

## **ACTIONS AGAINST CARTELS**

**Lucia IRINESCU**

Alexandru Ioan Cuza University

Iasi, Romania

*lirinescu@yahoo.com*

**Abstract:** *Compliance with competition on a market provides economic progress, consumer welfare and freedom of movement of goods, services and capital. The distortion of competition is most often the natural consequence of concerted practices between organizations, abuse of dominant position of undertaking a merger or state subsidies to the discretion of enterprises.*

**Keywords:** *competition, anticompetitive practices, cartels*

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### **WHAT ARE CARTELS?**

The provisions of art.101 of the Treaty on the Functioning of the European Union prohibit and declare incompatible with the common market all the agreements between organizations, decisions by associations of firms and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within internal market. Agreements between enterprises, decisions by associations of organizations and concerted practices may be grouped into the concept of the Entente. In our law, the legal regime of ententes is established by art.5 of the Competition Law 21/1996, which is similar to art.101 para. (1) of the Treaty.

The cartels are agreements between two or more economic operators aimed at distorting competition. The notion of understanding is generically used to refer to a cartel and represents any agreement, written or recorded orally, public or secret, regardless of name, between one or more economic operators (Didea, 2014). It is not necessary that the parties will take the form of a contract. The European Court of Justice considered that the cartel may consist of a single action in a series of actions or behavior in a way. For the deal to fall under art.101 para.(1) of the Treaty, it is sufficient that operators should have expressed their common intention to adopt a certain conduct on the market. European case law states that an "anticompetitive agreement", so called generically exists where the parties adhere to a common plan of action, not absolutely necessary to have a written, formal agreement providing, possibly contractual penalties. Such a definition covers even the concept of concerted practice that operates with both national and European law.

Cartels can take many forms, depending on how the willingness is manifested namely actual agreements, decisions and concerted practices Association. The agreement between organizations is based on a concurrence of wills which may consist of a simple commitment, convention or contract clause concluded in writing or otherwise, expressed or implied, public or secretor even gentleman's agreement. Agreements can be horizontal, between competing organizations, which are in the same market at the same stage of the economic process (producers, distributors) and vertical, which intervene at different stages (between manufacturers and distributors of the same product). Vertical agreements were considered by Council Regulation no. 330/2010 / EC on the application of art.101 para.(3) of the Treaty to categories of vertical agreements and concerted practices as all those vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing organizations, between certain competitors or by certain associations of retailers it also includes vertical agreements containing auxiliary provisions on the assignment or use of intellectual property rights. The term "vertical agreements" includes the corresponding concerted practices.

Decisions of association is a preliminary manifestation of will by which a trader agrees to group together with other collective entity which shall run only if an agreement is finalized. The concept of concerted practice aimed at "a form of coordination between organizations which, without having reached the stage of an agreement, deliberately substitutes the risks of competition with a practical cooperation between them. Therefore, without entering the category of formal cooperation between organizations as agreements / arrangements, the concerted practices are achieved through coordinated behavior and through direct or indirect contact that replace the independent acting of businesses. We are talking about a conscious, cooperative behavior. In the absence of "coordination" and "cooperation", a behavior made independently, unilaterally, even if it seems to be an effective coordinated action, shall not constitute a concerted practice. As regards the distinction between agreements / concerted practices that have the anti-competitive object and anti-competitive effect which the Court of Justice of the European Union recalls that anti-competitive object and effect are not cumulative conditions, but an alternative to assess whether a practice is prohibited or not is covered in Article 101 (1) TFEU. In addition, it should be noted that, in assessing whether a concerted practice is prohibited by Article 101 (1) TFEU the taking into consideration of its actual effects is superfluous when it proves that its object is the prevention, restriction or distortion of competition within the common market.

## **SANCTIONS**

To be sanctioned, an anticompetitive agreement must meet a number of conditions: to be an agreement between undertakings; have as their object or effect the restriction of competition; affect trade between states or restrict competition in a national market or a part thereof. As a general rule, ententes are void. However, exceptionally, some Entente are not covered by art.101 para.(2) of the Treaty on European Union and Art. art.5 paragraph.(1) of Law no.21/1996, when they meet the following conditions:

- contribute to improving the production or distribution of goods or to promoting technical or economic progress, ensuring at the same time, consumers with the resulting benefit of the parties to that agreement, decision or concerted practice;
- do not impose on the organizations concerned restrictions which are not indispensable to the attainment of these objectives;
- do not give the organizations the possibility of eliminating competition in a substantial part of the products in question.

Art.8 para.(1) of Law no.21/1996 establishes the rule that art.5 paragraph.(1) does not apply to agreements considered to have a minor impact on competition. This is the situation of economic operators that do not exceed thresholds of 10% and 15% as the parties to an agreement are or are not actual or potential competitors, on one of the relevant markets affected by the agreement.

If practices that have the object of fixing prices when selling products to third parties, limit output or sales or sharing of markets or customers, operators will not benefit from the exemption from the law because these agreements are presumed to affect significantly competition [art.8 par.(4) of Law no.21/1996].

Violation of art.5 of Law no.21/1996 and of art.101 of the Treaty on the Functioning of the European Union constitutes a contravention and it is punishable by a fine of 0.5% to 10% of total turnover achieved in the previous financial sanction following facts. If a person participates in fraud at the conception, development or organization of a cartel entails criminal liability of individuals. Criminal proceedings shall be initiated upon referral by the Competition Council. However, there are some exceptions, of those agreements that do not attract sanctions because they produce positive effects in the competitive environment. The exemption conditions of eligibility are detailed in European regulations on the application of art. Paragraph 101 (3) TFEU.

## **LENIENCY POLICY**

Leniency is a facility provided by the competition authorities to economic operators involved in a cartel (Coman, 2011). This implies that enterprises which cooperate with competition authority benefit from exemption from the application of the fine (fine 0) or reduce the fine as appropriate. In this regard, the Competition Council adopted Guidelines on the conditions and criteria for implementing a policy of leniency according to Art.51 para.(2) of the Competition Law no.21/1996.

The Competition Council granted immunity from fines to an economic operator if it is the first to provide evidence allowing the launched of an investigation on a possible cartel and conduct unannounced inspections at the premises of the parties involved and proving a serious breach of competition law. Competition Council verifies that the conditions for obtaining immunity and give the economic operator in writing conditional immunity from fines. Reduction of the fine is granted to an economic operator if it provides evidence to bring a significant added value in relation to those already in possession of the competition authority. Even if a case was granted immunity from fines (fine zero), other participants at the alleged cartel who denounce the cartel may benefit

from reduced fines as follows: between 30 - 50% - for the first, between 20 to 30 % - for the second; more than 20% - to other traders.

For example, the European Commission fined Procter & Gamble, Henkel and Unilever for forming a cartel on the market for laundry detergents. Henkel received full immunity from fines under the leniency program, as it was the first company to provide information about the cartel. Procter & Gamble has benefited from a reduction of 50%, while Unilever a 25% reduction in the fine, because they resorted in turn to the Leniency Notice.

Nationally, the Competition Council first gave immunity to pay the fine by leniency policy to Radio Taxi Company, in the transport market investigations of individuals taxi market in Timisoara. The Competition Council found that 11 dispatch and taxi operators have participated in a cartel on increasing tariffs for passenger taxi. Radio Taxi was the first company to apply the Leniency Notice and denounced anti-competitive practices and therefore received full immunity from fines. The second company reporting the cartel received immunity from fines by 50%.

## **CONCLUSIONS**

The fight against cartels has been and it is one of the main priorities of the competition authorities both at national and at European level. Cartels are hard to identify. They involve most of the time, many businesses located on different levels of the economic process. Therefore leniency policy was introduced.

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