Not such a quick fix

Cartels, cars and competition

by Suzanne Rab

The European Commission and the German Federal Cartel Office (FCO) have confirmed that they are investigating whether major German car manufacturers have colluded over the price of emissions technology and supplier dealings. That this announcement comes years after the first EU leniency notice and in the wake of increasing administrative penalties and mounting momentum for private actions may prompt calls for a strategic rethink on how to combat cartels. It may be almost trite to observe that antitrust enforcers have intensified their enforcement armoury and become more aggressive in their fight against cartels. But incentives to collude remain. The launch of new probes in familiar and unfamiliar contexts evokes a sense of dejà-vu.

Cartel crack-down nought to sixty

Much of what I have to say in the next paragraphs may seem familiar territory to the seasoned antitrust practitioner and, at first blush, an endorsement that our practice has now entered the mainstream. On closer inspection, however, there is much to suggest that all is not rosy in the kingdom of cartel enforcement. Cartels continue to form despite the increasing severity of the consequences of discovery; and some industries receive a level of scrutiny that suggests that recidivism remains rife.

Although opinions may shift on the type of practices that should attract the attention of antitrust enforcers, there is universal agreement (a few ultra-libertarians apart) that cartels are the most pernicious form of anti-competitive practice. They raise barriers to entry, reduce incentives to innovate and raise prices. There are objections from a social justice perspective, on account of the disproportionate effects on consumers in poor countries where the costs can be as much as those countries receive in external aid. The *Vitamins Cartel* – which artificially inflated the cost of such everyday necessities as milk, bread, orange juice, and cereal – is a classic example.

Cartels have traditionally tended to develop in highly standardised products such as industrial products which attract limited customer loyalty or in 'winner takes all' bidding markets where collusion rather than competition becomes the most economically rational strategy. However, in recent years, cartels have formed outside the sectors traditionally associated with collusion in areas as wide ranging as air freight, computer monitors, elevators, groceries, and seafood. Financial markets have also succumbed to such practices with high stakes conspiracies in interest rate and foreign exchange becoming a regular feature on the regulatory radar screen.

There are, however, ambiguities in that competitive and collusive markets can share similar features. If companies are pricing at marginal cost, then prices may tend to move in tandem and converge at a similar level just as they would in a cartel. The authorities may tend to address this by examining profits but that exercise can be fraught with difficulty and meaningful comparators may be difficult to find. Price transparency might be a good thing where it enables customers to play off one supplier against another but not where this serves as price signalling and suppliers follow the price-leader. Thus, the line between permissible and impermissible activity may not always be clear-cut.

Cartels frequently emerge as a response to market aberrations, the introduction of disruptive technologies or a decline in trade barriers. Manufacturers react by flexing their corporate muscle in their price negotiations with their suppliers. Those suppliers might then respond by calling a truce on competition, dividing markets between them and fixing prices.

The US has led the way in criminalising cartels but increasingly other countries as diverse as Mexico and the UK have adopted criminal sanctions. While it may be tempting to view price fixing as a victimless practice where the impact on individual consumers is small, increasingly the authorities are toughening up in recognition that putting the individual perpetrators behind bars may the only effective deterrent.

With a growing number of cartels having a global scope and regulators becoming increasingly aware of the limitations in their jurisdictional enforcement, those regulators have become more sophisticated and coordinated in their tactics to detect and enforce against cartels. This is seen in the Mutual Assistance Treaties allowing for cross-border cooperation as well as in the more informal 'pick up the phone' culture whereby regulators will liaise with their counterparts to share information and strategies. The Marine Hose cartel is a classic example, involving parallel proceedings worldwide including in the US, Canada, Brazil, EU, UK, Japan, Korea and Australia.

Cartels are difficult to uncover without inside information. The authorities' use of leniency/amnesty policies whereby cartelists are rewarded for their cooperation with immunity from penalties or reduced sanctions has probably been the single most powerful tool to detect and combat cartels. The foil of leniency and the public enforcement system is civil litigation whereby cartelists face damages claims from their customers and suppliers who have suffered loss as a result. These claims – up to treble damages in the US – are in addition to the administrative penalties that go into the public purse. The phenomenon of class actions in the US is well documented. Such litigation is on the increase in Europe,

although certain jurisdictions such as England and Wales, Germany and the Netherlands will probably remain at the vanguard of antitrust private enforcement at least until the reforms under Directive 2014/104/EU (Damages Directive) take root.

It is not surprising, then, that antitrust has risen up the Boardroom agenda probably now occupying a position on the regulatory heat-map akin to bribery, corruption and environmental law breaches. This has led to increasing corporate investment in compliance programmes and training from the grass roots. The aim is partly to prevent rather than cure the threats to corporate health resulting from sanctions for antitrust infringements, disruptions to management time, adverse publicity and a downward spiral in customer and shareholder confidence.

Spotlight on the auto industry

Against this background, the announcement of cartel probes into whether BMW, Volkswagen and Daimler have colluded over emissions technology and supplier terms appears to contain few surprises. Although it is not yet clear what path the investigations will take, or which authority will handle the matter (or, indeed, whether there will be multiple investigations) it can be expected that these investigations will be treated as a priority.

Press reports suggest that the allegedly infringing practices started in the mid-1990s and continued until very recently. It is alleged that the companies met in clandestine committees comprising up to 200 staff where they engaged in classic cartel behaviours including agreeing to set prices and agreeing on suppliers and other terms. The FCO launched dawn raids at the premises of BMW, Volkswagen, Daimler and their suppliers in 2016. It appears that Volkswagen and Daimler provided information to both the Commission and the FCO.

The allegations have a nexus with environmental law in the allegation that the parties used technology to conceal that they were not complying with regulations. The antitrust theory of harm linked to these practices will need careful articulation. Daimler has publicly refuted the antitrust allegations stating that its dealings with the other manufacturers were limited to the installation of diesel tank equipment.

The case has some parallels with the recent *Trucks Cartel* settlement (Case AT.39824 – Trucks). The Commission found that MAN, Volvo/Renault, Daimler, Iveco and DAF infringed Article 101(1) TFEU by colluding for 14 years on the pricing of trucks and on passing on the costs of compliance with stricter emission rules required by European environmental standards. The Commission imposed a record fine of EUR2,926,499,000 being the highest aggregate fine imposed to date for breach of EU competition law. The onslaught of private actions has started. Road Hauliers Association has announced that it intends to bring a collective action as a representative body (ie as an opt-out collective proceeding in the Competition Appeal Tribunal). Lenaghan International Transport, an Irish freight forwarding company, commenced proceedings in September 2016 in the High Court in Ireland against DAF, Daimler, Fiat Chrysler Automobiles, MAN, Renault, Scania and Volvo. Bundesverband Güterkraftverkehr Logistik und Entsorgung eV, a German transport and logistics industry association, has stated that it is seeking to bundle as many as 100,000 purchases and rentals in a competition damages action. Claims brought by members of the UK Freight Transport Association are believed to be in the pipeline.

The new probes by the Commission and the FCO may well end up in civil damages actions, as well as administrative fines and prohibition decisions. They may also be an important testing ground for implementation of the Damages Directive

In need of a rethink on empowerment of national competition authorities

As antitrust enforcement against cartels comes of age in Europe, what have we learnt? It is timely to reflect on the Commission's Impact Assessment (IA) of the proposal for a directive to empower the competition authorities of the member states to be more effective enforcers (COM(2017) 0063(COD)).

The IA finds that the main problem from a procedural perspective and specifically under Regulation 1/2003 is that this gives national competition authorities (NCAs) the power to co-enforce EU competition law but without providing them with the means and instruments to do so (IA, p14). The identified problems that affect the ability of NCAs to be more effective enforcers are cited as:

1. Lack of effective competition tools;
2. Lack of effective powers to impose deterrent fines;
3. Divergences in leniency programmes discourage companies from coming clean across Europe; and
4. Lack of safeguards that NCAs can act independently when enforcing the EU competition rules and have the resources they need to carry out their work.

The IA examines four policy options:

- Option 1 – no EU action (the baseline scenario);
- Option 2 – only soft action;
- Option 3 – EU legislative action to provide NCAs with minimum means and instruments to be effective enforcers, complemented by some soft action and some limited detailed rules where appropriate; and
- Option 4 – EU legislative action to provide NCAs with detailed and uniform means and instruments.

The IA acknowledges the benefits of effective enforcement of competition law throughout the EU. It is based on external research and makes quite a comprehensive analysis of the problems and causes. However, it has some pitfalls. First, there is minimal quantification of the costs and the benefits of the various options. Second, the preference for Option 3 has been selected at quite an early stage in the process with Options 1 and 2 being rejected as ineffective from the outset.

Third, there is a lack of defined operational objectives. The stated general objective is to "boost enforcement of the EU competition rules by the NCAs and the functioning of markets in Europe."

It is stated that this requires the achievement of the following specific objectives:

1. Ensuring all NCAs have effective investigation and decision-making tools;
2. Ensuring that deterrent fines can be imposed;
3. Guaranteeing that all NCAs have a well-designed leniency programme in place which facilitates applying for leniency in multiple jurisdictions; and
4. Ensuring that NCAs have sufficient resources and they can enforce the EU competition rules independently. However, this appears to restate the identified problems with an aspirational antidote rather than define specific operational objectives. As a result, it may be hard to monitor, evaluate and measure the implementation of the proposals.

Concluding thoughts

In the prevailing enforcement environment, it is undisputed that there are fewer places for cartelists to hide. The prisoners' dilemma on when to come clean can be very real. Regulators may congratulate themselves into thinking that companies will want to be at the front of the leniency queue but that does not always make sense in jurisdictions where the public enforcement machinery is weak and when private enforcement has yet to achieve its full potential. The aims behind the Commission proposals for reform of NCA procedures to ensure greater consistency and effectiveness are laudable but have been criticised for lack of specificity. Areas that would merit detailed consideration include whether there is a need for an updated and common leniency notice and the imposition of personal civil fines and director disqualification as the norm and not the exception.

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