety is evident. Clearly, for the Commission crime control predominates. Ultimately, this may mean that similar consequences to those revealed in the English criminal process will become manifest within EC competition law.

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1 Edgar Watson Howe *Ventures in Common Sense.*

[2] For background information, see : Kerse *EC Antitrust Procedure* (3rd Edn) Sweet and Maxwell (1994) at paras 4.25-4.34, 6.25, 7.09-7.38 ; Harding *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) at pp 47-51, 79-97 ; Gyselen 'The Commission's Fining Policy in Competition Cases' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 63 ; Joshua 'Information in EEC Competition Law Procedures' *ELR* [1986] 409 ; Temple Lang 'The Procedure of the Commission in Competition Cases' *CMLR* [1977] 155 ; Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods in European Law, with Special Reference to Competition' *YBEL* [1982] 1 ; Whish *Competition Law* Butterworths (1993) at pp 304-310 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO 1994. This stage of the process raises several issues relating to the Hearing Officer, Advisory Committee and the independence of the tribunal. The problems and complaints relating to these matters are more relevant to the exercise of defence rights and will be discussed within that section.

[3] Under Art.19/Reg 17 and Art.7(1)/Reg 99. The hearing procedure will only be outlined briefly here. Kerse *EC Antitrust Procedure* at paras 4.25-4.34, discusses the conduct of the oral procedure in much greater detail. Other interested parties, principally complainants and MS, may also request and attend oral hearings under Art.7(1) and Art.8(2)/Reg 99. The role of third parties has become increasingly important to the Commission's decision-making process. However, space does not allow for further discussion of this aspect. Harding *EC Investigations and Sanctions* Ch5, explores the issue further.

[4] Art.9(3)/Reg 99.

[5] Nor can it impose penalties for refusing to answer questions at the hearing; Kerse *EC Antitrust Procedure* at para 4.31 ; Temple Lang 'The Procedure of the Commission in Competition Cases' at p 161. However, DGIV could use its investigative powers to verify statements.

[6] Art.9(2)/Reg 99.

[7] Art.9(3)/Reg 99. Discussed by Harding *EC Investigations and Sanctions* at pp 47-48.

[8] See 11th Report on Competition Policy 1981 at p 27 ; AG Roemer *Continental Can* [1973] ECR 215 at 264 ; Green *Commercial Agreements and Competition Law : Practice and Procedure in UK and EEC* Graham and Trotman (1986) at p 280 ; Whish *Competition Law* at p 305 ; Harding *EC Investigations and Sanctions* at p 47. Whilst the hearing may not be a 'proper' trial, it does form an important feature of the final stage of the enforcement process, giving defendants the opportunity to be heard. The value of this feature will be evaluated later under 'Defence Rights'.

[9] Joshua 'Proof in Contested EEC Competition Cases : A Comparision with the Rules of Evidence in Common Law' *ELR* [1987] 315.

[10] See Arts.10,15,16/Reg 17.

[11] In the study, 20 of the formally prosecuted cases had decisions made against them and fines imposed. Only in *VBBB* and *Fedetab* were decisions alone made. See Appendix B, Table 5 for further details of sanctioning decisions in the case study.

[12] These orders are also known as 'cease and desist' orders. The parties must be informed of the decision, and any decision ordering termination must be published ; Art.21/Reg 17. In addition, DGIV generally publishes decisions imposing fines and sometimes issues press releases.

[13] Kerse *EC Antitrust Procedure* at para 6.17. The ECJ in *Commercial Solvents* [1974] ECR 223, upheld the Commission's right to impose positive measures in an Art.3 order. For further discussion, see Kerse ibid at para 6.19 ; Harding *EC Investigations and Sanctions* at pp 79-80.

[14] Eg reporting back as required in *United Brands* [1978] ECR 207 ; review of pricing policy in *ECS/AZKO* [1986] 3 CMLR 273 and divestiture in *Contintental Can* [1972] CMLR D11.

[15] The legality of such decisions was upheld by the ECJ in *GVL* [1983] ECR 483. Discussed by Kerse *EC Antitrust Procedure* at para 6.17.

[16] Such orders were imposed in all but *Meldoc, VBBB* and *Cast Iron and Steel* where cease and desist orders alone were made. Moreover, in *Zinc Producers, Benelux Flat Glass* and *GCB* declaratory decisions were made and fines imposed. See Appendix B, Table 5 for further details.

[17] In *Dutch Cigarettes*, parties were prohibited from holding joint consultations relating to price increases/dealer margins in the Netherlands. In *ANSEAU*, the parties were required to inform the Commission of the measures they had taken to terminate the infringement.

[18] The criminological analogy may shed further light on the precise impact of case construction. See particularly, McConville Sanders and Leng *The Case for the Prosecution* Routledge (1991).

[19] Art.15(2)/Reg.17. See Appendix A for text. Fines of up to 10% of annual turnover may be imposed. Under Art.17/Reg. 17 and Art.172 of the Treaty, the Court has unlimited jurisdiction to review the Commission's fining and may cancel, reduce or increase fines.

[20] The criminal nature of DGIV's fines has long been acknowledged, and often criticised, in many quarters. See particularly, Reynolds 'EC Commission Policy on Fines' *ECLR* [1992] 263 ; Written Submission by Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 7-9 ; Harding *EC Investigations and Sanctions* at pp 81-82 ; Green 'Evidence and Proof in EC Competition Cases' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 127 ; AG Myras in *General Motors* [1975] ECR 1367 at p 1388 ; AG Warner in *Miller* [1978] 131 ; AG Vesterdorf in *Hercules* at p 246 ; AG Darmon in *Woodpulp II* at p 539. The ECHR cases of *Societe Stenuit* (1992) 14 EHRR 509 and *Funke* [1993] 1 CMLR 879, also confirm the penal nature of antitrust fines.

[21] Both Reynolds in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 7-9 and Harding in *EC Investigations and Sanctions* Ch7, discuss the background to the Commission's fining policy.

[22] *MDF* [1983] ECR 1825. Principally these factors are : the knowledge, conduct and role of the parties including any existence of recidivist behaviour, the nature of the infringement, the legislative and economic context of the violation, the threat posed to Treaty aims and the need for deterrence. See also, Reply to WQ No 2002/86 OJ [1987] C133/52 for an outline of the Commission's approach to fining.

[23] *MDF* [1983] ECR 1825 at p 1922.

[24] For background information on this aspect, see Kerse *EC Antitrust Procedure* at paras 7.13-7.15 ; Harding *EC Investigations and Sanctions* at pp 83-86.

[25] *MDF* [1983] ECR 1825 ; *Rolled Zinc* at p 303.

[26] On this, see Harding *EC Investigations and Sanctions* at p 83 ; Reynolds 'EC Commission Policy on Fines' at p 264.

[27] Kerse *EC Antitrust Procedure* at para 7.13.

[28] *Meldoc* at p 877 "intentionally or negligently" ; *Dutch Builders* at p 183 "intentionally or, at the very least, through serious negligence" ; *Rolled Zinc* and *Cast Iron and Steel* used similar formulas.

[29] This occurred in 13 cases ; *Cement*, *FWA*, *Benelux Flat Glass*, *Welded Steel*, *Belgian Roofing Felt*, *Woodpulp*, *Zinc Producers*, *Peroxygen*, *LdPE*, *Polypropylene*, *PVC*, *Soda Ash* and *ANSEAU*. In the latter case, DGIV found some intentional and some negligent behaviour. Only in *Dutch Cigarettes* at para 167, did the Commission find the parties negligent only. In four other cases *Fedetab*, *VBBB*, *GCB* and *Italian Flat Glass*, whilst referring to the seriousness of the offence, DGIV did not explicitly address the issue of intention/negligence. In the former two cases, no fines were imposed - decisions alone were made.See Appendix B, Table 5 for further details of sanctioning decisions in the case study.

[30] In *IAZ* at p 3415, those violations which the Commission had considered negligent, the Court upgraded to intentional and in *Woodpulp II* at p 593, some intentional violations were found by the Court to be negligent only. Kerse *EC Antitrust Procedure* at para 7.13, notes that the formula may cause problems for the Commission. He argues that if DGIV's finding of intention is overturned on appeal, the Court would not be able to substitute a finding of negligence, but would have to annul the decision. Similarly, the use of the 'play-safe' formula prevents the Commission from imposing as large a fine as for an intentional violation. Admittedly, finding offences committed by horizontal cartels deliberate is safe ground. In its 13th Report on Competition Policy 1983, the Commission clearly classified them as serious infringements.

[31] See Kerse *EC Antitrust Procedure* at para 7.14 and Harding *EC Investigations and Sanctions* at p 84.

[32] See *ANSEAU* at p 210, *Dutch Builders* at p 183, *Cement* at p 525, *Cast Iron and Steel* at p 715, *FWA* at p 479, *Benelux Flat Glass* at p 156, *Woodpulp* at p 516, *Zinc Producers* at p 133, *Peroxygen* at p 506, *LdPE* at p 417, *Polypropylene* (Commission decision) [1988] 4 CMLR 347 at para 107, *PVC* at p 376 and *Soda Ash* at p 479, *Belgian Roofing Felt* at p 156, *Rolled Zinc* at p 303, *Dutch Cigarettes* at p 756, *Meldoc* at pp 877-878.

[33] Eg *Belasco* at para 41, *IAZ* at p 3415, *SSI* at p 3876. The CFI in *Plasterboard* [1993] 4 CMLR 143 at para 166, found anti-competitive awareness sufficient to establish intention.

[34] See eg *FWA*, *LdPE*, *PVC* and *Polypropylene*.

[35] *Cast Iron and Steel*, *Dutch Builders* and *ANSEAU* respectively.

[36] Harding *EC Investigations and Sanctions* at p 82. Harding argues that these are recurring themes in DGIV's fining policy influencing its assessment not just of 'gravity' but of 'duration' and 'intention/negligence'.

[37] Harding *EC Investigations and Sanctions* at pp 86-87 ; Kerse *EC Antitrust Procedure* a paras 7.19, 7.20 and 7.23 ; Reynolds 'EC Commission Policy on Fines'.

[38] Eg *Italian Flat Glass*, *Woodpulp*, *SSI* and *Meldoc*.

[39] Thirteen cases were regarded as deliberate and seventeen cases referred to "anti-competitive awareness". See notes 29 and 32 supra for further details of the cases involved.

[40] It has been mentioned in several cases, eg *PVC* at pp 376-377, *Polypropylene* at p 248, *LdPE* at p 417, *Soda Ash* at p 479, *Italian Flat Glass* at p 515 and *Benelux Flat Glass* at p 364.

[41] Eg *Polypropylene* at p 248, *Benelux Flat Glass* at p 365.

[42] For further discussion of this aspect, see Kerse *EC Antitrust Procedure* at para 7.23 ; Reynolds 'EC Commission Policy on Fines'.

[43] See particularly, *Polypropylene* at p 246, *LdPE* at pp 417-418, *Woodpulp* at p 516 and *Italian Flat Glass* at p 577. In these cases, DGIV did little more than state that it must/has taken this factor into account.

[44] Eg *PVC* at pp 376-377, *Polypropylene* at p 248, where the "Big Four" received substantially larger fines, and *Peroxygen* at pp 506-507. See also *Meldoc*, *Benelux Flat Glass*, *FWA* and *ANSEAU*. Many of these ringleaders also feature on the list of petrochemical recidivists, eg Hoechst, ICI, Solvay and Shell.

[45] See eg *Cast Iron and Steel*, *GCB*, *PVC* (except Shell), *LdPE* (with certain exceptions, eg Repsol and Statoil, and also Shell and BP, who were only on the periphery of the cartel), *Polypropylene* at pp 249, 322 and *IAZ* at p 3418. Also in *Peroxygen* and *Italian Flat Glass*, undertaking liability was used to extend liability for fines. For further discussion, see Gyselen 'The Commission's Fining Policy in Competition Cases' at p 72.

[46] *PVC* at pp 376-377.

[47] Reynolds 'EC Commission Policy on Fines' at p 264 and Kerse *EC Antitrust Procedure* at para 7.23, both discuss this.

[48] See *PVC* at pp 376-377, *Soda Ash* at p 478, *LdPE* at pp 415-416, where the parties refused to co-operate with the investigation and denied the offence, *GCB* at p 97 and *FWA* at pp 479-480, whose unco-operative behaviour was criticised. See also, *Peroxygen*, *Italian Flat Glass* and *Dutch Builders*, where a reluctance to spontaneously terminate the infringement was criticised. See discussion by Reynolds 'EC Commission Policy on Fines' at p 264.

[49] Kerse *EC Antitrust Procedure* at para 7.20.

[50] Five cases: *Polypropylene*, *LdPE*, *Soda Ash*, *Cast Iron and Steel* and *Cement*, were found to be operating both secret and institutionalised anti-competitive practices. *Meldoc*, *Benelux Flat Glass* and *FWA* were criticised for their covert behaviour alone, whilst *Welded Steel* and *Dutch Builders* had the systematic nature of their behaviour condemned. In the latter case, the fact that the system was not operated covertly was treated as mitigating the offence.

[51] *LdPE* at p 417. Similarly in *Cast Iron and Steel* ; "a deliberate effort over a period of at least 12 years ... to frustrate one of the principal aims of the Treaty".

[52] *Cast Iron and Steel* and *Dutch Builders* respectively.

53 *Cement* at pp 470, 529, *PVC* at pp 373-374, *Dutch Builders* at p 183, *Cast Iron and Steel* at p 716, *Welded Steel* at p 80, *LdPE* at p 414, *Soda Ash* at p 479, *Polypropylene* at pp 240,322.

54 Eg *PVC, LdPE, Polypropylene.*

55 *Hercules* at pp 322-323, discussed by AG Vesterdorf at p 249 et seq. Other cartel members made similar claims, eg Huls, Shell and Hoechst. In addition, Shell and Hoechst claimed they were not the cartel's ringleaders. The CFI largely dismissed their claims, although Shell's fine was reduced because of its shorter participation in the cartel. In ANIC/ENICHEM's *Polypropylene* appeal, the CFI did not support DGIV's use of the collective responsibility concept. On this, see Gyselen 'The Commission's Fining Policy in Competition Cases' at p 72.

56 *IAZ* at pp 3415-3418, *GCB* at p 98, *SSI* at p 3884, *Belasco* at pp 125-127, *Woodpulp II* at pp 558-560, 593. Though on some occasions fines were reduced. Where the Court does this, it ensures that the relative amount of fines remains proportional.

57 Harding *EC Investigations and Sanctions* at p 87.

58 See discussion by Harding *EC Investigations and Sanctions* at pp 87-89.

59 See Kerse *EC Antitrust Procedure* at paras 7.18, 7.21 and 7.24.

60 Eg *Benelux Flat Glass, Meldoc, Dutch Cigarettes, Rolled Zinc, Italian Flat Glass, Woodpulp, Cement,* and *Cast Iron and Steel.*

61 In its 13th Report on Competition Policy 1983, the Commission noted that price-fixing, market sharing and export bans were amongst the most serious competition infringements. Discussed by Kerse *EC Antitrust Procedure* at para 7.20.

62 See *Dutch Builders* at p 184. In *LdPE* at p 417, the violations were described as "by their very nature serious restrictions of competition" and in *FWA* at p 479, as a "particularly serious offence". See also *Cement* at pp 525-529, *GCB* at p 96, *ANSEAU* at p 210, *Cast Iron and Steel* at p 717, *Benelux Flat Glass* at pp 364-365, *Welded Steel* at p 81, *Rolled Zinc* at p 303, *Dutch Cigarettes* at para 167, *Italian Flat Glass* at p 576, *Meldoc* at p 878, *Belgian Roofing Felt* at p 157, *Woodpulp* at p 516, *Zinc Producers* at p 133, *Peroxygen* at p 506, *Soda Ash* at p 478, *Polypropylene* (Commission decision) [1988] 4 CMLR 347 at para 107 and *PVC* at p 376, where the serious and traditional character of the offences was noted.

63 *PVC* at p 376. See also, *Polypropylene, LdPE, Cement, Zinc Producers, Woodpulp* and *Cast Iron and Steel*, which all affected the W. European market in a major industrial product. *Belgian Roofing Felt, Benelux Flat Glass, Italian Flat Glass, Meldoc, ANSEAU, Dutch Cigarettes* and *Dutch Builders* involved the major producers on a national market in respect of an important product. In *ANSEAU, IAZ* at pp 3416-347, appealed arguing that there was a disparity between the amount of fines imposed on the parties and their respective market shares. The ECJ dismissed the appeal. In addition, *Peroxygen, Soda Ash* and *Welded Steel*, whilst not involving all market producers did involve some of the major undertakings.

64 This factor was explicitly mentioned in *Welded Steel, Cast Iron and Steel, Soda Ash, Dutch Cigarettes* and *Woodpulp.* In *Welded Steel*, the effect on prices was potential rather than actual. Of course, many other cartels involved price-fixing and this will have resulted in price increases elsewhere, eg *PVC, Polypropylene, Cement, Peroxygen, Zinc Producers* and *Belgian Roofing Felt.*

65 *FWA* at pp 480-481.

66 Kerse *EC Antitrust Procedure* at para 7.18.

67 Kerse *EC Antitrust Procedure* at para 7.24.

68 See *Welded Steel, Cast Iron and Steel*, described by the Commission as a "special case" at p 717, *PVC, Benelux Flat Glass, Polypropylene, LdPE, Zinc Producers, Belgian Roofing Felt, Italian Flat Glass, Cement, FWA* and *Meldoc*. In the latter case, not only industry problems but the special position of agriculture was taken into account.

69 In *Welded Steel*, DGIV took into account the Commission's crisis measures for the steel industry. In *Dutch Cigarettes*, Dutch excise and price laws and EC tax directives were taken in mitigation. Whilst in *Meldoc*, the special position of agriculture was relevant.

70 *Dutch Builders* at pp 183-184.

71 *Dutch Builders* at p 183. A number of other cases were explicitly condemned for offending this "fundamental objective" eg *Soda Ash, Peroxygen, Belgian Roofing Felt, Rolled Zinc, Welded Steel, FWA, ANSEAU, Cement, Cast Iron and Steel, Zinc Producers* and *Woodpulp*. In *Zinc Producers* at p 133, the violations were considered to "strike at the very foundations of the Community".

72 Kerse *EC Antitrust Procedure* at para 7.25, notes the complexity of the assessment. See also Gyselen 'The Commission's Fining Policy in Competition Cases' at pp 70-71.

73 Kerse *EC Antitrust Procedure* at para 7.25.

74 Reynolds in 'EC Commission Policy on Fines' and in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 7-9, he extensively criticised DGIV's inconsistent approach.

75 The infringement lasted for 17 years in *Soda Ash* who was fined 18m ECU, whilst in *Peroxygen*, a 10/20 years infringement received a 9m ECU fine. See Appendix B, Table 5 for further details of sanctioning in the case study.

76 Admittedly, the former case only involved the Dutch market, whilst *Cement* was an EC-wide violation. Nevertheless, it is difficult to understand how this can entirely account for a difference of 225.5m ECU in the fines.

77 The offences lasted 4 years and 3-5 years respectively. In *Italian Flat Glass*, the fine was substantially reduced on appeal. Cases of similar duration, but covering a wider market, have received much larger fines, eg in *PVC*, a 4 year offence received a 23.5m ECU fine, in *Polypropylene*, a 6 year offence was fined 57.5m ECU and in *LdPE*, a 7 year violation was fined 37m ECU.

78 Yet both fines related to a national market. *Dutch Cigarettes/SSI's* fine was reduced slightly on appeal. *Rolled Zinc* and *ANSEAU*, which both lasted 3 years, were fined less than *Dutch Cigarettes*, receiving 900,000 ECU and 944,000 ECU fines respectively.

79 *PVC, Polypropylene, LdPE, Zinc Producers, Welded Steel, Cast Iron and Steel* and *Cement*. The advantages to the Commission accruing from this have been noted by Kerse *EC Antitrust Procedure* at para 7.46 and Gyselen 'The Commission's Fining Policy in Competition Cases' at p 71. The limitation period for the enforcement of sanctions is provided for under Reg.2988/74.

Very briefly, Art.1 provides that no fines can be imposed afer 5 years in the case of most substantive infringements. Time starts to run on the day the offence is committed but, where the violation continues or is repeated, time does not begin to run until the offence ceases. Any actions taken by the Commission by way of preliminary investigations will interrupt the limitation period (Art.2(1)). Further details are given in Kerse *EC Antitrust Procedure* at para 7.46 et seq.

80 See also discussion in Kerse *EC Antitrust Procedure* at para 7.34 et seq.

81 See notes 68 and 69 above for further details of the cases involved.

82 Eg *Welded Steel* and *FWA*. In the latter case, DGIV stated that the parties proper course of action was to refer the anti-competitive practice to the Commission or national courts.

83 In *Woodpulp*, it was the first fine involving a US statute the Webb-Pomerene Act.

84 *FWA* at pp 479-485. However, on appeal in *Compagnie Maritime Belge*, the CFI did reduce the fine in this case. Similarly in *Polypropylene*, Hercules claimed it should have received a reduced fine because it was a 'first offender'. Both the Commission and CFI dismissed this argument at p 327.

85 In *LdPE* and *PVC*, the fact that some firms involved had been fined substantially for their participation in the *Polypropylene* cartel was taken into account. In *Cast Iron and Steel* and *Welded Steel*, fines imposed by the German and French authorities respectively were taken into account.

86 *Hercules* at pp 244-245, 324-327. Also in *GCB* at pp 95-97, the defendant argued that the Commission had not taken into account as mitigating the abolition of a uniform rate of commission. In *SSI*, defendants argued that the domestic scope of the agreement should mitigate the offence. In all three cases, the CFI dismissed these arguments.

87 *Zinc Producers* at pp 135-136. DGIV's more conciliatory approach here is the result of a plea-bargain.

88 See discussion by Gyselen 'The Commission's Fining Policy in Competition Cases' ; Kerse *EC Antitrust Procedure* at para 7.36 ; Reynolds 'EC Commission Policy on Fines' at p 264.

89 See *Dutch Builders*, *Cast Iron and Steel*, *Woodpulp* and *Zinc Producers*. In *Peroxygen*, *FWA*, *Welded Steel*, *LdPE* and *Polypropylene*, co-operation was given by one/some parties only.

90 In *FWA* and *Woodpulp*, undertakings were given. See also the plea-bargain in *Zinc Producers* and *Cast Iron and Steel* which was described as a "special case" at p 717. In *Polypropylene*, ICI's co-operation received a 10% reduction in its fine which the CFI increased to 20%.

91 Van Bael in 'The Antitrust Settlement Procedure of the EC Commission' *CMLR* [1986] 61, criticises the Commission's approach in this case.

92 *Hercules* at pp 324-329. Hercules claimed that it had co-operated fully with the Commission, had voluntarily terminated the infringement and had instituted a compliance programme.

93 *Hercules* at pp 327-329. Here, AG Vesterdorf at p 245, supported the CFI's view. A similar approach has been taken in *GCB* at pp 95-100, *IAZ* at p 3418, *Woodpulp II* at pp 592-593, *SIV* at pp 1552 and *SSI* at pp 3882-3883.

94 13th Report on Competition Policy 1983 at p 56. Discussed by Kerse *EC Antitrust Procedure* at paras 6.27 and 7.32 ; Reynolds 'EC Commission Policy on Fines' and in Reynolds Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 7-9 ; Gyselen 'The Commission's Fining Policy in Competition Cases' and also AG Vesterdorf in *Hercules* at pp 238-239. This more severe approach has been reiterated recently in the Commission's 21st Report on Competition Policy 1991 at p 101. Here, in its discussion of the *Tetrapak* fine, DGIV stated its intention to make greater use of its ability to impose fines up to 10% of turnover and to take into account the profits derived from the infringement.

95 *MDF* [1983] ECR 1825 at para 115 et seq. Also supported by AG Slynn in *MDF* at p 1947. The Court considered that in assessing the deterrent level of fines, regard must be had both to the requirements of individual and general deterrence.

96 Art.15(2)/Reg.17 provides for the imposition of fines ranging from 1,000 ECU to 1m ECU, or up to 10% of the firm's turnover in the preceeding business year. For further discussion, see Kerse *EC Antitrust Procedure* at paras 7.26-7.28. There has been considerable debate over whether or not the Commission should issue a tariff of fines. For instance, see discussion in *Polypropylene* by AG Vesterdorf at pp 246-247 and Gyselen 'The Commission's Fining Policy in Competition Cases'at p 64. Gyselen is opposed to tarification on the grounds that it will rob fines of their deterrent effect.

97 It seems that the assessment envisaged by the Court involves balancing global turnover, both product-wise and geographically, giving some estimate of the size and economic power of the undertaking, against the turnover in product and geographical area relevant to the violation. Here, the global turnover would set a maximum level of fine. For further discussion, see : Harding *EC Investigations and Sanctions* at pp 88-89 ; Kerse *EC Antitrust Procedure* at para 7.29 ; Gyselen 'The Commission's Fining Policy in Competition Cases' at p 67 ; Reynolds 'EC Commission Policy on Fines'.

98 See Gyselen 'The Commission's Fining Policy in Competition Cases' at p 67, contrasting the cases of *Polypropylene* and *Meldoc*.

99 *Soda Ash* at p 478. Here ICI's soda ash sales were less than one-third of Solvay's but its turnover for all products was three times greater than Solvay's.

100 Reynolds 'EC Commission Policy on Fines' at p 263. It seems that an amount representing 2%-4% of turnover will be used as a starting point. See eg *ANSEAU*, where the fine amounted to 1.5% of the total value of the goods concerned.

101 Eg *Dutch Builders* at p 185, where the total value of contracts put out to tender involving concerted practices within each association during the period concerned were taken into account. See also, *Peroxygen*, *Meldoc*, *Belgian Roofing Felt* and *Rolled Zinc*.

102 *Benelux Flat Glass* at pp 365-366. DGIV stated that this approach was taken into order to reflect the true economic power of these two firms.

103 *GCB* at pp 95-101. On appeal, the CFI upheld the Commission's assessment. Where trade associations are concerned and assessment of turnover is inappropriate, then their total annual expenditure will be evaluated. See eg *Belasco*.

104 See 21st Report on Competition Policy 1991 ; Gyselen 'The Commission's Fining Policy in Competition Cases' at pp 68-70 ; Kerse *EC Antitrust Procedure* at para 7.30.

105 In *GCB*, DGIV was able to calculate the precise profits derived from French banks charging extra commission. The Commission also took into account indirect profits. In *FWA* at pp 480-481, DGIV attempted to assess the profits, though a lack of information made this difficult. In the end, a plea-bargain meant that the full amount of the profits was not recouped.

106 See Appendix B, Table 5 for a list of sanctions imposed and duration of offences. Kerse *EC Antitrust Procedure* at para 7.26 and Reynolds in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 7, both discuss the Commission's fining policy past and present.

107 Compare fines imposed in *ANSEAU* (944,000 ECU), *Rolled Zinc* (900,000 ECU) and *Dutch Cigarettes* (1.5m ECU) with *Polypropylene* (57.85m ECU), *LdPE* (37m ECU), *Soda Ash* (18m ECU) and *Dutch Builders* (22.5m ECU).

108 These have also increased enormously in the last 15 years. See eg *Dutch Cigarettes* (1982) 1.5m ECU ; *Benelux Flat Glass* (1985) 4m ECU ; *Meldoc* (1989) 6m ECU ; *Italian Flat Glass* (1990) 13.4m ECU ; *Belgian Roofing Felt* (1991) 1m ECU and *Dutch Builders* (1993) 22.5m ECU.

109 Eg *Polypropylene* (1988) 57.85m ECU, *PVC* (1990) 23.5m ECU and *LdPE* (1990) 37m ECU.

110 Only in *VBBB* and *Fedetab* were decisions alone made.

111 These were both offences covering a national market. The violations lasted 6 years and 12 years respectively. This difference in duration does not seem to satisfactorily account for the enormous difference in the level of fines. The *Italian Flat Glass* sanction of 13.4m ECU for a 3-5 year violation also appears disproportionate. This sanction was drastically reduced on appeal.

112 *Woodpulp* and *Polypropylene*. The offences lasted 7 years and 6 years respectively and both covered a similar range of anti-competitive practices over a wide market. Also other plea-bargained cases have been dealt with generously, eg *Zinc Producers* received a 3.3m ECU fine for a 13 year violation and *Cast Iron and Steel* was fined 1,250,000m ECU for a 12 year offence. This enormous difference between the level of plea-bargained and other fines has been criticised by Reynolds in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 8-9, as provoking miscarriages of justice where the less sophisticated may be pressurised into accepting a plea-bargain.

113 The level of this fine seems even more inappropriate given that it was the first time that DGIV had imposed a sanction on the maritime sector - normally a mitigating factor. This fine was reduced to 9.09,000m ECU on appeal. See *Compagnie Maritime Belge.*

114 See the earlier discussion of the duration of fines for further consideration and examples.

115 Eg *Polypropylene*, *LdPE*, *PVC*, *Woodpulp* and *Welded Steel* where both concepts were employed. Fines in the latter two cases were much lower because of a plea-bargain in *Woodpulp* and the mitigating effects of a structural crisis in *Welded Steel.* The concept of complex infringement alone was used in *Dutch Builders* a 22.5m ECU fine ; *Soda Ash* a 18m ECU fine ; *Meldoc* a 6.5m ECU fine ; *Cast Iron and Steel* a 1,250,00 ECU fine and *Zinc Producers* a 3.3m ECU fine. Again, the latter two cases had their fines reduced because of a plea-bargain.

116 See Written Submissions by Reynolds, JWP and Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 7-9, p 38, and p 61 and p 221 respectively. See also AG Vesterdorf in *Polypropylene* at p 246. Reynolds notes that this evaluation is shrouded in even greater secrecy where major cartels are concerned. In contrast, Gyselen 'The Commission's Fining Policy in Competition Cases' at p 63, whilst admitting that DGIV's evaluation must be susceptible to review, is opposed to tarification as a means of ensuring transparency as this will reduce the deterrent effect of fines.

117 In *Polypropylene* at p 324, the CFI stated that it involved "a complex array of factors". In the same case, AG Vestedorf at p 246, noted the complexity of the evaluation and the fact that many influencing factors were not readily quantifiable. See also, discussion in *IAZ* and *MDF* [1983] ECR 1825. In Ehlerman's Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at para 62, he insisted that the Commission's approach was not flawed.

118 Reynolds in 'EC Commission Policy on Fines', has been particularly critical of this. However, the Court has reduced some fines. Ehlerman in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at para 62, looks forward to the time when the Court will increase competition fines.

119 Kerse *EC Antitrust Procedure* at para 8.12 ; Shaw 'Recent Developments in the Field of Competiton Procedure' *ELR* [1990] 326 ; Van Overbeek 'The Right to Remain Silent in Competition Investigations : The Funke Decision of the ECHR Makes Revision of the ECJ's Caselaw Necessary' *ECLR* [1994] 127 ; Mendelson 'The ECJ and Human Rights' *YBEL* [1981] 125 ; Dauses 'The Protection of Fundamental Rights in the Community Legal Order' *ELR* [1985] 398.

120 For background information on the requirements of natural justice, see Wade *Administrative Law* Oxford Unv. Press (5th Edn) (1982).

121 Art.19/Reg.17 and Arts 3,.4/Reg.99 refer only to a defendant's right to be heard. At Community law level, the right to an independent tribunal forms one of the fundamental rights protected under Art. 164 of the Treaty. See, *Internationale Handelgesellschaft* [1970] ECR 1125 and *Nold* [1974] ECR 491. Discussed by Mendelson 'The ECJ and Human Rights' and Dauses 'The Protection of Fundamental Rights'.

122 *Shell* [1992] ECR 757 at p 782. Similar arguments were advanced in *SIV* at pp 1436-1439 and *Van Landewyck* at p 3248. See also *VBBB* and *Orkem* [1989] ECR 3283.

123 See *Van Landewyck* at p 3248, *SIV* at p 1439, *Shell* [1992] ECR 757 at p 782. See also *MDF* at paras 6-8. In *Hercules*, at pp 101-104, AG Vesterdorf reviewed the issues involved and supported the position of the Commission and Court.

124 *Van Landewyck* at p 3248.

125 See *SIV* at p 1439, *VBBB* at p 58, *Shell* [1992] ECR 757 at p 782.

126 Art.7/Reg 99 gives the Commission a discretion over which witnesses to hear. Art.3/Reg 99 allows defendants to propose to DGIV those witnesses who can corroborate their case.

127 *VBBB* at pp 57-58, *Van Landewyck* at p 3232.

128 *Van Landewyck* at p 3234 and *VBBB* at p 58.

129 *Orkem* [1989] ECR 3283 at p 3350. Discussed by Van Overbeek 'The Right to Remain Silent in Competition Investigations' at p 132. He points out that in *Orkem*, the Court did not refer to a specific paragraph of Art.6 ECHR but to Art.6 in general.

130 This issue has not been raised by parties in the study presumably because of the confidential nature of matters discussed at the hearing.

131 Kerse *EC Antitrust Procedure* at para 8.12.

132 See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 18-24 and Written Submissions to the Committee by JWP, Van Bael and Duffy, Minutes of Evidence at pp 60-62 and pp 220-222 and p 224 respectively.

133 Ie the attainment of political and pragmatic goals.

134 For background information, see : Kerse *EC Antitrust Procedure* at para 4.25 et seq ; Harding *EC Investigations and Sanctions* at p 48, Harris 'Problems in Procedure in EEC Competition Cases' *NLJ* [1989] 1452,1457 ; Johannes (a Hearing Officer) in 'The Role of the Hearing Officer' in HAWK (Ed) *Annual Proceedings* Fordham Corp Law Inst (1989) p 347.

135 See in particular, House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO, where calls were made for an independent person to oversee defence rights including the conduct of the oral hearing.

136 See Art.2 of the Hearing Officer's Terms of Reference, discussed in 20th Report on Competition Policy 1990 at p 273. See also 12th Report on Competition Policy 1982 at pts 36-37 and 13th Report on Competition Policy 1983 at pp 75-76, 273-4. For further discussion, see particularly, Johannes 'The Role of the Hearing Officer' and Harris 'Problems in Procedure in EEC Competition Cases'.

137 Kerse *EC Antitrust Procedure* at para 4.25 et seq, gives a detailed account of the function of the HO and the conduct of the oral hearing. Also discussed by Harding *EC Investigations and Sanctions* at p 48.

138 See Written Submission by Ehlerman to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 108-109, who emphasises the need to maintain the HO's independence. Under Art.5 of the HO's Terms of Reference, the HO reports to the DG of DGIV both on the progress of proceedings and on his conclusions. His comments may include a discussion of the adequacy of the Commission's evaluation, the need for additional information, the withdrawal of certain objections and the existence of the violation. Under Art.6, the HO may instead report directly to the Commissioner responsible for Competition, who, under Art.7 may decide to attach the HO's Report to the draft decision when it goes before the Advisory Committee so that they may be made aware of all relevant information. See 12th and 20th Reports on Competition Policy 1982 and 1990 for Terms of Reference. Discussed in Kerse *EC Antitrust Procedure* at para 4.25 et seq.

139 See particularly, Reynolds Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 15-16, 32 ; Kerse *EC Antitrust Procedure* at para 4.27. Harris 'Problems in Procedure in EEC Competition Cases' at p 1457, also notes that the HO has been useful at pointing out gaps and factual errors. On occasion, this has resulted in the withdrawal of the complaint.

[140] See *PVC*, *LdPE* and *Polypropylene*. Discussed in JWP's Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 62.

[141] See Written Submissions by JWP, Van Bael, Competition Law Association and Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 62 : p 222 ; p 15 ; pp 16, 32 respectively. Reynolds, in particular, has been critical of the Commission's attitude towards the HO.

[142] Similarly, if the HO allows the Commission to present evidence which the defendant regards as unfair this procedural decision cannot be appealed. See Written Submission by Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 32.

[143] See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO. For criticism, see Written Submission by JWP to the Committee, Minutes of Evidence at p 62. Ehlerman in his Written Submission to the Committee, Minutes of Evidence at pp 108-109, details improvements designed to prevent further problems of this nature.

[144] The Report is not published and is not made available to the defence even in later appeals, See *ICI* [1992] ECR 1021 and Kerse *EC Antitrust Procedure* at para 4.34.

[145] The requirements of Art.190 of the Treaty are discussed by Kerse *EC Antitrust Procedure* at para 6.21 and below under 'Problems relating the SO and Decision'. The issue was further complicated because of confusion between the HO and Commissioner over the former's Terms of Reference.

[146] *Hercules* at p 106. Similar arguments were advanced in *Shell* [1992] ECR 757, *Huls* [1992] ECR 499 and *ICI* [1992] ECR 1021. The parties involved urged disclosure because they believed the HO's views varied from the Commission's decision. Discussed by AG Vesterdorf in *Hercules* at pp 99-107.

[147] See Art.20/Reg.17 and discussion of confidentiality in Ch4 under 'The Right to be Heard'.

[148] *ICI* [1992] ECR 1021 at p 1021, *Hercules* at p 319-320. The Court made it clear that the Report was purely advisory in nature and that the Commissioner could not be required to place the Report before the Advisory Committee. At p 107 in *Hercules*, AG Vesterdorf supported the Commission's interpretation of the Report as an internal document which could only be disclosed where a serious misuse of powers was suspected as per *BAT and Reynolds v Commission* [1987] ECR 4487.

[149] 18th Report on Competition Policy 1988 at p 44. Johannes in 'The Role of the Hearing Officer' at p 350, also states that in 25% of cases, the HO may suggest a change in the Commission's evaluation, whilst in 10%, he may propose a reduction/withdrawal of fines.

[150] See Written Submission by Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 16, 32, where Reynolds argues that there is no valid reason for non-publication of the Report.

[151] If a plea of lack of access is advanced at the oral hearing, the HO under Art.2 Terms of Reference must address this issue in his Report to DG/DGIV. On this, see Johannes 'The Role of the Hearing Officer' at p 348.

[152] See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at p 39, for the Committee's recommendations on this. Written Submissions by JWP, Competiton Law Association, Reynolds, and Van Bael to the Select Committee have all urged that the HO be brought into the procedure earlier in the process, preferably at investigation and be allowed to rule on access, time limits for the SO and other procedural matters. Many of these parties have also called for the publication of his Report. See comments made by Reynolds and JWP, Minutes of Evidence at p 16 and p 62 respectively. However, the Select Committee, at p 16, reports that the OFT, whilst favouring publication of the HO's Report, did not consider that he should be given greater status. Reynolds, Minutes of Evidence at p 32, has argued that the development of the HO is the most realistic way of achieving a system of checks and balances on Commission decision-making.

[153] See Written Submission by Ehlermann to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 108-109.

[154] See Written Submission by Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 222.

[155] For background information, see : Kerse *EC Antitrust Procedure* at paras 5.21-5.28 ; Whish *Competition Law* at p 33 ; Harris 'Problems in Procedure in EEC Competition Cases' ; Temple Lang 'The Procedure of the Commission in Competition Cases' ; Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods' ; Harding *EC Investigations and Sanctions* at pp 48-50 ; Van Bael 'Transparency of EC Commission Proceedings' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 192 at p 193.

[156] Arts.10(1), Art.15 and Art.16/Reg.17 require the Committee's opinion to be obtained before the Commission takes a decision regarding an infringement of Arts.85/86, a decision relating to Art.85(3) or the imposition of fines. The Committee consists of officials from the competent authorities of each MS (Art.10(4)). The constitution and function of the Advisory Committee are discussed further by Harding *EC Investigations and Sanctions* at pp 48-49 ; Kerse *EC Antitrust Procedure* at para 5.21 et seq ; Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods' at pp 22-23.

[157] Under Art.10(6)/Reg.17, a copy of the Committee's opinion is attached to the draft decision when it is placed before the full Commission. But, the opinion is not published nor is it disclosed to the undertaking nor generally to the Court. However, in *Quinine* [1970] ECR 661 and *Distillers* [1980] ECR 2229, the opinion was eventually disclosed to the Court.

[158] *Distillers* [1980] ECR 2229 at p 2292. This situation has been trenchantly criticised by Van Bael 'Transparency of EC Commission Proceedings' at p 192 and by a number of parties giving evidence before House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO.

[159] *MDF* [1983] ECR 1825 at paras 34-36 ; *Van Landewyck* [1980] ECR 3125, per AG Reischl at p 3129. It seems that the rationale behind the Court's approach to non-disclosure is that disclosure would amount to a re-opening of the procedure and that the Commission may, in any event, only base decisions on facts disclosed to the parties. See Kerse *EC Antitrust Procedure* at paras 5.25-5.26, for further on this.

[160] See *Polypropylene*, *Woodpulp II* and *SIV*. The non-disclosure of the Committee's opinion is currently on appeal in *PVC II*.

[161] For further discussion of this point, see Harding *EC Investigations and Sanctions* at pp 48-49 ; Written Submission by Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 16,33.

[162] Harding *EC Investigations and Sanctions* at p 49.

163 House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at para 20. As well as recommending publication, the Select Committee also suggested that the firms should be informed of the documents submitted to the Advisory Committee and that the minutes of the oral hearing should always be placed before the Committee. Reynolds in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 16, claims that none of these reforms has been implemented. However, Ehlerman in his Written Submission to the Committee, Minutes of Evidence at p 109, insists that the minutes of the hearing are normally placed before the Advisory Committee. At paras 54-58 of the Select Committee's Report, several parties including JWP, Reynolds, CBI, Competition Law Association, Van Bael, OFT and DTI renewed their calls for publication of the Advisory Committee's Report. This situation is now even more anomalous as the Committee's opinion on merger cases is now published.

164 See Written Submission by Ehlerman to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 109. The Select Committee disagrees. At paras 101-102, it has urged widespread amendment of Reg.17.

165 See Art.10(1)/Reg.17. Discussed by AG Warner in *Distillers* [1980] ECR 2229 at p 2292. The effect of the Committee proceeding to consider matters in the absence of "important documents" was also assessed.

166 Kerse *EC Antitrust Procedure* at para 5.23. Any complaints and the letter initiating the procedure would probably be included too.

167 See *Huls* [1992] ECR 499 at p 536 - part of the *Polypropylene* cartel. Discussed by AG Vesterdorf in *Hercules* at pp 122-123. In *Huls*, at p 533, the firms claimed that the fact that the Committee only had the draft minutes before them amounted to a procedural irregularlity. The other case to mount a challenge was *SIV* at p 1534. Here the distortion of documents by DGIV meant that the Committee were unable to properly assess the nature and significance of the violation in full knowledge of the facts. See also *Buchler* [1970] ECR 733 at para 17 and *RTE* [1991] 4 CMLR 586 at paras 34-35, which made it clear that for such a plea to succeed, the defendant must establish not only material discrepancies between the draft and final minutes of the hearing, but also that the draft was actually misleading.

168 See *Huls* [1992] ECR 499 at pp 533-536, where the CFI dismissed the submission holding that Huls had failed to show that the draft was materially misleading. However in *SIV*, the distortion of documents was so extensive that the CFI partially annulled the Commission's decision.

169 See especially, Written Submissions by Reynolds, JWP and Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 16-17 and p 62 and p 220 respectively, who all reported that many MS did not take their responsibilities within the Advisory Committee seriously because of a perception that the Commission regarded the consultation process as a "mere ritual" with little influence over the final decision. Van Bael noted problems regarding the inadequate disclosure of information to MS. Whilst the OFT in its Written Submission to the Select Committee, Minutes of Evidence at p 92, revealed that liaison was made even more difficult by late disclosure of documents.

170 See Written Submissions by JWP, Reynolds and Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 16-17 and p 62 and p 220 respectively, who all note that many MS only took an active interest in the Advisory Committee when national interests were at stake.

171 See particularly JWP's comments on this matter in their Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 62.

172 For further information on this aspect, see : Whish *Competition Law* at p 317 ; Kerse *EC Antitrust Procedure* at paras 6.21, 6.41 ; Temple Lang 'The Procedure of the Commission in Competition Cases' ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO.

173 The scope and requirements of Art.190 of the Treaty are discussed by : Kerse *EC Antitrust Procedure* at paras 6.21, 6.41 ; Temple Lang 'The Procedure of the Commission in Competition Cases' at pp 163-165 ; Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods' at pp 22-23. See also cases of *Quinine* [1970] ECR 661, *Dyestuffs* [1969] CMLR D23 and *GVL* [1983] ECR 483.

174 *Quinine* [1970] ECR 661 at paras 92-94.

175 Ten cases made such complaints:- *Polypropylene*, *Woodpulp II*, *Belasco*, *VBBB*, *SSI*, *Van Landewyck*, *IAZ*, *GCB*, *SIV* and *PVC/BASF*. In the latter case, the appeal related to discrepancies in the text of the decision as notified to individual parties.

176 *Woodpulp II*, discussed by AG Darmon at pp 443-458. In particular, the SO only explicitly referred to violations regarding concert on announced prices, whilst the decision also referred to violations relating to transaction prices. The Commission attempted to use the vagueness of the SO to claim that it related to both offences. It also argued that the evidence obtained after the SO was issued was confidential and therefore could not be disclosed. AG Darmon at p 464, was particularly critical of the vagueness of the SO and the manifest non-observance of defence rights. As for the evidence obtained after the SO, he pointed out that DGIV should either not have relied on it or should have issued a supplementary SO.

177 In *Polypropylene*, such complaints were made by Hercules, Shell, Hoechst and Huls. All claimed that the change in legal classification hindered their ability to defend themselves as the precise case against them was unclear. *Huls* [1992] ECR 499 at p 560, claimed that the notion of complex infringement was introduced to cover gaps in the Commission's evidence. See *Hercules* at pp 117-129, where AG Vesterdorf reviews the law on these issues. In *GCB*, DGIV failed to properly notify a supplementary SO which the parties claimed, inter alia, altered the definition of the relevant geography market. Similar complaints regarding changes in legal characterisation and new objections being raised in the decision were also made in the other cases already noted.

178 *Woodpulp II* at pp 452-453. Here the vagueness of the SO meant that there was a lack of individualisation regarding the number and duration of offences and each party's participation in them. Later in the case, the ECJ at pp 569-572, were equally critical. Complaints that a lack of individual assessment in the decision infringed defence rights were also made in *Polypropylene*. See eg *Hercules* at pp 128-129.

179 In *Polypropylene* at pp 319-321, the CFI found the decision adequately reasoned to the requisite legal standard. In the same case, AG Vesterdorf at p 124, agreed with this finding. A similar approach was taken in *Belasco* at p 127, *VBBB* at pp 58-59, *SSI* at pp 3831-3836, *Van Landewyck* at pp 3244-3246, *IAZ* at p 3407 and *GCB* at p 94, where the CFI found no breach of Art.190 in relation to GCB though the decision against Eurocheque was annulled and fines cancelled because of DGIV's failure to properly notify a supplementary SO.

180 *Woodpulp II* at pp 569, 588, *GCB* at pp 85-86. *SIV* at para 159 and *BASF/PVC I*.

181 *Woodpulp II* at pp 569-588. The ECJ were trenchantly critical of the Commission's prosecution of this case.

182 See *BASF*. On appeal to the ECJ as *PVC I*, the Court set aside the CFI's judgement and annulled the Commission's decision for failure to duly authenticate the decision. The Court in *SIV*, partially annulled the Commission's decisiion for a failure to adequately define the geographical market. Whilst in *GCB*, the decision against Eurocheque was annulled because of inconsistencies between the SO, as formally notified, and the decision.

183 For background information, see Sanders and Young *Criminal Justice* Butterworths (1994) ; WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) ; McConville, Sanders and Leng *The Case for the Prosecution*.

184 Sentences are rarely fixed by law and, apart from statutory provisions stating maximum penalties for offences or special rules for certain types of offender and limited guidance from the Court of Appeal, sentencers enjoy considerable freedom over the sentence they impose. On this, see Kelk, Koffman and Silvis 'Sentencing Practice, Policy and Discretion' in HARDING, FENNELL, JORG and SWART (Eds) *Criminal Justice in Europe : A Comparative Study* Clarendon Press (1993) p 319 at pp 333-335. There exists extensive literature discussing the principles and practices of English sentencing. See eg Ashworth *Sentencing and Criminal Justice* Wiedenfeld and Nicolson (1992) ; WASIK and PEASE (Eds) *Sentencing Reform - Guidance or Guidelines* Manchester Unv. Press (1987) ; CARLEN and COOK (Eds) *Paying for*

Crime OU Press (1989) ; Fitzmaurice and Pease *The Psychology of Judicial Sentencing* Manchester Unv. Press (1986).

185 The inconsistency was considered to be the result of an individualised approach to sentencing and inadequate guidance on sentencing policy from the Court of Appeal. The Court's guidance has been criticised as being unrealistic, counter-productive and inconsistent. Moreover, the sparse guidance provided often failed to be properly communicated to the lower courts. The overcrowding in prisons resulted from sentencers' inclination to send all offenders to prison. Combined with the degrading state of prisons, this overcrowding led to riots and unrest in many English prisons. For further discussion see Kelk, Koffman and Silvis 'Sentencing Practice, Policy and Discretion' at p 322 et seq, as well as literature indicated in previous footnote.

186 See para 1.1 Government White Paper, Home Office *Crime, Justice and Protecting the Public* (Cm 695) HMSO (1990).

187 The justice model of criminal justice is discussed in detail in CARLEN and COOK (Eds) *Paying for Crime* ; Hudson *Justice Through Punishment* Macmillan (1987).

188 The Act attempts to separate serious violent/sexual offences from other offences for sentencing purposes and places a broad restriction on the use of prison as a sanction. In general, custodial sentences are to be used as a last resort, or where the seriousness of the offence or the need to protect the public requires their imposition (s.1 CJA 1991). Under s.1(4)(b) CJA 1991, on passing a custodial sentence, the Court must explain to the offender why they are imposing such a sentence. The Act introduces a number of other changes and places particular emphasis on "community sentencing". For further details, see Home Office *Crime, Justice and Protecting the Public* (Cm 695) HMSO (1990), particularly paras 1-20 ; Dingwall and Davenport 'The Evolution of Criminal Justice Policy in the UK' in HARDING, FENNELL, JORG and SWART (Eds) *Criminal Justice in Europe : A Comparative Study* Clarendon Press (1993) p 21 at p 31-33.

189 See Home Office *Crime, Justice and Protecting the Public* (Cm 695) HMSO (1990) at paras 17-19.

190 Wasik 'Guidance, Guidelines and Criminal Record' in WASIK and PEASE (Eds) *Sentencing Reform - Guidance or Guidelines* Manchester Unv. Press (1987) p 108 at pp 122-123. Wasik also notes that this approach places considerable weight on the offender's past record as it indicates a propensity to offend, and thus increased culpability, and indeed, present guilt. He criticises the fact that this approach tends to result in punitive, cumulative sentencing. See also discussion in Hudson *Justice Through Punishment* at p 114 et seq.

191 For further discussion, see Kelk, Koffman and Silvis 'Sentencing Practice, Policy and Discretion' at p 338.

192 Dingwall and Davenport 'The Evolution of Criminal Justice Policy in the UK' at pp 31-32 ; Kelk, Koffman and Silvis 'Sentencing Practice, Policy and Discretion' at pp 332-38. The tough approach to crime taken by the recent Home Secretary, Mr. Michael Howard, has meant that the prison population continues to rise.

193 Eg race, class, gender, age and geographical area. These issues are discussed in Carlen 'Crime, Inequality and Sentencing' in CARLEN and COOK (Eds) *Paying for Crime* OU Press (1989) p 14 at pp 15-16 ; Allen 'Fines for Women: Paradoxes and Paradigms' in CARLEN and COOK (Eds) *Paying for Crime* OU Press (1989) p 73 at pp 75-89 ; Levi 'Suite Justice - Sentencing for Fraud' *Crim LR* [1989] 4 ; Hudson *Justice Through Punishment.*

194 See Zuckerman 'Bias and Suggestibility: Is There an Alternative to the Right to Silence?' in MORGAN and STEPHENSON (Eds) *Suspicion and Silence : The Right to Silence in Criminal Investigations* Blackstone Press (1994) p 117 at pp 119-20, who argues that the police's control of the investigation allows them to control all other aspects of enforcement. He suggests that the reasons for many miscarriages lie in the police's conduct of the investigation. Indeed, the displacement of discretion within the process from the judiciary to the prosecutor, as a result of plea-bargaining, allows prosecutors more directly to affect gravity and sentencing. On this, see Bottomley 'Sentencing Reform and Structuring of Pre-Trial Discretion' in WASIK and PEASE (Eds) *Sentencing Reform - Guidance or Guidelines* Manchester Unv. Press (1987) p 140 at pp 141-147.

195 Jackson 'Trial Procedures' in WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) p 130 at pp 152-153 ; Law Society *Judicial Appointments* London (1991) ; JUSTICE *The Judiciary in England and Wales* London (1992) ; Griffith *The Politics of the Judiciary*

Fontana (1981), who seeks to dispel the view that judges are 'neutral'. Griffith argues that judges are primarily concerned with protecting property rights, preserving the status quo and upholds values and attitudes normally associated with the Conservative Party.

196 *Galbraith* [1981] 1 WLR 1039, where the Court of Appeal indicated that judges should only direct an acquittal where there was no evidence upon which a jury could properly convict. Sprack 'The Trial Process' in STOCKDALE and CASALE (Eds) *Criminal Justice under Stress* Blackstone Press (1992) p 62 at pp 80-82, argues that this ruling means that judges must run the risk of an unjust conviction in order to maintain the jury's role as arbiter.

197 Jackson 'Trial Procedures' at pp 145-146, criticises the Court of Appeal's unwillingness to uphold the non-intervention of judges.

198 One of the most obvious examples of this is the summing up by Bridge J. (later Lord Bridge) in the Birminghan Six trial, detailed by Wood 'Extracts from the Transcript of the Trial of the Birmingham Six, Lancaster, June 1975' in WALKER and STARMER (Eds) *Justice in Error* at pp 159-162, and the half-hearted comments of the Court of Appeal in the Maguire Seven case which was criticised by the May Report *Second Report* HC Papers 1992/93 (296) at paras 1.4-1.8. See also, Jackson 'Trial Procedures' at pp 144-145, 152-153 and Pattenden *Judicial Discretion and Criminal Litigation* Oxford Unv. Press (1990) at pp 98-102.

199 Eg the Bridgewater case, Birmingham Six, Maguire Seven. See discussion in Foot *Murder at the Farm: Who Killed Carl Bridgewater* Sidgewick and Jackson (1986) and Woffinden *Miscarriages of Justice* Hodder and Stoughton (1989).

200 See eg the comments of L. Denning MR in *Ward v James* [1966] QB 273 at p 295.

201 Hedderman and Moxon *Magistrates' Court or Crown Court? - Mode of Trial Decisions and Sentencing* (Home Office Research Unit Report) HMSO (1992) ; Sprack 'The Trial Process' at pp 77-78 ; Jackson 'Trial Procedures' at pp 133-134.

202 McConville and J.Baldwin *Jury Trials* Clarendon Press (1979), particularly Chs 4, 5 ; Enright and Morton *Taking Liberties* Butterworths (1990) ; Sprack 'The Trial Process' at pp 79-80. However, most of the evidence placed before the Runciman Commission (Royal Commission on Criminal Justice) favoured the retention of the jury. See eg Bar Council *The Bar Council's Response to the RCCJ* London (1992) at p 50.

203 The prosecutor may check the criminal records of jurors, whilst s.118 Criminal Justice Act 1985 abolished the defendant's right of peremptory challenge. This has made it difficult for defendants to challenge unsuitable jurors as other methods of challenge are problematic in that they require reasons to be given for the challenge and courts discourage the questioning of jurors. See Buxton 'Challenging and Discharging Jurors' *Crim LR* [1990] 225 ; Vennard and Riley *Triable Either-Way Cases : Crown Court or Magistrates' Court* (Home Office Research Study No.98) HMSO (1988) ; Jackson 'Trial Procedures' at p 134. Admittedly, the Government has placed some restrictions on the prosecutor's right to stand-by jurors, see *Practice Direction* [1988] 3 All ER 1086.

204 The Commission for Racial Equality (CRE) has argued that the current method of jury selection is unfair as it often results in black defendants facing an all white jury which he may feel will be biased against him. See CRE *Evidence of the Commission for Racial Equality to the Royal Commission on Criminal Justice* HMSO (1990) at pp 15-20 ; Enright 'Multi-Racial Juries' *NLJ* [1991] 992 ; McConville and J.Baldwin *Jury Trials* at pp 97-99.

205 S.8 Contempt of Court Act 1981 prohibits the investigation of jury decisions. See discussion in Sanders and Young *Criminal Justice* at pp 384-389, of the problems faced in evaluating jury decisions.

206 93% of defendants receive a summary trial. See Royal Commission on Criminal Justice (RCCJ) *Report* (Cmnd 2263) HMSO (1993) Ch6 at para 18. Over recent years, the Government has reduced the defendant's right to elect trial by jury by reclassifying many serious offences as summary matters, eg s.15 Criminal Law Act 1977 and ss.37-39 Criminal Justice Act 1988. Discussed by Jackson 'Trial Procedures' at pp 132-135.

207 The selection process is highly secret. Moreover, research reveals that, amongst magistrates, the middle classes are clearly over-represented, whilst women and ethnic minorities are under-represented. See J.Baldwin 'The Social Composition of the Magistracy' *Brit Jo Criminology*

[1976] 171 ; King and May *Black Magistrates* Cobden Trust (1985) ; Sanders and Young *Criminal Justice* at pp 299-300 ; Crane *Local Justice* T & T Clark (1989), particularly at pp 43-46. These claims of bias have been rejected as "myth" by a former Secretary of Commissions, see Sir Thomas Skyrme *The Changing Image of the Magistracy* (1983) at p 48.

208 Enright and Morton *Taking Liberties* at pp 96-99 ; Vennard *Contested Trials in Magistrates' Courts* HMSO (1982) ; Bar Council *The Bar Council's Response to the Royal Commission on Criminal Justice* London (1992) at p 50. Other researchers have noted the "ideology of triviality" which prevades summary cases and often deters solicitors from thoroughly preparing cases, see eg McBarnet *Conviction - Law, the State and the Construction of Justice* Macmillan (1981).

209 Sanders and Young *Criminal Justice* at pp 251-252 ; Sprack 'The Trial Process' at pp 75-76.

210 83.6% of defendants plead guilty, whilst a further 8.1% of cases are proved in the absence of the defendant. Crown Prosecution Service *Annual Report 1993* HMSO (1993) at p 18. See discussion by Sanders and Young *Criminal Justice* at p 304.

211 Zuckerman 'Bias and Suggestibility' at pp 138-139, who argues that the present system is too trial-orientated and ignores the problematic nature of the police's case construction which is often of debateable factual accuracy.

212 Sanders and Young *Criminal Justice* at p 371 ; Sprack 'The Trial Process' at pp 70-74 ; Jackson 'Trial Procedures' at p 131.

213 Wide inconsistencies between courts have been noted. See Young, Moloney and Sanders *In the Interests of Justice?* Legal Aid Board (1992) and Sanders and Young *Criminal Justice* at pp 253-267.

214 Young, Moloney and Sanders *In the Interests of Justice?* ; Jackson 'Trial Procedures' at p 141. Recently, a Divisional Court even refused to allow a defendant the right to have a friend assist in the conduct of his case, though this decision was subsequently reversed on appeal, see *R v Leicester City Justices ex p Barrow* [1991] 1 QB 260.

215 Stockdale and Walker 'Forensic Evidence' in WALKER and STARMER (Eds) *Justice in Error* Blackstone Press (1993) p 75 at pp 75-101 ; Sprack 'The Trial Process' at pp 72-73. Such problems are exacerbated by delays in granting legal aid. As a result, solicitors are often reluctant to commission expert reports.

216 The Court of Appeal in the Birmingham Six and Ward cases recognised the problems caused by the lack of defence resources. See *R v McIlkenny and Others* [1992] 2 All ER 417 and *R v Ward* (1992) 96 Cr App R 1. Despite these problems further curtailment of legal aid and therefore defence resources continues.

217 Eg particularly rules relating to the burden/standard of proof, the right to silence and the exclusion of inadmissible evidence.

218 S.1 Criminal Evidence Act 1898 provides that the defendant is a competent but not compellable witness.

219 S.11 Criminal Justice Act 1967 requires alibi defences to be notified to the police before trial ; s.81 PACE 1984 requires the defendant to disclose its expert testimony. In fraud trials, ss. 7-11 Criminal Justice Act 1987 can be used to require extensive defence disclosure. At trial, judges may comment on the defendant's failure to disclose such evidence. Numerous other examples exist in relation to terrorism and drug trafficking. For further discussion, see Zander 'Abolition of the Right to Silence 1972-1994' in MORGAN and STEPHENSON (Eds) *Suspicion and Silence : The Right to Silence in Criminal Investigations* Blackstone Press (1994) p 141. Moreover the RCCJ proposed even greater defence disclosure suggesting that defendants should disclose in full the substance of their case. See Royal Commission on Criminal Justice *Report* (Cmnd 2263) HMSO (1993) at pp 97-100. The proposals of the Commission have themselves been trenchantly criticised, see eg MCCONVILLE and BRIDGES (Eds) *Criminal Justice in Crisis* Edward Elgar (1994).

220 Ss.27-30 Criminal Justice and Public Order Act 1994. Adverse inferences may also be drawn where the defendant has remained silent during investigation but subsequently raises a defence at trial. This move is perhaps unsurprising as, in the past, judicial enthusiasm for the right to silence has been limited. See eg Viscount Dilhorne in *Gilbert* (1977) 66 Cr App R 237 at p 245.

For a further review of the caselaw, see Wolchover 'The Right to Silence' *NLJ* [1989] 396, 428, 484, 501. The issues involved in the right to silence debate are discussed thoroughly in MORGAN and STEPHENSON (Eds) *Suspicion and Silence : The Right to Silence in Criminal Investigations* Blackstone Press (1994).

221 See discussion in McEwan *Evidence and the Adversarial Process* Blackwell (1992) at p 55 et seq.

222 Jackson 'Trial Procedures' at pp 142-145.

223 These exceptions are contained in s.1(f) Criminal Evidence Act 1898. Most typically, the defendant's shield is lost where the defendant asserts good character or attack the prosecution (s.1(f)(ii)). As courts have generously interpreted these provisions, the immunity is easily lost. See discussion by Murphy *A Practical Approach to Evidence* Blackstone Press (1980). Also where the prosecution adduces similar fact evidence, details of the defendant's previous convictions may be released. See Zuckerman 'Similar Fact Evidence : The Unobservable Rule' *LQR* [1987] 187. These issues are also discussed by Sanders and Young *Criminal Justice* at pp 374-376.

224 *Turnbull* [1977] QB 224, which requires that. where the evidence is poor, the judge should direct an acquittal. Elsewhere, the Judge should warn the jury of the need for caution before convicting on such evidence. Despite the inherently unreliable nature of identification evidence, the courts have chosen to confine *Turnbull* guidelines to situations where identity is based on a "fleeting" glimpse. See eg *R v Curry* ; *R v Keeble Crim LR* [1983] 737 and discussion in Jackson 'The Insufficiency of Identification Evidence Based on Personal Impression' *Crim LR* [1986] 203 and JUSTICE *Miscarriages of Justice* London (1989).

225 Doubtful forensic evidence assisted in securing convictions in Birmingham Six and Maguire Seven cases. The May Report *Second Report* HC Papers 1992-1993 (296), criticised the Court's lack of thoroughness in assessing such evidence, finding that supposedly foolproof scientific tests were in fact defective.

226 These problems are discussed more extensively by Sanders and Young *Criminal Justice* at pp 419-420 ; Jackson 'Trial Procedures' at pp 137-141 ; Gudjonsson *The Psychology of Interrogations : Confessions and Testimony* John Wiley and Sons (1992).

227 See s.1(f). Discussed by Sanders and Young *Criminal Justice* at pp 375-377.

228 Jackson 'Trial Procedures' at p 150. See Birmingham Six and Tottenham Three cases (*R v McIlkenny and Others* [1992] 2 All ER 417 and *R v Silcott and Others, The Times* 9th December 1991 respectively). These miscarriage cases fuelled demands for the corroboration of evidence - the RCCJ rejected such corroboration proposals. See Royal Commission on Criminal Justice *Report* (Cmnd 2263) HMSO (1993) at paras 4.77 and 4.87. The proposals of the Commission have themselves been trenchantly criticised. See eg MCCONVILLE and BRIDGES (Eds) *Criminal Justice in Crisis.*

229 Here the evidence is not inherently unreliable, but has been obtained in breach of procedural rules.

230 Eg *Sang* [1979] 2 All ER 1222, on the grounds that the reception of such evidence did not have an adverse effect on the fairness of the proceedings.

231 Sanders and Young *Criminal Justice* at pp 421-427 ; Zander *The Police and Criminal Evidence Act 1984* (2nd Edn) Sweet and Maxwell (1990) at pp 205-207.

232 Ashworth *Sentencing and Criminal Justice* ; Kelk, Koffman and Silvis 'Sentencing Practice, Policy and Discretion' at pp 322, 332-334 ; Stone 'Sentencing Reform and the Probation Service' in WASIK and PEASE (Eds) *Sentencing Reform - Guidance or Guidelines* Manchester Unv. Press (1987) p 170.

233 Stone 'Sentencing Reform and the Probation Service' at pp 171-172 ; Bottomley 'Sentencing Reform and the Structuring of Pre-Trial Discretion' at pp 168-169 ; Zuckerman 'Bias and Suggestibility' at pp 119-120, 138-139.

234 Ashworth *Sentencing and Penal Policy* Wiedenfeld and Nicolson (1983) at p 450.

235 See eg Ward, Birmingham Six, Maguire Seven, Tottenham Three, Bridgewater Four and Kisko cases. Discussed in Foot *Murder at the Farm* ; Woffinden *Miscarriages of Justice* ; Rozenberg 'Miscarriages of Justice' in STOCKDALE and CASALE (Eds) *Criminal Justice under Stress* Blackstone Press (1992) p 91.

236 Dingwall and Davenport 'The Evolution of Criminal Justice Policy in the UK' at p 21.

CHAPTER SEVEN

THE CRIMINAL/CRIMINOLGICAL EVALUATION OF VERTICAL ARRANGEMENTS - PART I

> "Little by little, the agents have taken over the world. They don't do anything, they don't make anything - they just stand there and take their cut."[1]

A)INTRODUCTION

Having examined the Commission's use of its enforcement powers in relation to horizontal cartels, it is now apposite to evaluate its approach to vertical arrangements. As previously explained, the examination of vertical agreements will concentrate on exclusive and selective distribution arrangements [2]. A broad range of cases has been selected providing ample scope to examine both DGIV's formal and informal prosecution of vertical arrangements, as well as, its attitude towards the individual exemption of such agreements [3]. This chapter will discuss the investigation and formal prosecution of vertical arrangements, whilst the following chapter will evaluate the informal resolution and trial and sentencing of such agreements. Before discussing the process and substance of DGIV's enforcement of vertical agreements, these arrangements will be set in their legal and economic context.

Generally, competition law is sympathetic towards vertical agreements, but problems and conflicts do exist. In assessing vertical agreements, the main question for competition law is the extent to which distribution agreements should be permitted to restrict the conduct of the parties involved. Invariably, this requires a choice to be made between a number of competing interests. As types of vertical restriction vary enormously in scope and character, they tend to generate diverse conceptual and analytical problems. The complexity of the issues raised often makes it difficult to decide whether a particular agreement is pro/anti-competitive [4]. Some of these problems and competing interests will be outlined briefly [5]. In setting up a distribution system, a producer's two main aims will be to achieve cheap, efficient distribution and

maintain a high demand for his product. But, some of the methods he employs may restrict competition. Often such problems revolve around restrictions affecting inter/intra brand competition. Vertical restraints may place serious restrictions on the number of outlets on the market, producing significant foreclosure of inter-brand competition. But, vertical restraints do not necessarily harm inter-brand competition. Indeed, restrictions on intra-brand competition, common in distribution agreements, may intensify inter-brand competition [6]. Thus, it can be argued that vertical restraints do not harm competition in the wider context. Foreclosure of competition may also occur where the market has rigidified because of the number of distribution systems in operation. This may harm competition by preventing the entry of new competitors. It has also been argued that vertical restrictions are harmful because they prevent competition from operating freely at all levels of the market. Conversely, producers argue that, as the conduct of dealers/retailers may affect the brand image and harm the producer's competitive status, they have a legitimate interest in maintaining some form of control over their product. Vertical restraints may be objected to on the basis that they are the product of a horizontal cartel of producers or distributors. Such horizontal market division may be detrimental to both inter- and intra-brand competition. Advocates of vertical restraints argue that the competition authorities should concentrate their efforts on preventing horizontal cartels rather than prohibiting vertical restraints for which there may be valid economic justification [7].

A further objection to vertical restrictions is their ability to compartmentalise markets by offering territorial protection to dealers within the system. Economically, two main justifications for such protection exist. Such restraints both prevent 'free-rider' dealers from benefiting from the promotional and servicing efforts of dealers with the system, whilst encouraging those dealers to actively promote the product, producing an increase in inter-brand competition [8]. However, the Commission's focus on market integration has resulted in considerable sympathy for free-riders because of the assistance they give to economic integration through parallel imports. This political focus places the Commission in the centre of a conflict between achieving its political mandate and safeguarding the legitimate interests of producers and dealers

and promoting efficient distribution [9]. A final objection to vertical restraints is the harm they may do to consumer interests as a result of restrictions on intra-brand competition which may lead ultimately to higher prices and a reduction in consumer choice [10].

Thus, in enforcing competition rules against vertical agreements, competition authorities must decide between many conflicting interests. In terms of the agreements under consideration, the main conflict in exclusive distribution agreements arises over the territorial protection afforded to dealers. Such agreements have the economic advantage of achieving efficient distribution and maintaining high demand for the product in question, but they may infringe competition rules where the protection results in geographical market division. Selective distribution agreements, by limiting the quantity and quality of outlets handling the goods, may achieve significant efficiency gains and promote inter-brand competition [11]. But, the restrictions on intra-brand competition may lead to higher prices and therefore harm consumers. In addition, the problems inherent in resolving such conflicts may be exacerbated by the existence of several different levels of distribution within the system and by the fact that a distribution system may combine the features of several different types of distribution agreement, making analysis of the agreement even more problematic [12].

B)PROCESS AND SUBSTANCE - INVESTIGATION - COMMISSION POWERS

This section will examine DGIV's classification of vertical agreements and the nexus between that characterisation, the Commission's use of its enforcement powers and the effect on defence rights. As much of the background information on these issues has already been discussed in detail during the examination of horizontal cartels, this evaluation of vertical agreements will concentrate on discussing the nature and scope of enforcement powers and defence protections in the context of the case study.

However, where substantive and procedural rules differ, these will be examined further.

1)Art.14 Powers

Previous discussion has already shown that DGIV enjoys extensive discretion over its choice of investigation method [13]. At a horizontal level, the Commission has employed this latitude to the point where use of Art.14(3) is virtually automatic. The situation in the vertical context is less clear. In the case study, 16 cases were formally prosecuted [14]. In only two of these cases was there explicit use of Art.14(3) inspection powers [15]. In four other cases, information was obtained primarily from notifications submitted by the firms themselves [16]. But, in the vast majority of cases, the mode of inspection is ambiguous. Although it is clear from the reported decisions that Art.14 inspections were undertaken, no information is provided regarding whether inspection was voluntary or mandatory [17]. Unfortunately, this lack of information makes evaluation of DGIV's investigation of vertical arrangements problematic. In particular, it is difficult to assess the factors controlling its choice of Art.14(3) inspections. From the information available, influencing factors such as recidivism and nationality, evident in the investigation of horizontal cartels, do not seem to be apparent here. What is interesting to note is that in the majority of formally prosecuted exclusive distribution cases, Art.14 was used [18]. In contrast, only two of the six formally prosecuted selective distribution cases were subjected to Art.14 investigation [19]. The other noticeable feature of DGIV's investigation of vertical agreements is the absence of defence complaints and challenges regarding DGIV's use of its fact-finding powers. The majority of firms accepted, without question, the Commission's use of its investigation powers. Only in three cases, did firms complain of DGIV's investigation tactics [20]. The main challenge came from *National Panasonic*. The issues involved in this case have already been discussed in detail [21]. Briefly, *National Panasonic* argued that DGIV's automatic use of Art.14(3) infringed both fundamental Community rights and Art.8 ECHR's principle of inviolability. They asserted that Art.8 ECHR demanded

a right to prior warning of an inspection or the obtaining of a search warrant before an inspection was undertaken [22]. Moreover, the firm complained that the Art.14(3) decision lacked specificity and was inadequately reasoned. The ECJ affirmed DGIV's discretion over its choice of investigation method, holding that the Commission need not give reasons for its ultimate choice [23]. The Court made it clear that the defendant's right of inviolability was subject to the economic considerations alluded to in Art.8(2) ECHR. Both *Hasselblad* and *AEG* complained of DGIV's biased approach to investigation, alleging that the Commission had only sought out and subsequently used incriminating evidence [24]. In both cases, the Court upheld DGIV's discretion regarding whether and how it investigated infringements [25].

2)Art.11 Powers

Art.11 is rarely used as a primary means of investigating distribution agreements. In the study, it was only used on one occasion as the chief means of fact-finding [26]. In other cases where the use of Art.11 would normally have been appropriate, information was obtained through the notification process. As with horizontal cartels, Art.11 was mostly employed following an Art.14 inspection, although even here, it was only used to a limited extent [27]. Again, the lack of detailed information in Commission decisions means that it has been impossible to ascertain under which provision of Art. 11 the information was obtained. However, overall the case study showed a restricted use of Art.11. More often, information was obtained solely under Art.14 or through the notification process.

3)Conclusion - Commission Powers

This examination reveals that, in the context of vertical agreements, DGIV suffers no curtailment of its investigation powers ; their scope remains criminal in nature. But, the Commission's use of its powers is not as overtly penal as evidenced in the enforcement of horizontal cartels. At this stage, it is unclear whether this less stringent

use of its enforcement powers is the result of a difference in DGIV's characterisation of vertical agreements or whether it is simply the consequence of the undertakings' tendency to submit to investigation with little complaint. Admittedly, firms involved in distribution cases have shown concern over the same issues of inviolability, 'fishing trips' and biased investigation that posed so many problems in the enforcement of horizontal cartels. But, the concern shown here is not of the same intensity as evident in horizontal cartels. Quite why is, as yet, obscure. As a consequence, DGIV is able to obtain the information it requires without resorting to more penal measures. Not only does firms' co-operative attitude mask the Commission's characterisation of vertical offences, the lack of detailed information has a similar result. This paucity of specific enforcement information is in marked contrast to the treatment of horizontal cartels where DGIV has shown itself to be more than willing to publicise its stringent approach to enforcement. It may be that further examination will reveal that this lack of detailed data is indicative of a more relaxed approach to the enforcement of distribution agreements. Nevertheless, it is clear from DGIV's investigation of vertical agreements that Reg.17 remains paramount and that DGIV's dominance of the process continues unchallenged. The Commission still possesses penal powers. Art,14 investigation is still the norm. Where necessary, DGIV is still prepared to exert the full force of its authority to meet enforcement needs.

The Commission's approach to the investigation of vertical arrangements is consistent with its political and pragmatic goals. Firm's co-operation with investigation is cost-efficient, saving time and money on fact-finding with obvious pragmatic advantage. DGIV's apparently more relaxed approach to the enforcement of vertical arrangements also has political benefits. Distribution agreements have proved a valuable tool in securing Single Market integration.

C)PROCESS AND SUBSTANCE - DEFENCE RIGHTS

1)Self Incrimination

There were no direct challenges in the study claiming breach of this privilege. But the scope of this protection in relation to the defendant's duty to co-operate with investigation was raised in *National Panasonic* [28]. Specifically, the challenge in *National Panasonic* related to DGIV's power to ask oral questions and the firm's right to legal representation during inspection. Here, the ECJ affirmed the Commission's discretion to ask questions during inspection relating to the subject matter of the investigation [29]. The indeterminate nature of this power significantly limits the defendant's right to silence by placing the defendant's duty to co-operate before due process protections. As such, it has generated concern and calls for stricter limits on inspectors' powers [30]. On the subject of legal representation, National Panasonic claimed that they had a fundamental right to be legally represented and that DGIV's refusal to wait for the arrival of the firm's lawyer before commencing inspection breached that right [31]. Whilst the ECJ did not specifically decide on the issue of legal representation, they did hold that there had been no breach of the defendant's fundamental rights [32]. As such, *National Panasonic* makes it clear that the defendant's duty to co-operate takes priority over the defendant's rights to silence and to legal representation.

DGIV's willingness to penalise firms who refuse to co-operate is as evident in vertical agreements as in horizontal cartels. In *National Panasonic* and *Camera Care*, maximum fines were imposed for supplying incorrect information [33]. The unreasonableness of the Commission's approach in these cases has been criticised by Korah on the basis that DGIV's broad interpretation of "incorrect information" means that DGIV not only fines firms for supplying false information, but also for their failure to provide sufficiently comprehensive replies [34]. She argues that this approach ignores

the fact that the Commission's Art.11 requests are often ambiguously drafted, making it difficult for firms to know what is expected of them, yet fines are still imposed.

2)Protection of Confidential Documents

a)Legal Professional Privilege

As previously discussed, EC competition law recognises a qualified protection in respect of some communications between a firm and its independent lawyer [35]. The unfairness of excluding in-house lawyers from the scope of this privilege has been widely criticised [36]. In one of the cases in the study, *John Deere*, some of critics' worst fears were realised [37]. Here, a communication between the firm and its in-house lawyer, which would normally have been protected by legal professional privilege, was used by DGIV to establish the firm's awareness of the illegality of its conduct. It would seem that, despite the wide recognition of this privilege and DGIV's insistence on the integral fairness of proceedings, its sense of 'fair play' clearly has strict limits. As a result, the Commission's policy of curtailing defence rights to meet enforcement needs achieves its desired goal by directly assisting enforcement.

3)Presumption of Innocence

As with horizontal cartels, little reference is made to the existence or scope of this protection. Some rather limited indication of a presumption of guilt exists. In *National Panasonic*, DGIV's distrust of undertakings was evident. Here circumstantial evidence that National Panasonic was likely to conceal evidence was sufficient to justify a dawn raid [38]. However, there is insufficient evidence of a presumption of guilt at this stage to draw any firm conclusions.

D)CONCLUSION - INVESTIGATION

Having examined the ambit of defendants' protections, it is now necessary to evaluate their classification, scope and value as enforcement resources. The defendant's situation will then be compared and contrasted with DGIV's position in the process, highlighting the prevailing political and pragmatic advantages.

The most notable feature of this examination is the lack of challenge to DGIV's investigation of vertical offences. Defendants seem reluctant to confront, and possibly antagonise, the Commission. But, where firms do choose to complain, the case study shows that the attitude of DGIV towards the classification and scope of defence rights remains unchanged. Defendants here are in no stronger position than those involved in horizontal cartels. Thus, defendants' safeguards remain characterised as 'administrative' and continue to be based on the flexible concept of 'integral fairness'. The evidence available suggests that DGIV continues to employ its discretion to curtail the scope of defence rights to meet enforcement requirements, imposing the same compromises upon due process as were revealed in the examination of horizontal cartels. The Commission's interpretation of the ambit of the privilege against self incrimination continues to be defined to maximise successful enforcement of Reg.17, revealing the same determination to acquire the defendant's co-operation and the same willingness to employ Reg.17 punitively by penalising any reluctance on the part of defendants to incriminate themselves.

DGIV's interpretation of the right to legal representation during investigation is equally restrictive. Again, defendants are left in a position where they may be required to incriminate themselves in the absence of legal guidance. This situation is of considerable enforcement value to the Commission. The absence of a legal adviser means that there is no-one to challenge DGIV's interpretation of the defendant's duty to co-operate, no-one to hamper the effectiveness of the Commission's oral questioning. At every point, it is DGIV's continued policy to employ the 'law as a resource' to maximise conviction prospects. As a result, the defendant's right to

silence is only tolerated where it does not hinder the Commission's fact-finding, necessarily curtailing the effectiveness of this safeguard.

The Commission's interpretation of the scope of legal professional privilege is also far from generous. The withholding of this privilege from the in-house lawyers, currently employed by many large undertakings, ensures that vital information assisting conviction is secured on a regular basis. Indeed, *John Deere* has demonstrated the profitability of curtailing this particular safeguard.

The existence and scope of a presumption of innocence is unclear. Whilst this presumption may operate at an undisclosed level, there is no explicit reference to its role or value in enforcement proceedings. Indeed, as with horizontal cartels, there is some limited indication of a presumption of guilt.

The administrative character and repeated curtailment of defence rights may be contrasted with DGIV's extensive penal fact-finding powers. The absence of confrontation between the Commission and undertakings involved in vertical agreements means that DGIV is not always required to employ Reg.17 punitively, Though, where necessary, the Commission has shown itself able and willing to do so. Moreover, in the context of vertical agreements, DGIV has secured confirmation from the Court of its absolute discretion over whether and how it investigates infringements. The Court have also acknowledged that the defendant's guarantee of inviolability is subordinate to economic, and therefore, enforcement requirements. By these means, DGIV has substantially augmented its investigation powers.

Clearly, within the context of distribution agreements the Commission continues to combine its monlithic discretion with the inherent flexibility of the law to increase the classification and scope of its own powers whilst restricting those of the defendant. As a result, the fundamental conflict between Reg.17 and defence safeguards is again resolved in favour of enforcement. The absence of widespread dispute between DGIV and defendants does not indicate a more generous interpretation of defence rights. It simply means that DGIV's enforcement task is easier, serving both political and pragmatic goals. Due process remains on the Commission's terms. Most importantly, the mismatch between DGIV's penal powers

and the defendant's administrative safeguards, revealed in the examination of horizontal cartels, is equally evident in the investigation of vertical agreements. This disparity secures the Commission's continued dominance of enforcement and serves to increase conviction prospects with the same political and pragmatic advantages achieved in the enforcement of horizontal violations.

E)CRIMINOLOGICAL ANALOGY - INVESTIGATION

Having examined the Commission's investigation of vertical arrangements and its effect on defence rights, it is now appropriate to draw a criminological analogy. As the background details on the use of enforcement powers and defence rights in the criminal justice system have already been examined [39], this section will concentrate on contrasting and comparing the justice system's approach with that of the Commission's and assessing DGIV's enforcement techniques against the due process and crime control models of criminal justice.

The Commission's investigation of vertical arrangements bears several similarities with that of the English criminal process. As these similarities have been fully discussed in the horizontal context, they will only be noted briefly here. In each jurisdiction, the scope of investigation powers is penal in nature. In each system, steps are taken to augment fact-finding powers and ensure that those powers are not fettered by due process protections, most notably, the right to silence, legal professional privilege and the inviolability of private premises. In each process, the same manipulation occurs creating disparity between the relative bargaining position of prosecutors and defendants. The only apparent difference is the lower key approach of DGIV in relation to vertical arrangements. This less overt use of its penal powers seems to be largely the result of defendants' less confrontational attitude to the investigation of vertical offences. Nevertheless, the crime control model seems to be the most applicable to DGIV's investigation of vertical offences. The Commission's

central aim remains the cost-efficient repression of any conduct hindering Single Market integration. The export bans associated with exclusive distribution agreements pose a particular problem in this respect and justify DGIV's interpretation of its own powers and defence rights to secure the dominance of Reg.17. In the investigation of vertical agreements, this results in the routine use of Art.14. Although the method of Art.14 investigation is unclear, DGIV's approach still displays a preference for on-the-spot inspections rather than obtaining information under Art.11. Combined with its insistence upon the defendant's total co-operation with enforcement, this allows DGIV to acquire the maximum possible amount of information with the minimum trouble. The Commission also seeks to control the process by limiting defence opportunities for challenge. Certainly, in the investigation of distribution agreements, the lack of defence challenges to DGIV's exercise of its powers seems to indicate that this technique has had the required deterrent effect. The resulting inequality of arms is the direct antithesis of due process values - but it is entirely consistent with crime control beliefs.

F)PROCESS AND SUBSTANCE - FORMAL PROSECUTION - COMMISSION POWERS [40]

As with horizontal cartels, the following discussion will first consider the formal prosecution of vertical agreements. The next chapter will examine informal resolutions, including the plea-bargaining of distribution agreements, and the individual exemption of vertical arrangements. At each stage, the effect of DGIV's enforcement powers on defence rights will be assessed.

1)Legal Evaluation

In assessing the Commission's legal evaluation of vertical agreements, this discussion will focus again upon DGIV's case construction of offences. The following sections will demonstrate that the Commission's classification of these violations dictates DGIV's approach to case construction, controlling the analytical format employed, the interpretation of Art.85(1) and the quality and quantity of evidence required to substantiate an offence. It will be argued that problems exist with the Commission's evaluation of vertical agreements as the criteria employed are ambiguous and highly susceptible to case construction. As a result, it is often difficult to predict whether DGIV's assessment of these criteria will result in formal prosecution, informal resolution or individual exemption [41]. Moreover, the problems caused by the ambiguity of these determining criteria is exacerbated by the Commission's inadequate legal and economic analysis, specifically its failure to properly assess the pro/anti-competitive effects of an agreement. It will be demonstrated that DGIV's preference for formalistic evaluation has produced inconsistent and seemingly arbitrary decisions and generated substantial legal uncertainty [42].

a)Criminal Classification

First, it is necessary to establish the Commission's characterisation of the vertical offences under consideration [43]. In 12 of the 16 formally prosecuted cases in the study, DGIV clearly regarded the offences as criminal/quasi-criminal in nature [44]. Whilst the Commission did not employ the blatantly criminal terminology used in horizontal cartels, it did refer regularly to the per se or manifestly anti-competitive nature of the offences [45]. In the majority of cases, DGIV noted the deliberate and/or systematic nature of the infringement and the undertaking's awareness of the illegality of its conduct [46]. Its disappproval of such conduct was apparent in several cases [47]. In *Tippex*, the reason for the Commission's penal characterisation of these offences

was made explicit. Conduct hindering the political objective of economic integration receives both an anti-competitive definition and a criminal classification [48].

b)Ambit of Art.85(1) - Exclusive Distribution [49]

This section will examine how the substantive elements of Art.85 have been developed in the context of distribution agreements, thereby increasing the scope of DGIV's prosecutorial powers. In the interpretation of Art.85, vertical agreements raise different issues to horizontal cartels. Consequently, this discussion will focus on the Commission's construction of a 'restriction of competition' and 'concerted practice' [50].

As DGIV's approach differs between exclusive and selective distribution agreements, the interpretation of Art.85 will be considered under each type of agreement. First, the approach in exclusive distribution agreements will be examined

i)restriction of competition

The ECJ have made clear that vertical restraints are capable of restricting competition, but have repeatedly insisted that generally this assessment will require a full legal and economic analysis [51].

Often, whether the terms of an exclusive distribution agreement restrict competition depends on the degree of exclusivity granted under the contract. The granting of territorial protection has met with opposition from the Commission because it results in the compartmentalising of markets. Here, DGIV has taken a formalistic approach. Any agreement granting absolute territorial protection under an export ban is automatically considered contrary to Art.85(1) and unsuitable for exemption [52]. In eight of the formally prosecuted exclusive distribution cases in the study, the Commission found direct export bans [53]. DGIV has used its discretion to extend the width of the definition of an export ban to cover conduct which might amount to an indirect ban. Thus, where price discrimination has been used to prevent parallel imports, it infringes Art.85(1). This approach brought three study cases within Art.85(1) [54]. Elsewhere, monitoring clauses in contracts and the use of serial

numbers, both allowing producers to control the movement of goods between territories, have been used to curtail parallel imports. In two cases, this tactic was condemned as an indirect export ban [55]. In a further case, *Sandoz*, the reducing of supplies to a certain distributor so that no surplus existed for export purposes, was held to restrict competition [56]. Other types of exclusivity are also prohibited, particularly attempts to limit the class of customers supplied [57].

ii)concerted practice

Comments already made regarding the width of a concerted practice in horizontal cartels are equally applicable to vertical agreements [58]. In addition, this concept has been extended in the context of distribution agreements to cover unilateral conduct which would normally fall outside Art.85. In these cases, DGIV has argued that the conduct derives from the underlying agreement and is thus subject to Art.85(1). This technique was used in four exclusive distribution cases in the study [59]. In *Tippex*, apparently unilateral refusals to supply were held attributable to the distribution contract. Whilst in *Sandoz*, despite no evidence of a written agreement between the manufacturer and its distributors, DGIV held that the producer's unilateral actions derived from some underlying arrangement and were therefore caught by Art.85 [60].

The wide interpretation given to these elements of Art.85(1) and DGIV's formalistic treatment of all export bans means that exclusive distribution cases automatically infringe Art.85, even where no absolute territorial protection is afforded [61]. Indeed, all formally prosecuted distribution cases in the study were brought within Art.85 by DGIV's interpretation of an export ban. Some cases were also caught by the generous extension of the concerted practice concept. Whish suggests that the inclusion of unilateral conduct into the concept of a concerted practice may make it even easier to establish concerted practices in distribution cases than in horizontal cartels [62]. The result is the criminalisation of much vertical conduct, bringing it within DGIV's control. This approach is of further advantage to DGIV. Treating such agreements as automatically infringing Art.85 obviates the need for resource consuming market

analysis and enables DGIV to prosecute conduct threatening economic integration cost-effectively, serving both political and pragmatic goals [63].

c)Ambit of Art.85(1) - Selective Distribution [64]

i)restriction of competition

Whether a selective distribution system restricts competition depends on its compliance or otherwise with criteria laid down in *Metro I* [65]. These criteria will be briefly discussed in the context of the study, highlighting the malleable nature of these factors.

Firstly, the *Metro* doctrine only applies to certain types of goods whose nature justifies restrictions on the type of outlet permitted to deal with such products. Suitable goods fall into three main classes : technically complex equipment [66] ; newspapers [67], and finally ; products where brand image is paramount [68]. Overall, DGIV has a wide discretion in deciding whether a particular product will fall into any of these categories. In four of the six formally prosecuted selective distribution cases, the product fell within the *Metro* doctrine [69]. In contrast, in *Ideal* and *Grohe*, the Commission doubted whether plumbing fittings satisfied the criteria of a technical advanced product [70].

In *Metro*, the ECJ made a clear distinction regarding the type of criteria employed in the selection of suitable outlets. All such factors must be qualitative and not quantitative in nature [71]. This has caused difficulties as the distinction between the two is not always readily identifiable [72]. Terms such as the promotion of goods or the holding of stock have sometimes been regarded as qualitative and elsewhere as quantitative. Three cases in the study met with such problems [73]. In *Ideal* and *Grohe*, such requirements were regarded as possibly infringing Art.85(1) because they restricted the wholesaler's freedom of action. In these cases, individual exemptions were refused [74]. These cases may be contrasted with *Parfums Givenchy* where similar requirements were regarded as quantitative, but were individually exempted [75].

Moreover, the restrictions imposed must be objectively necessary to protect the quality of the goods. Four cases infringed this criteria [76]. In *Ideal* and *Grohe*, restrictions on wholesalers, forbidding the sale of products to anyone other than plumbing contractors, was held to infringe Art.85 [77].

Metro requires that selection criteria be applied objectively. All qualifying distributors must be allowed into the system. Where criteria are applied discriminatorily to assist market division or to increase profits, these systems will be held to restrict competition. In two cases in the study, refusals to supply were regarded not as unilateral acts, but as the discriminatory application of the distribution system [78]. However, following some modification, similar practices in *AMP* were given an individual exemption [79].

Finally, the application of the Metro doctrine requires an evaluation of the economic context of the agreement. Where the market is rigidified because of the number of selective distribution agreements, further distribution arrangements may infringe Art.85(1) despite satisfying the basic *Metro* doctrine [80]. In *Vichy*, the cumulative effect of a number of distribution systems on the market was taken into account in finding a restriction of competition [81].

ii)concerted practice

As with exclusive distribution agreements, this concept has been extended to cover unilateral conduct. In the context of selective distribution systems, such activity is regarded as the discriminatory application of the agreement. Three cases in the study infringed Art.85(1) on this ground [82].

DGIV's interpretation of Art.85 in relation to selective distribution systems reveals the same combination of flexible criteria and formalism as employed in exclusive distribution cases. The ECJ have insisted upon a formalistic distinction between qualitative and quantitative criteria in order to bring the latter within the control of Art.85(1) because of their capacity to compartmentalise markets, and thus threaten economic integration. DGIV's approach is based on similar objectives. The malleable nature of the criteria employed has made them highly susceptible to DGIV's case

construction, allowing it to bring conduct hindering political and pragmatic goals within its prosecutorial discretion. But, problems exist. The ambiguous scope of the criteria employed has caused evaluative difficulties. It is often problematic to tell whether a particular requirement is qualitative or quantitative. Moreover, qualitative requirements may have quantitive outcomes and vice versa. These effects are not discovered because of DGIV's failure to undertake full market analysis [83]. The approach is economically dubious. In economic terms, the distinction between qualitative and quantitative criteria is a distinction without a difference. Outlets may be limited quantitatively for the same reasons as they are qualitatively [84]. The malleable nature of the criteria employed has produced arbitrary and inconsistent results. The Court's insistence upon formalism has exacerbated matters, leaving the law complex and uncertain.

As with horizontal cartels, the Commission uses its monolithic discretion to interpret Art.85 in the way most favourable to the attainment of political and pragmatic goals. Vertical arrangements threatening economic integration are criminalised and brought under DGIV's authority. The malleable nature of the criteria employed allows the Commission both to augment the criminality of the offences, whilst enabling cost-effective prosecution serving both political and pragmatic goals.

d)Type of Analysis

Again, it will be argued that the combined effect of the criminal classification of these formally prosecuted distribution cases and the width of Art.85 affects the analytical format employed by DGIV. As a result, distribution agreements compartmentalising markets are regarded as having a clearly anti-competitive object, allowing the Commission to employ a curtailed legal and economic assessment. In ten of the formally prosecuted cases, DGIV found that the agreement had an anti-competitive object [85]. In the remaining six cases, the Commission held that the arrangements had both the "object and effect" of restricting competition [86]. In all cases, the 'object' analytical format was employed with only limited economic evaluation taking place [87].

In some instances, markets have been narrowly defined by DGIV facilitating the finding that the conduct had an anti-competitive object [88]. Once again, there are concerns over the validity of an approach which bases its finding of an anti-competitive object on purely a formalistic assessment. The ECJ have repeatedly emphasised the importance of market analysis in vertical cases [89]. Five cases in the study complained of the Commission's lack of sensitive economic evaluation [90]. Nevertheless, this focus on anti-competitive object is of significant advantage to DGIV reinforcing the criminal classification of the conduct and facilitating speedy prosecution and conviction.

From the above it can be concluded that the classification of offences and the breadth of Art.85 do affect analytical format. Without exception, the criminal/quasi-criminal classification of these offences has dictated the routine use of the superficial 'object' analysis. Despite the fact that the Court have emphasised the importance of economic evaluation in distribution agreements, DGIV continues to pursue a limited economic analysis. This has political and pragmatic advantages, allowing the effective prosecution of politically damaging vertical arrangements without the need to expend resources on establishing anti-competitive effect.

e)Quality of Evidence [91]

This section intends to examine the nature of evidence required to prove a vertical offence. It has already been demonstrated in the context of horizontal cartels, that the flexibility of evidential rules provides DGIV with the opportunity to dictate evidential sufficiency. It is now apposite to examine whether the Commission exercises the same control over evidential sufficiency in the enforcement of distribution agreements. This section intends to demonstrate that the analytical evaluation of vertical agreements similarly affects the quality of evidence required to substantiate these offences, resulting in a formalistic assessment which places little reliance on economic evidence [92].

In the case study, the widespread reliance on the 'object' format of analysis produced an inevitable decrease in the amount of economic evidence relied upon to prove an infringement [93]. Once again, the study shows that DGIV places considerable reliance on circumstantial evidence - specifically circumstantial evidence suggesting the existence of an unwritten export ban [94]. Consequently, it can be concluded from this examination that, in accordance with previous research, this curtailed format directly affects the nature of supporting evidence, resulting in decreased emphasis on economic evidence and a concomitant increase in the value of circumstantial evidence [95]. However, closer analysis suggests that DGIV's evaluations may be defective. To illustrate this, it is intended to examine more thoroughly the Commission's analysis and the quality of the evidence it relies upon in relation to some of the typical restrictions found in distribution agreements [96]. This discussion will argue that the combination of DGIV's formalistic assessment and the malleability of the criteria under analysis permit the Commission to find an offence based on evidence of dubious economic validity [97]. More importantly, it will be asserted that, at the root of these problems, is a conflict between economic integration and economic efficiency in which the political goal of market integration invariably wins.

i)Export Ban/Cross Supplies [98]

These are a common feature of distribution agreements and are regularly condemned by DGIV. In the study, 13 cases were found to infringe competition rules on this basis [99]. Invariably, DGIV based its decision on a formalistic finding that the agreement partitioned markets [100]. In economic terms, export bans may be anti-competitive because they support a cartel of manufacturers or distributors. Chard argues that, if cartelisation is the basis of an export ban, then Commission decisions should be supported by evidence of market concentration, the prevalence of selective distribution systems on the market, evidence of entry barriers and direct evidence of co-ordination [101]. Sometimes, DGIV's decisions in the case study do refer to market shares and evidence of co-ordination between manufacturer and its dealers. But, there is only limited investigation of these issues and, as has already been demonstrated with horizontal cartels, evidence of a concerted practice is susceptible to the Commission's

case construction [102]. Export bans may also be used to control prices and maintain significant price differentials between MS. Chard argues that whilst price discrimination may be common, DGIV has not drawn particular attention to it in its investigations [103]. In all 13 cases in the study attempting to prevent parallel imports, there was evidence suggesting that the ban enabled the maintenance of price differentials between MS [104]. Yet, in all of these cases, the Commission failed to investigate fully the price discrimination and, in particular, examine the costs faced by a manufacturer in supplying different markets. Instead, DGIV relied on a formalistic analysis which regards all price maintenance as inherently anti-competitive [105]. A somewhat more pragmatic approach was taken in *Distillers*, where price differentials between MS amounting to an indirect export ban were used to counteract a free-rider problem. Here, the Commission was faced with a direct conflict between economic integration and economic needs. At first, DGIV announced its intention to grant an individual exemption, but later changed its mind. However, by delaying this decision for several years, the Commission enabled Distillers to establish itself on the market, thus serving both the political need to deter market division, whilst meeting economic demands [106].

DGIV's analysis of export bans also ignores the possibility of pro-competitive effects. Such restrictions may promote beneficial increases in the levels of pre- and after-sales service and may create efficiency benefits by allowing producers to forecast sales accurately and thus control production and ensure effective marketing [107]. Commission decisions reveal that DGIV fails to give adequate consideration to any pro-competitive benefits of such restraints. In particular, the Commission fails to examine thoroughly whether the restriction is necessary to achieving these benefits [108]. In the study, conduct in cases like *Camera Care* is clearly aimed at protecting dealers from free-riders, yet DGIV's formalistic approach simply condemns it as a concerted practice, without further investigation of the indispensability of the conduct [109].

Overall, the Commission's evaluation of export bans/restrictions on cross supplies indicates DGIV's general failure to adduce valid evidence of anti-competitive

effect to support its findings [110]. Instead, the Commission is content to rely on a formalistic analysis which condemns all conduct hindering market integration regardless of its actual market effect.

ii)Customer Restrictions

Chard argues that as these restraints produce similar pro/anti-competitive effect to supply restrictions, DGIV should adduce similar economic evidence in support of its decisions [111]. The limited evidence in the case study suggests that the Commission fails to establish adequately any anti-competitive object or effect [112]. In both *Ideal*_and *Grohe*, restrictions placed on wholesalers only allowing resale to plumbing contractors were held to be serious infringements [113]. The parties advanced a number of arguments regarding the indispensability of the restriction [114]. Again, DGIV rejected such considerations outright, preferring a formalistic approach which insisted that restrictions on resale were necessarily anti-competitive [115].

iii)Qualitative/Quantitative Criteria

It has already been noted above that DGIV makes a formalistic distinction between these two types of selection criteria. However, this approach is based on the assumption that qualitative criteria are necessarily pro-competitive and quantitative criteria are anti-competitive. This ignores the possibility that the opposite may also be true. Yet, qualitative criteria may be used for the same anti-competitive purposes as quantitative ones. Indeed, to be effective, qualitative criteria must exercise some quantitative control [116]. Similarly, quantitative criteria may achieve pro-competitive benefits [117]. However, the study suggests that DGIV makes little attempt to thoroughly investigate these possible alternative effects of qualitative or quantitative restrictions. The formalistic approach of both DGIV and Court in *Vichy* is typical. Here the criterion of pharmacist was treated as unquestionably quantitative and so as possessing no possible benefits [118].

Even if one could rely on the fact that qualitative criteria were entirely pro-competitive and quantitative criteria were anti-competitive, the problems would not be solved. The ambiguity and malleability of these criteria means that the difference between what is qualitative and what is quantitative is not easily distinguishable. The

Commission's approach to an obligation to promote the product, to hold stock and achieve a minimum turnover provides a typical example. In two cases in the study, DGIV doubted whether this obligation was consistent with Art.85(1) [119]. Yet, in *Parfums Givenchy* and *Yves St Laurent*, the Commission held that the obligation was quantitative, but was entitled to exemption under Art.85(3) [120]. In contrast, in *Villeroy Boch*, DGIV decided that a similar obligation fell entirely outside Art.85(1) and granted negative clearance [121]. Matters are exacerbated by the fact that in exclusive distribution agreements, requirements to advertise, hold spare parts and stock the full range of products are considered to be normal contractual obligations which fall entirely outside Art.85(1) [122]. As many arrangements contain elements of both exclusive and selective distribution, it is difficult to know which set of rules they should be judged under. This assessment of qualitative/quantitative criteria shows that, once again, DGIV substitutes formalism for substantive evidence of pro/anti-competitive effects. The malleability of the criteria allows DGIV to construct as quantitative all terms which may threaten its political objective. Formalism enables the Commission to condemn those terms without further consideration. Yet, in reality this approach is based on a distinction without a difference and therefore arbitrary. As a result, DGIV's decisions have served only to produce confusion and inconsistency [123].

It is not surprising that the Commission's approach to proof has resulted in complaints. Eleven cases in the study appealed against DGIV's incorrect or inadequate market assessment [124]. *Ford* alleged that the Commission's reasoning was not based on coherent legal principle, whilst *MDF* claimed that DGIV's evidence did not support its findings [125]. *AEG* and *Hasselblad* both complained of the Commission's biased investigations and selective use of information which focused solely on incriminating evidence [126]. These complaints received very little sympathy from the Court. In each case, the Court upheld DGIV's market analysis. Only in *Hasselblad* and *MDF*, did the Court partially annul the decision [127]. In contrast, in *AEG*, the Court upheld DGIV's decision in its entirety, despite procedural irregularities and the fact that DGIV was found to have proved its case in only some instances [128]. The Court's attitude to market analysis is inconsistent. Traditionally, the Court have always

insisted that full market analysis is essential in vertical cases. But, in practice this does not seem to occur. For example, in *Vichy*, the CFI reiterated the importance of market analysis, but then undertook a formalistic evaluation of the issues[129].

This discussion has demonstrated that DGIV's use of the 'object' format of analysis has a significant impact on the quality of evidence supporting Commission decisions. At every point, DGIV substitutes formalistic evaluation for substantive proof of anti-competitive effect, using the flexibility of the criteria under consideration to bring individual terms within the scope of this formalism. In this way, infringements can be established in the absence of thorough market analysis.

But, the discussion has also revealed that this failure to assess pro- and anti-competitive effects renders the approach of questionable economic validity. Examination of the cases shows that restrictions offering competitive benefits are condemned because of a formalistic belief that they threaten economic integration, whilst requirements believed to promote market integration are permitted, despite unexplored anti-competitive consequences. The outcome is arbitrary, confused and inconsistent decision-making which in the long term may well do more harm than good.

However, whilst this formalistic evaluation may be economically dubious, it is entirely permissible under the 'object' analytical format. Moreover, the political and pragmatic benefits are extensive. Formalism is cost-efficient allowing the resource consuming responsibilities of an effects based competition policy to be circumvented. Formalism also permits the sure prosecution of politically threatening agreements, masking any evidential inadequacies of such a policy. But, the examination also shows that these political and pragmatic advantages may be achieved at the expense of competition.

f)Quantity of Evidence

This section intends to examine the quantity of evidence required to prove a vertical offence. As was demonstrated in the examination of horizontal violations, the flexibility of the standard of proof permits the Commission to control the standard required to serve enforcement needs. In this way, DGIV may mask evidential inadequacies and increase the burden on defendants challenging the prosecution case [130]. This section will argue that the Commission's formalistic approach to distribution agreements allows it to establish violations on the basis of a low standard of proof, thus increasing the probative value of DGIV's evidence and facilitating prosecution. First, this section will consider the standard of proof applied in the case study and whether that standard is applied consistently. Then, evidence of Commission attempts to manipulate the burden or standard of proof to meet enforcement needs will be discussed.

The most notable feature in the case study is the general absence of clear reference to a standard of proof. Nowhere in the study do DGIV or Court refer to a 'requisite legal standard', or indeed a standard of 'reasonable doubt', or even a 'balance of probabilities'. Most cases simply state that Art. 85(1) has been violated or that the facts allow such a conclusion to be drawn [131]. Other cases referred to the sufficiency of the evidence. *AEG* is typical, finding the case "sufficiently proved in law" [132]. Comments made by the Court in *AEG* suggest that the standard required in these cases is of a low prima facie nature. The ECJ found that the facts were "sufficient for the conclusion" and that AEG's policy was "capable" of affecting exports [133]. Little comment can be made here on the issue of consistency. The lack of clarity regarding the standard of proof applied means that it is impossible to assess whether there was internal consistency within a case, let alone between cases. Only four cases in the study, explicitly referred to the defendant's burden [134]. From these cases, it would seem that a high burden is placed upon defendants. In *John Deere*, the defendant was required to show that instructions aimed at preventing parallel imports "were *never* obeyed and such requests were *always* ignored" [135]. In all four cases, defendants

failed to discharge their burden [136]. There is little evidence in the study of DGIV attempting to manipulate the standard of proof via its line of argument. But, in *BL*, DGIV did argue that the defendant's behaviour could not be justified on objective grounds [137]. This seems to be an attempt to reverse the burden of proof by arguing that an export ban is the only reasonable explanation for the conduct. Thus, placing the onus on the defendant to prove his innocence [138].

The examination shows that the standard of proof in distribution cases is unclear. Best evidence suggests that a violation will be proved if the evidence is merely capable of sustaining DGIV's construction of the facts. It appears that this formalistic approach permits the Commission to avoid evidential issues by allowing DGIV to rule that an agreement simply does or does not infringe Art.85(1) without further discussion. The high burden placed on defendants makes it difficult to disprove such a finding. Under this formalistic approach, political and pragmatic goals are able to control evidential sufficiency, significantly reducing the quality and quantity of evidence required to prove an offence and thereby increasing conviction prospects.

Whilst this technique permits the Commission to dictate evidential sufficiency, DGIV's failure to assess the full range of pro- and anti-competitive effects of distribution agreements has provoked concerns that this formalistic approach is unsound in that it allows false inferences to be drawn from the facts. Nevertheless, such conclusions benefit the Commission. This examination has revealed that this construction has been adopted in order to promote economic integration by the most cost-efficient means. As with the prosecution of horizontal cartels, DGIV exerts control over all aspects of prosecution. In each instance, the Commission's construction of competition rules is tailored to meet the needs of political and pragmatic goals, ensuring the criminalisation and speedy conviction of distribution agreements threatening the Single Market.

G)PROCESS AND SUBSTANCE - DEFENCE RIGHTS

1)The Right to be Heard [139]

This section will concentrate on problems relating to the existence and scope of the right to access and the contents of the SO and their effect on the defendant's right to comment. It will be demonstrated that DGIV uses its dominance of the process to limit the scope of the defendant's right and thereby control the quality and quantity of information available to the defendant.

Only three cases in the study appealed against the Commission on the issue of access [140]. However, these cases represent major challenges to DGIV's decision-making. In none of these cases was access refused outright. But, in each instance, disclosure was limited on the grounds of confidentiality [141]. DGIV's tendency to curtail disclosure on this ground has raised concerns that it is using this claim as a means of controlling the scope of defence rights, thereby making access to exonerating evidence difficult and enabling DGIV to alter the balance of evidence in its favour [142]. In *Distillers*, DGIV attempted to control the ambit of the defendant's right on the grounds of confidentiality and relevancy. Here, DGIV disclosed only part of the complaint made against Distillers asserting that the remainder, which contained information on Distiller's distribution system and a discussion of the market context was "wholly extraneous" [143]. This 'irrelevant' information was transmitted in its entirety to the Advisory Committee as being one of the "most important documents" in the case [144]. On appeal, AG Warner criticised DGIV's narrow interpretation of relevancy, pointing out that the undisclosed material contained exculpatory evidence. Moreover, the AG considered that this failure to disclose substantially infringed the defendant's right to be heard and left Distillers unable to defend itself adequately against the complaint. In particular, he argued that DGIV may have been influenced by the undisclosed information, yet Distillers were not given the opportunity to refute any

erroneous facts contained in the complaint [145]. As a result of DGIV's approach, Distillers was convicted on information it never saw [146].

The vague and biased nature of the SO has also brought criticism. In *AEG* and *Hasselblad*, the undertakings complained that the SO was vague and was based on selective disclosure of selected documents. This distorted the weight of evidence and curtailed their opportunity to comment [147]. Kerse recognises that this lack of clarity and failure to disclose may affect significantly the defendant's right to be heard, preventing defendants from acquiring exonerating evidence and making it difficult to prove the biased nature of DGIV's case construction [148]. The considerable burden placed on defendants attempting to establish that the Commission has abused the disclosure process means that invariably DGIV's construction of the facts prevails [149].

In the cases under consideration, procedural irregularities were found to exist in relation to the Commission's disclosure practice [150]. The Court's attitude towards the relationship between access rights and confidentiality was made clear. For the right to comment to be effective, DGIV may only rely on documents disclosed and such material must be disclosed in its entirety. Moreover, the SO must make clear the relevance of the material disclosed. Information necessary for the defence must be made available [151]. However, there has been some concern that, in the interests of pragmatism, the Court will not annul decision for procedural irregularities. The Court have shown a particular reluctance to annul decisions where there has been late rectification of the defect [152]. This has been criticised as giving DGIV a licence not to disclose until the appeal stage, knowing that the Court's attitude to late disclosure is such that late rectification will allow the decision to stand despite the breach of defence rights [153]. It would seem that these concerns are well founded. In all three cases, DGIV attempted late disclosure of documents previously treated as confidential. Only in *MDF*, did the Court make it clear that late disclosure infringed defence rights [154]. More often in the study, the Court's approach was to rule that procedural defects did not necessarily vitiate the decision and to declare the undisclosed documents inadmissible and re-assess DGIV's decision on that basis [155]. The practice of the Court has not always accorded with stated principle. In *AEG*, despite ruling evidence

inadmissible, the Court went on to consider the probative value of this 'inadmissible' evidence [156]. As a result, only in *MDF*, was the Commission's decision partially annulled and fines reduced [157].

This examination discloses that the right to access receives the same administrative classification and treatment from DGIV as it did in the prosecution of horizontal cartels. There is no evidence in the study of vertical cases to suggest that the right is anything more than a matter of administrative fairness. The Commission again uses its dominance of the enforcement process to limit the scope of defence rights thereby controlling the quality and quantity of information available to defendants in preparing a defence. The same techniques of confidentiality and relevancy are employed as resources to achieve this objective. The narrow interpretation of relevancy, the withholding of exonerating evidence by labelling it 'confidential' and the vagueness of the SO are all used by DGIV to distort the balance of evidence and leave the scope and strength of the case against the defendant unclear. Combined with the considerable burden on defendants attempting to establish that DGIV has abused the disclosure process, this approach does much to limit the effectiveness of the right to comment, making prosecution easier and defence more problematic.

Whilst the Court have shown that they will not allow claims of confidentiality to conflict with the defendant's right to know the case against him, the effectiveness of these rulings as a control upon DGIV is limited as it only applies to evidence DGIV relies upon in the SO. It has no effect on DGIV's treatment of undisclosed evidence. Consequently, DGIV is still able and willing to take every opportunity to prevent disclosure by labelling it 'confidential'. Thus, in practice, Art.19(1) is subject to the Commission's use of Art.20 as a prosecution resource. Atlthough the Court have made some attempt to uphold defence rights, their response to many of the problems encountered by defendants has been ineffective in deterring DGIV from attempting further breaches of defence rights. The Court's regular refusal to annul decisions for procedural defects, and its attitude to rectification by late disclosure serve more to uphold DGIV's use of disclosure as a resource to increase prosecution chances than to

promote defence safeguards. This reluctance to punish procedural impropriety not only allows DGIV to infringe defence rights with impunity, it also discloses the paramouncy of Reg.17. Enforcement is more important than fairness.

2)Presumption of Innocence

As noted in previous sections there is no explicit demonstration of a respect for the presumption of innocence in EC competition law. Once again, there is some limited evidence of a presumption of guilt. In the prosecution of vertical offences, the focus on anti-competitive object, the formalistic assessment of distribution agreements and the Commission's concomitant refusal to examine market context are all suggestive of a presumption of guilt.

Several cases in the study have argued that DGIV ignores the presumption of innocence. Three cases complained that DGIV's arbitrary investigation and its refusal to examine exonerating evidence indicated that DGIV had pre-judged the situation and was operating a presumption of guilt [158]. In addition, in *Vichy*, claims that it was the victim of discriminatory practice by the Commission are possibly suggestive of a presumption of guilt [159]. In all four cases, the Court dismissed the undertakings' claims.

This brief review suggests that the Commission's criminal characterisation of these offences may be translated into a presumption of guilt, allowing DGIV to equate econmically rational distribution practices with anti-competitive behaviour. The resulting inferences of guilt are bolstered by the Commission's formalistic evaluation of vertical arrangements.

H)CONCLUSION - FORMAL PROSECUTION

This examination of the Commission's formal prosecution of distribution agreements provides further evidence of DGIV's incremental use of the 'law as a resource'. At the

outset, DGIV characterises these cases as criminal/quasi-criminal and as possessing a clear anti-competitive object. It seems that this finding is not based on intensive market analysis, but rather on the flexibility of the substantive elments of Art.85(1). In exclusive distribution agreements, the wide definition of an export ban and the inclusion of unilateral conduct into the concept of a concerted practice have extended the ambit of anti-competitive behaviour. Whilst in selective distribution arrangements, the malleability of qualitative and quantitative distribution terms has been effective in constructing the prosecution case. In both instances, this has enabled DGIV to treat conduct compartmentalising markets as having a clear anti-competitive nature, thus justifying the Commission's employment of a curtailed analytical approach. These tactics both ensure cost-effective enforcement and increase the certainty of conviction, so providing political and pragmatic advantages. In turn, this formalistic evaluation has a significant impact on DGIV's attitude to proof, reducing both the quality and quantity of evidence supporting the Commission's decisions. Substantive proof of anti-competitive effect is neither sought nor required. In its place is DGIV's ritual finding that such conduct necessarily infringes competition rules. A similar justification allows DGIV to mask evidential inadequacies by avoiding references to an explicit standard of proof. In short, formalism allows the Commission to control evidential sufficiency. Moerover, the high burden on defendants makes it difficult to challenge that control. Indeed, the flexibility of current evidential rules offers virtually no protection to defendants. Again, the overall impact is to secure the surest route to conviction by the most pragmatically beneficial means

Whilst notably few defence challenges occurred, those that did revealed a familiar pattern. DGIV's choices at prosecution continue to impact upon the characterisation and ambit of defence safeguards. Defence protections remain administrative in nature and limited in scope. The curtailment of the defendant's right to access occurs on recognisable grounds ; those of confidentiality and relevancy. The reason for this limitation is equally familiar ; the paramouncy of Reg.17. To this end, DGIV has been prepared to infringe defence rights and the Court have demurred to punish such procedural irregularites. Consequently, DGIV has been able to pursue its

policy of selective disclosure unhindered, thereby limiting the quality and quantity of evidence available to defendants and making formaulation of an effective defence difficult. Inevitably, this promotes political and pragmatic aims by rendering conviction more likely than not. Equally familiar is evidence suggesting that DGIV may operate a presumption of guilt. This too promotes conviction.

Overall, DGIV's continued domination of enforcement permits it to limit the breadth and effectiveness of defence rights, whilst augmenting its own control of the process. At every point, political and pragmatic goals benefit.

Before drawing a criminological anaolgy with the prosecution of vertical arrangements, the informal resolution of such agreements will be evaluated.

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[1] Jean Giraudoux *The Madwoman of Chaillot.*

[2] These areas have been chosen because the Commission's attitude towards these practices is typical of its general approach towards vertical agreements.

[3] See Appendix B, Table 2 for case list of agreements under consideration. As regards Art.85(3) exemptions, the case study contains all such recently exempted cases. Thus, the information derived from this element of the study will be statistically complete.

[4] Whish *Competition Law* Butterworths (1993) at pp 535, 540, 544. The recent Green Paper acknowledged the ambiguous and problematic nature of the impact of vertical restraints on competition. See European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997) at p v.

[5] For more thorough treatment of the issues involved, see : Green *Commercial Agreements and Competition Law : Practice and Procedure in UK and EEC* Graham and Trotman (1986) Ch10 ; Chard 'The Economics of the Application of Art.85 to Selective Distribution Systems' *ELR* [1982] 83 ; Gyselen 'Vertical Restraints in the Distribution Process : Strength and Weakness of the Free Rider Rationale under EEC Competition Law' *CMLR* [1984] 647 ; Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion in EC Competition Law - Part II' *ECLR* [1989] 256 ; Easterbrook 'Vertical Arrangements and the Rule of Reason' *Antitrust LJ* [1984b] 135 and Bock 'An Economist Appraises Vertical Restraints' *Antitrust Bulletin* [1985] 117. See also, European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997), particularly Chs 2, 5, 7, for a discussion of the economic background to vertical restraints and the perceived advantages and disadvantages of DGIV's current approach to distribution agreements.

[6] Eg where a dealer is protected from intra-brand competition, he may promote his goods more assiduously, and consequently, may increase competition with other brands.

[7] Eg Bork *The Antitrust Paradox : A Policy at War with Itself* (1978) Chs 14, 15. Discussed also in Whish *Competition Law* at pp 544-548 ; Green *Commercial Agreements and Competition Law* Ch10.

[8] The free-rider problem is discussed in detail by Gyselen 'Vertical Restraints in the Distribution Process', who compares and contrasts EC and US positions.

[9] This approach may be contrasted with that of the US where the focus is on the efficiency gains to be derived from vertical agreements. Chicagoists argue that vertical restrictions should generally not be subjected to antitrust regulation unless the producer has significant market power. See discussion by Easterbrook 'Vertical Arrangements and the Rule of Reason' [1984b] ; Bock 'An Economist Appraises Vertical Restraints' ; Bork *The Antitrust Paradox* Chs 14,15.

[10] Whish *Competition Law* at p 545 ; Green *Commercial Agreements and Competition Law* Ch10 ; A.Evans 'EC Competition Law and Consumers : The Article 85(3) Exemption' *ECLR* [1981] 425.

[11] See Whish *Competition Law* at pp 541-544.

[12] See discussion in Whish *Competition Law* at pp 539-541 ; Green *Commercial Agreements and Competition Law* at pp 435-436. The problematic nature of vertical agreements has provoked a fundamental review of vertical restraints policy. See European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997), Ch8 of which outlines four main proposals for reform. Broadly, these are : i)to maintain the present system ; ii)to introduce wider block exemptions ; iii)to introduce more focused block exemptions, and ; iv)to reduce the scope of Art.85(1).

[13] The scope of DGIV's investigation powers and the issues involved are discussed in depth in Ch3 supra.

[14] See Appendix B, Table 2, Cases 1-16 for the list of formally enforced cases, ie :
1)Tippex [1989] 4 CMLR 425. Appealed as *Tippex* [1990] ECR II 261 (both hereafter referred to as *Tippex*) ;
2)John Deere [1985] 2 CMLR 554 (hereafter referred to as *John Deere*) ;
3)Camera Care v Hasselblad [1982] 2 CMLR 233 (hereafter referred to as *Camera Care*). Appealed as *Hasselblad* [1984] 1 CMLR 559 (hereafter referred to as *Hasselblad*) ;
4)Sandoz [1989] 4 CMLR 628. Appealed as *Sandoz* [1990] ECR 45 (both hereafter referred to as *Sandoz*) ;
5)Pioneer [1980] 1 CMLR 457 (hereafter referred to as *Pioneer)*. Appealed as *MDF* [1983] ECR 1825 (hereafter referred to as *MDF*) ;
6)Bulloch v Distillers [1978] 1 CMLR 400. Appealed as *Distillers* [1980] ECR 2229 (both hereafter referred to as *Distillers*) ;
7)Viho/Toshiba [1992] 5 CMLR 180. Appealed as *Viho/Toshiba* [1995] 4 CMLR 299 (both hereafter referred to as *Viho*) ;
8)Newitt v Dunlop/Slazenger [1993] 5 CMLR 352 (hereafter referred to as *Dunlop/Slazenger*). Appealed as *All Weather Sports Benelux* [1995] 4 CMLR 43 (hereafter referred to as *AWS*) ;
9)Fisher Price/Quaker Oats Ltd - Toyco [1989] 4 CMLR 553 (hereafter referred to as *Fisher Price*) ;
10)National Panasonic [1983] 1 CMLR 497, interim appeal *National Panasonic* [1980] ECR 2033 (both hereafter referred to as *National Panasonic* ;
11)Derek Merson v BL [1984] 3 CMLR 92 (hereafter referred to as *BL*) ;
12)AEG-Telefunken [1982] 2 CMLR 386. Appealed as *AEG-Telefunken* [1983] ECR 3151 (both hereafter referred to as *AEG*) ;
13)Ford Werke [1984] 1 CMLR 569. Appealed as *Ford Werke* [1985] ECR 2725 (both hereafter referred to as *Ford*) ;
14)Vichy OJ [1991] L75/57, interim appeal *Vichy* [1992] ECR 415 (both hereafter referred to as *Vichy*) ;
15)Ideal Standard [1988] 4 CMLR 627 (hereafter referred to as *Ideal*) ;
16)Grohe [1988] 4 CMLR 612 (hereafter referred to as *Grohe*).
In cases where the Commission decision and appeal share the same name, they will be distinguished by noting those page references which refer to Commission decisions. The majority of the above cases are exclusive distribution agreements, although some - *Ford* , *Vichy*, *Ideal*, *Grohe*, *BL* and *AEG* - are selective distribution arrangements. Proportionally, more exclusive distribution systems are prosecuted because of their tendency to impose export bans and thus segregate markets.

[15] See *National Panasonic* and *Camera Care.*

16 *Ford*, *Vichy*, *Ideal* and *Grohe*. See Appendix B, Table 6 for details of the investigation method(s) used in the study cases.

17 This problem arose in nine cases; *Tippex*, *John Deere*, *Sandoz*, *Pioneer/MDF*, *Viho*, *Dunlop/Slazenger*, *Fisher Price*, *BL* and *AEG*. This lack of clarity is in marked contrast with DGIV's treatment of horizontal cartels. Whilst such lack of specificity was common in many early Commission decisions, it is now the Commission's practice in horizontal cartels to provide clear details of enforcement. Part of the problem is that, under Art.21, DGIV is not obliged to publish this information.

18 Art.14 was employed in nine of the ten exclusive distribution cases. See *Tippex*, *John Deere*, *Camera Care*, *Sandoz*, *MDF*, *Viho*, *Dunlop/Slazenger*, *Fisher Price* and *National Panasonic*. The other exclusive distribution case, *Distillers*, was dealt with under Art. 11 and by notification.

19 Ie *BL* and *AEG* . The others - *Ford*, *Vichy*, *Ideal* and *Grohe* were notified to the Commission.

20 See *National Panasonic*, *Camera Care* and *AEG*.

21 See discussion of this case in the context of horizontal invesigations in Ch3 supra.

22 *National Panasonic* at pp 2037-2050. National Panasonic also claimed that they had a right to be heard and a right to legal advice before an inspection took place.

23 *National Panasonic* at pp 2056, 2058.

24 *AEG* at pp 3187-3188, *Hasselblad* at p 567.

25 *AEG* at pp 3189-3191, *Hasselblad* at p 584. In *AEG's* appeal, AG Reischl at p 3242, criticised the Commission's inadequate investigation, particularly its failure to seek out alternative, exonerating explanations for certain refusals to supply.

26 See *Distillers*.

27 Art.11 follow up was only used in five of the 16 formally prosecuted cases in the study : *Tippex*, *John Deere*, *Viho*, *Dunlop/Slazenger* and *AEG*. In a further case, *Sandoz*, an Art.11 request preceded an Art.14 inspection. See Appendix B, Table 6 for details of the investigation method(s) used in the study cases.

28 See *National Panasonic* at pp 2044-2047.

29 *National Panasonic* at p 2056.

30 See particularly, discussion in House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO ; Korah 'The Rights of the Defence in Administrative Proceedings under Commmunity Law' *CLP* [1980] 73. These issues are discussed more thoroughly in Ch3 supra in the evaluation of investigations in horizontal cartels.

31 *National Panasonic* at pp 2045-2046.

32 *National Panasonic* at pp 2057-2058.

33 Under Art.15(1)(b). See *National Panasonic (France)* [1982] 3 CMLR 623 and *National Panasonic (Belgium)* [1982] 2 CMLR 410. In *Camera Care/Hasselblad*, a fine was imposed upon Telos. See *Telos* [1982] 1 CMLR 267.

34 Korah 'Narrow or Misleading Replies to Requests for Information' *BLR* [1982b] 69.

35 See discussion in *AM&S* [1982] ECR 1575, at pp 1610-1612 and Kerse *EC Antitrust Procedure* (3rd Edn) Sweet and Maxwell (1994) at para 8.13 et seq. The issues involved are reviewed in depth in Ch3 supra.

36 See particularly, the opinion of AG Slynn in *AM&S* at p 1655 et seq ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and*

Inspection HL Papers 1983/84 (220) HMSO ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO.

37 See *John Deere* at p 554.

38 *National Panasonic* at p 2049.

39 See criminological analogy of the Commission's investigations in Ch3 supra.

40 Background information derived from : Whish *Competition Law* Ch17 ; Green *Commercial Agreements and Competition Law* Ch10 ; Kerse *EC Antitrust Procedure* at paras 4.02 et seq ; Chard 'Selective Distribution Systems' ; Downes 'Exclusive Dealing - A Change for the Worse ?' *ELR* [1979] 166 ; Korah 'Pronuptia Franchising : The Marriage of Reason and the EC Competition Rules' *EIPR* [1986c] 99 ; Korah 'Selective Distribution' *ECLR* [1994] 101 ; Gyselen 'Vertical Restraints in the Distribution Process'; Harding *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) at pp 104-105 ; Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion' ; Goebel 'Metro II's Confirmation of the Selective Distribution Rules : Is This the End of the Road ?' *CMLR* [1987] 605 ; Denis 'Focusing on the Characterisation of Per Se Unlawful Horizontal Restraints' *Antitrust Bulletin* [1991] 641 ; Burns 'Rethinking the "Agreement" Element in Vertical Antitrust Restraints' *Ohio State LJ* [1990] 1 ; Brunt 'The Use of Economic Evidence in Antitrust Litigation : Australia' *Australian Business LR* [1986] 261 ; Vogelaar 'The Impact of the Economic Recession on EEC Competition : Part Two : Crisis Cartels' *Swiss Review of International Competition Law* [1985] 35 ; Venit 'Pronuptia : Ancillary Restraints - or Unholy Alliances' *ELR* [1986] 213 ; European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997).

41 These themes are explored fully by Chard 'Selective Distribution Systems' ; Korah 'Selective Distribution' ; Whish *Competition Law* at pp 558-565, 587-595.

42 See particularly, Chard 'Selective Distribution Systems' for a discussion of these problems. DGIV's focus on the analysis of individual clauses and failure to consider fully has also been criticised by numerous firms in European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997) at pp 70-71. Chapter 5 of the Green Paper outlines the perceived advantages of DGIV's current approach.

43 This assessment is based on the same criteria employed in respect of horizontal cases. Chiefly, these are : i)DGIV's use of blatant criminal/quasi-criminal language ; ii)the considerable opprobrium with which DGIV treats such conduct ; iii)the repeated references to the covert nature of such behaviour and firms' awareness of the illegality of their conduct ; iv)the penality of DGIV's sanctioning powers.

44 See *Tippex* (Commission decision) at p 441, *John Deere* at p 563, *Camera Care* at pp 256-258, *Sandoz* (Commission decision) at pp 629, 636-637, *MDF* at pp 1866, 1903-1905, *Viho* (Commission decision) at p 187, *Dunlop/Slazenger* at p 373, *Fisher Price* at p 559, *National Panasonic* (Commission decision) at p 507, *BL* at p 100, *AEG* at p 3320, *Vichy* (Commission decision) at p L75/63. In the remaining four cases, *Distillers*, *Ideal*, *Grohe* and *Ford*, DGIV's classification is unclear. Whilst all these cases were dealt with as clear infringements, the Commission's description and analysis of these cases was markedly less penal then elsewhere. However, in all four cases DGIV acknowledged the serious nature of the infringement. From this, it would seem that the Commission's classification of these offences is quasi-criminal. Indeed, in *Ford* at p 2741, the Court clearly regarded Ford's behaviour as at least quasi-criminal in nature. Here the Court criticised the deliberate nature of Ford's anti-competitive conduct.

45 Eg *Camera Care* at p 235, *Sandoz* (Commission decision) at p 636, *Viho* (Commission decision) at p 185 and *Dunlop/Slazenger* at p 367, all described as "per se" offences. In *Vichy* at p 458, DGIV regarded the offence as a "serious and manifest infringement".

46 Such comments were made in all cases except *Grohe*, *Ideal* and *Distillers*.

47 See eg *National Panasonic* (Commission decision) at p 508,*John Deere* at p 563, *AEG* at p 3158, *Ford* at p 2741, *Vichy* at p 459, *Camera Care* at p 249, *Sandoz* (Commission decision) at p 636, *MDF* at p 1830, *Tippex* (Commission decision) at p 442, *Viho* (Commission decision) at p 185, *Dunlop/Slazenger* at p 367.

[48] In *Tippex* (Commission decision) at p 442, DGIV stated that such offences "substantially impede the integration of the markets in the Community". In several other cases, the Commission's antipathy towards practices which compartmentalised markets was made clear. See eg *National Panasonic* (Commission decision) at p 508, *AEG* at p 3158, *Ford* at p 2741, *Vichy* at p 459, *John Deere* at p 563, *Camera Care* at p 249, *Sandoz* (Commission decision) at p 636, *MDF* at p 1830, *Viho* (Commission decision) at p 185, *Dunlop/Slazenger* at p 367.

[49] For background information on this section, see : Whish *Competition Law* at pp 205-206, 559-565 ; Korah 'EEC Competition Policy - Legal Form or Economic Efficiency' *CLP* [1986b] 85 ; Korah 'Group Exemptions for Exclusive Distribution and Purchasing in the EEC' *CMLR* [1984] 53 ; Forrester and Norall 'The Laicisation of Community Law : Self Help and The Rule of Reason : How Competition Law Is and Could Be Applied' *CMLR* [1984] 11 ; Venit 'Pronuptia'; Chard 'Selective Distribution Systems'.

[50] Concerted practice will only be discussed in the context of exclusive distribution agreements as they are more relevant in this context.

[51] See *Consten and Grundig* [1966] ECR 299 ; *STM* [1966] ECR 235 and *Brasserie de Haecht* [1967] ECR 407. No market analysis is required where the object of the agreement is clearly anti-competitive.

[52] This approach was upheld by the ECJ in *Consten and Grundig* [1966] ECR 299.

[53] *MDF*, *Tippex*, *National Panasonic*, *Sandoz*, *Viho*, *Dunlop/Slazenger*, *John Deere*, and *Fisher Price*. The remaining two exclusive distribution cases, *Camera Care* and *Distillers*, were caught as indirect export bans.

[54] *Dunlop/Slazenger*, *Viho* and *Distillers*. The former two cases were caught as both direct and indirect bans.

[55] *Camera Care* and *Dunlop/Slazenger*.

[56] See *Sandoz* (Commission decision) at pp 628, 636.

[57] See eg *Ivoclar* [1988] 4 CMLR 781. This case will be discussed later in the study. Other distribution terms such as advertising requirements, obligations to stock the full range of goods and spare parts are generally regarded as normal contractual requirements and are not caught by Art.85(1). For further on this, see Whish *Competition Law* at pp 564-565.

[58] See discussion of the concept of a concerted practice in horizontal cartels in Ch4 supra.

[59] *Camera Care*, *MDF*, *Sandoz* and *Tippex*. It was also evident in three selective distribution cases. These will be discussed later. Green 'Article 85 in Perspective : Stretching Jurisdiction, Narrowing the Concept of a Restriction and Plugging a Few Gaps' *ECLR* [1988] 190, discusses the stretching of Art.85 to cover such conduct.

[60] One of the measures employed was the placing of the words "export prohibited" on invoices.

[61] Whish *Competition Law* at p 564, who notes that this assumption underlies block exemptions.

[62] Whish *Competition Law* at p 200.

[63] The lack of sensitive market analysis has been criticised as a clear case of the political goal of Single Market integration triumphing over economic considerations. See Korah 'Pronuptia Franchising' [1986c] ; Venit 'Pronuptia' ; Forrester and Norall 'The Laicisation of Community Law' ; Chard 'Selective Distribution Systems', who all argue that the Commission's approach prohibits agreements which are in reality pro-competitive. This issue will be returned to under the examination of analytical format.

[64] For background information, see : Chard 'Selective Distribution Systems' ; Goebel 'Metro II's Confirmation of the Selective Distribution Rules' ; Korah 'Selective Distribution' ; Green *Commercial Agreements and Competition Law* Ch10 ; Whish *Competition Law* Ch17.

[65] *Metro I* [1977] ECR 1875 at para 21, the ECJ stated that where a system selects its distributors on the basis of qualitative, objectively justified criteria, relating to the technical qualification of the retailer and his staff and the suitability of the premises and these criteria are

not applied discriminatorily, then the system will fall outside Art.85(1). Both the Court and Commission have been particularly insistent that restrictions do not hinder cross supplies between appointed distributors. For further discussion of the issues involved and criticism of DGIV's approach, see Chard 'Selective Distribution Systems' ; Goebel 'Metro II's Confirmation of the Selective Distribution Rules'; Korah 'Selective Distribution'.

66 Eg cars, consumer durables, hi-fi equipment and computers. The justification is that such items require technically qualified sales staff and after-sales service. Whether a product will lose its classification as technically complex, once in common use is debatable. This argument was advanced and dismissed in *Metro II* [1986] ECR 3021. For further discussion of classification of products, see Whish *Competition Law* at pp 589-590.

67 The argument here is that their very short shelf life necessitates careful supervision under a selective distribution system.

68 Eg jewellery, ceramic goods, perfumes and luxury cosmetics.

69 *AEG* dealt with consumer durables; *Vichy* with luxury cosmetics; *Ford* and *BL* with cars. The *BL* case was decided under Art.86 but has been included in the study to allow the Commission's approach to motor vehicle distribution agreements to be compared and contrasted.

70 *Ideal* at p 633 and *Grohe* at p 615. These cases were refused exemption on other grounds.

71 They must relate to properly trained staff, suitable premises, the stocking of spare parts and after-sales service.

72 Chard, in particular, has been critical of the Commission's assessment of criteria. See 'Selective Distribution Systems'.

73 See *Vichy*, *Ideal* and *Grohe*.

74 Appeals by *Grohe* and *Ideal* were later dropped.

75 *Parfums Givenchy* [1992] 4 CMLR 331 at pp 591-595. Individual exemption was granted in similar circumstances to *Yves St Laurent* [1993] 4 CMLR 120. The Commission's approach to *Grundig* [1988] 4 CMLR 865 and *Villeroy Boch* [1988] 4 CMLR 461 may also be contrasted. DGIV's treatment of these cases will be discussed further when informal resolutions and Art.85(3) exemptions are evaluated. In the other case, *Vichy*, restricting the sale of products to registered pharmacists was considered a quantitative restriction. Vichy's immunity to fines was lifted.

76 *AEG*, *Grohe*, *Vichy* and *Ideal*.

77 See *Ideal* at pp 630-634 and *Grohe* at pp 615-617. In *AEG*, restrictions aimed at guaranteeing dealers a minimum profit were regarded as objectively unjustifiable. In *Vichy*, the requirement of status of pharmacist was regarded as unnecessary for the distribution of cosmetics.

78 Eg *Ford* and *AEG*. In a further case, *Vichy*, the requirement that the retailer had the status of a pharmacist was regarded as a disproportionate requirement and therefore discriminatory application of the system.

79 *AMP* [1985] 3 CMLR 800, and Commission notice, *AMP* [1987] 3 CMLR 579. The full decision in *AMP* is awaited. The real issue in these situations is why DGIV sometimes chooses to negotiate and modify some provisions, but elsewhere prosecutes similar restrictions. This aspect will be discussed further under the informal resolution of vertical cases. See also discussion of *AMP* under the assessment of the individual exemption of vertical agreements.

80 On this, see *Metro II* [1986] ECR 3021 ; *L'Oreal* [1980] ECR 3775 at para 19; *Lancome* [1980] ECR 2511 at para 24.

81 See *Vichy* at pp 432-433. Vichy contested this by arguing that DGIV had failed to evaluate the market properly as its assessment was based on an inappropriate definition of the relevant market. The Commission's approach was upheld by the Court.

82 See *AEG*, *Ford* and *Vichy*. See above discussion under 'restriction of competition' for further details. Also discussed in Green 'Article 85 in Perspective'.

[83] These criticisms are discussed in depth by Chard in 'Selective Distribution Systems'.

[84] See Whish *Competition Law* at p 588 ; Chard 'Selective Distribution Systems' at p 97.

[85] *John Deere*, *MDF*, *National Panasonic*, *BL*, *AEG*, *Ford*, *Camera Care*, *Sandoz*, *Viho* and *Dunlop/Slazenger*. The last four of these cases were all described by the Commission as "per se" offences.

[86] *Tippex*, *Distillers*, *Fisher Price*, *Vichy*, *Ideal* and *Grohe*.

[87] See particularly, *Viho* (Commission decision) at p 185 and *Sandoz* (Commission decision) at p 636. where it was made clear that market evaluation was unnecessary in such circumstances. This was confirmed by the Court on appeal in *Sandoz* at p 45.

[88] See *Vichy*, *AEG* and *Camera Care*. *Vichy* at pp 432-433, argued that it was wrong for DGIV to broadly define the relevant market as the cosmetics market, but then assess its market share in terms of the dermopharmacy market. *AEG* at p 3190, asserted that the Commission's approach ignored the wider context of the market in consumer electronics. Both *Hasselblad* at p 584 and *Vichy* at p 433, complained of DGIV's incorrect assessment of market share. All submissions failed on appeal.

[89] *STM* [1966] ECR 235 ; *Brasserie de Haecht* [1967] ECR 407 ; *Metro I* [1977] ECR 1875 ; *Metro II* [1986] ECR 3021.

[90] See *Hasselblad*, *Sandoz*, *Viho*, *AEG* and *Vichy*. These submissions were dismissed on appeal. The inadequate and incorrect nature of the Commission's economic evaluation is discussed by Chard 'Selective Distribution Systems' and Korah 'Selective Distribution'. These problems involved will be considered in depth in the examination of the quality and quantity of DGIV's evidence in substantiating infringements.

[91] For further information on the aspects under discussion, see : Green *Commercial Agreements and Competition Law* Ch10 ; Downes 'Exclusive Dealing' ; Chard 'Selective Distribution Systems' ; Goebel 'Metro II's Confirmation of the Selective Distribution Rules' ; Korah 'Selective Distribution' ; Venit 'Pronuptia' ; Burns 'Rethinking the "Agreement" Element' ; Brunt 'The Use of Economic Evidence in Antitrust Litigation' ; Denis 'Per Se Unlawful Horizontal Restraints' ; European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997).

[92] See Burns 'Rethinking the "Agreement" Element' ; Brunt 'The Use of Economic Evidence in Antitrust Litigation' ; Denis 'Per Se Unlawful Horizontal Restraints', who all discuss the relationship between analytical format and the quality and quantity of evidence relied upon.

[93] See above discussion under 'Type of Analysis' for further consideration of the analytical format employed in the case study. *Sandoz*, *Viho*, *Tippex*, *Fisher Price* and *John Deere* are typical examples of the decreased reliance on economic evidence.

[94] This type of approach was employed in ten cases in the study; *Dunlop/Slazenger*, *Sandoz*, *Viho*, *Fisher Price*, *AEG*, *MDF*, *Camera Care*, *Tippex*, *BL* and *Ford*. In *Sandoz*, the Commission held that an export ban was implicit in the continuing commercial relations between the parties. Not surprisingly, in most of these instances, DGIV's decisions were supported by a mixture of direct and circumstantial evidence.

[95] See previous discussion by Denis 'Per Se Unlawful Horizontal Restraints' ; Burns 'Rethinking the "Agreement" Element'; Brunt 'The Use of Economic Evidence in Antitrust Litigation'.

[96] In general, these restrictions are common to both the exclusive and selective distribution arrangements. Where differences between the two types of agreement exist, they will be highlighted.

[97] Later comparisons with other cases undergoing informal prosecution will also argue that DGIV's approach is arbitrary.

[98] Background information for the following discussion is largely derived from : Chard 'Selective Distribution Systems' ; Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion'; Goebel 'Metro II's Confirmation of the Selective Distribution Rules' ; Korah 'Selective Distribution' ; Gyselen 'Vertical Restraints in the Distribution Process' ; Whish *Competition Law*

[111] See Chard 'Selective Distribution Systems' at p 95.

[112] Chard 'Selective Distribution Systems' at p 95, argues that invariably such restrictions are not used to achieve anti-competitive ends but rather to maintain incentives to continue providing services.

[113] *Ideal* at p 633 and *Grohe* at p 620.

[114] *Ideal* at pp 630-631 and *Grohe* at pp 625-626. It was argued that the products were technically complex and that only registered plumbing contractors were legally permitted to install such fixtures. These cases also argued that the restriction was necessary to protect the brand image from harm by improper installation or from being sold as a loss leader by major stores. The parties further asserted that if they did not restrict sales to contractors, they would lose their custom and that the selective distribution system was necessary in order to compete with a major competitor who had just introduced a similar system.

[115] See *Ideal* at pp 633, 635.

[116] Specifically, qualitative criteria may be used anti-competitively to control prices and reduce competition in order to facilitate horizontal collusion between producers or distributors. These points are discussed more fully by Chard 'Selective Distribution Systems' at pp 95-97 ; Downes 'Exclusive Dealing' ; Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion'.

[117] See Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusio' at pp 267-268 and Chard 'Selective Distribution Systems' at pp 97-98, who suggests that quantitative restrictions may reduce consumer free-riding by discouraging consumers from shopping around and may achieve economic efficiencies by quantitative limiting the supply of promotional material. Indeed, he argues that some form of quantitative restriction is essential to maintain an efficient distribution system.

[118] *Vichy* (Commission decision) at pp L75/60, 63, and on appeal, at p 444. DGIV at pp 434-435, refused to countenance the notion that this criterion was necessary to protect the brand image of Vichy's more prestigious products or the advantages of an increase in inter-brand competition. This formalistic approach took place despite the CFI's assertions at p 438, that full market analysis was essential. Korah in 'Selective Distribution', criticises the approach of both DGIV and the Court. In *Camera Care/Hasselblad*, Hasselblad's quantitative control of dealers was similarly condemned. The fact that these quantitative limitations were part of an attempt to control a free-rider problem was ignored.

[119] *Ideal* at p 633 and *Grohe* at p 615.

[120] *Parfums Givenchy* [1993] 5 CMLR 579 at p 598, *Yves St Laurent* [1993] 4 CMLR 120 at p 139.

[121] *Villeroy Boch* [1988] 4 CMLR 461 at pp 468-469.

[122] This assumption underlies block exemption. See Art.2(3)/Reg.1983/83. Discussed further by Whish *Competition Law* at pp 564-565.

[123] Chard 'Selective Distribution Systems' at p 97, argues that, as both types of criteria are capable of producing pro- and anti-competitive effect, both should be subject to full economic analysis.

[124] *Ideal*, *Grohe*, *Vichy*, *Ford*, *AEG*, *Dunlop/Slazenger*, *Viho*, *Distillers*, *MDF*, *Sandoz* and *Hasselblad*. The appeals in *Ideal* and *Grohe* were subsequently dropped. On appeal in *AWS*, the CFI annulled DGIV's decision in *Dunlop/Slazenger* in relation to AWS for infringements relating to Art.190.

[125] *Ford* at p 2730 and *MDF* at p 1860. Several other cases alleged that DGIV failed to take account of all the relevant pro/anti-competitive effects, eg *Vichy* at p 432.

[126] See *AEG* at pp 3188-3190 and *Hasselblad* at pp 567-570. AEG asserted that DGIV had used evidence out of context, had ignored exculpatory evidence and had based its decision on selected passages from only 40 of the 500 documents impounded.

127 In *Hasselblad* at p 559, on the grounds that an incriminating clause had been wrongly taken into account for a period of the offence and that the Commission had failed to adduce evidence demonstrating that Hasselblad's guarantee/repair service restricted competition. As a result, Hasselblad's fine was reduced. In *MDF*, the Court partially annulled and reduced fines because of an inconsistency between SO and decision regarding the duration of the violation. In *Sandoz*, the ECJ dismissed the appeal but reduced the fine.

128 *AEG* at p 3220. The procedural irregularities will be discussed shortly under 'Defence Rights/The Right to be Heard'.

129 *Vichy* at p 438. Similarly, in *Sandoz* at p 45, the CFI adopted a formalsitic approach stating that extensive market analysis was not necessary in per se infringements. See also *Ford* at p 2746 and *AEG* at p 3205.

130 See also discussion by Green 'Evidence and Proof in EC Competition Cases' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 127 and Brunt 'the Use of Economic Evidence in Antitrust Litigation'.

131 Twelve cases in the study took this approach. See *Camera Care* at p 249, *MDF* at pp 1892, 1894, 1897, *Distillers* (Commission decision) at p 412, *Viho* (Commission decision) at p 185, *Dunlop/Slazenger* at p 363, *Fisher Price* at p 558, *National Panasonic* (Commission decision) at p 505, *Sandoz* (Commission decision) at p 636, *BL* at p 99, *Ideal* at p 639, *Grohe* at p 610 and *John Deere* at p 562. Even on appeal, the approach of the Court was no more precise. In *Hasselblad* at p 592, the ECJ simply stated that DGIV were "justified in concluding ...".

132 *AEG* at p 3220. See also at p 3207, where the Court found the facts "adequately proved". Also *Tippex* (Commission decision) at p 434, which referred to "sufficient grounds" and "sufficient certainty" ; *Ford* at p 2744 "sufficient to show" and "good reason to believe" and *Vichy* at pp 465 and 439, "sufficiently established".

133 *AEG* at p 3202. Comments in *Tippex* (Commission decision) at pp 433, 438, Hasselblad p 592, *Sandoz* (Commission decision) at p 633, *John Deere* at p 562 and *Vichy* at p 444, 448, suggest an equally low standard was applied.

134 See *Ideal* at p 637, *BL* at p 99, *AEG* at p 3198 and *John Deere* at p 561.

135 *John Deere* at p 561, italics inserted. Similarly, in *AEG* at p 3102, it was held that systematic abuse of the selective distribution system could only be ruled out if AEG proved there was no general policy of discrimination.

136 See eg *BL* at p 99 where BL's explanations were dismissed as "not convincing".

137 *BL* at p 99.

138 In this case the defendant found the weight of the burden impossible to discharge.

139 For background information, see : Kerse *EC Antitrust Procedure* at paras 4.04-4.25 ; Lavoie 'The Investigative Powers of the Commission with Respect to Business Secrets under Community Competition Rules' *ELR* [1992] 20 ; Doherty 'Playing Poker with the Commission : Rights of Access in Competition Cases' *ECLR* [1994] 8 ; Coppel 'Curbing the Ruling Passion : A New Force for Judicial Review in the European Cummunities' *ECLR* [1992] 143 ; Joshua 'Information in EEC Competition Law Procedures' *ELR* [1986] 409 ; Joshua 'Balancing the Public Interest : Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedure' *ECLR* [1994] 68 ; Vaughan 'Access to the File and Confidentiality' in in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 169 ; McBridge and Brown 'The UK, the European Community and the ECHR' *YBEL* [1981] 167 ; Livingstone and Sherliker 'Confidentiality in UK and EEC Antitrust Procedures' *JBL* [1982] 31.

140 See *AEG*, *Distillers* and *MDF*.

141 In all three cases, letters, or in *Distillers* case, the complaints, were only selectively disclosed on grounds of business secrecy. In *MDF*, access to the inspector's report was also refused. In *MDF*, disclosure between the parties partially overcame these problems.

142 See particularly, Written Submission by JWP to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 59-60, 84-85.

at p 560 et seq ; Green *Commercial Agreements and Competition Law* Chs 10, 17. In particular, this discussion will develop Chard's analysis of the problems.

99 *Ford, BL, National Panasonic, Fisher Price, Dunlop/Slazenger, Viho, Distillers, AEG, MDF, Sandoz, Camera Care, John Deere* and *Tippex* used direct/indirect measures preventing parallel imports.

100 The formalistic nature of the evaluation was particularly evident in *Sandoz, Camera Care, Viho* and *Dunlop/Slazenger*, where the per se anti-competitiveness of the behaviour was noted. The hindrance this conduct caused to Single Market integration was noted in all 13 cases : *Ford* at p 2725, *BL* at pp 98-99, *National Panasonic* (Commission decision) at pp 502-506, *Fisher Price* at pp 558-559, *Distillers* (Commission decision) at p 400, *MDF* at p 1904, *Sandoz* (Commission decision) at p 636, *Camera Care* at p 257, *John Deere* at p 563, *Tippex* (Commission decision) at p 441, *Dunlop/Slazenger* at p 373, *AEG* at p 3197 and *Viho* (Commission decision) at p 187.

101 See Chard 'Selective Distribution Systems' at pp 89-90 ; Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion' at pp 264-267.

102 See Ch4 supra for discussion of DGIV's case construction of a concerted practice in horizontal cartels. The Commission appears to have made no investigations in the case study into horizontal cartelisation of manufacturers or distributors. Pathak in 'Art.85 and Art.86 and Anti-Competitive Exclusion' at p 267, criticises the Court and DGIV for this. Chard 'Selective Distribution Systems' at p 90, considers such collusion unlikely. Typical examples of the Commission's limited investigation of the necessary economic issues may be seen in *Tippex* (Commission decision) at pp 427-429, *John Deere* at pp 555-556, *Camera Care* at pp 236-256, *Sandoz* (Commission decision) at pp 630-633, *Viho* (Commission decision) at pp 181-184, *Fisher Price* at pp 554-557 and *Dunlop/Slazenger* at pp 354-365.

103 Chard 'Selective Distribution Systems' at p 91. Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion' at pp 266-267, argues that whilst the Commission is obsessed with price competition, it has failed to consider the issue of price discrimination. Firms contributing to the Commission's recent Green Paper also criticised DGIV's approach here. See European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997) at pp 72.

104 Eg *Camera Care, AEG, BL, Distillers, Tippex, National Panasonic, Fisher Price, Dunlop/Slazenger, Viho, Sandoz, MDF, Ford* and *John Deere*. Pathak in 'Art.85 and Art.86 and Anti-Competitive Exclusion' and Goebel in 'Metro II's Confirmation of the Selective Distribution Rules', discuss in further detail price maintenance in the cases of *Camera Care/Hasselblad* and *AEG*.

105 The Commission's analysis in *Ford* (Commission decision) at p 607 and *John Deere* at p 560 is typical. In both cases, DGIV simply stated that the conduct enabled the maintenance of substantial price differences between MS. See also Chard 'Selective Distribution Systems' at p 91 ; Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion' at pp 266-267 ; Goebel 'Metro II's Confirmation of the Selective Distribution Rules' at pp 617-618. Chard argues that part of the problem is that price discrimination is difficult to identify and it is unclear whether it produces pro- or anti-competitive effects. As a result, it is doubtful whether attempts should be made to control price discrimination.

106 See Whish *Competition Law* at pp 565-566.

107 Chard 'Selective Distribution Systems' at pp 90-93.

108 A particular problem in this respect is the free-rider problem discussed in the introduction to this chapter. Firms within the distribution system will be reluctant to invest in pre-sale promotion if the actual sales are likely to be 'stolen' by free-riders. To prevent this, restrictions on cross supplies are essential. See discussion by Gyselen 'Vertical Restraints in the Distribution Process' ; Korah 'Selective Distribution' at pp 101-102 ; Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion'at pp 267-268.

109 See also cases of *MDF, Dunlop/Slazenger, Viho.*

110 Indeed, Chard 'Selective Distribution Systems' at p 93, argues that the background information in the Commission's decisions is more suggestive of pro- rather than anti-competitive effects.

143 *Distillers* at p 2295. Information on business secrets was also excised.

144 *Distillers* at p 2296.

145 See discussion in *Distillers* at pp 2295-2298. Similar complaints of withholding exonerating evidence as 'confidential' were made in *AEG* at pp 3166, 3192 and *MDF* at pp 1856, 1860.

146 Discussed further by Doherty 'Playing Poker with the Commission'.

147 *AEG* at pp 3188-3192, *Hasselblad* at p 567. Criticism in both cases was trenchant. The firms claimed that passages were quoted out of context, exculpatory evidence was ignored and the facts were insufficiently investigated. In *AEG*, the firm claimed that the biased nature of the Commission's prosecution was evidenced in DGIV's use of only 40 out of 500 documents it impounded. *Vichy* at p 458 and *MDF* at pp 1873-1881, also complained of the vagueness of the SO.

148 Kerse *EC Antitrust Procedure* at para 4.07. Also criticised in *AEG* by AG Reischl at p 3242.

149 Eg in *Hercules* at p 276, the CFI ruled that the defendant must establish that there were serious doubts as to the real reasons for the Commission's decisions.

150 In *AEG* and *MDF*, the Commission was found to have infringed defence rights by relying on undisclosed documents. A similar conclusion was reached by AG Warner in *Distillers*, where the Court did not rule on the procedural issues. In *Hasselblad*, the firm's complaints regarding procedural defects were rejected by the Court.

151 See *AEG* at p 3191, *MDF* at pp 1882-1883 and *Distillers* at pp 2295-2298, per AG Warner. In all these cases, it was made clear that confidential information should not be relied upon unless DGIV could find a means of communicating the substance of the material to the defendant.

152 This approach was taken in *Hoffman La Roche* [1979] ECR 461, cf *France v Commission* [1979] ECR 321 at p 336, handed down a week earlier and which came to the opposite conclusion. The ruling in *Vitamins* has been criticised extensively. See Doherty 'Playing Poker with the Commission' and Kerse *EC Antitrust Procedure* at para 4.12.

153 See comments by AG Warner in *Distillers* at p 2295 et seq ; Sen 'Can Defects in Natural Justice be Cured on Appeal' *ICLQ* [1993] 369.

154 *MDF* at pp 1882-1883, where the ECJ held that all information must be disclosed before the hearing. See also *AEG* and *Distillers*.

155 *MDF* at pp 1882-1883, *AEG* at p 3193 and *Distillers* at p 2290 per AG Warner. The procedural irregularities would only make a difference if it could be established that in its absence a different result would have been reached. Kerse *EC Antitrust Procedure* at para 4.12, considers it unfortunate that the Court did not take the opportunity in these cases to expressly overrule the approach in *Vitamins*.

156 *AEG* at pp 3206, 3208. In relation to one of AEG's distributors, Auchan, this supposedly inadmissible evidence appears to have been the deciding factor in finding a violation. The Court's treatment of this case is discussed and criticised by Doherty 'Playing Poker with the Commission'.

157 In *AEG*, the appeal was dismissed in its entirety, despite the fact that the Court found the violation only sufficiently proved in some instances. In *Distillers*, the application was dismissed outright.

158 *Hasselblad* at p 567, *AEG* at pp 3187, 3192, 3197 and *MDF* at p 1875.

159 *Vichy* at pp 423-424. Other notified systems such as *Yves St Laurent* [1993] 4 CMLR 120 and *Parfums Givenchy* [1993] 5 CMLR 579 were negotiated and modified rather than prosecuted like Vichy.