

GCP

THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Recent Developments in EU Anti-Cartel Enforcement

Kirtikumar Mehta

DG Competition, European Commission

Recent Developments in EU Anti-Cartel Enforcement

Kirtikumar Mehta *

Anti-cartel enforcement has been a major priority for some time for all competition agencies. Beyond intensifying investigative actions and prosecutions, however, the primary thrust of policy and indeed the chief yardstick for evaluation of enforcement is the degree to which ongoing cartel activities in the jurisdiction are severely deterred. Fines or other sanctions through which this deterrence may be expected to dissuade cartel conduct thus assume a central role in any policy considerations. In the EU, fines on undertakings involved in cartel infringements are set according to the 2006 guidelines on fines which succeeded the 1998 guidelines. As recent decisions show, under the new guidelines fines may be hefty and are claimed to be substantially higher than would have been the case under the previous guidelines, particularly where cartel turnover is high, the cartel was durable, and an undertaking concerned (the term 'undertaking' referring to the corporate group in its entirety) is not only a large multiproduct entity but also a repeat offender.

The question of what level represents a deterrent fine level is both complex and protean. In the EU, fines on an undertaking are capped by the legislator at a maximum of 10% of the global turnover of the undertaking concerned. Such a limit may perhaps be

* Kirtikumar Mehta is the Director of the Cartels Directorate, DG Competition, European Commission. The views expressed are personal and may not be attributed to the European Commission.

considered relatively modest for a small-sized uniproduct undertaking (the cap would mitigate the calculated fine) but quite clearly can still lead to extremely high levels in absolute value for a large multiproduct undertaking, whose actual turnover in the cartel itself may be a minute part of its global world wide turnover. In defining a deterrent level of fines, the literature on optimal fines may perhaps be considered a useful starting point. However, this literature's dependence on imprecise and often arbitrary assumptions regarding some of the major unknowns of anti-cartel enforcement—such as the degree to which cartel conduct permeates the different sectors of the economy, the intensity of cross-border cartel activity, the underlying detection rate of the agency, its variability with duration of cartels, and the probable average overcharge—makes its conclusions only suggestive. I shall outline below that what actual enforcement reveals is that deterrence is an aggregate composed of several constituents, including the level of fines, the entities on which they impinge, perceptions about the agency's detection rate, its sustainability, and so on, and that it is this aggregate impact that has to have the potential to severely defeat cartel culture.

By way of introduction it is useful to look at the development of recent EU anti-cartel enforcement as revealed by statistics covering the period since the first Leniency Notice of 1996. The table below shows, for some selected years, the evolution of the number of undertakings fined, the accumulative total of undertakings fined since 1995, the total value of fines imposed, the average fine per undertaking, and the highest fine levied on an undertaking:

	1996	1999	2002	2005	2006	2007
N° of undertakings fined	6	10	40	33	39	41
Accumulative total of undertakings fined since 1995	8	60	178	258	297	338
Fines imposed in EUR	646,000	105,550,000	944,781,000	683,029,000	1,846,385,500	3,338,427,700
Average fine / undertaking	107,667	10,555,000	23,621,775	20,697,848	47,343,218	81,425,066
Highest fine during the year	400,000	13,500,000	249,600,000	84,380,000	272,250,000	479,669,850

What is first striking is the increase in the number of undertakings that have been addressees of recent decisions. If one looks at the cumulative total, even allowing for repeat offenders, this is a very significant total, particularly in certain industrial sectors. Another noteworthy point is that after the 1996 Leniency Notice the number of cartel cases and hence the number of undertakings prosecuted has grown significantly: the increase was reinforced by the second Leniency Notice of 2002. The underlying detection rate—an unobservable figure so we cannot be certain—must be assumed to have increased substantially, an assumption also supported by the fact that the number of cartel investigations over the period that started as ex-officio also increased. The efficiency of a leniency program in strengthening the incentive to defect and to self-report depends on a number of different parameters of the program, but it would not be incorrect to emphasize the role of very significant fines. As may be expected, cartels reported under the leniency program are primarily, though not all, terminated cartels—a good number reported in the course of due diligence relating to cross-border acquisitions or reported by

other cartel participants in the face of the prospective structural change in that business sector. In contrast, cartels detected by ex-officio investigations of the Commission tend as a rule to be ongoing cartels.

From this, it is clear that significant fines set at a level exceeding the probable profit to cartel participants are a basic constituent of the deterrence signal to undertakings and are, in any case, a vital element in driving incentives for concerned undertakings towards reporting rather than simply defecting from the cartel. Nevertheless what we see today—and it is amply exemplified in the texts of Commission's cartel decisions—is that the ratio of cartels that were ongoing when an intervention took place to cartels already terminated (in general and specifically in certain sectors not traditionally the target of cartel investigations), was relatively high, even if falling. This would tend to suggest that, notwithstanding much commentary that fines under the previous guidelines were very high and higher still under the new guidelines, the fines still were not perceived as being deterrent enough for certain categories of cartel participants. On the other hand, as the table shows, the risk of a very significant fine—a multiple of the turnover of the entity in the cartel—was indeed very real for undertakings that were multiproduct, with high global turnover, and also repeat offenders. For undertakings of this profile, the level of fines and the factors taken in their calculation can thus be expected to approach deterrent levels. Adoption of internal compliance programs could well be an indication of this and, of course, a more compelling indication is the fact of leniency applications that such undertakings submit.

A further element that is likely to contribute to the deterrent effect of fines is a sustained level of prosecution as revealed by the annual rate of prohibition decisions, not just of large cartels but of any cartels where the evidential threshold is met, so as to deny safe haven for cartel conduct. A sustained level of prosecution is an observable and unbiased surrogate for the unobservable detection rate and hence a persuasive enticement for serious implementation and respect of compliance programs. Clearly a more rapid procedure to reach a prohibition decision, an alternative foreseen in the Commission's recent Settlement Notice, can also be considered in this way to contribute to the deterrent effect. The experience of settlement procedures in some other jurisdictions suggests this direction, although it is obviously difficult to extrapolate given the jurisdictional specificities.

In conclusion, recent developments in EU anti-cartel enforcement suggest a continuation and affirmation of credible enforcement. An important degree of deterrence is in place because the interventions of the Commission are coupled with the significant number of enforcement actions by National Competition Authorities in the framework of the European Competition Network. It may be countered that fines only on undertakings cannot be considered to be as effective deterrence as (criminal) sanctions on individuals. It is worth recognizing that analytically the impacts of criminal sanctions are likely to be felt at two levels: first, in so far as they affect the elasticity of supply of cartel conduct on the part of the individual and, secondly, to the extent they substantially stimulate incentives at both the individual level and the corporate level to defect and report. If the

main effect of such sanctions is to further increase the incentive to report then this, as such, means that the effect is realized even for jurisdictions where there are no criminal sanctions so long as at least one jurisdiction affected by the same cartel criminally prosecutes the participants. We already see in international cartels that high fines by the EU on undertakings and criminal sanctions elsewhere have been a major element in recent anti-cartel enforcement. An important aspect of recent developments is that a certain number of Member States do provide for criminal sanctions for breaches of EC competition law and hence cases of criminal enforcement at the national level coexisting with administrative enforcement at the EU level is a reality that cartel participants face in the EU.