CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT

ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES

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Criminalization of Competition Law Enforcement

Economic and Legal Implications for the EU Member States

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Abbreviations

AAGs	Assistant Attorney Generals, United States
ABA	American Bar Association, United States
ACLE	Amsterdam Center for Law & Economics, The Netherlands
AFM	Authoriteit Financiele Markten (Dutch financial markets supervisor), The Netherlands
AOA	Administrative Offences Act, Germany
ARC	Act against Restrictions of Competition, Germany
BGH	Bundesgerichtshof, Germany
CIB	Cartel Investigations Branch, OFT, United Kingdom
CDO	Competition Disqualification Order, United Kingdom
CFI	Court of First Instance, European Union
CC	Criminal Code, Germany
CMRG	Competition and Mergers Review Group
CPC	Criminal Procedure Code, Germany
DG IV	Directorate-General Four, European Commission
DG COMP	Directorate-General Competition, European Commission
DoJ	Department of Justice, United States
DTI	Department of Trade and Industry, United Kingdom
DPP	Director of Public Prosecutions Ireland
EC	European Commission, European Union
ECB	Estonian Competition Board
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
EUI	European University Institute, Italy
FCA	Finnish Competition Authority
FCRA	Federal Central Register Act, Germany
FBI	Federal Bureau of Investigations, United States
FTAIA	Foreign Trade Antitrust Improvements Act, United States
FTC	Federal Trade Commission, United States
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act Against

	Restraints of Competition, Germany)
IBA	International Bar Association
ICPAC	International Competition Policy Advisory Committee
KNAW	Koninklijke Nederlandse Akademie van Wetenschappen (Royal Academy of Dutch Science), The Netherlands
MLAT	Mutual Legal Assistance Treaty
NCA	National Competition Authority
NMa	Nederlandse Mededingingsautoriteit (Netherlands Competition Authority), The Netherlands
OECD	Organisation for Economic Co-operation and Development
OEM	Original Equipment Manufacturer
OFT	Office of Fair Trading, United Kingdom
OPTA	Onafhankelijke Post en Telecommunicatie Autoriteit (Dutch Telecoms Regulator), The Netherlands
PACE	Police and Criminal Evidence Act 1984, United Kingdom
R&D	Research and Development
RIPA	Regulation of Investigatory Powers
SFO	Serious Fraud Office, United Kingdom
TEU	Treaty on European Union

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1 INTRODUCTION

Competition laws are set to maintain and protect the competitive process and allow society to reap its fruits in the form of high quality goods and services at low prices. A working competitive process is a precious public benefit that should be safeguarded, as it is well-established that attempts by firms to pervert competition cause greater overall harm than individual gain. When firms charge 'supra-competitive' prices and reduce output instead of competing on the market, consumers and economic efficiency will suffer serious damage.[1] Therefore, the primary objective of competition law enforcement is to keep market parties from being tempted to collude. It can be met both by facilitating an economic and legal structure that encourages competition and by actively policing the market for those who behave anticompetitively regardless. In particular, competition authorities seek to efficiently deter anticompetitive behaviour through a tuned mix of enforcement mechanisms.

In merger control, a trajectory of *ex ante* assessment and licensing serves to prevent the build-up of undesirable concentrations. Parties report their intentions to merge at their own initiative, as it is unlikely that a major merger consummated without being notified and approved will go unnoticed. Little active policing or sanctioning is required to secure truthful reporting of relevant information in the required formats.[2] However, anticompetitive agreements and abuses of dominance escape by their very nature the attention of the competition authorities unless actively detected. *Ex post* remedies and sanctions provide the mechanism to prevent such breaches of law. It is here that desk-top and *ex officio* detective work and evidence gathering is to be combined with tough punishments for violations detected.

Therefore, in assessing both the effectiveness and efficiency of competition law enforcement, an important criterion is the extent to which existing remedies and sanctions form a sufficient deterrent. Effective deterrence requires that undertakings that might otherwise engage in illegal activities perceive a reasonable probability of being detected, as well as a sufficiently severe punishment when indeed they are.[3] The question is whether the threat of the potential punishment is sufficiently large to assure compliance with the legal rules and behaviour within the boundaries set by the law.

In the EU and its Member States, there is increasing awareness that this may not be the case. This is not so much because truly sufficient deterrence would imply that no breaches of law are to be seen, where DG Competition has found many: full deterrence is arguably too much to ask for. Rather, the effectiveness of administrative fines as presently imposed on undertakings is limited. The enforcement practice over the past decades shows that the mere application of corporate fines does not effectively deter cartels and the abuse of a dominant position. Even though existing potential ramifications for antitrust violations include serious pecuniary sanctions – with recent record-breaking fine levels in vitamins (more than €855 million in total), plasterboards (almost €480 million) and Microsoft (almost €500 million) – these amounts do not constitute a large enough threat to deter parties from outright violations of the EC competition rules.[4]

For a number of reasons, the present European system of maximum sanctions and remedies appears to be too limited to counter the apparent net gains thought to be secured through breaches of competition law. It largely relies on administrative law-based corporate fines being imposed on the undertakings. The EU fining Guidelines[5] and European Council Regulation 1/2003[6] limit the effective fine to a maximum of 10 per cent of group turnover worldwide. Actual fines nowadays are increasingly based on a percentage of sales concerned – as opposed to worldwide group turnover. Recent economic studies have revealed these percentages to be substantially less than the estimated benefits related to the average infringement, however.[7] Furthermore, detection probabilities are known to be surely far from one.[8]

Moreover, these sanctions affect the corporation and not the private individuals, who may be both higher and lower management, and the ones to decide on the undertaking's business strategy, including possible anticompetitive acts. Neither the European Commission nor most of the Member States have at present possibilities to impose sanctions on individual directors, managers or employees of the undertakings that are responsible for the anticompetitive acts. Also, with only a modest level of public awareness of the seriousness of antitrust violations, incurring a negative reputation with regard to compliance with the competition rules

does not seem to worry many companies in Europe. For the same reason, the political climate is not presently suitable for tougher or alternative punishments of competition law violations, although there are signs that this may be changing. Finally, at present deterrence from effective possibilities for private damage claims remain limited in the EU.[9]

In comparison with their American counterparts, European competition authorities have a smaller arsenal of enforcement instruments. US federal antitrust laws are enforced in three main ways: criminal[10] and civil enforcement actions brought by the Antitrust Division of the Department of Justice (DoJ) and state attorneys, civil enforcement actions brought by the Federal Trade Commission and civil law suits brought by private parties asserting damage claims.[11] As a result, potential sanctions in the US antitrust system include high corporate fines and damages claims, as well as individual fines of up to $1 million, and maximally 10 years of imprisonment for those within the companies found responsible for the anticompetitive acts.[12]

Criminal sanctions have been part of the US antitrust system since it came into existence. Engagement in cartel agreements has consistently been punished as a criminal felony. Outright violations of antitrust laws, such as price-fixing, bid-rigging, market sharing and allocation of customers have always been regarded as felonies, and as such have been condemned both socially and politically. Criminal sanctions for anticompetitive acts seem to have gained actual political momentum and backing, and were significantly strengthened during the 1970s.[13] Ever since, antitrust enforcement has enjoyed financial and political support by government that may have fluctuated somewhat with the party in power, but has been consistently strong.[14]

Antitrust authorities (DoJ and FTC) are equipped with broad investigative powers. Moreover, judges are willing to impose prison sentences on individuals. Finally, private treble damage cases, which were enabled by Section 4 of the Clayton Act from 1914, have grown exponentially since the 1960s, and in terms of the number of cases have actually long surpassed public enforcement. Combined, today the US enforcement system is characterized by substantial corporate fines on cartel members as well as tough individual sanctions on co-conspirators.[15] In 2003, for example, the DoJ levied a total sum of some $65 million in fines for antitrust violations. Out of the 500 to 600 private damage suits brought annually, in that same year the VISA/Mastercard damage suit alone was settled for more – that is, $3.1 billion.[16] Moreover, in the last five years, the Antitrust Division secured the imprisonment of over 80 individuals for a total of over 100 years, doubling the average sentences to almost one-and-a-half years above that of the 1990s, including a 10 year jail sentence in one case.[17]

The US system has embedded the various sanction mechanisms in a specific institutional and procedural setting.[18] A unique grand jury system requires the competition authority to act as prosecutor. This is alleged to favour the investigation side.[19] The plea bargaining system means that defendants seem to have an increased interest in settling cases instead of going through the rigmarole of lengthy and costly trial proceedings. Furthermore, the US DoJ operates a successful Corporate Leniency Programme that was introduced in 1993.[20] This programme offers (full or partial) immunity from fines for companies, directors, officers, and employees of corporations that choose to self-report their involvement in cartel agreements. For investigations which had been started already, the programme includes an 'Amnesty Plus' policy for those who report further unknown cartel arrangements. On the shadow side thereof, there is a 'Penalty Plus' policy with substantially higher fines and jail sentences for those who participated in further cartel agreements but decided not to seek amnesty. This would typically be the case where the conduct is later discovered and successfully prosecuted.[21]

With a relatively low evidence requirement, the US leniency policy further ensures that even peripheral cartel participants can come forward and blow their whistles. Also, leniency applications can be submitted for crimes committed several years in the past.[22] And recently, the possibilities of a lenient treatment were extended to follow up private damages litigation by a potential reduction to single damages for corporations that benefited from public leniency.[23] Although their overall success in bringing new conspiracies to light is a topic of ongoing research and should at present not be exaggerated, the leniency programmes are documented to have successfully uncovered at least some antitrust violations hitherto unknown to the authorities. It also seems to have saved enforcement costs, speed up investigation processes and shortened decision-making periods.[24] Furthermore, it is said to have led to increased and enhanced civil antitrust litigation.[25]

Surely with a keen eye for its limitations, since its origin the European Union has studied and used the US system of antitrust enforcement as a source of inspiration for developing its own. In recent years, this attention has turned to the mechanism of deterrence. Since 1996, the EC has introduced its own leniency programme, which is said to be frequently relied upon by the business community.[26] Yet, leniency can only be effective if the threat of potential punishment is sufficiently serious. Since these often are lucrative restraints of trade or abuses of dominance, business corporations and their management may only then start seeking its protection. In order to strengthen this threat, possibilities for both private damage suits and enhancing the potential for the imposition of individual criminal sanctions are presently at the centre of the enforcement debate throughout Europe. At EC level, one

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