The European Community Rules on Competition: The Concerted Practices Doctrine

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INTRODUCTION

On December 21, 1988, the Commission of the European Communities (Commission) issued the PVC and LdPE decisions. In these two decisions, the Commission fined twenty-three major producers of thermoplastic products fifty million dollars for participating in price-fixing and market-sharing cartels throughout the European Community (Community). The Commission found that several cartel members met regularly to coordinate their prices for polyvinyl chloride and low density poly-

1 The Treaty of Rome (EEC Treaty) created the European Economic Community (Community) in 1957. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The original signatories of the EEC Treaty were the six West European states of Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands. Id. Today, the number of Community member states is twelve, including, in addition to the original members, Denmark, England, Greece, Ireland, Portugal, and Spain. See 28 O.J. EUR. COMM. (No. L 302) 9; 3 Common Mkt. Rep. (CCH) ¶ 7,001–7,708 (1989).

2 The Commission of the European Communities (Commission) is a nine member panel appointed by the member states, acting in common agreement, and charged with the responsibility of implementing the provisions of the EEC Treaty in a manner independent of the desires of individual member states. EEC Treaty, supra note 1, at arts. 155–63.


5 New Developments, Commission Imposes Heavy Fines on Plastics Sector Cartels, 4 Common Mkt. Rep. (CCH) ¶ 95,032 at 51,104 (1989) [hereinafter Plastics Sector Cartel]. “[T]he Commission imposed fines totalling 60m. ECU [European Currency Units] on 23 major petrochemical producers which had taken part in two Europe-wide price fixing and market sharing cartels, one in LdPE (low density polyethylene) and the other in PVC [polyvinyl chloride].” Id.

6 “LdPE and PVC are key intermediate products used by the plastics processing industry throughout the Community.” Id.


8 See infra notes 72–94 and accompanying text.
ethylene. The Commission held that all cartel members, by virtue of their cartel membership, violated the Community rules on competition, specifically the prohibition of concerted price-fixing practices under article 85(1) of the Treaty Establishing the European Economic Community (EEC Treaty). In both decisions the holdings rested largely on circumstantial evidence, deductive reasoning, and an expanded application of the concept of concerted practices. This incorporation, best understood as

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9 See infra notes 78–90 and accompanying text.
10 See infra notes 91–94. The Community rules on competition are intended to ensure that businesses in the Community operate as independent competitors. See generally Sutherland, The Competition Policy in the European Community, 30 ST. LOUIS U.L.J. 149 (1985). Mr. Sutherland, the Commissioner in charge of competition policy at the time of the PVC and LDPE decisions, stated that the competition policy of the Community is part of the wider endeavor of European integration. Id. According to Sutherland, free competition is the best way to achieve the twin goals of a genuine “barrier-free internal Market” and of enhanced competitiveness of the European industry. Id.
12 EEC Treaty, supra note 1, at art. 85. Article 85 of the EEC Treaty provides:

1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in: (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions; (b) the limitation or control of production, markets, technical development or investment; (c) market-sharing or the sharing of sources of supply; (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or (e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.
2. Any agreements or decisions prohibited pursuant to this Article shall be null and void.
3. Nevertheless, the provision of paragraph 1 may be declared inapplicable in the case of:
   - any agreements or classes of agreements between enterprises,
   - any decisions or classes of decisions by associations or enterprises, and
   - any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:
     (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
     (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Id.
13 PVC, supra note 3, at para. 23; LDPE, supra note 4, at para. 28.
14 PVC, supra note 3, at paras. 25–26; LDPE, supra note 4, at paras. 30–33.
the Commission's solution to the noncooperative attitude of the thermoplastics industry in the PVC and LdPE investigations, expanded the legal framework the Commission applied to enforce the Community rules on competition rigorously despite adverse circumstances.

The Community rules on competition were ratified to create a Community characterized by genuine competition and an absence of trade barriers.\textsuperscript{15} PVC and LdPE demonstrate that businesses currently active in the Community and those anticipating their future participation might encounter legal and financial predicaments by pursuing impermissible business associations.\textsuperscript{16} The Commission's application of the concept of concerted practices in these two decisions restricts permissible contact between businesses\textsuperscript{17} and may lead to hefty fines for businesses which breach their duty to act as independent competitors in the Community.\textsuperscript{18}

Part I of this Note discusses how the European Court of Justice (European Court)\textsuperscript{19} and the Commission defined concerted price-fixing practices prior to the 1988 PVC and LdPE decisions and looks at the corresponding evidentiary requirements.\textsuperscript{20} Part II considers the PVC and LdPE decisions as examples of the Commission's current expansive application of the concept of concerted practices.\textsuperscript{21} Part III analyzes the evolution of the concept of concerted practices in light of the recent PVC and LdPE decisions.\textsuperscript{22} This Note concludes that the Commission's expansive application is consistent with its efforts to create a competitive and barrier-free Community by 1992.

\textsuperscript{15} EEC Treaty, supra note 1, at art. 3.

\textsuperscript{16} Commenting on the PVC and LdPE decisions, Commissioner Sutherland said that it was particularly important in the context of 1992 to ensure that competition in the Community was not distorted. He assured that the Commission remained determined to enforce the competition rules and to deter such behavior by imposing appropriate fines. Plastics Sector Cartels, supra note 5, at 51,105.

\textsuperscript{17} See infra notes 110–117.

\textsuperscript{18} PVC, supra note 3, at arts. 1, 3.

\textsuperscript{19} The Court of Justice of the European Communities (European Court) is charged with the duty to ensure that in the interpretation and application of the EEC Treaty, the law is observed. EEC Treaty, supra note 1, at art. 164. The European Court can review acts of the Commission upon application by any natural or legal person who is directly and individually concerned by the Commission's acts. Id. at art. 173.

\textsuperscript{20} See infra notes 23–69 and accompanying text.

\textsuperscript{21} See infra notes 70–118 and accompanying text.

\textsuperscript{22} See infra notes 119–142 and accompanying text.
I. Concerted Practices Before 1988

Prior to the 1988 PVC and LdPE decisions, the European Court defined the concept of concerted practices in the 1972 *Imperial Chemical Industries, Ltd. v. Commission* case23 and in the 1975 *European Sugar Cartel Cases (Sugar Cases)*.24 In these two judgments, the European Court held that businesses acting in the Community are prohibited from engaging in intentional parallel conduct which distorts free price competition,25 especially if the parallel conduct involves direct or indirect contact between businesses.26 Two years later, the Commission decided the 1977 *Vegetable Parchment* decision27 on the same standards.28

The European Court defined concerted practices in the context of price-fixing practices in the 1972 *Imperial Chemical* judgment.29 One of the issues in *Imperial Chemical*,30 one of the Dyestuffs cases,31


25 See *Imperial Chemical*, supra note 23, at 655–61. The parallel conduct discussed in *Imperial Chemical* consisted of multiple industry-wide price increases which were identical with respect to timing, the products affected, and the rates of increase. *Id.* at 657–58.

26 *Sugar Cases*, supra note 24, at 1942. See infra note 55 and accompanying text.


28 See infra notes 66–69 and accompanying text.

29 *Imperial Chemical*, supra note 23, at 655.

30 *Id.* at 623. *Imperial Chemical* reached the European Court by way of Imperial Chemical Industries' (ICI's) action to annul the *Dyestuffs Manufacturers* Commission decision of July 24, 1969, relating to proceedings under article 85 of the EEC Treaty. *Id.* at 622. The Commission in *Dyestuffs Manufacturers* imposed a fine of 50,000 units of account (EUA) on ICI for violating article 85(1) of the EEC Treaty together “with other undertakings in concerted practices for the purpose of fixing the amount of price increases and the circumstances in which these increases were to be introduced in the dyestuffs industry in 1964, 1965 and 1967.” *Id.* at 623. The decision also imposed fines of 50,000 units of account on seven other member state companies. *Id.* The European Court dismissed ICI's complaint thereby affirming the *Dyestuffs Manufacturers* decision. *Id.* at 664.

was whether the dyestuffs manufacturers' practice of publicly announcing their intention to increase prices at a future date and subsequently increasing prices simultaneously constituted a concerted practice under article 85(1) of the EEC Treaty. The European Court held that this practice violated article 85(1) of the EEC Treaty.

In Imperial Chemical, the European Court found that three uniform price increases in the dyestuffs market constituted a progressive cooperation between the enterprises. The European Court further found that the enterprises eliminated the risk of independent change thus temporarily eliminating competitive market conditions. The dyestuffs manufacturers claimed that the uniformity of the price increases resulted from the presence of a price leader in an oligopolistic market. The European Court conducted a market analysis to ascertain whether the dyestuffs manufacturers' claim could be sustained and concluded that the dyestuffs manufacturers engaged in a concerted practice in violation of article 85(1). The European Court reasoned that since the dyestuffs market was not an oligopoly, it was unlikely that three simultaneous price increases could have come about spontaneously on all the national markets.

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17/67, against a number of companies for alleged violations of Article 85." *Id.* The Commission alleged that the indicted companies had engaged in illegal concerted practices prohibited by article 85(1). *Id.*

32 Imperial Chemical, *supra* note 23, at 653.

33 *Id.* at 661.

34 *Id.* at 658.

35 *Id.* at 659.

36 *Id.* at 653. "[Oligopoly describes a] market condition in which the sellers are so few that the actions of any one of them will materially affect the price and hence have a measurable impact upon competitors." *The American Heritage Dictionary* 866 (2nd ed. 1982) [hereinafter *American Heritage Dictionary*].

37 See *Imperial Chemical*, *supra* note 23, at 655–58. The European Court's findings included the following:

In the territory of the Community, the market in dyestuffs in fact consists of five separate national markets with different price levels which cannot be explained by differences in costs and charges affecting producers in those countries . . . . [I]t is clear that each of the national markets has the characteristics of an oligopoly and that in most of them price levels are established under the influence of a 'priceleader', who in some cases is the largest producer in the country concerned . . . . [E]ven in cases where a producer establishes direct contact with an important user in another Member State, prices are usually fixed in relation to the place where the user is established and tend to follow the level of prices on the national market.

*Id.* at 655–56.

38 See *id.* at 661.

39 *Id.* at 659. The European Court continued to reason that "[a]lthough a general,
rates, timing, and range of products affected by the three price increases indicated a cooperation between the enterprises to eliminate the risks of competition.40 Imperial Chemical demonstrates that a business participates in a concerted practice when it intentionally cooperates with alleged competitors in order to eliminate the risks of free competition in the Community.41

The European Court explained that the concept of a concerted practice does not necessarily involve a formal agreement but can result from a cooperation between businesses manifested by their parallel conduct.42 Parallel conduct per se cannot be considered a concerted practice but is suggestive of one if it leads to abnormal competitive market conditions.43 The European Court seemed to define a concerted practice as parallel conduct which eliminates normal competition and does not arise spontaneously under normal market conditions,44 but results from intentional cooperation between alleged competitors.45 Thus, Imperial Chemical established parallel conduct, distorted competition, and intentional cooperation as the three constitutive elements of a concerted practice.46

The European Court in Imperial Chemical appeared to base its finding of a concerted practice on circumstantial evidence and deductive reasoning.47 After it established the existence of the first two elements, parallel conduct and elimination of competi-

spontaneous increase on each of the national markets is just conceivable, these increases might be expected to differ according to the particular characteristics of the different national markets.” Id.

40 Id. at 659–61.

41 Id. at 661.

42 Id. at 655.

43 Id.

44 Id. The European Court defined normal competitive market conditions as those in which price stability was achieved at the lowest possible level given the nature of a product, the size and number of the enterprises concerned, and the extent of the market. Id.

45 Id. at 659. The European Court further explained that:

Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.

Id. at 660. For a critique of the European Court's affirmation of the conviction as lacking persuasiveness on the facts as they were stated and used, see Mann, The Dyestuffs Case in the Court of Justice of the European Communities, 22 INT'L & COMP. L.Q. 35, 37-41 (1973).

46 Id. at 655.

47 See id. at 658-59.
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tion, the European Court declined to explain them as spontaneous features of a competitive market by essentially deducing the existence of the third element, intentional cooperation, from the existence of the first two.\(^{48}\) In other words, *Imperial Chemical* seemed to allow a finding of intentional cooperation between competitors to be based on a judicial refutation of economic theories that explain parallel conduct as the autonomous behavior of real competitors.

In 1975, the European Court had a further opportunity to define concerted practices. In the 1975 *Sugar Cases*,\(^ {49}\) the European Court expanded on the mandate underlying all Community rules on competition: businesses must conduct their Community affairs as independent operators.\(^ {50}\) The *Sugar Cases* demonstrate that business cooperation involving direct or indirect contact between alleged competitors is impermissible.\(^ {51}\)

In the 1975 *Sugar Cases*, the European Court was asked to rule on the validity of the 1973 *European Sugar Cartel* Commission decision.\(^ {52}\) In this decision, the Commission held that the chief European sugar producers engaged in various concerted practices.\(^ {53}\) The European Court annulled large parts of the Commission decision.\(^ {54}\) While discussing the Community rules on competition, the European Court stated that businesses acting in the Community must operate independently and determine their business strategies without contacting competitors.\(^ {55}\)


\(^{49}\) *Sugar Cases*, supra note 24. For a brief discussion of the *Sugar Cases*, see Wolfe & Montauk, Antitrust in the European Economic Community: An Analysis of Recent Developments in the Court of Justice, 18 SANTA CLARA L. REV. 349, 385 (1978). In the *Sugar Cases*, “the main sugar producers in France, Belgium, the Netherlands, Germany, and Italy attempted to separate their national markets from each other, so as to allow each group of national producers sole access to its own market.” Id. at 387.

\(^{50}\) *Sugar Cases*, supra note 24, at 1942.

\(^{51}\) Id.


\(^{53}\) Id. at 9,281–82.

\(^{54}\) *Sugar Cases*, supra note 24, at 2025.

\(^{55}\) Id. at 1942. Specifically, the European Court stated that “each economic operator must determine independently the policy which he intends to adopt on the common
quired independence strictly precludes direct or indirect contact between competitors lest they influence each other's conduct. The *Sugar Cases* demonstrate that businesses violate article 85(1) prohibitions on concerted practices when they maintain direct or indirect contact with competitors.

After the European Court decided *Imperial Chemical* in 1972 and the *Sugar Cases* in 1975, the Commission issued the *Vegetable Parchment* decision on December 23, 1977 (*Vegetable Parchment*). In this decision, the Commission fined the principal European producers of vegetable parchment for violating article 85(1) through three concerted practices, one of which involved a price-fixing scheme. In *Vegetable Parchment*, virtually all the manufacturers were members of the international trade association Genuine Vegetable Parchment Association (GVPA). Through GVPA, the parchment manufacturers convened several meetings each year to set the rate of increase of vegetable parchment prices in the Benelux and Danish markets. At those meetings, the manufacturers generally set the rate and date of the next price increase. Subsequently, the price leader in each market sent the

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market including the choice of the persons and undertakings to which he makes offers or sells.” *Id.*

56 *Id.* The European Court conceded, however, that the required independence does not deprive businesses of their right to adapt themselves to their competitors' conduct. *Id.*

57 *Vegetable Parchment*, *supra* note 27. For a lucid discussion of *Vegetable Parchment*, see *Pricing of Products in the EEC*, *supra* note 31, at 244.

58 *Vegetable Parchment*, *supra* note 27, at paras. 10–16. The following producers were involved: the German Feldmühle AG, 4 P Nicolaus Kempten GmbH, 4 P Rube Göttingen, and Schleipen & Erkens AG (Feldmühle, Nicolaus, Rube, and Schleipen & Erkens); the French Canson & Montgolfier, Dalle & Lecomte, Les Papeteries Alamigeon & Lacroix (Alamigeon), and Vizille; the British Wiggins Teape, Ltd. (Wiggins); and the Italian CIMA, CRDM, and Cartiere Burgo (Burgo). *Id.* at paras. 10–15. All of these producers, except CIMA and CRDM, were at one point members of GVPA. *Id.* at para. 16.

59 *Id.* at paras. 1–2. Vegetable parchment is a kind of wrapping paper which is impermeable to fatty substances and, to a substantial extent, water and gas. *Id.*

60 *Id.* at paras. 78–80. The first concerted practice involved a distribution agreement. *Id.* at paras. 17–33, 55–62. The second concerted practice involved the exchange of information regarding prices and export quantities through GVPA. *Id.* at paras. 34–39, 63–70. The third concerted practice consisted of regular meetings of the GVPA members, during which they determined the rate of price increases for those EEC markets without domestic producers. *Id.* at paras. 40–52, 71–73.

61 *Id.* at para. 16.

62 Benelux is an acronym for the customs union formed by Belgium, the Netherlands, and Luxembourg. *American Heritage Dictionary*, *supra* note 36, at 1472–73.

63 *Vegetable Parchment*, *supra* note 27, at paras. 40–52.

64 *Id.* at para. 40.
new price schedules via the GVPA Secretariat to all GVPA members for implementation. 65

In Vegetable Parchment, the Commission held that this practice clearly constituted a concerted practice of price-fixing in violation of article 85(1)(a). 66 The Commission reasoned that the GVPA members could not fail to realize that their conduct had a significant anti-competitive effect and violated the Community rules on competition. 67 The Commission fined 68 all but three participating producers. 69

The Vegetable Parchment decision demonstrates that, prior to 1988, the Commission seemed to follow the European Court implicitly in its definition and application of the concept of concerted practices by either generally prohibiting intentional cooperation or, more specifically, prohibiting direct or indirect contact between alleged competitors in the European Community.

II. THE 1988 PVC AND LDPE COMMISSION DECISIONS

The facts in PVC and LDPE were similar, and the Commission's legal theories identical. 70 This section focuses on PVC as an example of the Commission's new definition and application of the concept of concerted pricing practices.

In PVC, the Commission fined fourteen major producers of thermoplastic polyvinyl chloride 23.5 million European Currency Units 71 (ECUs) for infringing article 85(1) of the EEC Treaty by participating in a cartel engaged in collusive pricing activities. 72 The Commission considered the cartel to constitute an agreement 73 but held that the infringement constituted an

65 Id.
66 Id. at para. 71.
67 Id. at para. 84.
68 Id. The fines imposed ranged from 10,000 EUA (European Unit of Account) to 25,000 EUA. Id. at art. 2.
69 Id. at para. 84. The Commission reasoned that since the three exempted manufacturers made few sales to the Benelux and Danish markets, their role in export price-fixing was insignificant. Id. at paras. 41, 84. The Commission seemed to take a measured approach to punishing violations of article 85(1)(a), reflecting its policy to make fines commensurate with both the "gravity and the duration of the infringement." Id. at para. 81; see also Imperial Chemical, supra note 23, at 663.
70 See Plastics Sector Cartels, supra note 5, at 51,104; compare PVC, supra note 3, at paras. 28–38, with LDPE, supra note 4, at paras. 35–45.
71 For the current exchange rate, see supra note 7.
72 PVC, supra note 3, at arts. 1, 3.
73 Id. at para. 30.
agreement and/or a concerted practice within the meaning of article 85(1).\textsuperscript{74} The Commission stated that it was not as important to distinguish agreements from concerted practices as to distinguish mere parallel conduct from conduct constituting a concerted practice under article 85(1).\textsuperscript{75} According to the Commission, the conduct of Shell Chemical International Co., Ltd. (Shell), whose involvement in the cartel was limited, best exemplified the scope of the concept of concerted practices.\textsuperscript{76}

The producers fined in PVC were the fourteen major producers\textsuperscript{77} of polyvinyl chloride.\textsuperscript{78} These producers regularly met to coordinate and ensure the progress of concerted price initiatives.\textsuperscript{79} The Commission's three evidentiary pillars\textsuperscript{80} were planning documents found at Imperial Chemical Industries, Ltd. (ICI), ICI's testimony affirming the existence of the meetings, and internal pricing documents found at some of the producers' plants.\textsuperscript{81} The planning documents proposed a framework of meetings to implement quotas and a price-fixing scheme and recorded the generally positive response of the indicted producers.\textsuperscript{82} According to ICI's testimony, the proposed meetings took place approximately once a month from August 1980 through

\textsuperscript{74} Id. at art. 1.
\textsuperscript{75} Id. at para. 34.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at para. 2. The producers were Atochem SA, BASF AG, DSM/NV, Enichem SpA, Hoechst AG, Huels AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij (LVM), Montedison SpA, Norsk Hydro AS, Société artésienne de vinyl (SAV), Shell International Chemical Co., Ltd.(Shell), Solvay et Cie, and Wacker Chemie GmbH. Id. at art. 1.
\textsuperscript{78} Id. at paras. 2–3. Polyvinyl chloride is a common thermoplastic resin used in a wide variety of manufactured products, including rainwear, garden hoses, and floor tiles. American Heritage Dictionary, supra note 36, at 963. Polyvinyl chloride is a "key intermediate product[] used by the plastic processing industry throughout the Community." Plastics Sector Cartels, supra note 5, at 51,104.
\textsuperscript{79} PVC, supra note 3, at paras. 7–9, 17–22.
\textsuperscript{80} Id. at para. 21.
\textsuperscript{81} Id. at paras. 7–8, 17.
\textsuperscript{82} Id. at para. 7. In these meetings the following matters, among others, were to be discussed:

- the achievement of greater price transparency with a common European price, although importers might still be allowed a penetration margin (two per cent was suggested);
- the machinery of price initiatives and measures designed to ensure they were successful [sic], including the discouraging of 'customer tourism' (buyers changing to a new supplier offering the lowest price).

Id.
September 1983. ICI provided a list of participants, which Badische Anilin- und Soda-Fabrik (BASF) confirmed, and testified that each of the participants attended at least some of the meetings. According to ICI, the participants discussed topics such as pricing and market shares but did not make firm commitments to each other. The Commission tried to obtain detailed information about the meetings but most of the producers either claimed to be unaware of any meetings or to have no relevant details. The Commission consequently did not possess any records or minutes of the meetings. With respect to internal pricing documents, the Commission found internal price directives at five producers' plants. These price directives often emphasized the need for sales offices to support price initiatives by confining sales to regular customers, allowing discounts only with head office approval, and even instructing sales personnel to refuse business rather than sell below list prices. The Commission requested documentation of internal price policy from the other nine producers but was told that producers routinely destroy such documents or such documents never existed.

In PVC, the Commission held that the direct documentary evidence, namely the 1980 planning documents, ICI's testimony of a system of regular meetings, and the internal documents relating to quotas and compensation schemes, was sufficient to prove the existence of a cartel. Regarding concerted pricing practices, the Commission admitted that it was unable to show the number of meetings each producer attended or that the producers simultaneously introduced identical price lists. The Commission held, nevertheless, that the indicted producers

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83 Id. at para. 8.
84 Id. at paras. 8–9. The producers identified by ICI were Anic (now Enichem), Atochem (formerly Chloe), BASF, DSM, Kemanord (a division of Kemanobel), LVM, Montedison, Norsk Hydro, Enichem, Hoechst, Huels, ICI, PCUK, SAV, Shell, Solvay, and Wacker. Id. at para. 8.
85 Id.
86 Id.
87 Id. at para. 9.
88 Id. at para. 20.
89 Id.
90 Id.
91 Id. at para. 25.
92 Id.
93 Id. at para. 20.
clearly infringed article 85(1) of the EEC Treaty and designated the producers' conduct as “an agreement and/or concerted practice” under article 85(1).

The Commission based its reasoning on the following concepts. The Commission adopted the European Court's definition of concerted practices as stated in Imperial Chemical and the Sugar Cases, introduced the concept of cartel, and asserted the validity of circumstantial evidence and deductive reasoning in decisions involving concerted practices. The Commission defined a cartel as an association whose participants pursue a common unlawful goal for which they are responsible as a whole. Applying these concepts, the Commission found the existence of a cartel, concerted price initiatives between some cartel members, and concerted price-fixing practices by virtue of the producers' cartel membership.

In PVC, the Commission based its finding of a cartel on evidence directly relating the producers' conduct to the cartel's activities. The Commission's standard for concerted pricing practices no longer required a showing of a business's direct involvement in concerted pricing practices, but instead a showing of a business's membership in a cartel in which other members engaged in price-fixing activities. Regarding the nature of the meetings, the Commission deduced from the original planning documents and from five producers' internal pricing documents that the meetings served to set price targets and coordinate price initiatives. Based on the correspondence between the five producers' internal price directives and specialist press reports, the Commission held that price initiatives between cartel members existed. This holding applied to all members, not only to the

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94 Id. at art. 1.  
95 Id. at para. 33.  
96 Id. at paras. 25–26.  
97 Id. at para. 23.  
98 Id. at para. 26.  
99 Id. at para. 25.  
100 Id. at para. 9.  
101 Id. at para. 26.  
102 Id. at para. 25.  
103 Id. at paras. 25–26.  
104 Id. at para. 9.  
105 Id. at para. 18. The specialist trade press regularly reports on periodic price initiatives by the industry identifying new target price levels and proposed dates of implementation. Id.  
106 Id. at art. 1.
five producers directly implicated by their internal price directives.\textsuperscript{107} Considering the price-sensitivity of thermoplastics and the full documentation obtained from five producers, the Commission rejected the remaining producers' explanations regarding absent internal price documents as mere excuses\textsuperscript{108} and reasoned that all cartel members participated in concerted price practices by virtue of their cartel membership.\textsuperscript{109}

The reach of this new standard of concerted practices is demonstrated by Shell's limited involvement in the cartel.\textsuperscript{110} The original planning documents did not mention Shell as a potential participant in the future meetings.\textsuperscript{111} ICI and BASF named Shell as a participant in at least some meetings between August 1980 and September 1983.\textsuperscript{112} Shell admitted to attending two meetings in 1983, and its internal documents showed that before these two meetings, it was informed of price targets.\textsuperscript{113} Shell was the only producer that did not participate in the compensation scheme.\textsuperscript{114} The Commission conceded that Shell's involvement with the cartel was limited and that Shell had apparently ceased to participate in the arrangements by the time of the PVC decision.\textsuperscript{115} Because Shell's contact with the cartel nevertheless allowed it to adapt its market behavior,\textsuperscript{116} the Commission held that Shell engaged in a concerted pricing practice.\textsuperscript{117}

PVC demonstrates that a business can be held, as a matter of law, to engage in concerted price-fixing practices in violation of article 85(1) based on evidence which shows that a business is associated with a cartel and that some of the other cartel members participate in concerted price-fixing practices.\textsuperscript{118} The Commission thus established a third standard for concerted price-fixing practices.

\textsuperscript{107} Id. at paras. 17, 20; art. 1.
\textsuperscript{108} Id. at para. 20.
\textsuperscript{109} Id. at para. 26.
\textsuperscript{110} Id. at para. 34.
\textsuperscript{111} Id. at para. 48.
\textsuperscript{112} Id. at paras. 8–9.
\textsuperscript{113} Id. at para. 26.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at paras. 48–49.
\textsuperscript{116} Id. at para. 34.
\textsuperscript{117} Id. at art. 1. Considering Shell's limited involvement, the Commission imposed a lower fine on Shell than on the other producers. Id. at para. 53.
\textsuperscript{118} See supra notes 95–109 and accompanying text.
III. Analysis

The Commission in PVC expanded the application of the concept of concerted practices by incorporating it into the concept of a cartel. While adopting the European Court's definition of concerted practices in Imperial Chemical and the Sugar Cases, the Commission, in effect, substantially broadened the concept's application. In the 1972 Imperial Chemical judgment, the European Court seemed to define a concerted practice as an intentional cooperation between businesses which distorted normal competitive conditions and which could manifest itself in the conduct of the parties. The European Court deduced the element of intention from the circumstances based on a total market analysis without explicitly stating that such deduction was a proper method of legal reasoning. Imperial Chemical held that the intentional cooperation of the parties was established if their parallel conduct could not be explained as a spontaneous result of normal competitive market conditions. The European Court thus relied on circumstantial evidence to establish a concerted price-fixing practice but, nevertheless, seemed to maintain that the evidence had to show a direct correlation between perpetrator and pricing activities: the indicted party had to engage in cooperative pricing activities. The European Court did not seem to abolish this requirement in the Sugar Cases, where it further defined the kind of business conduct that violates article 85(1). The 1975 Sugar Cases defined a concerted price-fixing practice as consisting of parties directly or indirectly contacting each other in the process of designing their pricing policies and setting prices.

The European Court's definition of concerted practices relating to price-fixing as illegal business contact in the Sugar Cases is consistent with its definition of concerted practices in Imperial Chemical. The Sugar Cases analysis can be understood as a special kind of an Imperial Chemical analysis. Unlike the Imperial Chemical definition, the Sugar Cases definition requires only a showing

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119 See supra notes 95–117 and accompanying text.
120 See supra notes 42–46 and accompanying text.
121 See supra notes 47–48 and accompanying text.
122 See supra notes 33–40 and accompanying text.
123 See supra notes 37–38 and accompanying text.
124 See supra notes 53–56 and accompanying text.
125 See supra notes 42–46 and accompanying text.
of contact between competitors. 126 The contact standard, however, could conceivably be separated into three components which are equivalent to the Imperial Chemical definition: parallel conduct, distorted competition, and intentional cooperation. 127 After the Sugar Cases, absent a finding of contact, the analysis of concerted practices must presumably still be based on circumstantial evidence and deductive reasoning derived from a comprehensive market analysis. 128

Conversely, the European Court in Imperial Chemical seems to have anticipated the contact standard adopted in the Sugar Cases. Instead of the intentional cooperation test based on a total market analysis, the European Court could have applied the contact test established in the Sugar Cases and reached the same result. 129 The contact test is narrower in scope since it does not involve an analysis of the total market context and, thus, appears easier to apply. 130 In this sense, the contact standard of concerted practices seems to provide the European Court, the business community, and the Commission with a reliable legal principle to design and evaluate competitive business conduct in the European Community.

The Commission in the 1977 Vegetable Parchment decision did not mention the European Court’s definitions of concerted practices in either Imperial Chemical or the Sugar Cases, but its holding is consistent with both. Under the Imperial Chemical definition, the European Court probably would have viewed the repetitive meetings in Vegetable Parchment as parallel conduct leading to abnormal competitive market conditions. 131 The prices arrived at by the GVPA members were not the spontaneous result of normal competitive market conditions, thus presumably justifying the European Court’s deduction of an intentional cooperation between the vegetable parchment producers. The Commission’s holding of a concerted practice seems, therefore, consistent with the European Court’s definition of concerted practices in Imperial Chemical. The contact definition established in the Sugar Cases, requiring businesses to act independently, seemingly would have left

126 See supra notes 52–56 and accompanying text.
127 See supra note 46 and accompanying text.
128 See supra notes 34–40 and accompanying text.
129 See supra notes 32, 37, 55–56, and accompanying text.
130 Compare supra notes 37–39 with notes 55–56 and accompanying text.
131 Compare supra notes 39–40 with notes 63–67 and accompanying text.
the outcome in *Vegetable Parchment* unchanged.\(^{132}\) The vegetable parchment manufacturers had both direct and indirect contact with competitors, thus violating the *Sugar Cases* standard. The Commission's holding in *Vegetable Parchment* was therefore also consistent with the European Court's definition of concerted practices in the *Sugar Cases*.

The Commission in *Vegetable Parchment* did not, however, spell out its own reasoning beyond asserting that the practices in question had an anti-competitive effect and violated the EEC Treaty rules on competition.\(^ {133}\) In light of the clear connection established by circumstantial evidence between the indicted party and concerted pricing activities, the European Court's requirement that circumstantial evidence directly implicate a perpetrator also seemed to have been maintained.\(^ {134}\)

The Commission abolished this requirement in *PVC* by applying the concept of a cartel. The Commission established a particular producer's participation in a price-fixing practice with circumstantial evidence not directly connecting the indicted party with collusive pricing activities.\(^ {135}\) The Commission in *PVC* explicitly adopted the implicit reasoning in *Imperial Chemical* which established an infringement of article 85(1) if elements of the infringement could be proven by logical deduction from other proven facts.\(^ {136}\) The Commission in *PVC* applied this method of reasoning in a context which seemed to extend to any infringement of article 85(1), while the context in *Imperial Chemical* was limited to collusive pricing.\(^ {137}\) The Commission in *PVC* deduced the existence of a cartel from circumstantial evidence and the participation of an individual producer in the cartel from that producer's participation in at least one of the cartel's activities.\(^ {138}\) A cartel member was consequently convicted of engaging in a concerted practice of price-fixing although the Commission had no direct evidence implicating that member in a price-fixing scheme.\(^ {139}\)

\(^ {132}\) See supra notes 52–56, 63–67, and accompanying text.

\(^ {133}\) See supra notes 66–69 and accompanying text.

\(^ {134}\) See supra notes 58–65 and accompanying text.

\(^ {135}\) See supra notes 77–94 and accompanying text.

\(^ {136}\) See supra notes 47–48, 95–109, and accompanying text.

\(^ {137}\) See supra notes 30–46, 98–101, and accompanying text.

\(^ {138}\) See supra notes 102–109 and accompanying text.

\(^ {139}\) See supra notes 110–117 and accompanying text.
Neither the Commission's method of reasoning in PVC nor the introduction of the concept of a cartel was based on the language of article 85(1) of the EEC Treaty. The Commission's reasoning is best understood as an effort to bring the implicated parties' suspected anti-competitive conduct within the bounds of the Commission's legal authority. The Commission's effort to enforce the law seemed to have been obstructed by the parties' non-cooperation which, in the Commission's view, seemed to involve the destruction of evidence relating to price initiatives and price directives. The Commission, in response, applied the concept of concerted practices expansively and loosened the requisite standard of proof. In PVC, the Commission demonstrated its determination to enforce the EEC Treaty rules on competition vigorously and to be instrumental in the creation of an open and unified European Community by 1992.

CONCLUSION

The Commission in PVC has shown that it will apply the EEC Treaty rules on competition broadly and rely on minimal circumstantial evidence and deductive reasoning to establish a violation of article 85(1). The Commission expanded a key concept under article 85(1), concerted practices, by merging it with the concept of a cartel. Most importantly, the Commission in PVC has demonstrated that it will not succumb to the practice of non-cooperation by businesses obstructing the enforcement of the EEC Treaty rules on competition, but rather will adapt to such hostile behavior by applying its legal tools broadly. Therefore, the Commission must be taken seriously as an increasingly important and forceful guardian of the EEC Treaty rules on competition and their purpose, the creation of an open and unified Community.

Martin Ris

140 See supra note 12 and accompanying text.
141 See supra notes 86–90 and accompanying text.
142 See supra notes 15–18 and accompanying text.