



Indirect Evidence in Cartel Cases

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Overview

1) Burden and standard of proof

2) Evaluation of evidence

3) Use of indirect evidence

4) Case study – Gas Insulated Switchgear cartel



Burden and Standard of Proof

What needs to be proven?

- **Existence** of an agreement /concerted practice
- **Who** participated in it and for **what duration**

Burden of proof is on the Commission

- **Reversals / Shifting** of burden of proof (participation to a meeting, alternative explanation for established facts)
- **Presumptions** (parental liability, causal connection between information received and market conduct)

Standard of proof

- Prove to a '**requisite legal standard**' ; furnish '**precise and consistent evidence**'
- 'where the Court still has a doubt, the **benefit of that doubt** must be given to the undertakings accused' (para 72, Case C-89/11 E.ON)

Evaluation of evidence

Recognized difficulty of proving a cartel

- **Holistic view**: not every single piece of evidence but its body as a whole to meet standard of proof
- **Inferences / deductions** allowed since evidence sparse, fragmentary

All legally obtained evidence allowed (be it direct or indirect)

- Principle of **unfettered** evaluation of evidence and **probative value** depends only on **reliability**
- **Greater** probative value if (i) contemporaneous, (ii) detailed, (iii) based on direct knowledge, (iv) made against self-interest, (v) made where is a risk of sanction, (vi) made after mature reflection, (vii) made by executive on behalf of undertaking

Need for corroboration?

- **Single piece** of evidence can be enough
- But a statement of one cartelists **needs corroboration** if others contest
- Economic/conduct evidence alone **not sufficient** – alternative plausible explanation possible

Use of Indirect Evidence

Direct vs Indirect evidence

- Direct evidence: **directly related** to what needs to be proven - cartel agreement/discussions (written, recorded in minutes, reported by direct witnesses)
 - Indirect / circumstantial evidence: provides a **basis for inference** about the facts that need to be proven (alone can be enough, no need to examine alternative explanations)
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Examples of indirect evidence relied on by the Commission

- Meeting invitations, bookings, travel receipts, restaurant receipts, diary entries
 - Evidence of awareness of illegality, efforts to conceal, evidence of disputes
 - Communications to customers, monitoring or '**loading**' mechanisms
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Case study – GIS Cartel

GIS Cartel (1988-2004)

- Involved [European](#) and [Japanese](#) GIS producers: ABB, Siemens, Alstom/Areva, VA Tech, Hitachi, Mitsubishi, Toshiba, Fuji
- ABB submitted [immunity application](#) in 2004
- Decision adopted in [2007](#) imposing fines of 750 million EUR

Elements of the GIS cartel

- [Written GQ Agreement](#) (world-wide allocation [expressly excluding](#) Europe),
- [Written EQ Agreement](#) (allocation in Europe among Europeans)
- Oral '[Common understanding](#)' between Europeans and Japanese not to enter their respective markets - key to liability for [all participants](#)

Case study – GIS Cartel cont'd

Direct evidence of common understanding

- 1) [Leniency statement](#) by ABB based on statements of four employees of which Mr. M was key; although he was **not present** when 'common understanding' concluded and the subject never mentioned during meetings when he was present – **still reliable witness**
- 2) [Fuji's response to the SO](#) – limited acknowledgement of common understanding – although 'relatively vague' and of 'limited' probative value it tended to corroborate ABB statements

Indirect evidence of common understanding – necessary corroboration

- 1) **Absence** of Japanese producers from EU market
- 2) **Loading mechanism** (acknowledged by Hitachi in response to SO and foreseen in EQ agreement) – projects in Europe outside of home countries counted under the European's global quota



Thank you for your attention