

Kluwer Competition Law Blog

Cartel Enforcement: In Europe, Like Canada, Cat & Mouse Game: Remarks by EC Competition Head Almunia, Some Thoughts for Canada

Steve Szentesi (Steve Szentesi Law Corporation) · Friday, April 11th, 2014

Earlier today I read remarks delivered by European Commission competition head Joaquin Almunia in Brussels on the topic of cartel enforcement (see: [Fighting against cartels: A priority for the present and for the future](#)). He discussed, among other things, recent European cartel cases, fines achieved, cartels in innovation and fast moving markets and recent detection strategies (see highlights at the bottom of this post).

Readers of my blog will know that I find cartel detection and enforcement one of the most interesting, if not the most interesting, aspect of working in the competition law area. Perhaps it's the game theory associated with the formation, maintenance and detection of cartels that I find so fascinating.

In Canada, we've had competition laws, including anti-price-fixing and other cartel rules, in place since the late 19th century – as is often pointed out, one year before the U.S. *Sherman Act*. Yet, like other major jurisdictions, there appear to be a steady stream of price-fixing, bid-rigging and other cartel cases.

In reading Vice President Almunia's remarks it seemed to me that the continued ebb and flow of competition/antitrust cartel enforcement in Canada, the U.S, Europe and elsewhere is a constant cat and mouse game with some market participants working to form and maintain cartels and enforcers chasing behind (and occasionally ahead) trying to crack as many as possible.

However, while fines increase and enforcement has been at record levels in Canada, the U.S. and Europe over the past several years (e.g., more than \$1 billion in criminal fines in the U.S. in 2013 according to the DoJ Antitrust Division's recently issued [annual newsletter](#); several record bid-rigging fines in Canada last year of \$5 million and \$30 million; and €8.6 billion in recent fines in the EU), cartel activity seems to continue relatively unabated.

In Canada, this apparent regularity of cartel cases, most of which tend to be global cartels with Canadian effects, has made me wonder whether penalties need to be enhanced or other measures introduced.

These might include, for example: financial incentives for whistleblowers; increasing the size of fines; adding treble damages for civil actions; or for prosecutors, as enforcement policy, to more

assiduously pursue jail time – real jail time – for cartel offences.

With respect to paying whistleblowers – why not? If a cartel is successful, parties may realize monopoly profits of 10-20%+/- . Why not reward whistleblowers in Canada, and pay them (i.e., offer an equal or greater financial incentive), for reporting what have been criminal offences since the 19th century?

Another option in Canada would be, as announced by the DoJ in the U.S., to seek extradition of executives participating or allegedly in cartels to be tried in Canada (for that development see: [DoJ – First Ever Extradition on Antitrust Charge](#)).

The potential penalties for violating the conspiracy offences of the *Competition Act* currently include criminal fines of up to \$25 million, imprisonment for up to 14 years and civil actions (though no treble damages). Canada also has [whistleblower provisions](#) in the *Competition Act*, but these presently provide employment (i.e., non-retaliation) and confidentiality protections to whistleblowers but no financial incentives.

Also, while Canada's competition enforcement body (the Competition Bureau) has signaled over the past several years that personal liability would be pursued in more criminal cases, this has not yet translated to actual prison time for the convicted in [price-fixing](#), [bid-rigging](#) or other cartel cases.

Despite these theoretical penalties, accused in Canada are more likely to face, for example, real jail time for misleading advertising or fraud than participating in or operating a cartel (though this may change with the recent elimination of conditional sentences in Canada for cartel and bid-rigging offences).

In any event, with these general observations on cartel enforcement in Canada, some of Vice President Almunia's cartel enforcement related remarks that I found interesting included:

1. Enforcement Priorities. Cartels remain a priority in Europe. No surprise there – that is also the case in Canada, the U.S. and other major jurisdictions (e.g., Ireland, Australia, New Zealand, etc.). The more pertinent question, however, not only in Europe but in Canada and other jurisdictions appears to be how to better detect and prevent cartels.

2. Emerging and Fast Moving Markets. There is bit of an axiom in the competition/antitrust law world that homogeneous, commodity, declining or other similar industries are most susceptible to price-fixing and other cartel conduct among competitors. Not so says Vice President Almunia (and I found this very interesting):

“... although economists often claim that expanding industries are not suited to cartels, our many decisions in the information-technology sector show that they are. We have even seen a domino effect in this area, where we first intervened in the market for DRAMs in 2010, and then in those for LCDs, TV and computer monitor tubes, and CRT glass. We have also sent statement of objections to alleged participants in smart card chips and optical disc drives cartels. It seems that, when a technology expands, companies are tempted to collude to set prices as high as possible – as was the case for LCDs – and to prop them up when it is being phased-out, as in the cathode ray tubes cases.”

3. Enforcement figures. The European Commission has recently adopted 25 cartel decisions,

resulting in fines of €8.6 billion. While Vice President Almunia referred to the quantum of recent fines as both “deterrent and appropriate”, the deterrent effect remains to be seen.

4. Detection and efforts to evade detection. Perhaps the most interesting aspect for me of Vice President Almunia’s remarks in his recent cartel speech were his descriptions of the European Commission’s efforts to detect cartels and efforts by parties to cartels to evade detection. In this respect, some “techniques” in recent price-fixing, bid-rigging and other cartel cases in the EU have included: momentary pauses of coordination following enforcement; reducing communications with competitors; the use of only web-based e-mail accounts; special mobile phones and SIM cards; and code names for meetings, members and products.

5. Enhanced forensic detection. According to Vice President Almunia, the EU continues to rely on and enhance its forensic capabilities for cartel detection – for example, retrieving “thousands of deleted documents” during recent dawn raids in the power cables cartel case (see: [Commission fines producers of high voltage power cables 302 million Euro for operating a cartel](#)).

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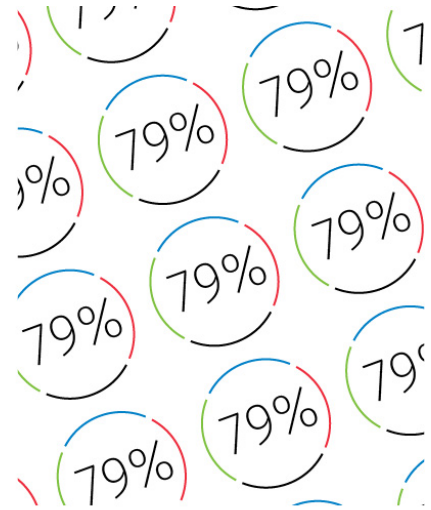
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