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Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield

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US and EU antitrust law – antipodes as far as individual liability is concerned?

The US and EU approaches with regard to individual liability for competition law infringements have traditionally been notoriously different. US antitrust enforcement is well-known for its use of criminal sanctions against individuals, from fines to imprisonment. Since 2004, an individual who takes part in a cartel in the US can be imprisoned for up to ten years under the US Sherman act. In 2011 some 35 to 40 individuals received an average prison sentence of 17 months in the USA for cartel activities. By contrast, EU competition law exclusively focuses on infringements of competition law by “undertakings”. And the Commission can only sanction undertakings.

It’s the national competition authority, stupid!

On a closer look however, the contrast between the two major competition law systems is rapidly diminishing. As a matter of fact, employees engaging in antitrust infringements within the EU increasingly run the risk of being sanctioned. Indeed, while the European Commission does not have this power, more and more national competition authorities and criminal law enforcers in the EU can impose fines or even prison sentences on individuals for participating in anti-competitive arrangements, irrespective of whether these arrangements have been prohibited by national or EU competition law.

In nineteen of the twenty-seven Member States of the EU, individuals can currently be sanctioned for infringements of competition law. Fourteen Member States have introduced criminal penalties for competition law infringements, sometimes parallel to a system of administrative fines. For instance, individuals that have been involved in bid-rigging in Austria and Germany can be sent to prison, while in Germany individuals may face fines up to €1 million for other anti-competitive behavior. The Dutch competition authority may fine individuals up to €450,000. In France, individuals may be subject to fines of up to €75,000 and imprisonment for up to four years where they have ‘*fraudulently taken a personal and decisive action in the conception, organization or implementation of cartel activities*’. In Ireland, individuals face fines and/or imprisonment of up to ten years for cartel involvement. In the UK, disqualification, five years imprisonment and unlimited fines are sanctions faced by individuals who participate in price-fixing.

Individual liability is increasingly taken seriously by the EU Member States

Not all Member States actively enforce their provisions on sanctioning individuals yet. In particular, criminal enforcement of competition law infringements have met with substantial practical obstacles. For instance, in the UK there has only been one successful criminal prosecution thus far since 2002. In Ireland, since 2002 individuals have been given a suspended prison sentence for cartel involvement in only two cases (in one of them, in addition to a fine of €30,000). In a number of Member States, provisions to punish individuals still remain largely untested.

That being said, the understanding that adding individual penalties to fines for companies would contribute to combating cartels seems to be winning ground in the EU for at least two interrelated reasons.

First, the legislatures and competition authorities in EU Member States increasingly recognize that employees who run a risk themselves may be more reluctant to draw the company they work for into anti-competitive arrangements. The financial consequences of a personal fine will probably weigh heavily on an individual. In addition, strongly negative reputational effects of a criminal conviction or a personal administrative fine are a strong deterrent for individuals as well. Even if for the sake of confidentiality names of the natural persons are often removed in fining decisions, in practice it is often not very difficult for the societal and professional circles concerned to guess the identity of the persons in question.

Second, national competition authorities realize that individual liability may make it easier for them to uncover cartels. Indeed, most if not all EU Member States that have introduced individual liability have given individuals the opportunity to make use of their leniency systems in their own right. This may make the prisoners' dilemma in relation to leniency even more complicated for all concerned, in particular if employees are involved who have a disturbed relationship with their (former) employer.

As a result, more and more competition authorities in the EU now focus on individual liability. For instance, the UK is strengthening criminal enforcement in preparation of its new competition authority, the Competition and Market Authority, which will become operational in 2014. Last year, the maximum prison sentence that can be imposed on individuals in respect of "hard-core" cartel offences has been increased in Ireland from five to ten years. Both the German and Dutch competition authorities now almost routinely fine not only undertakings but also individuals in their cartel cases. In 2010, the Dutch competition authority even fined individuals for non-compliance with a commitment offered by a company in a merger proceeding. In 2012, the German competition authority fined 31 individuals, whilst in the Netherlands 6 persons were fined for cartel activities.

In other EU Member States, new competences have been recently created to sanction individuals for cartel involvement. For instance, Belgium will introduce a new competition act in the course of this year, establishing a more powerful competition authority which will also have the competence to fine individuals up to €10,000 for involvement in hard core infringements. This year a new law already entered into force in Denmark, which introduced the possibility of imprisoning individuals for up to 18 months for participating in serious and intentional cartel infringements. Under special aggravating circumstances, a sanction of up to 6 years imprisonment may be imposed. Poland is considering a modification to its competition act in the current calendar year, whereby individual liability (fines up to €500,000) for cartel involvement will be introduced.

In short, individuals increasingly run the risk of being punished in the European Union for

involvement in anti-competitive practices.

Individual liability in the EU also for cross-border cartels?

Thus far, national competition authorities in the EU mostly have fined individuals in cases where cartels had a national or local character. However, national competition authorities in the EU also have the competence to apply European competition law to cartels which have an effect on trade between the EU Member States.

For that purpose, the EU legislature set up the European Competition Network (“ECN”) in 2003. Within the ECN, the European Commission and the national competition authorities of the 27 (and with the accession of Croatia very soon 28) EU Member States allocate cases amongst one other. In that context, they also exchange evidence to prove infringements of EU competition law (and national competition law provided that it is applied to the same case and does not lead to a different outcome). This information can be used as evidence to impose administrative and criminal sanctions (including prison sentences) on individuals, if the national law of the transmitting authority foresees sanctions of a similar kind, or, alternatively, if the information has been collected in a way that respects the same level of protection of the rights of defense of individuals as provided under the national law of the receiving authority. In the latter case, such information may not be used by receiving authorities to impose prison sentences, but it can still be used for the purpose of imposing both administrative and criminal fines on individuals.

The general view is that the ECN operates quite successfully. It is therefore likely that in the future national competition authorities will increasingly deal with (parts of) European cartel cases either alone or in cooperation with other competition authorities, where in the past such cases would have been dealt with by the European Commission alone. Thus, while in the past individuals would go unpunished in European cartel cases, in the future they will run a higher risk in the EU of being caught by national competition authorities or criminal enforcers. In some Member States, like the Netherlands, the national competition authority might even impose fines on individuals in cross-border cartel cases while the European Commission punishes the companies in question.

Conclusion

It is unlikely that there will be a proposal to grant the European Commission competence to impose fines on individuals any time soon. But inaction at the EU level is not preventing national competition authorities and criminal law enforcers in the EU from punishing individuals for infringements of national and EU competition law. Individuals who engage in anti-competitive arrangements in the EU therefore increasingly enter a minefield that may not only harm their employers, but may also have severe financial and reputational consequences for themselves. While other differences remain, from the perspective of individual liability, antitrust law in the USA and the EU are certainly growing closer.

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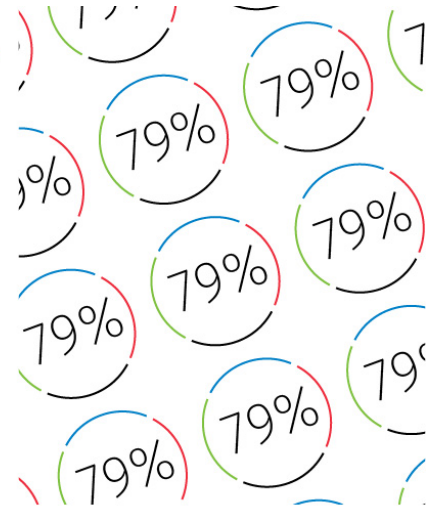
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