

PROSECUTING CARTELS: THE USE OF INDIRECT AND DIRECT EVIDENCE

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OUTLINE

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 - Evidential standard
 - Settlement procedure
- **Building a case**
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 - Indirect evidence
 - Bid rigging - special types of indirect evidence
- **Cases**
 - Waste collection
 - Facility management Litoměřice
 - Wood Pulp
 - Raw material mining (Shale)
- **Final Remarks**

PROSECUTING CARTELS – GENERAL INTRODUCTION

Cartel is

- a group of similar, **independent companies** which join together to fix prices, to limit production or to share markets or customers between them.
- is **anti-competitive horizontal agreement** infringing Article 101 of the Treaty on the Functioning of the European Union (TFEU) or its national equivalents.
- Article 101 TFEU (and its national equivalents) prohibits agreements between companies **which prevent, restrict or distort competition** in the EU and which may affect trade between Member States (anti-competitive agreements).



PROSECUTING CARTELS – GENERAL INTRODUCTION

Cartel is

- anti-competitive horizontal agreement **by object** which means in practice that there is **no need to prove its anti-competitive effect to successfully prosecute it** in the EU competition law system.
- sometimes called „**hardcore**“ anti-competitive **agreement**
- **highly secretive = very difficult to detect and prosecute cartels! (review system)**
- infringement of competition law and its detection, investigation and prosecution is difficult task needs some specific instruments



PROSECUTING CARTELS – GENERAL INTRODUCTION

- **Typical cartel behavior**
 - *price fixing*
 - *market allocation*
 - *output restriction*
 - *bid-rigging*
- **Hard to distinguish** between **price** and **non-price related conduct** (bid-rigging)
- From economic point of view **cartel** generally **leads to higher prices, lower output** and **decrease of consumer welfare**
- In the EU competition law system the real **effect of cartel is not usually investigated** (not necessary for its successful prosecution)



PROSECUTING CARTELS – GENERAL INTRODUCTION

- **Judicial Review system**
 - EC and NCAs **decisions** can be (and **often are**) **reviewed by courts**
 - **EC and NCAs have to meet evidential standard** otherwise their cases are rejected
- **Evidential standard**
 - **Burden of proof**
 - Obligation to prove that cartel agreement was concluded
 - CAs bears the burden of proof
 - **Judicial standard of prove**
 - Level of certainty needed to be proved at court
 - In competition cases standard of prove is not defined but is generally very high, almost similar to criminal cases (very high) because of hefty fines for competition law infringement

To prove cartel EC and NCAs need sufficiently precise and consistent evidence that the alleged infringement took place = „**bullet-proof cartel story**“



PROSECUTING CARTELS – GENERAL INTRODUCTION

Settlement

- settlement is specific procedure which core is that upon parties **acknowledgement** of infringement and **regarding legal and factual qualification** of their infringement they will receive **reduction from fines**
- allows **faster, more streamlined decision** and to **allocate resources to other cases**.
- Settlement cases are **usually not appealed**.
- Settlement procedure is **not source of evidence**.



BUILDING A CASE – SOURCES OF EVIDENCE

- **Complaint** (general public, other government bodies, police, other cases in different MS, whistle-blower)
- **Own-initiative investigation** (press, tv, internet, decisions of other authorities, targeted market study – usually only source of very indirect evidence)
- **Leniency application** (main source of direct evidence, high differences in success rate of leniency CAs success)
- **Inspections** (conducted based on previously gathered evidence – problem of fishing expedition, one shot – possibly very good direct evidence might be captured)
- **Request for information** (right against self incrimination, usually only indirect and supportive evidence could be obtained)
- **Witness** (might be criminal law interplay)
- **Economic evidence** (solely on economic evidence it is almost impossible to prove cartel)
- **Wire tapings** (Different treatment across EU)
- **Use of special agent** (USA)



BUILDING A CASE – DIRECT AND INDIRECT EVIDENCE

- No clear line between direct and indirect evidence. (especially regarding communication evidence)
- All types of evidence are helpful
- They should be used together (pieces of puzzle)
- Quality matters (direct evidence in the form of testimony from a single, unconvincing witness is less credible than strong and cumulative circumstantial evidence)



BUILDING A CASE – DIRECT EVIDENCE

- Types of direct evidence (smoking guns)
 - Formal agreements (very rare nowadays)
 - Business plans
 - Minutes of meeting
 - Corporate statements
 - Oral statements
 - Communication
 - Directly concerning cartel behavior
 - Regarding future prices, outputs, strategy, bidding patterns
- Leniency as a source of direct evidence
 - Principle - competition authorities are to grant immunity from fines to the undertaking that reports its participation in a cartel which
 - enables uncovering and prosecuting of a cartel
 - Is based on „race“ principle
 - Two types – immunity applications, reduction of fines application
 - Extreme importance of leniency – between 2011-2015 in 21 of 23 cartel decisions by EC immunity has been granted

BUILDING A CASE – INDIRECT EVIDENCE

- Communication (more important)
 - do not describe the substance of a cartel
 - is not directly linked to cartel (records of telephone contacts among suspected cartel participants, information about traveling to a common destination, records of meetings in which they participated, attendance at trade fairs, press announcements etc.)
- Economic evidence
 - Conduct (more important)
 - how company behaves on the market and is that conduct in line with economic thinking – game theory? (*parallel pricing, output limitation, same delivery schemes, same surcharges*)
 - Structural
 - Is given market prone to collusion? (*market shares, homogeneity of product, barriers to entry, number of players, market transparency*)

BUILDING A CASE – INDIRECT EVIDENCE

How to prove cartel without direct evidence?

- Very difficult – need to prove that undertakings behavior on the market is anticompetitive because of previous coordination with its competitor(s) and is inexplicable by parallel behavior, tacit collusion and/or by general coincidence
- Chain of indirect evidence – usually at least some communication supported by real market behavior
- It is almost impossible to prosecute cartel based solely on economic evidence (other plausible explanation of conduct – unilateral price following etc.)

BID RIGGING - SPECIAL TYPES OF INDIRECT EVIDENCE

- Special types of indirect evidence in bid rigging cases
 - Regarding one procurement
 - Wider bidding behavior
 - Compensation
- Repetition of bids + winner and prices
- Rotation
- Withdrawing pattern
- Subcontracting between bidders



BID RIGGING - SPECIAL TYPES OF INDIRECT EVIDENCE

- Unusually high prices, margins
- Number of bidders
- Indexes in bids
- Similarities in bids (mistakes, text, ordering of documents, fonts, declarations, brands etc.)
- One delivering company
- One time of submission
- Unacceptable bid form strong undertaking (criteria, missing statements, extremely high bid)
- Alternative bids



CASE EXAMPLES - EVIDENCE

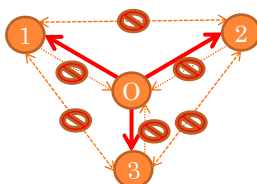
- **Waste collection** (from one bid to complex agreement)
- **Facility management Litoměřice** (just one bid, only one piece of one –way communication)
- **Wood Pulp** (is only economic evidence enough?)
- **Seamless Steel Tubes** (anonymous evidence)
- **Raw material mining (Shale)** (complex cartel in formal agreement)

WASTE COLLECTION

- One specific procurement – „very strange similarities and patterns in bids of three out of four bidding companies“
- Inspections – lot of indirect and some direct evidence
 - cartel indirect communication,
 - alternative bids
 - remarks of general agreement
 - some information about specific bids
- Communication considered by the Czech NCA to be proven (it is necessary for companies in this sector to communicate on daily basis)
- Leniency at later stage (enabled to prove complex agreement)
- Finally settlement – no court review

FACILITY MANAGEMENT LITOMĚŘICE

- Separate e-mails with prices sent to other bidders by O



- Absolutely no additional communication between 1,2,3 and O has been found
- But 1,2,3 submitted bid prices precisely according to email
- Pending at Supreme Administrative Court

WOOD PULP

- Parallel conduct – the companies' price announcements and price increases cannot be explained as independently chosen parallel conduct in given conditions
- The standard that it applied to this inquiry was whether concertation constitutes the only plausible explanation for such conduct

Court review

- The court did not rule out concertation but also found other legitimate reasons for the conduct under consideration.
- Simultaneity and parallelism of announced prices could be explained by the very high degree of transparency that existed in the market. The court therefore annulled the case

SEAMLESS STEEL TUBES

- Written statement of one executive made during inspections
 - Many other indirect evidence supporting given statement
- Court review
- Acknowledged corroborative effect on the statement
 - No need to prove the actual existence of harm - sufficient to prove that an agreement is potentially capable of producing such an effect
 - Impossible to dismiss a document as unreliable on the ground that the Commission which produces it refuses to divulge its source
 - statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence

RAW MATERIAL MINING (SHALE)

- Leniency
- Agreement from 1998 contained cartel clauses regarding planned opening of mine (under leniency)
 - Output limitation from new mine
 - Customer allocation – prohibition to directly offer material from new mine to customers of other company
 - Minimum selling prices of raw material from new mine
- Inspections - great amount of communication (unnecessary)
- Finally settlement – no court review

FINAL RECOMMENDATIONS

- Always try to build a strong story (many pieces of story gives good plot)
- Set the story within plausible scenario (market characteristics)
- Use evidence together rather than individually – cumulative effect
- Exclude as much as possible coincidence and possible parallelism
- Prefer quality rather than quantity
- Be very careful when using econometric or statistic as evidence - ambiguity



Questions?

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