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Is the Definition of a Cartel Ballooning?

Rein Wesseling[1]

The media tend to refer to gangs that produce and distribute drugs as "cartels." Of course these are not cartels as we, as antitrust lawyers, traditionally use the concept. In fact “drug cartels" seem to operate as businesses in the various regular forms we know: conglomerates, cooperatives, or "one-product firms." Note, too, that the media habitually refer to rival drug cartels, meaning that these cartels are competing fiercely. So, in the antitrust context, are these cartels? To the extent we understand the agreements underlying the drug cartels, they would not seem to be that. An antitrust assessment of the workings of drug cartels, therefore, would need to be undertaken on the basis of a "rule of reason" analysis.

One may wonder therefore why the reference to drug gangs as "cartels" seems ineradicable. Perhaps that is due to the fact that there is no set definition of the concept of a cartel. Traditionally, however, this has not been an issue in the enforcement of antitrust laws around the world. Although the concept is perhaps difficult to define, cartels have historically been easy to recognize.

The application of the cartel concept has been restrained by a number of factors. The focus on prosecuting cartels originated and was historically centered in the United States, where the cartel rules are enforced within a criminal law framework. It is almost inherent in criminal law enforcement that the legal norms that businesses and individuals have to comply with, lest they might go to jail, have to be clearly defined and curtailed. And, as one of the contributions to this issue highlights, "hard-core cartels"—those which can be prosecuted criminally—need to be "naked" and typically "covert" agreements between competitors not to compete, fix prices, or divide markets.[2] There has been no need for a strict definition of cartels since a jury could work on the basis of the "elephant test;" in spite of the absence of a definition, cartels can be recognized instantly when spotted in the evidence

Arguably, however, the factors preventing the cartel concept from widening and becoming more blurred are no longer as pre-eminent as the concept has moved away from the U.S. criminal law framework. Numerous authorities are enforcing national or regional competition laws around the world. Many of them focus on prosecuting cartels, but the applicable governing laws diverge considerably as to procedures, institutions, and substance. Thus we are witnessing a process in which the cartel concept is arguably inflating. As the various contributions in this issue illustrate, this is a process that is going on in numerous jurisdictions worldwide.

If one were to (re-)construct the cartel concept it would arguably be limited to behavior fulfilling the following cumulative conditions:

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[2] M. Howard Morse, *Cartels: Confusing Covert and Ancillary*, 12(1), CPI ANTITRUST CHRON. (Dec. 2013).

- A "naked"…
- understanding…
- between competitors…
- restricting competition between them in such a way that it is evident, on the basis of experience, that competition will be restricted.[3]

Looking at developments in cartel enforcement around the globe—as we do in this issue—it emerges that none of these inherent limits to the cartel concept is inviolable.

- "Naked" – Howard Morse reports on a case in Australia in which an element in a broader business integration agreement was, in his view, unreasonably qualified as a cartel arrangement.[4] In his article he strongly disagrees, arguing for limiting the cartel concept to clearly "naked" restraints.
- "Understanding" – Cecil Saehoon Chung and others report on a case, now pending before the South Korean Supreme Court, in which the central question is whether the mere exchange of commercially sensitive information implies the required understanding (to fix prices as the competition authority posited).[5] And in the European Union there is continued controversy over the question whether the mere exchange (or even receipt) of commercially sensitive information between competitors is automatically a violation of the EU cartel prohibition.
- "Between competitors" – Omar Guerrero Rodríguez & Alan Ramírez Casazza discuss a recent case in Mexico in which the horizontal element seems to be absent.[6] Likewise competition authorities in the European Union have introduced the concept of "hub-and-spoke" cartels. At present it is not clear what the boundaries of this concept are, but if such situations were to be prosecuted as cartels (or "object infringements") one would think that there would have to be strong evidence of a horizontal understanding as one characteristic.
- Clear and certain restriction of competition – It is in relation to this criterion that the case law in the European Union is taking a surprising direction. While the cartel prohibition in the EU Treaty (the Treaty on the Functioning of the European Union) does not refer to cartels at all, it does distinguish between behavior with the "object" to restrict competition and other types of behavior. Object restrictions would appear to be those restrictions that, on the basis of experience, almost always lead to a restriction of competition, in particular

[3] Cf. the definition the EU Commission interestingly proposes in Article 4(12) of its Proposal for a "Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union" (COM (2013) 404 final, 11 June 2013).

[4] Morse, *supra* note 2.

[5] Cecil Saehoon Chung, Sung Bom Park, & Seung Hyuck Han, *Ballooning Definition of Cartel and Information Exchange in Korea* 12(1), CPI ANTITRUST CHRON. (Dec. 2013).

[6] Omar Guerrero Rodríguez & Alan Ramírez Casazza, *Cartels Horizontally: Assuming the Obvious*, 12(1), CPI ANTITRUST CHRON. (Dec. 2013).

"naked cartels." In the EU context, with its focus on establishing the Internal Market, it is perhaps no surprise that the "object" category is not limited to horizontal cartels.

Recent case law, however, seems to suggest that the "object" criterion is to be interpreted very widely. In *T-Mobile* the EU Court of Justice ruled that an agreement may have the "object" to restrict competition if the agreement "has the *potential* to have a negative impact on competition", that is to say, in the words of the Court, that it be "*capable* in an individual case of *resulting* in a restriction of competition".[7] In *Allianz Hungária* the EU Court of Justice ruled that an (essentially vertical) agreement could have the "object" to restrict competition if a national system, unrelated to competition law, required independence between suppliers and customers of certain services and this independence is affected by a (bonus) arrangement where the "*proper* functioning of the market is *likely* to be significantly *disrupted*" by the arrangements at issue.[8]

In the United States, however, there seems to be resistance to this widening. For example, in one of the first cases involving the alleged LIBOR "cartel," Richard Taffet & Michael Whitlock note that the Judge's decision was based on a negative to the question: "To what extent is the setting of a benchmark rate, which is administered, calculated and published by a third party, a competitive process the alleged manipulation of which is a harm that the antitrust laws are intended to prevent?"[9]

If it were to be established that the cartel concept is indeed "ballooning"—and the contributions in this issue certainly provide some indication that this is happening—the question remains: What are the implications? Answering that question goes beyond the scope and intention of this issue of CPI. Yet, it would be interesting to examine more deeply whether the effectiveness of the cartel prohibition will be compromised. Where the cartel concept is used outside of situations in which there is an evident horizontal price-fixing agreement, it is to be expected that "equilibrating tendencies" will build in additional defense mechanisms.[10] Such tendencies could potentially complicate procedures in which actual cartels are being prosecuted.

And, while there is—to the best of my knowledge—no empirical evidence that the expansive interpretation of the cartel prohibition is leading to "over-enforcement" risks, it would be interesting to assess whether wider use of the cartel concept (or for that matter the "per se" or "object" infringements) increases the risk that competition authorities will commit "type I errors" or sanction "false positives," i.e. imposing fines on companies for behavior which does not have any negative effect on competition. The contributions in this issue are therefore only a first step in what could be a broader research agenda in the area of antitrust law enforcement.

[7] Case C8/08, T-Mobile and others [2009] ECR I-4529 (emphasis in quote added, rw).

[8] Case C-32/11, Allianz Hungária and others, judgment of 14 March 2013 (emphasis in quote added, rw).

[9] Richard Taffet & Michael Whitlock, *Antitrust and Financial Benchmark Litigation: The LIBOR, Foreign Exchange, and Platts Cases*, 12(1) CPI ANTITRUST CHRON. (Dec. 2013).

[10] Cf. Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 GEO. L. J. 1065 (1985-1986).