Competition in the Market and Application of Competition Law

Introduction

The Cartel has been defined as the “supreme evil of antitrust” shaking the foundations of an ethical structure of the existing competition in the market. In 1996 the European Union introduced the concept of the leniency programme to ease the Commission’s burden and time in detecting cartel. Leniency programme gives immunity or discount in fine to the first undertaking in the cartel, reporting the Commission. Prior to the leniency programme cartel were mostly detected by own initiatives, customer complaint, notification or other such methods which were time-consuming and by the time the investigation concluded the cartel had already affected the market flow for an adequate time period. The first cartel detected by the leniency programme was in 1998 in the British sugar case. In the recent decade, leniency has become a common detection method for the Commission.

This essay will discuss and look into the utmost concern of the authorities to look into the policies adopted by the firms engaged in a cartel for the ethical conduct of the business. The leniency provision has opened the doors to debate upon its deterrent effect on the firms. An analysis in the manner of deterrence to expose and curb cartel in an efficient and effective way has been made with the introduction of the leniency programme when the application is brought by the undertaking which had taken enough compliance programme. The essay also discusses on the discounts granted in fines in the Leniency programme if is justified when the company has taken adequate steps to comply with the Competition law prior to the formation of the cartel to discourage its employees from getting involved in any act violating the Competition law. Lastly, the essay has established a relationship between leniency application, deterrence and compliance mechanisms adopted by the undertakings.

Legislative mechanisms

Treaty of Functioning of the European Union (TFEU) lays two prominent rules for the policy of European Antitrust law. Article 101 of the TFEU states that if two undertaking by mutual consensus fixes some share in the market or the price to dominate the market it leads to the creation of a cartel. “Charging unfair prices, limiting productions or by refusing to innovate to the prejudice consumers” are some of the examples of prohibitions of firm dominating the market solely to abuse its position is laid down in the Article 102 of TFEU. The National Competition Authorities are the competent authorities to look into applications of the Articles 101and 102. A complaint filed before the Commission undergoes the similar procedure as the complaint filed by other legal methods. However, in “cartel cases, the fine is increased by a one-time amount equivalent to 15-25% of the value of one year’s sales as an additional deterrent and the maximum level of fine is capped at 10% of the overall annual turnover of a company.” The European Commission amended the Leniency Notice in 2006 where the provision that the undertaking involved in the cartel to receive immunity essentially has to give evidence and information about the cartel to the Commission first. The company giving out the information about the cartel voluntary has to submit the Corporate Statement either in a written or oral

medium by disclosing its identity. The EU guidelines on methods of setting fines state that the undertakings having cooperated with the Commission effectively beyond the Leniency notice or any legal obligation, the basic amount of the fine may be reduced by the Commission. However, for the undertaking to qualify for immunity it has to fulfill some of "additional qualifications" such as submitting the application procedure according to the administrative procedure of the Commission. The business is also expected to end the cartel after submitting the application still upon the desire of the Commission the business may involve in the cartel even after the application to conserve the solidarity of the inspections.

Jurisprudential views in deterrence

Deterrence is an integral element to enforce the Competition law and policy. In many instances, the employees individually involved in the cartel are not penalized and the company they are associated during the formation of the cartel has to indemnify for the losses to the authorities. The technology advancement has made the communication easier and forming a cartel has become easier with just a call.

Detecting, prosecuting and punishing the offender are the three rules of Becker's theory of deterrence. Werden and Simon, competition economists disagreeing with the Beckerian approach in law enforcement specifically in the cases involving cartels have opinioned that fines are less costly for the society thus are given priority than the imprisonment in the competition law cases. The prison sentences for a short period of time leaves a psychological and medicatic result on the people prosecuted with the white collar-crime and the expense is cheaper than paying heavy fines by the corporations. The different views on fines are 'charging fines against firms and individual employees can be relatively less effective than imprisonment of the managers, because firms are protected by limited liability and they can easily indemnify managers by paying their own fines when they acted in the interest of the firm. On the other hand, the design of the optimal sanction against corporations should consider that firms can be sanctioned both by the market and by the presence of a principal-agent problem between shareholders and managers, and between managers and their subordinates.' There is a possibility that the business involved in the cartels are not always motivated by profit margins but also are the result of some personal gain of the employees. Therefore undertakings take the recourse of strong compliance mechanism to curb the practice of the cartels by its employees to avoid the deterioration of the organizational image. It is important to note that the deterrence in some jurisdiction are civil in nature whereas some have criminal sanctions for the cases involving infringement of competition law. Imposing criminal sanctions in the infringement of competition law evolved in Europe with Ireland criminalizing the infringements of antitrust law in 1996. Some of the non-EU countries like the US, Japan and Korea have also imposed criminal sanctions for the undertakings involved in the cartels. The criminal sanction in the cases involving cartel has a clear deterrent effect in the undertakings as they can imbibe more compliance mechanism to keep a check on its employees. It can be argued in support of the criminal sanction that the individual involved in the cartels when are imposed with punishment cannot be indemnified by the business undertakings and leaves a direct impact on the individual. The deterrence effect of the charging high fines because of the involvement of a few people in the cartel also creates an imbalance in the financial structure of the whole organization which may act as a barrier to the healthy competition in the market of a specified product.

The judges and the bodies generally do not favor charging high fines as the firms may reduce its credibility and there is a possibility for the firm to get bankrupt which will reduce the deterrence effect of the firm. Buccirossi and Spagnolo, competition economists taking into consideration the standards laid down in the 'Beckerian' cost-benefit methodology' have argued that the European Commission sanctions have left a very little deterrence effect prior to implementation the leniency programme. Leniency programme is a beneficial tool to investigate in an existing cartel if the level of sanction increases. However, Buccirossi and Spagnolo state that higher level of sanction does not qualify imprisonment as an effective mechanism to deter an individual. Imprisonment as a medium of sanction in the leniency programme has its own disadvantages as the government has to spend more to keep up the prison cells. In determining the amount of fine it is also important for the fine amount to exceed the profit which the undertaking gained from the cartel.

Cartel culture and participation in leniency programme

Cartel culture is common among the business enterprises having its trade in metals, oil and pharmaceuticals. The singularity among these businesses is the oligopoly market. The oligopoly market is dominated by a few firms and there are very few small firms in the market operating its business in these products so formation of cartel becomes easier with such economic structure. The firms having a large-scale operation to remain supreme form a cartel fixes the price collusively. In the enforcement of law relating to a cartel, the loss incurred by the enterprises by any of the cartel member cheating should be more than the profit earned from the cartel. The participation of the firms differs from the enforcement of the law. It is pertinent to note that while determining the necessary conditions for the sustainability of any illegal agreement the disproportionately of the loss from cheating and gain from the cartel plays an important role which is known as 'incentive compatibility or self-enforcing constraint'.

The grant of immunity from fines to encourage the compliance may be beneficial partially when the mechanism is not existent in the organization. However, it is also difficult to give discounts in fines when the cartel is formed between the enterprises registered with a different jurisdiction. The difficulty in the enforcement of immunity can be discussed with the Archer Daniels Midland (ADM) case. ADM, an agriculture processing company based in Illinois, the US was found guilty in the cartel involved with international lysine and citric acid in 2003 by the European Commission. The cartel initially involved three international companies namely Ajinomoto from Japan, Masaru Yamamoto from Korea and ADM from the US and later joined by the five subsidiary companies of the existing companies in the cartel. The cartel first met in Mexico in June 1992 followed by their meeting in Paris in the same year in October to discuss and fix the future price schedule. In the first meeting, ADM was dominated by the two undertakings and there was disagreement in the cartel for the equal distribution of the share in the market. A fake agenda and later an imaginary lysine association was put forth in the second meeting in Paris by ADM without leaving an impression on the members of the cartel about their future course of action to approach the law enforcement authorities. ADM started to cooperate with FBI soon after the conclusion of the meeting in Paris. To get substantial evidence the meetings held after 1992 were recorded in the form of audio and video recordings. The cartel continued till 1995 until the FBI raided ADM's Decatur and Heartland Lysine office in Chicago. The Japan, home office of Heartland Lysine and Ajinomoto was duly informed about the raid and the evidence was destroyed but some of the documents were left unnoticed while destroying the evidence which was stored at the house of the individual representing Ajinomoto. When the investigation

was initiated by the authorities the President of the ADM Europe food additive division, Barrie Cox was interviewed in order to determine the amount of fine. The ‘immunity agreement’, a plea agreement was entered between the government and the President to negotiate and settle the charges on the organization. It was established by the authorities that only the President of the ADM’s food division would be exempted from any charges and the CEO and the President and the Board of Director, Andreas and Wilson respectively who participated in the meeting would not get an exemption from any plea agreement. Subsequently, ADM concurred to pay a fine of $100 million and also consented that the employees would cooperate with the government. In the District Court’s appeal by Andreas and Wilson, it was contented as a defense that the cartel continued till 1995 to deceive the other members of the cartel in pursuance to help the authorities with evidence. However, their active participation in determining the sales and price level in the market per se amounted to the violation of the antitrust law and they were aware of the consequences of the act with the knowledge of the act. ‘Effect theory’ originating from the Gypsum case played a prominent role in deciding the final decision of the ADM’s case. The court held that the ‘the defendants must have intended to “help accomplish” the known goal of the conspiracy is entirely consistent with the reasoning and holding of U.S. Gypsum.’ According to the effect theory, the criminal intention includes the intent of the undertaking to enter into an anti-competition agreement and the steps taken by it in cartel conspiracy.

In the year 2000, the parties were presented before the European Court of Justice. One of the key points in the decision of the case was to determine the validity of the method applied for fining. The Commission held that the market structure plays a vital in analyzing the method of calculation of the fine and that the EUR 20 million is a hefty amount and is imposed only in very serious infringement cases. The Commission while looking into the deterrent effect of the fines stressed upon the undertaking’s prior knowledge for the commission of any anti-competitive act. The principle of ‘equal treatment’ enshrined in the Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was considered while reducing the fine imposed by the Commission by US 9th Circuit Court.

In such a peculiar situation when some of the cartel members are a non- EU members the conflict of jurisdiction arises. The fairness and equal treatment of the undertakings are possible when the principle pillars of the law are similar in nature. The ECJ held that the fairness was not observed by the courts of the US and the sanction conferred was restricted to the undertakings involved in the cartel of the US and ordered the Commission to bear ‘one-tenth of the cost incurred’ by ADM and the remaining amount of the fine was to be borne by ADM.

Thus the complexity of the law of different jurisdictions and forming a focal point in delivering the final judgment has been one of the most challenging parts in the Leniency applications. Further, the applicant’s involvements in the cartel in dominating the market and prices also have to be taken into consideration while fixing the amount of fine. Nevertheless, the involvement of the top management of the undertaking in forming a cartel shakes the foundations of the compliance mechanisms adopted by the undertaking.

Importance of compliance mechanism in determining the deterrence

Compliance methods are the steps taken by the undertaking to make the employees aware of

the consequences of the formation of a cartel. If the employee of a firm engages in forming a cartel after taking steps to adhere against anti-competition practices the intensity of the deterrence is affected by the level of its compliance. Beckenstein and Gable, antitrust economists found in a survey with the independent and in-house US antitrust practitioner's that 'frequency of violations of the Sherman Act and on the causes that led firms to commit them' that the ignorance of the law and 'ambiguity in law' were the prominent reason for the anti-competitive practices. The Nielsen and Parker research exhibit a market-oriented result stating that the compliance level is determined by the scale of business operation. Thus, the larger the scale of the business more is the compliance mechanism required.

According to the Office of Trade Fair's report on 'The impact of competition interventions on compliance and deterrence' the three basic pillars of compliance are 'knowledge and awareness of competition law, sanctions and enforcement, and voluntary compliance measures' respectively. Knowledge and awareness help the employees of the firms in limiting their activities to dominate the market. It also helps the undertakings to avoid any breach in the anticompetitive practice and also to keep a track of the legally identified risk areas. It is interesting to note that the liability of the infringement by the subsidiary companies rests with the holding company. Sanction and enforcement encourage the management to ensure to have a strong compliance mechanism to prevent the undertaking against the penalty. Lastly, voluntary compliance measure is the measures taken by companies to implement the agenda to build a strong compliance network within the undertaking. Leniency policy is one of the most important tools for an undertaking in determining the deterrent effect.

It has been questioned by many jurists if the companies having taken strong compliance mechanisms granted heavy discount in fines in leniency programme is justified or not. The steps taken by the Commission in deciding the fines of the Leniency application clear that compliance cannot be taken as a sole method to get discount as the undertakings can set up a compliance method after fling the Leniency application to avail the discount in fines. In the case of Arriva, no discount in fines was granted as the Office of Trade Fair found during the investigation that the senior managers trained in the compliance programme were actively involved with the cartel. Thus, by making a logical analysis between the deterrent effect and compliance programme adopted by an undertaking it can be deduced that the compliance is an effective tool in determining the credibility of measures taken by an undertaking to curb any anti-competition practice but it is an easy tool for a company to escape from the heavy fines.

Conclusion

To conclude leniency and compliance form the part of the same thread to escape a heavy fine. However, compliance may be taken as an excuse to be granted a discount in fines only in certain exceptional cases where the top management is not involved in the cartel and the undertaking has taken sufficient means to comply with the leniency policy. The effect of deterrence can be determined if the undertaking filing the leniency application suffers a loss in production after the payment of the fine. Thus, the grant of heavy discount in fine is not justified when the undertaking has taken sufficient compliance mechanisms to prevent the formation of a cartel. The effect of deterrence after granting heavy discounts in fines can be described in the words of Robert McNamara, an American business executive, 'One cannot fashion a credible deterrent out of an incredible action.'