

Criminal cartels

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Abstract

Cartels are nowadays a global issue, affecting consumers from all over the world. As the consequences of anticompetitive agreements have an impact at extraterritorial level, with implications beyond the market where the cartel operates, cartel investigations have a global dimension. Cartel members, which are global players, should be aware of this aspect, as in some jurisdictions, for example in the United States of America, cartel agreements are a criminal offence, as they harm the consumer. The present paper will analyze the approach to cartels in the United States of America and in the European Union, it will deal with the research question if cartels are seen as criminal in several jurisdictions and it will point out aspects of international cooperation in fighting against cartels, in order to ensure consumer protection. The research questions will be illustrated by case-law and case-studies that will serve as examples. The present paper will use an interdisciplinary comparative research approach, with focus on an international perspective related to cartel enforcement at a global level.

Keywords: cartel, cartel enforcement, criminal cartels, consumer protection, global cartel investigations.

JEL Classification: K21, K22, K33, K14

1. Introduction

Cartels are nowadays a global issue in our business environment, where the main actors are multinational companies. Multinational companies concentrate a huge amount of power and of influence on the market. They build a typical oligopolistic structure, where few market participants hold significant market shares². Given this structure of the market, the tendency of the global players on the market is to collude, to agree upon prices, terms and conditions or markets and thus to avoid real competition. Given this international context, the research topic of the present paper is to find out if cartels are seen as a criminal offence in several jurisdictions around the world, mainly in the United States of America and within the European Union and to compare these approaches related to cartel agreements.

The new perspective compared to the existing literature is given by the new and dynamic development of competition law in the European Union, by the

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² See O’Kane, Michael: *The Law of Criminal Cartels*, Oxford University Press Inc., New York, 2009, p. 2; Bishop, Simon and Walker, Mike: *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, London, 2010, p. 14.

fact that this fields changes and improves every and that antitrust enforcement authorities within the European Union become more active and that they receive more competencies and responsibilities than in the past, when the European Commission as a supranational competition authority was responsible for competition law enforcement in the European Union. A new approach is as well to cooperate at international level by means of the European Competition Network (ECN) and of the International Competition Network (ICN) and to perform cross-border antitrust investigations, at global scale³.

In order to clarify the used terminology, a cartel can be defined as “an agreement between businesses not to compete with each other⁴”. Most cartel agreements have price fixing as a goal⁵. As these types of agreements eliminate real competition, the prices can be fixed by the cartelists and can be higher than in a free competition situation. While free competition is a factor which is for the benefit of the consumer⁶, cartel agreements harm the consumer. As multinational companies operate at global level, such an anticompetitive behavior affects consumers from all over the world. In this context it is interesting to analyze the aspect of territoriality and extraterritorial enforcement of antitrust law, an issue that will be presented in the present paper.

Regarding the structure of the research, the present paper will ask the research question if cartels are criminal and it will present an answer to this question from the perspective of the United States of America and of the European Union. Furthermore the present paper will deal with cartel enforcement in the United States of America and in the European Union, presenting details about cartel enforcement in Germany, in France and in the United Kingdom. Aspects of international cooperation in order to fight against cartels will as well be presented. Given the global context in which cartels are operating, the issue of territoriality and extraterritorial enforcement of antitrust law will be addressed and illustrated by relevant case-law. The present paper will outline as well concrete measures taken in order to fight against cartels and thus to ensure consumer protection, for example by promoting leniency programs.

In order to deal with the research question, the literature, the legal provisions and the relevant case law will be analyzed and interpreted. The research questions will be illustrated by case-law and case-studies that will serve as examples. The teleological interpretation method will be used in order to understand the rationale of the explained measures related to the established goal of competition policy. The present paper will use an interdisciplinary comparative research approach, with focus on an international perspective related to cartel enforcement at a global level.

³ O’Kane, Michael: *op. cit.*, p. IX.

⁴ http://www.ofc.gov.uk/advice_and_resources/resource_base/cartels/what-cartel (last consulted on 1.11.2017).

⁵ See O’Kane, Michael: *op. cit.*, p. 1.

⁶ *Idem*, p. 2.

The proposed solutions will outline the approach towards cartels in the United States of America and in the European Union, they will point out possible influences between the two systems in terms of antitrust law. Aspects to be kept in mind by global players will be emphasized. The conclusions can be used for further research, as the field of competition law is dynamic and will further improve.

2. Research topic

Given the international context of the business environment nowadays and the strong interconnection between markets, the research topic of the present paper is to find out if cartels are seen as a criminal offence in several jurisdictions around the world, mainly in the United States of America and within the European Union and to compare these approaches related to cartel agreements.

The studied literature (e.g. O'Kane, Michael: *The Law of Criminal Cartels*, Oxford University Press Inc., New York, 2009) points out the fact that cartel activity is a main issue of competition authorities worldwide, the tendency is to increase corporate and individual accountability in the field of antitrust law and many jurisdictions have coupled civil or administrative cartel regimes with criminal liability and criminal sanctions⁷. These measures are supported by leniency programs⁸, representing a main issue of the American antitrust policy and as well a focus of the European Competition Policy drafted by the European Commission as a supranational cartel enforcement authority and of the national competitions authorities in the Member States of the European Union.

The new perspective compared to the existing literature is given by the new and dynamic development of competition law in the European Union, by the fact that this field changes and improves every year and that antitrust enforcement authorities within the European Union become more active and they receive more competencies and responsibilities than in the past, when the European Commission as a supranational competition authority was responsible for competition law enforcement in the European Union. A new approach is as well to cooperate at international level by means of the European Competition Network (ECN) and of the International Competition Network (ICN) and to perform cross-border antitrust investigations, at global scale⁹.

3. Research structure

Regarding the structure of the research, the present paper will ask the research question if cartels are criminal. In answering this question, two perspectives can be outlined according to the studied literature. Cartels are seen as criminal in the United States of America, as they harm the consumer. The consumer protection focus is a main issue in fighting against cartels. The United

⁷ Idem, p. 288.

⁸ Idem, p. 288.

⁹ Idem, p. IX.

States of America have a vast experience, of more than 100 years in antitrust law, as the Sherman Act, upon which antitrust law is based, originates 1889. Compared to this, European Competition Law is a new field and the European Union does not have that much experience in competition law. The prevailing European approach regarding cartels is that cartels are an economic issue and should be dealt with by means of administrative measures, not by means of criminal prosecution¹⁰. The main European Law provisions related to cartels are stipulated in article 101 of the Treaty on the Functioning of the European Union and they prohibit the restriction or distortion of competition within the common market of the European Union¹¹.

The United States of America and the United Kingdom share a common view regarding cartels. In the United Kingdom there are criminal sanctions for cartel behavior.

Regarding the situation in other jurisdictions of the European Union, the situation can be summarized as it follows: In Germany there are no criminal sanctions for breach of competition law, but there are criminal sanctions for bid rigging in tender proceedings. The same situation applies to Austrian cartel enforcement. In France, criminal sanctions are as well possible. In Greece, there are criminal fines or imprisonment, but only for providing false information or for obstruction. In Ireland, criminal sanctions are foreseen for individuals and as well for companies. In Poland bid rigging in public tenders is criminalized. In Portugal there are fines for violations of competition law, which are seen as quasi-criminal minor offences¹².

Cartel enforcement is ensured in the United States of America by the US Department of Justice, Anti-Trust Division. For Sherman Act violations, there is a maximum criminal penalty of \$ 100 million fine for a corporate entity, \$ 1 million for an individual and 10 years' term of imprisonment for an individual¹³.

In the European Union the European Commission acts as supranational competition authority, cooperating with national competition authorities for the enforcement of European Competition Law.

In France there are civil and criminal sanctions for anti-competitive behavior, but in fact criminal sanctions are not applied very rigorously¹⁴. Corporate entities and individuals are liable for the breach of competition law. For individuals, criminal liability is as well foreseen. The cartel enforcement authority in France is the Conseil de la Concurrence and the Direction Générale de la Concurrence de la Consommation et de la Répression des Fraudes. The criminal penalties are imposed by the criminal courts. Related to the issue of territoriality, the French competition law covers as well anti-competitive agreements which were concluded outside France, if they distort the competition on a French market. In

¹⁰ Idem, p. 10.

¹¹ See art. 101 of the Treaty on the Functioning of the European Union, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

¹² See O'Kane, Michael: *op. cit.*, p. 326; Broder, Douglas: *U.S. Antitrust Law and Enforcement – a Practice Introduction*, Oxford University Press Inc., New York, 2010, p. 127.

¹³ O'Kane, Michael: *op. cit.*, p. 289.

¹⁴ Idem, p. 296.

France, the leniency program is used and immunity can be granted from payment of financial penalties¹⁵.

In Germany criminal liability is not foreseen for breach of legal provisions of competition law, but it is foreseen in the case of bid rigging in tender proceedings, in the field of public procurement. The cartel enforcement authority in Germany is the Federal Cartel Office (“Bundeskartellamt”). In Germany there is the possibility to apply for the leniency program, which is available to companies and as well to individuals and it is inspired by the European Commission’s 2002 leniency Notice. The immunity from civil sanctions given by the leniency program does not influence the criminal liability in case of bid rigging¹⁶.

In the United Kingdom, cartel enforcement is the responsibility of the Office of Fair Trading, an institution that acts in order to ensure consumer protection. Criminal sanctions for breach of competition law are foreseen in this jurisdiction¹⁷.

Competition policies are a field in which international cooperation plays a very important role. At the level of the European Union, The European Commission as a supranational competition authority cooperates with the national competition authorities within the “European Competition Network”. This network supports the enforcement of the European Commission competition policy, it ensures cooperation for the enforcement of article 101 and 102 of the Treaty on the Functioning of the European Union and it contributes to building a common competition culture in Europe¹⁸.

There is international cooperation as well beyond the European Union, namely within the International Competition Network, a network with over 80 members worldwide, which deals with matters of antitrust enforcement and which is open to all competition agencies¹⁹.

Anticompetitive agreements have an impact at extraterritorial level, with implications beyond the market where the cartel operates. This is why cartel investigations have a global dimension and are performed in more jurisdictions at the same time, with subsequent parallel investigations²⁰ in the case of a global cartel. This occurred for instance in the case of the Air Cargo Investigation, performed between 2006 and 2009, a case in which several airlines had an anti-competitive agreement and had fixed cargo prices, including for shipments to and from the United States of America. One company acted as a whistle-blower and the consequence was that simultaneous dawn-raids were organized on 14 February 2006 at the premises of the airlines in several jurisdictions²¹. International cooperation plays a key-role in such situations.

¹⁵ *Idem*, p. 296 – 298.

¹⁶ *Idem*, p. 299-301.

¹⁷ *Idem*, p. 39-40.

¹⁸ *Idem*, p. 40-41.

¹⁹ *Idem*, p. 41-42.

²⁰ *Idem*, p. 288.

²¹ *Idem*, p. 294.

Another global cartel with an impact on the market of the European Union and of the United States of America was the Vitamin Cartel Case²², where the companies Hoffman La Roche AG and BASF AG shared the market for vitamins A and E. The cartel had consequences on products from the market of the European Union and of the United States of America, it was a cartel with global dimension. The fines applied by the European Commission amounted at 462 million Euro for Hoffman La Roche AG and 236 million Euro for BASF AG²³.

Cartel members, which are global players, should be aware of these aspects, as well as of the fact that in some jurisdictions, for example in the United States of America, cartel agreements are a criminal offence, as they harm the consumer.

4. Research methodology

In order to deal with the research question the relevant literature has been studied.

The legal provisions in the field of American antitrust law and European Competition Law have been analyzed, for instance the Sherman Act, the Treaty of the Functioning of the European Union, with its articles 101 and 102 referring to competition law and several national competition laws from Germany, France and the United Kingdom. The websites of the European Commission as a supranational competition authority, as well as the websites of national competition authorities have been consulted in order to find information regarding aspects of competition policy and of cartel enforcement in several jurisdictions.

Relevant case law has been as well analyzed and interpreted. The research question is thus illustrated by case-law and case-studies that serve as examples of cartels with a global dimension, for instance the case of the Air Cargo Investigation and the Vitamin Cartel Case.

The teleological interpretation is used in order to understand the rationale of the explained measures related to the established goal of competition policy, for example related to the leniency programs used in several jurisdictions.

The present paper will use an interdisciplinary comparative research approach, outlining the perspective towards cartels in the United States of America and in the European Union, with a focus on an international perspective related to cartel enforcement at a global level and to the intention of criminalizing cartels due to their negative consequences on consumers.

²² See Vitamin Cartel Case, 2003/2 (2003) OJ L6/1.

²³ See O'Kane, Michael: *op. cit.*, p. 16; Buttigieg, Eugène: *Competition Law: Safeguarding the Consumer Interest – A comparative Analysis of US Antitrust Law and EC Competition Law*, Wolters Kluwer Law & Business, The Netherlands, 2009, p. 34.

5. Solutions

The solutions with regard to the issue of criminal cartels take into account the presented approaches towards cartels in the United States of America and in the European Union. The United States of America have chosen to criminalize cartels, as they harm the consumer and affect consumer protection. This approach has found an echo in the United Kingdom, which shares the view that criminal sanctions are a good measure to fight against cartels.

According to the European Union Competition Policy and to most of the jurisdictions in the European Union, cartels are seen rather as an economic issue and the related sanctions are administrative measures, meaning very high fines. Criminal prosecution is not used at the same scale as in the United States of America, it is mainly applied in some jurisdictions of the European Union for bid rigging at tenders, in the field of public procurement.

Comparing the two systems, possible influences between the two systems in terms of antitrust law can be pointed out. The American system has a strong influence in shaping the European Competition Policy, but aspects like criminalization of cartels are not implemented in European jurisdictions the way they are implemented in the United States of America.

An issue that has been implemented in the European Union and that shows a strong influence from the United States of America are the leniency programs used as measures in order to fight against cartels and to achieve a better consumer protection.

Aspects to be kept in mind by global players are related to the fact that nowadays cartels have a global dimension, that antitrust investigations are organized in parallel jurisdictions at the same time and that if by their cartel agreements cartel participants affect the market of the United States of America, it is possible that they will have to face the sanctions used in the United States of America for breach of antitrust law, which are criminal sanctions, like imprisonment.

The conclusions of the present paper can be used for further research, as the field of competition law is dynamic and will further improve.

6. Conclusions

Cartels are seen as a criminal offence in the United States of America, as they harm the consumer. According to the American view, the best way to fight against cartels is to use criminal sanctions for breach of antitrust law. This view is as well shared by the United Kingdom.

In the European Union, cartels are seen as economic issues and are sanctioned by means of administrative measures, by fines with very high amounts.

The response of the European Union to the question how to fight against cartels is given by the implementation of leniency programs in the jurisdictions of the European Union.

Another important element in order to fight against cartels is international cooperation. This is achieved in the European Union within the European Competition Network. At global level international cooperation is ensured within the International Competition Network, in order to find solutions for antitrust enforcement.

Given the progress achieved in international cooperation, cartel investigations are performed in parallel in several jurisdictions for global cartels, thus gaining a global dimension.

As the field of competition law is dynamic and will further improve, these conclusions and the above mentioned solutions can be used for further research.

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