

ENFORCEMENT OF EU COMPETITION LAW AGAINST CARTEL PARTICIPANTS

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INTRODUCTION

To better understand the concepts of the EU competition law it is necessary for one to understand the basic terminology.

Firstly, one must understand that 'cartels' in lay man's terms are agreements made between various firms or companies in order to regulate or 'fix' prices of commodities or services within the market. For example if two companies producing rugs have an agreement to sell the rugs at fixed prices within the market. The main aim of such an agreement is to maximize profits and maintain a monopoly through the market as well as deter competitors from entering the sphere.

However it is crucial to note that recommending prices are not illegal however retailing them is. Art.81 of the EU competition law deals with the aspects of defining cartels and how such agreements are *void ab initio*. The European Commission has been granted wide powers under Regulation 1/2003 to maintain undistorted competition by ensuring compliance with Article 101 of Treaty on the Functioning of the European Union (hereinafter TFEU) on the prohibition of concerted practices. The Commission investigates only the most 'hard-core' international cartels. Investigations can be started on the Commission's own initiative, on complaint or based on a leniency application under which the first participant of the cartel to 'blow the whistle' to the Commission receives total immunity. The collected evidence and proposed remedy are presented to the accused in a 'statement of objections'. The accused can access the investigative file and

had an opportunity to reply in writing and at an oral hearing. The decision is adopted by the College of Commissioners on the recommendation of the Competition Commissioner.¹

CARTELS MUST BE TREATED AS A CRIME

One must understand that any crime has two elements, namely; *mens rea* (mental element or intention?) and *Actus Reus* (physical element or the act). Therefore the mental element of regulation of prices and avoidance of competition to maintain monopoly in the market is the *mens rea* of cartel agreements and the formation of such agreements or compliance to such practices must be viewed as the *Actus Reus* or the physical element. Therefore one can safely say that Cartels are and must be viewed as a crime in itself and such crimes must not go unpunished.

While many argue that cartels may be viewed as healthy competition, in my opinion this is not the case because in the absence of such agreements, the various companies or organizations will be in a continuous battle to gain monopoly via various tactics and rebates which would actually provide the market with a dynamic pricing system allowing them to literally 'choose.' However in the case of presence of cartels, the minimum or maximum price brackets are already pre-decided and set up which does not allow the people a fair chance/choice as well as deterring many other competitors from entering the market. The law clearly provides that a person has the right to choose his own trade and practice the same and in my opinion cartels are restrictive in nature and thus affect the choice of various traders as the monopoly is pre-decided and fixed and given to those who indulge in such practices. Therefore it may be stated that cartels may actually be looked at as being violative of the fundamental right of an individual to practice the trade of their own choice and thus must be viewed as a crime.

Cartels activities as most people may not be aware of also do a substantial amount of harm. The direct effect of such activity is on the prices of commodities within the market. Such prices may not harm the people in the very first instance but however it will affect the value that they derive from the long term continuous purchases made by them.

Another issue to be considered is the monetary sanctions imposed on cartel participants. One of the main problems faced in this area is that the monetary sanctions imposed on cartel participants

¹ Assessing the Effectiveness of Competition Law Enforcement Policy in Relation to Cartels, Priit Mändmaa

is not enough and thus it is not deterrent enough for the participants as the overall profits yielded by indulging in such practices supersedes the sanctions imposed. Therefore, the expected fine necessary to deter the cartel activity would be a bit more than twice the participants' annual turnover within the relevant market.²

On the other hand it must also be noted that in a particular study it was found that non-monetary sanctions like that of imprisonment may not be as efficient as those of monetary sanctions. This was found because, firstly prisons are expensive and secondly imprisonment would deprive the society of their productivity and services and also sabotage their business due to their absence. The desired level of deterrence therefore could be achieved by avoiding such issues by means of subjecting the participants to high levels of monetary sanctions which will not only include any cost factor, but also solve the problem of the society losing out on their productivity.³

Thus in conclusion it must be noted that imprisonment would only be required and useful if the required amount of deterrence could not be achieved by the means of monetary compensation.⁴

However it is highly true that financial sanctions on business enterprises would mostly be negligible if they are lesser in value to the assets of such an enterprise and thus fines of such negligible value will hardly ever produce the desired amount of deterrence and thus it is important to note that the necessary fine must be twice the annual turnover within the relevant market of the defendant business enterprise.

Collection of such fines would have many complications related to it because one cannot assume that the defendant business enterprise would have that amount of liquid assets to cover such a fine imposed upon them.⁵ Consequently, trying to collect a fine that is twice the amount of the

² R. Posner, *Economic Analysis of Law* 223-24 (7th ed. 2007); G. Becker, *Crime and Punishment: An Economic Approach*, 76 *Journal of Political Economy* 169 (1969); K. Elzinga & W. Breit, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 *Harvard Law Review* 693 (1973); R. Posner, *Optimal Sentences for White-Collar Criminals*, 17 *American Criminal Law Review* 409 (1980).

³ M. Block & R. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 *Journal of Legal Studies* 479 (1975); M. Block & R. Lind, *Crime and Punishment Reconsidered*, 4 *Journal of Legal Studies* 241 (1975); J. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 *American Criminal Law Review* 419, 423-26 (1980).

⁴ R. Posner, *An Economic Theory of Criminal Law*, 85 *Columbia Law Review* 1193, 1201-08 (1985); S. Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 *Columbia Law Review* 1232 (1985).

⁵ A study focusing on U.S. criminal antitrust cases during 1955-93 found that only 18 percent of the enterprise defendants had sufficient cash and short-term investments to pay an "optimal fine" calculated.

annual turnover of the business enterprise in the relevant market, could possibly create disruptions, and even possibly force liquidation even for businesses that have a sufficient diversification outside of the sector in which they participated in cartel activity.

Fines cease being nearly costless as soon as payment requires business enterprises to take disruptive actions, such as selling off assets, and liquidation is particularly costly. Moreover, the costs of fines are not borne entirely by culpable executives and shareholders who reaped the gains from the cartel activity, but also by innocent employees, suppliers, distributors, and communities.⁶

Another issue to consider would be that the fines imposed on the cartel participants would not only affect the society but also the employees and other associated members of the cartel participants' enterprise. Not only will companies be driven into liquidation but also be forced to shut down in certain circumstances. One must also consider that when even after the process of liquidation the company is unable to pay off the fine imposed, there will be no 'justice' acquired as the plaintiff will still bear the loss while the defendant (the cartel participant) will be unable to reimburse the loss incurred by such a plaintiff. Which would eventually be a lose-lose situation with no gains for either party and thus make the whole exercise redundant in nature.

Another significant issue arising in the area of cartel participation is the detection. The law states that a person is *innocent until proven guilty* and therefore it is this aspect that the participants use as a cloak to get away with such malpractices. Cartel participants have a strong tendency and interest in concealment of such practices and given that such agreements are never put on paper it becomes rather difficult to prove that a particular enterprise has been a cartel participant.

A major development in cartel enforcement over the past quarter century was the advent of leniency programs under which a business participating in cartel activity is granted leniency or amnesty in return for coming forward and cooperating in the investigation and prosecution of its cartel activity. Since 1993 the United States has automatically granted amnesty from prosecution

⁶ J. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Michigan Law Review 386, 389-93, 401-02 (1981); R. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale Law Journal 857, 882-83 (1984); Wils, *supra* note 30, at 1970.

to a business enterprise that meets certain conditions, including that it is the first to come forward and cooperates completely in the investigation.⁷

In 1994 the U.S. program was extended to individuals.⁸ The widespread use of prison sentences for cartel activity gives the leniency program in the United States a powerful destabilizing effect than most other programs lack. Cartels in my opinion are organized crimes operated by individuals and companies who calculate the substantial gains they stand to earn from participation. The people behind cartels are not petty crooks; they are clever sophisticated business executives who have risen to senior management positions in their companies. Given that firms can earn substantial profits from engaging in cartels, serious penalties are required to deter such behavior.⁹

In my opinion for the deterrent effect to be effective it is a must that the individual or individuals who are responsible for the decision to participate in a cartel must be identified and it is them who must face penalties rather than the enterprise as a whole. But then again the employer of such an individual may also reimburse them which make the deterrent factor redundant in nature. In New Zealand consideration has been given to the idea of making it illegal for firms to reimburse employees fined for competition law breaches.¹⁰

The Irish Competition Authority has sought powers to impose fines on parties for the breach of articles 81 and 82.¹¹ But such requests have been rejected by the Government. Because merely fining companies will not be enough to deter such behavior or cartel involvement. Apart from that there are a few issues as to why such powers were not granted by the Government. One of the main issues with such a request was the fact that there would be issues with having the same agency acting as a judge, jury and prosecutor even though such a regime appears at the EU level. Also the lack of consensus as to what does and does not constitute as anti-competitive behavior, it is difficult for the penalties to appear appropriate. Unless there is a case wherein it is clearly stated as to how the behavior of the enterprise or company is anti-competitive and the firm is

⁷ Antitrust Division, U.S. Department of Justice, Corporate Leniency Policy (10 August 1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.pfd>.

⁸ Antitrust Division, U.S. Department of Justice, Individual Leniency Policy (10 August 1994), available at <http://www.usdoj.gov/atr/public/guidelines/0092.pfd>.

⁹ Werden, G.J., M., (1987): Why Price-Fixers Should Go To Jail, Antitrust Bulletin, 24(4): 917-37.

¹⁰ Department of Trade and Industry, (2001): A World Class Competition Regime, London: HMSO.

¹¹ If it could be shown that there was a requirement under EU law to have a system of civil fines then This would override the Constitutional prohibition on such fines.

required to discontinue such behavior. However if the firm fails to do so, inclusion of penalties in such cases would be apt.

Further, Scherer and Ross point out that penalizing firms for abuse of dominance rather than tackling the dominant position itself requires continuous monitoring of dominant firms' behavior, if it is to be anything other than an occasional "lightning bolt," They argue that:

"It is better...to take once and (one hopes) for all whatever structural actions are needed to restore effective competition and then stand back and let market processes do their job."¹²

Massey argued that Article 82 should be adjusted to allow for structural adjustment where appropriate, and Regulation 1/2003 gives the Commission power to impose such a remedy. Many commentators have observed that the massive fine imposed on Microsoft by the Commission is relatively insignificant, given that company's massive financial resources. Rather it is the potential for the obligations which the Commission is seeking to impose on Microsoft to allow for effective competition that is the real penalty.¹³

Therefore, it must be noted that if fines did actually have the required deterrent effect, then, when the line between what is and what is not harmful remains unclear, there is a high possibility that the enterprises or firms will play safe and avoid competing very aggressively so as to pay it safe and not cross the line. In other words not only will this lead to discouragement of anti-competitive behavior but also deter firms from competing at all which is far from what is intended. In Ireland's case however, the system of civil fines for some offences and criminal penalties for cartel offences would provide insufficient or rather poor incentives for the Corporation Authority. In the settlement of enforcement penalties, the authority would have to choose between pursuing serious infringements with an extremely high burden of proof or a less serious infringement with a lower burden of proof. Upon facing such choices it is highly possible that such an authority is more likely to choose the cases which are less serious so that they have better chances at winning. This over time would produce a view that civil penalties were working while criminal penalties were not.

¹² Scherer, F.M. and Ross, D., (1990): Industrial Market Structure and Economic Performance, New York: Houghton-Mifflin, 3rd edition, p.486.

¹³ Massey, P., (1996): Reform of EC Competition Law: Substance, Procedures and Institutions in B. Hawk (ed.), International Antitrust Law and Policy, New York: Juris Publications reproduced in B. Hawk (ed). (2002), Reform of EU Competition Law, New York: Juris Publications.

The rationale behind common law is that one should not act as a prosecutor and a judge and a jury at the same time especially in their own case therefore it is impossible for someone involved in the case themselves to view the facts in a non- biased way and judge the same in an effective manner. Even though this may seem unfair from a common law perspective, the ECJ has rejected the suggestion that the approach is contrary to the rules of natural justice.¹⁴

In my opinion on many occasions, there has been a wrongful decision made by the European Commission, like in the case of *wood pulp*¹⁵ for example, initially the courts rejected the findings of the commission on grounds of insufficient evidence. Similarly, in the *Airtours* case as well, the courts found that the economic evidence did not support the decision of the commission.¹⁶

CONCLUSION:

In my conclusion I would like to begin with addressing the issues pertaining to the 2002 Act. Even though the 2002 Act has addressed many of the shortcomings of the 1996 Act like that of giving more powers to the Authority in terms of search and seizure.

Section 6(3) of the Irish Act, provides that a defendant can claim that an agreement, which is contrary to Article 81(1), satisfied the four conditions contained in Article 81(3). The effect of section 6(3) is that juries will be required to assess complex economic arguments and that will increase the length and complexity of the cartel related cases. The fact that Article 81 applies a bifurcated test and the exemption requirements are part of the Treaty pose obvious difficulties in this regard. The CFI has stated that, as a matter of law, there are no anti-competitive agreements which could not be eligible for exemption.¹⁷

The failure to introduce a specific offence along the lines provided for in Section 179 of the Enterprise Act, 2002, constitutes a serious weakness in the Irish legislation and thus creates a lot of grey area in account of this.

Evidently it can be noted that the EU competition law has been extremely bureaucratic with a lot of the commission's resources being used up in dealing with notifications while serious

¹⁴ Cases 100/80 etc. *Musique Diffusion Francaise SA v. Commission* [1983] ECR 1825.

¹⁵ *Ahlstrom v. Commission, (Wood Pulp)*, [1988] ECR 5193.

¹⁶ *Airtours/ First Choice v. Commission* (T-342/99) [2002] 5 CMLR 25

¹⁷ Case T-17/93 *Matra Hachette v. Commission* [1994] ECR II-595, para 85.

infringements like that of cartels have been on the back burner. The 1/2003 regulation should help to increase the effectiveness of the EU competition law by means of increase in resources available to pursue anti-competitive behavior. Nevertheless, the absence of criminal penalties in the form of prison sentences for individual executives responsible for engaging in cartels remains a serious weakness in EU competition law. It is important, therefore, that the Commission does not prevent those Member States that wish to do so from imposing such sanctions, particularly in the most serious cases, in order to maximize deterrence.

The success of reforms however depends on national authorities rising to the challenge of application of the EU law. This requires such agencies to have adequate resources for the same purpose.