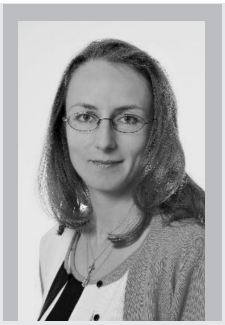
Divergence of antitrust enforcements – where and where not to collude …



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Our post-modern society is marked by a strong reliance on information systems and technology and by the intensification of business competition, along with a focus on virtualization and globalization.[1] *New trends have been emerging, generating a need for new business practices in order to successfully operate in the global environment.*[2] *A correct, smooth-running operation of competition is critical for capitalism, and the growing number of competitors supports the intensity of such a competition.*[3]

Introduction

The fight for permanently sustainable growth, the competitive advantage generating such growth, and net gain motivates each and every business, regardless of its size, so as to be more effective and efficient than its rivals.[4] This fight has its winners, its losers and its victims, which can be such third parties as consumers. Despite their original allegedly good intentions, businesses can easily succumb to the temptation to engage in practices with an anti-competition impact and hurt their competitors, other businesses, consumers and even the entire society. Probably the most dangerous form of anti-competitive behavior is the cartel collusion, and so the principal focus of this paper is oriented on the competition law enforcement against cartels, and thusly special aspects of competition law enforcement vis-à-vis monopoly, state aid, etc. are not covered.

Within the category of cartels, the worst are horizontal cartels fixing prices, sharing a market or making any other arrangements in order to control a market and take advantage of it, i.e. typically to get rid of other competitors, to charge consumers more for less and to ultimately become parasitic on the entire society, weaken its economy and probably decrease the GDP and the tax collected. In other words, often a cartel agreement is a collusive arrangement to attain profits at the cost of the rest of the society and to repress the future of the society in exchange for a fast egotistic reward. With a few exemptions due to public order concerns, such as intellectual property and the limited monopoly for the inventor, cartels mean conspiracy, organization, coordination, sophistication and abuse. Similar to intellectual property protection, the protection against cartels has an inherently global nature, but the enforcement is decentralized. Plainly, cartel collusion, especially horizontal cartels, is perceived as repudiated and not reconcilable with the desired market setting in the majority, if not all, of developed countries. Each and every one of these countries selects and implements its competition policy and establishes a set of substantive and procedural rules, as well as an organizational structure for the application and enforcement, while having in mind similar goals and objectives, ultimately leading to the detection and administrative, civil and even criminal, punishment of cartels. And each and every country reaches a different level in the transposition into the real business life.

Therefore, the substantive legal system to protect competition is only slightly different in each state, while the procedural legal system set for the enforcement of the allegedly violated substantive legal system is more varying, and the final operation can be dramatically different. There is a large enforcement divergence – different types and numbers of state agencies are entrusted with competition protection competency, a different level of engagement of criminal organs and third private parties is reached, and even the procedural rules differ. There is an even larger divergence in the readiness to apply the antitrust enforcement systems and to go after cartels, to punish them and to (proudly) report about it.

Generally, antitrust enforcement rests on three pillars – administrative, civil and criminal. The detection and administrative proceedings leading to punishment by fines are usually entrusted to a national competition authority, sometimes even to several state authorities, while a court appeal is available, especially to verify the respect and observance of Human rights and Fundamental freedoms, such as the due process right. The civil proceedings are initiated by private

[1] MACGREGOR PELIKÁNOVÁ, RADKA. Internet My Dearest, What Type of European Integration Is The Clearest? *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis,* 2013, LXI (7): 2475-2481. ISSN 1211-8516. Permanently available at http://dx.doi.org/10.11118/actaun201361072475.

[2] ŠIMBEROVÁ, IVETA. Company strategic marketing management – synergic approach and value creating. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2010, LVIII(6): 543–552. ISSN 1211-8516. Available at http://www.mendelu.cz/dok_server/slozka.pl?id=45392;download=72034.

[3] ZICH, ROBERT, VESELÁ, JITKA. Competitive Space Demands Acclerator and Its Impacts on Importance and Sustainability of Competitive Advantages. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, LXI (2): pp. 529-538. ISSN 1211-8516. Permanently available at http://acta.mendelu.cz/pdf/actaun201361020529.pdf.

[4] SYCHROVÁ, LUCIE. Measuring the effectiveness of marketing activities use in relation to company size. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, LXI (2): 493-500. ISSN 1211-8516. Available at http://acta.mendelu.cz/61/2/0493/.

parties claiming law damages and are conducted and decided by civil courts. Criminal proceedings are initiated by the state prosecutor, are conducted and decided by criminal courts and can lead to fines as well as imprisonment. All these three pillars have the potential to invoke the liability of both natural and legal persons, i.e. of undertakings as well as their individuals.

An effective and efficient antitrust enforcement system can successfully operate only provided these three pillars are set correctly, overlap and support each another, and are correctly and consistently employed with respect to all wrongdoers, regardless whether they are entities or individuals. Each and every state has a different setting of this three pillar mechanism and its operation is varyingly vigorous, intense and successful. Thus, divergent pathways are set and followed to reach similar objectives and goals and it is highly instructive to compare antitrust enforcement systems in selected developed countries and to assess their efficiency and effectiveness.

Methodologically, the multidisciplinary comparison of the enforcement of antitrust policies will be performed by using, to a limited extent, quantitative analysis collecting and assessing mathematically measurable data, such as the amount of prosecuted cases or the amount of fines imposed, and by using, in a larger extent, qualitative analysis focusing more on underlying phenomena. A myriad of official, semi-official, academic and practical sources will be used to locate pertinent data. Since the cartel games are played in a dim light, often behind and not in front of the curtain, only a smaller amount of information is available. Hence, this must be fully exploited and thus the meta-analysis should be employed and assist in finding the overlooked, and in forming and presenting conclusions and critical comments.

Considering the size of this paper, only several aspects of antitrust enforcement systems in the USA, the EU and selected EU member states will be described, analyzed and compared. The cornerstone is the prosecution of cartels and its results, i.e. the study of the enforcement pillars and their practical consequences for the liability of undertakings and individuals which succumbed to the temptation and engaged in cartel collusion activities. Even this rather preliminary and partial assessment can demonstrate the dramatic divergence and provide hints about the reasons.

Preliminary note on the global low cartel detection and procedural complexity

Cartels have been, are, and will be, and thusly before any discussion regarding their prosecution can start, they must be detected. Thus, probably the greatest challenge for each and every antitrust enforcement system in the entire universe is neither the substantive law nor the procedural law nor the organizational aspect, but the mere detection and the right punishment of the culpable persons. It needs to be ensured that appropriate and proportionate sentences are imposed on convicted individuals and entities.[5]

Without a concrete impulse, no proceedings against a cartel can commence. It may sound simplistic, but arguably the largest potential for the risk of a miscarriage of justice, lack of the use, and the abuse, of the antitrust proceedings is caused by the iceberg effect. Many businesses engaging in cartels can seriously harm for many years markets and competition while nobody notices. *Deus iudicat cum nemo accusat*, where there is no accusation, than only God can judge … At the same time, national competition authorities and other organs and parties can aggressively go after many absolutely honest businesses not engaged in cartels, and manipulate them into the position of bad guys needing to prove their innocence.

Globally, cartels are very bad news for competition on each and every level. A domestic cartel causes, on average, an illegitimately unjustified increase in prices by 15% and an international cartel causes, on average, an illegitimate increase in prices by 25%.[6] Worldwide, the majority of cartels last considerably more than one year, escape the public's attention, and their detection rate oscillates around 10% and even the champion in discovery of cartels, the USA, brings to light only 25% of cartels.[7]

Once detected, there is still a lot of work ahead, antitrust proceedings are complex, lengthy, and with uncertain results, especially considering the evidence issue. On average, antitrust proceedings have become swifter over the last two decades and instead of several years, nowadays one year is sufficient.[8] All similarities end when we compare the outcome of these proceedings, and the following part of this paper shows clearly that, despite their *prima facie* likeness, the efficiency of antitrust enforcement systems in the developed countries diverges dramatically. Also, clearly the common law approach performs much better than the continental law approach.

The USA enforcement system – the cradle and champion of antitrust enforcement

The era of modern antitrust law and its enforcement started at the end of the 19th century in the USA. The Sherman Antitrust Act, passed by Congress in 1890 and codified at 15 U.S.C. §§ 1-7, was modified by the Clayton Antitrust Act, enacted in 1914 and codified at 15 U.S.C §§ 12-27. Accordingly, for over one hundred years, the antitrust enforcement in the USA is in the hands of the Federal Trade Commission ("FTC"), of the Antitrust Division of the U.S. Department of Justice ("DoJ") and of third private parties. The antitrust enforcement of detected cartel cases in the USA is highly efficient, since 80%

[5] GORECKI, Paul K., MAXWELL, Sarah. Alternative Approaches to Sentencing in Cartel Cases: The European Union, Ireland, and the United States. *European Competition Journal*, 2013, 9(2): 341-382. ISSN 1744-1056.

[6] LANDE, Robert H., CONNOR, John M. Cartel Overcharges and Optimal Cartel Fines, November 12, 2007. Available at SSRN: http://ssrn.com/abstract=1029755 or http://dx.doi.org/10.2139/ssrn.1029755.

[7] FARMER, Susan Beth. Real Crime: Criminal Competition Law. *European Competition Journal*. 2013, 9(3): 599-622. ISSN 1744-1056, Online ISSN: 1757-8396.

[8] CONNOR, John M., HELMERS, Gustav C. *Statistics on Modern Private International Cartels, 1995-2005*. Working Paper #06-11, November 2006. Available at http://www.agecon.purdue.edu/working_papers/workingpaper.connor.11.10.06.pdf.

of cases prosecuted by the DoJ and the FTC end with the imposition of punishment.[9]

The antitrust law in the USA is a federal law clearly belonging to the common law family, thus its sources are federal legislation and judicial precedents. The common law practical and business oriented approach is noticeable, thus the involvement of private parties as well as the state prosecution are well established and heavily used with respect to antitrust enforcement. The whistle- blowing idea for cartels, called euphemistically leniency or amnesty (a USA term) or immunity (EU) program, and the related legal regime are as well of the USA origin. As a matter of fact, ever since its launching by the DoJ in 1978, it has several times been significantly modified and it has become the most important investigative tool for detecting cartel activity. Corporations and individuals who report their cartel activity and cooperate in the DoJ's investigation can avoid not only fines, but also criminal conviction and prison sentences.[10]

Last, but not least, criminal punishment is most decidedly an integral and active part of the enforcement system in the USA. Just in the last year, the DoJ filed 50 criminal cases and collected USD 1 billion in criminal fines. In these cases, the DoJ charged 21 corporations and 34 individuals, and the courts ultimately dispatched 28 individuals to jail, for an average of 2 years.[11] The threat of criminal punishment, namely imprisonment for up to 10 years and a fine of USD 1 000 000 for individuals and a fine of up to USD 100 million, [12] is a powerful deterrent, provided those responsible are rightly punished. Thus, the criminal charges should go to the true decision makers and orchestrators of cartel mechanisms, and not only to mere cartel executing officers. Naturally, a correct methodology and calculation formula needs to be established. Thus, the Federal US Sentencing Guidelines Manual was issued and its last version from 2013 includes e.g. Part R-Antitrust Offenses.[13] In addition, American academics have presented well explained and clearly argued calculation methods, such as a gain-based deterrence formula, according to which the wrongdoer's personal profits in USD is divided by the detection probability rate (0.25), the conviction probability rate (0.80) and the sentence-serving index (0.87). The resulting large number in USD is divided by the well accepted worth of one year in prison, typically for a CEO this is USD 2 million.[14] So, if a CEO made USD 1 million via a cartel, then according to the formula this would lead to USD 5,74 million and this means 2,87 years in jail. And this exactly happens in the USA. However, this methodology would not work in the Czech Republic, where the conviction probability and sentence-service index would be between 0.1 and 0.5, i.e. way under 0.80 and 0.87 and thus theoretically due to the extremely low effectiveness of the Czech enforcement system, this American formula would lead to imprisonment terms of over 50 years.

It cannot be stressed enough that, in the USA, engaging in cartels means having committed a crime, and to have a serious potential to spend several years in prison and to forget about any future business career. The Anglo-Saxon culture despises cheaters, especially cheaters that are caught, and does not hesitate to send the tainted CEOs to jail and ostracize them from further business life once they get out of prison. On the European continent, the prosecution of cartels is far less efficient than in the USA and instead of 80% reaches 40-50%, and even less in certain countries such as the Czech Republic, and, in addition, it is extremely unlikely to use penal punishment with respect to cartels. Thus, corporations have far less reason to be afraid, and their CEOs have almost nothing to fear.

EU enforcement system – powerful Commission supported by CJ EU and NCAs

The Treaty on the European Union (2012/C 326/01 "TEU") makes it crystal clear that European integration is centered around the internal market with the four famous freedoms.[15] The Treaty on the functioning of the European Union (2012/C 326/01 "TFEU") expressly states that the EU has an exclusive conferred competence with respect to the establishing of the competition rules necessary for the functioning of the internal market, and the shared conferred competence with respect to the area of the internal market in general.[16] The regulation of competition and its protection, as well as its enforcement, by the European Commission is included not only in the primary EU law,[17] but as well by the secondary EU law, predominantly regulations and directives. Nevertheless many interpretation issues related to the dangerous triad for the desirable competition on the internal market, namely the abuse of monopoly, antitrust forms and state aids, are left for the Court of Justice of the European Union ("CJ EU"), which has developed a longstanding, consistent and generally well argued approach.[18]

In the EU, the EU supranational competition authority is

[9] FARMER, Susan Beth. Real Crime: Criminal Competition Law. *European Competition Journal*. 2013, 9(3): 599-622. ISSN 1744-1056, Online ISSN: 1757-8396.

[10] The United States Department of Justice, Antitrust Division, Criminal enforcement, Leniency information available at http://www.justice.gov/atr/public/criminal/239583.htm.

[11] WILKINSON, Laura. DOJ´s cartel enforcement statistics for fiscal year 2013 illustrate the robust enforcement activity. *Inside Counsel*, 9th January, 2014. Available at http://www.insidecounsel.com/2014/01/09/doj-is-aggressively-pursuing-cartel-enforcement.

[12] GORECKI, Paul K., MAXWELL, Sarah. Alternative Approaches to Sentencing in Cartel Cases: The European Union, Ireland, and the United States. *European Competition Journal*, 2013, 9(2): 341-382. ISSN 1744-1056.

[13] United States Sentencing Commission. 2013 USSC Guidelines Manual Available at http://www.ussc.gov/guidelines-manual/2013-ussc-guidelines-manual.

[14] FARMER, Susan Beth. Real Crime: Criminal Competition Law. *European Competition Journal*, 2013, 9(3): 599-622. ISSN 1744-1056.

[15] Art. 3 TEU.

[16] Art. 3 and 4 TFEU.

[17] Art. 101 and foll. TFEU.

[18] ŠANDOR, Matěj, ČERNÝ, Pavel. Selected Judgments of the Court of Justice of the European Union focusing on state aid to the energy industry. *Acta Oeconomica Pragensis*, 2013, 2:25-39. ISSN 0572-3043. Available at http://www.vse.cz/english/aop/abstract.php?IDcl=397.

the European Commission and more specifically its department called the Directorate-General for Competition of the European Commission ("DG EC"). Regarding the enforcement of antitrust regulations, the DG EC works closely with national competition authorities ("NCAs") and the fundamental Regulation 1/2003[19] decentralized the enforcement of the EU competition law by destroying the "monopoly" of the DG EC by expressly stating that the NCAs and national courts shall apply, along with national antitrust law, as well EU antitrust law when in a situation of trade between EU member states.[20] Based on the general principles of supremacy and the direct effect of the EU law and on express provisions,[21] the EU antitrust law prevails. Thus the operation of a cartel in the EU, which has more than a mere national impact, violates the EU antitrust law as well as the national law(s) and the enforcement regarding the EU aspects is performed either by the DG EC or by the national NCA wearing two hats, national and EU. Hence the DG EC and NCAs from the EU member states closely co-operate, and all are active elements of the EU antitrust enforcement system. The decentralized enforcement regime regarding competition law has preserved the dominance of the EU, i.e. DG EC, and Europeanized national competition laws to the model of EU law.[22] However, the EU organizationally does not micromanage NCAs, and EU member states remain free to select and to set up their antitrust enforcement structure, i.e. they decide who to organize their competition and consumer protection authorities[23] and these NCAs enforce identical or similar competition substantive rules according to relatively different and not extensively harmonized procedural rules. Certainly, Regulation 1/2003 had a strong and direct impact on substantive competition laws, but contains certain procedural rules with regard to NCAs. Nevertheless, the EC admits that the divergences of enforcement systems in the EU member states remain in important aspects, such as fines, penal sanctions (!), the liability of undertakings, procedural standards, and the degree of participation rights.[24] However, this does not allow, per se, the EU to go ahead with a massive radical harmonization, or even unification, of the competition procedural rules in all EU member states and the TEU, the TFEU and their conferral of competencies and principles of subsidiarity and proportionality needs to be observed. In addition, no sufficient arguments in favor of procedural harmonization were found. [25]

Since the DG EC has neither penal competence nor private law matters competence, all of its direct competition protection and antitrust enforcement activities belong in the first pillar, i.e. in the administrative pillar. Nevertheless, it should be pointed out that still the EC has taken a number of concrete steps in order to facilitate damages actions for the violation of EU competition rules,[26] such as the Green Paper in 2005 and the White Paper in 2008. Annually, the DG EC deals with 4 to 7 cartel cases, generally each cartel case involves a large number of undertakings, and the judicial confirmation of imposed fines reaches 70% and more.[27] However, there is a lot of criticism targeting the entire administrative procedure conducted by the very powerful DG EC and ending with the issuance of the cartel fine smoothly approved by the "sister" EU organ, the CJ EU, and suggesting that the procedural safeguards are not sufficient.[28]

For example, the disregard of professional privilege, especially legal privilege in the famous C-550/07 P *Akzo Nobel v. Commission* shows that almost nothing is confidential before the DG EC desperately looking for cartel evidence. Another issue, heavily discussed recently, represents the loss of interest in the leniency program because of the necessity to disclose information about one's own cartel behavior in order to obtain the "immunity" from a cartel fine. Such a disclosure is the long awaited evidence for third parties enforcing, in private proceedings, damages caused to them by the cartel denunciating participant. The secondary EU law is currently in the process of review in order to allure again the whistle-blowers and reassure them that the disclosed information will

[19] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Availalbe at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02003R0001-20061018&qid=1399626877077&from=EN.

[20] Regulation 1/2003 – Article 3 *1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.*

[21] Regulation 1/2003 – Article 3 *2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.*

[22] CSERES, Kati. Comparing Laws in the Enforcement of EU and National Competition Laws. *European Journal of Legal Studies*, 2010, 3 (1): 7-44. OCLC 762014260.

[23] MUSIL, Aleš. Recent development in some National Competition Authorities – splitting, merging, super-merging. *Antitrust – Ročenka*, 2013, p. 13-16. ISSN 1805-2428.

[24] CSERES, Kati. Comparing Laws in the Enforcement of EU and National Competition Laws. *European Journal of Legal Studies*, 2010, 3(1): 7-44. OCLC 762014260.

[25] CSERES, Kati. Comparing Laws in the Enforcement of EU and National Competition Laws. *European Journal of Legal Studies*, 2010, 3(1): 7-44. OCLC 762014260.

[26] CSERES, Kati. Comparing Laws in the Enforcement of EU and National Competition Laws. *European Journal of Legal Studies*, 2010, 3(1): 7-44. OCLC 762014260.

[27] Europan Commission. *Cartel Statistics,* 2013. Availalbe at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

[28] MacGREGOR, Anne, GECIC, Bogdan. Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings. *Journal of European Competion Law and Practice,* 2012, 3(5): 425-438. Online ISSN 2041-7772 - Print ISSN 2041-7764.

not be used against them by the cheated competitors and other parties not participating in the cartel and seriously hurt by the cartel. Namely, considering some famous cases of the CJ EU, C-360/09 *Pfeiderer AG v Bundeskartellamt* and C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and other*, the European Commission prepared a proposal for a Directive on rules governing private antitrust damages which should introduce rules defining categories of submitted documents, namely documents submitted by leniency applicants, and their level of confidentiality and related level of protection – absolute, temporary, and no specific.[29]

Regardless of the (non)enactment of the proposed changes, the position of the DG EC is rather delicate, on one hand they are responsible for an assertive antitrust enforcement and, on the other hand, they should model the EU commitment to observe human rights and fundamental freedoms, including due process, and their failure to well balance these often contradicting goals could significantly affect the perception of the legitimacy of the Commission, and the entire EU, in the eyes of EU citizens.[30]

In sum, the correctness of the DG EC proceedings and the slight inclination of the CJ EU to endorse actions of the DG EC and just gently moderate imposed fines can be questioned. However, the general impression of an active DG EC valiantly battling against cartels and scaring them is beyond any doubt. Thus, the EU enforcement system, especially in its part performed by the DG EC, is definitely efficient and effective with respect to it's undertakings. Nevertheless, due to the almost exclusive focus on undertakings with virtually no drive to go after guilty individuals and the lack of penal punishment, especially for CEOs sailing their corporations into cartel waters, there is resultantly a miniscule efficiency and effectiveness with respect to the true wrongdoers.

At the same time, the criticism regarding the omission of two pillars from the classic three pillar antitrust enforcement structure does not apply only to the EU and DG EC. As a matter of fact, Europe, in almost its entirety, is reluctant to lift the corporate veil and to hold liable the individuals orchestrating cartel collusion between their corporations. Two thirds of EU member states have a law providing for punishment of individuals for their violation of competition law and a half of EU member states have a law which includes, in this punishment, criminal penalties. However, there is no EU member state actively applying these norms, and thus, unfortunately, individual liability is extremely unlikely to be invoked in cartel cases in Europe.

[29] VANDENBORRE, Ingrid, GOETZ, Thorsten. EU Competition Law Procedural Issues. *Journal of European Competition Law and Practice*, 2013, 4(6): 506-513. ISSN 2041-7764.

[30] DIAMANDOUROS, Nikiforos P. Improving EU Competition Law Procedure by Applying Principles of Good Administration: The Role of the Ombudsman. *Journal of European Competition Law and Practice*, 2010, 1(5): 379-396. Online ISSN 2041, Print ISSN 2041-7764. Available at http://jeclap.oxfordjournals.org/content/1/5/379.full.pdf+html.

UK enforcement system – new supra NCA and criminal law issue of "honesty"

Since 1st April, 2014, the national competition authority in the UK is the Competition and Markets Authority ("CMA") which brings together the Competition Commission and the competition and certain consumer functions of the Office of Fair Trade.[31] This organizational change came together with modifications of the competition policy regime and with rather controversial modifications of the consumer protection regime.[32] Regarding the workload, a mergers agenda has represented a larger bulk of the workload than the cartel agenda, namely the Competition Commission has dealt annually with 8 to 19 merger cases and with 1 to 5 cartel cases.[33] The UK Competition Appeal Tribunal ("CAT") hears appeals against decisions of the Competition Commission, newly the CMA, and other regulatory authorities made under the Competition Act 1998, the Enterprise Act 2002 and the Communications Act 2003.[34] A further appeal against decisions issued by CAT is possible only for questions of law, called points of law, to the appropriate Court of Appeal.

One of the mentioned statutes, based on which the CMA deals with cartel cases, is the Enterprise Act 2002 which defines a cartel as a dishonest agreement about fixing prices, limiting supply, restricting production, dividing customers or bid rigging in the UK.[35] A person guilty of such an offence can be punished by an imprisonment of up to five years and by a fine.[36] Probably due to the difficulty to establish the "dishonesty" feature,[37] there were only two reported cases. The first one, *R v Whittle, Alison and Brammar* [2008] EWCA Crim 2560, was settled by means of a plea arrangement with the USA (!) authorities, and was reluctantly accepted by the England and Wales Court of Appeal Criminal Division, according to which the sentences provided were 2½ years for Whittle, 2 years for Allison and 20 months for Brammar.[38] The second one, *R v George, Burns, Burnett and Crawley* [2010] EWCA Crim 1148, reduced the requirement regarding the establishment of "dishonesty", but still the defendants were acquitted.[39] Such an

[31] http://www.competition-commission.org.uk/.

[32] MUSIL, Aleš. Recent development in some National Competition Authorities – splitting, merging, super-merging. *Antitrust – Ročenka*, 2013, p. 13-16. ISSN 1805-2428.

[33] Competition Commission Annual Report 2012-2013. Available at http://www.competition-commission.org.uk/assets/competitioncommission/docs/2013/transparency/annual_report_for_web_2013.pdf.

[34] Competion Appeal Tribunal – Home/Frequently asked questions. Available at http://www.catribunal.org.uk/245/Frequently-asked-questions.html.

[35] Enterprise Act 2002, Chap. 40, Art. 188 Cartel offence. Available at http://www.legislation.gov.uk/ukpga/2002/40/section/188.

[36] Enterprise Act 2002, Art. 190 Cartel offence: penalty and prosecution. Available at http://www.legislation.gov.uk/ukpga/2002/40/section/190.

[37] MUSIL, Aleš. Recent development in some National Competition Authorities – splitting, merging, super-merging. *Antitrust – Ročenka*, 2013, p. 13-16. ISSN 1805-2428.

[38] Available at http://www.bailii.org/ew/cases/EWCA/Crim/2008/2560.html.

[39] Available at http://www.bailii.org/ew/cases/EWCA/Crim/2010/1148.html.

outcome is not acceptable, and there is much discussion about a legislative change targeting the reduction or even abolishment of the "dishonesty" element. Probably the time is ripe for the UK to look for the inspiration to their sister, or maybe it is better to say their daughter, in the common law system, meaning, of course, to the USA.

Irish enforcement system – active supra agency, even in criminal matters?

The national competition authority in Ireland is the Irish Competition Authority. It is a national agency responsible for enforcing Irish and EU competition law, which should promote competition in the economy in general, enhance awareness and provides the antitrust enforcement system. It investigates and decides about alleged cartels, abuse of dominance, problematic mergers and acquisition and public procurement. It has a similar scope of competencies as the Czech Office for the protection of competition, however, during this year the amalgamation between the Irish Competition Authority and the National Consumer Agency should be completed in order to rationalize the operation of these state agencies.

According to the chairperson of the Irish Competition Authority, Isolde Goggin, the Irish nation "would be immeasurably poorer" in a world without open markets and competition policy[40] and thus active enforcement steps need to be performed. Hence, the Irish Competition Authority deals with and resolves annually 20 to 40 complaints regarding alleged cartels, e.g. in 2013 it received 34 new complaints and managed to assess and close 26 of them.[41]

According to Irish antitrust law, cartel cases are criminal offences under which both individuals and firms can be charged. The punishment for this crime has been significantly increased over the last two decades and instead of 2 years, since the Competition (Amendment) Act 2012, individuals can be sentenced up to 10 years in prison for cartel activities. In addition, the fine of 10% of the turnover or of EUR 5 millions can be imposed in criminal proceedings against individuals and undertakings. The Irish courts have a large discretion to impose sentences within a rather broad legislative setting and no guidance or methodology has yet been established to assist them in setting the appropriate punishments.[42]

One of the few reported Irish cartel cases is the Citroen cartel. A number of proceedings occurred with respect to its members and participants, including Mr. Duffy and his Ltd. firm, *DPP v Patrick Duffy and Duffy Motors (Newbridge) Limited* [2008] IHEC 208.[43] In the Duffy judgment Irish judges considered, due to the lack of Irish guidance, methodology and case-law in this arena, the above mentioned EU Regulation 1/2003 and UK case, *R v Whittle, Alison and Brammar* [2008] EWCA Crim 2560.[44] The result was a sentence of six, respectively nine, months and a fine of EUR 50 000 for Mr. Duffy and a fine of EUR 50 000 for Mr. Duffy´ company. The prison sentence was suspended for a period of five years and the total fine of EUR 100 000 was to be paid within six months.

Netherlands enforcement system – supra NCA ready to communicate with everyone

In the Netherlands, the national competition authority is De Autoriteit Consument & Markt – the Authority for Consumers and Markets ("ACM"), which is a "multifunctional" authority entrusted with the enforcement of the protection of competition, consumer protection and even sector regulation.[45] A creation of a similar "supra" and "multifunctional" authority is proposed in Spain and is a subject of some criticism. [46]

The ACM provides free information to consumers and businesses and investigates, based on impulses from consumers, businesses or other parties.[47] The determination for the enhancement of awareness and the increase of the information level is carried by the special consumer information desk, called ConsuWijzer.[48] Considering the possibility to impose a fine of up to EUR 450 000, such an information system is indispensable.

Taking into consideration the extent of competencies, the ACM activities regarding detection and prosecution of cartels are not suitable to be compared with other NCAs dealing exclusively with competition issues. Nevertheless, it should be stressed that the ACM is a truly communicative office, which issues clear statements about complex and litigated issues, e.g. an ACM statement from 6th February, 2014, about the legal professional privileges of lawyers (LPP).[49]

German enforcement system – undertakings pay both, cartel fines and private damages

In Germany, the national competition authority is the Bundeskartellamt ("Bundeskartellamt") and has a similar scope of competencies as the Czech Office for the protection

[40] Irish Competition Authority, Annual Report 2013, p. 6. Available at http://www.tca.ie/images/uploaded/documents/Annual%20Report%202013.pdf.

[41] Irish Competition Authority, Annual Report 2013, p. 14. Available at http://www.tca.ie/images/uploaded/documents/Annual%20Report%202013.pdf.

[42] GORECKI, Paul K., MAXWELL, Sarah. Alternative Approaches to Sentencing in Cartel Cases: The European Union, Ireland, and the United States. *European Competition Journal*, 2013, 9(2): 341-382. ISSN 1744-1056.

[43] Available at http://www.courts.ie/Judgments.nsf/0/7EDD63F6621AA222802575D1003983FF.

[44] GORECKI, Paul K., MAXWELL, Sarah. Alternative Approaches to Sentencing in Cartel Cases: The European Union, Ireland, and the United States. *European Competition Journal*, 2013, 9(2): 341-382. ISSN 1744-1056.

[45] MUSIL, Aleš. Recent development in some National Competition Authorities – splitting, merging, super-merging. *Antitrust – Ročenka*, 2013, p. 13-16. ISSN 1805-2428.

[46] MUSIL, Aleš. Recent development in some National Competition Authorities – splitting, merging, super-merging. *Antitrust – Ročenka*, 2013, p. 13-16. ISSN 1805-2428.

[47] https://www.acm.nl/en/about-acm/our-organization/the-netherlands-authority-for-consumers-and-markets/.

[48] http://www.consuwijzer.nl/.

[49] https://www.acm.nl/en/publications/publication/12771/2014-ACM-Procedure-regarding-the-legal-professional-privilege-of-lawyers/.

of competition, i.e. abuse of monopoly, cartel, merger, and public procurement cases. Annually, Bundeskartellamt deals with 3 to 5 cases and the imposition of fines occurs in slightly over 70% of the cases and this number can be further reduced by judicial review.[50] Commencing last year, the Bundeskartellamt applies Guidelines for the setting of fines in cartel administrative offence proceedings[51] and accordingly assumes a gain and harm potential of 10% of the company's turnover achieved from the infringement during the infringement period. The German punctuality goes further and thus consequently, the imposition of an administrative fine for cartel behavior opens doors to private parties to go after cartel wrongdoers and sue them in civil proceedings in order to receive damages, i.e. compensation for caused harm. For example, in the case of cartel ThyssenKrupp, Voestalpine and Vossloh, the Bundeskartellamt imposed on all cartel members a fine in a total amount of EUR 125 million and the damaged third party, the German state owned rail operator Deutsche Bahn, decided to sue all of them for its damage caused by them, reportedly at least for EUR 100 million.[52] The most spicy part of the story is that the Deutsche Bahn wants to go after all cartel members, i.e. including the whistle-blowers asking for leniency in the administrative proceedings. Obviously, the proposed EU Directive on private damages actions is highly relevant in this aspect.

In addition, Germany is one of the few EU member states where individual liability can be invoked and thus individuals may be punished by imprisonment and fines up to EUR 1 million for anti-competitive behavior. Nevertheless, there is no information about an abundance of individuals punished in such a manner.

Italian enforcement system – good setting, weaker operation

In Italy, the national competition authority is Autorità Garante della Concorrenza e del Mercato and annually it deals with 5 to 8 cartel cases, but only in slightly over 50% of the cases do the proceedings end with the imposition of a fine.[53] In addition, this fine can be further challenged in court proceedings and its imposition can be judicially cancelled. Obviously, the above mentioned American guidelines and especially gain-based deterrence formula would not work here, i.e. it would lead to jail terms of 40-60 years.

Similar to the Czech Republic, the Italian Penal codes prohibit and punish not only the breach of the competition law in general, but specifically sanctions cartels, e.g. speculative manoeuvres over prices,[54] however there is no information about any case where an individual was punished via penal proceedings.[55]

Czech enforcement system – cartels are winning …

In the Czech Republic, the national competition authority is the Office for the protection of competition ("Czech Office"), which deals with monopoly, cartel, state aids and public procurements. However, the Czech Office is not charged with consumer protection issues per se. As a matter of fact, these issues are in the competency of the Czech Ministry of Industry and Trade and independent sector regulators.[56]

Regarding the antitrust enforcement by the Czech Office against cartels, there is a tremendous variation in the number of cartel cases launched annually, e.g. in 2008 there was begun an impressive (and unrealistic) 16 cartel proceedings, while the next year, 2009, only 2 cartel cases were undertaken, and the year following, 2010, only one single cartel case arose. In addition, the top five prosecuted cartel cases, in which massive fines were imposed, ended unpunished, i.e. the Czech Office or courts cancelled the imposed fines.[57]

The other two pillars of the antitrust enforcement system in the Czech Republic, the penal prosecution and the private parties enforcement exist formally, but their application is not noticeable. The Czech legislature penalizes cartel behavior, along with unfair competition behavior, by the Penal Code, with up to three years of imprisonment and prohibition of activity,[58] but this provision remains dormant and has not caused any changes in practical life and no punishments on their basis were reported, thus its allegedly deterring effect is highly doubtful.[59] Similarly, the private enforcement via the action for a compensation of damages caused by cartels to other competitions and consumers is virtually non-existent. This just reflects the European dichotomy between the proclaimed willingness to aggressively punish cartels and their "conductors" and the internal feeling shared by many members of the society that it would be immoral to send someone to jail for a mere

[50] Bundeskartellamt. *Erfolgreiche Kartellverfolgung*, August 2011, p. 30. Available at http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Broschüren/Informationsbroschüre%20-%20Erfolgreiche%20Kartellverfolgung.pdf?__blob=publicationFile&v=8.

[51] Bundeskartellamt. Guidelines for the setting of fines in cartel administrative offence proceedings, effective on 25th June, 2013. Available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3.

[52] SOBOLOWSKI, Matthias, KAECKENHOFF, Tom. German rail operator Deutsche Bahn plans to sue members of a rail track cartel UPDATE 3-Deutsche Bahn to sue steelmakers in cartel case. *Reuters*, 5th July, 2012.Available at http://www.reuters.com/article/2012/07/05/germany-rail-cartel-idUSL6E8I53LP20120705.

[53] Italian Competition Authority (AGCM, 2012) Autorità Garante della Concorrenza e del Mercato. *Statistics*, 2012. Available at http://www.agcm.it/en/.

[54] Art. 501bis Penal Code.

[55] FARMER, Susan Beth. Real Crime: Criminal Competition Law. *European Competition Journal*. 2013, 9(3): 599-622. ISSN 1744-1056, Online ISSN: 1757-8396.

[56] MUSIL, Aleš. Recent development in some National Competition Authorities – splitting, merging, super-merging. *Antitrust – Ročenka*, 2013, p. 13-16. ISSN 1805-2428.

[57] Úřad pro ochranu hospodářské soutěže - Informační centrum - Přehled a statistiky, 2013. Available at http://www.uohs.cz/cs/informacni-centrum/statistiky/prehled-nejvyssich-pokut-ulozenych-v-oblasti-hospodarske-souteze.html.

[58] Act No. 40/2009 Coll., Penal Code – Art. 248 Violation of regulations on competition rules (1) unfair competion … (2) cartels.

[59] VALOUŠKOVÁ, Zuzana. Globální rozměry boje proti kartelům a korupci. *Antitrust – Ročenka*, 2013, p. 29-30. ISSN 1805-2428.

damaging business conduct. In addition, in the Czech Republic, lying and redistributing the resources of somebody else is not considered taboo. Often, political corruption and antitrust behavior is related[60] and if they are tolerated, then nobody should be surprised that the wealth and economic potential of the country are siphoned off.

Of course, the Czech Office does much more than only cartel prosecution, and many of its activities are successful, efficient and effective. Certainly, the Czech Office is seriously attempting to improve its poor record in its battle against cartels. Nevertheless, during the last decade of the Czech membership in the EU, the Czech Office become one of the weakest NCAs cooperating with the DG EC, and the inefficiency of the Czech Office during the last decade has seriously harmed the Czech market, consumers and society, and maybe even led to negative impacts on the EU level. We cannot afford such a second decade … However, not only the Czech Office needs to work better, as well the other two pillars need to be put to work, such as penal prosecution organs going after the cartel "brains" and third parties claiming damages from businesses engaging in cartel activities and their leaders steering them into such a direction.

Conclusions

There is a common consent that cartels are omnipresent, destructive, only seldom legitimated and almost always barely, if at all, detectable. Typically, they last more than one year, increase prices by 15-25%, and drive away competitors. In the longer term, they reduce the number of jobs, true competitiveness, the national GDP and the income in the state budget. A small number of dishonest individuals drain off wealth and business potential and for their immediate gratification preferable in tax paradise countries they damage the long term interest of the entire society. Such behavior is odious and should be exposed and punished. The detection rate is very low, generally 10-20%, and this most certainly should be improved. Of course, the few detected cartel cases cannot be wasted and should be efficiently prosecuted while due process and other human rights and fundamental freedoms are observed, and punished.

There is no common consent about the approach to be selected, and more conceptually about whom to go after. Is the evil the colluding undertaking or should we lift the corporate veil? In the USA, the latter concept is fully embraced and there is no hesitation to hold individuals liable for the cartel collusion of their businesses, and to send them to jail. In contrast, in Europe, the social condemnation of cartels is definitely not so strong and well established and the fiction of the independency of legal entity is strictly observed. Hence, the proceedings should go after bad undertakings without challenging the individual liability of their owners, managers, advisors, and employees.

Recently, discussions in Europe have covered the celebration of the leniency program and the need to re-shape the distribution of competition protection competencies between various national and supranational organizations. However, in the light of the provided data and their comments, it seems that the most important factors for the improvement of the antitrust enforcement system lies outside the administrative setting of national authorities and their administrative proceedings against undertakings.

The American pragmatism, the honesty value proclaimed by its entire society, the general endorsement of an aggressive criminal prosecution and private parties proceedings are the true motive power, along with the developed methodology. A cartel fine is not pleasant, but definitely does not hurt so much as a massive compensation to be paid as damages to competitors, several years in jail and the rejection from business for the rest of one's life. So far, Europe has been slowly following the USA model, and it seems that it should keep doing so, and, for the sake of our economies and we the consumers, faster rather than slower. Obviously, shielding individuals from their liability for their invidious cartel behavior and merely punishing their instruments, undertakings, is not sustainable in the global economy of the 21st century.

Abstract

[**Radka MacGregor Pelikánová: Rozdíly ve vymáhání antimonopolních pravidel: kde a kdy neuzavírat zakázané dohody…**]

Stěžejní prioritou moderní společnosti je řádně fungující hospodářská soutěž a soutěžní právo napříč světem, či alespoň na obou stranách Atlantiku, se zaměřuje na potírání a trestání kartelů a jiných proti-soutěžních jednání ve shodě, zejména pokud mají horizontální rysy. I přes jejich značný zničující potenciál, kartely se odhalují nesnadno a jejich prokázání je často nesplnitelným úkolem. Moderní vymáhací systémy zaměřené na těch málo odhalených a prokázaných kartelů spočívají na třech pilířích – správním, soukromoprávním a trestním. Většinou nejsou skutečné rozdíly v jejich hmotněprávním nastavení a rozdíly v jejich procesně-právním režimu jsou jen menší, naopak dramatické rozdíly jsou v jejich praktickém použití. V USA jsou kartely vnímány jako zlo a všechny tři pilíře jsou proti nim používány, řízení jsou vedena proti podnikům i jednotlivcům. V Evropě jsou kartely označovány za možné zlo a všechny tři pilíře nejsou aktivně proti nim využívány, přičemž řízení jsou většinou vedena proti podnikům a tudíž odpovědnost jednotlivců je uplatňována zřídka a trestní postih jedinců nastupuje výjimečně, pokud vůbec. Restrukturalizace antimonopolních úřadů, spuštění programu shovívavosti a jiné prostředky mohou lehce zlepšit celkově neuspokojivou situaci v Evropě, v některých státech EU dokonce velmi žalostnou. Zřejmě skutečně vhodná a účinná dekartelizaci bude vyžadovat ještě jednou následovat příklad USA, překročit Rubikon a začít vymáhat antikartelové právo proti všem pachatelům a uplatňovat veškerá soukromoprávní a procesněprávní ustanovení, včetně trestněprávní kartelové úpravy ukládající trest odnětí svobody.

[60] VALOUŠKOVÁ, Zuzana. Globální rozměry boje proti kartelům a korupci. *Antitrust – Ročenka*, 2013, p. 29-30. ISSN 1805-2428.