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INTERNATIONAL FRAMEWORK FOR COUNTERING CARTELS: THEORETICAL AND PRACTICAL PROBLEMS

Anna Vladimirovna Danilovskaia (a)*
*Corresponding author

(a) Khabarovsk State University of Economics and Law, 134 Tihookeanskaya St., Khabarovsk, Russia, d_a_v@list.ru

Abstract

International cartels have a negative impact on many countries' economies. They affect the interests of competitors and other economic entities, as well as consumers around the world. The world currently lacks any obligatory international acts to protect competition and the rights of economic entities and consumers from international cartels. The existing acts that function within the frameworks of the UN, WTO, OECD, ISS, etc are recommendations. The lack of a uniform international act to combat cartels that would cover a large number of interested countries leads to various problems associated with cartel investigations. The theoretical aspects of these problems are connected to the lack of a uniform definition of a cartel, the different understanding of this notion in national jurisdictions, different liability for breaches, and the absence or imperfection of leniency programs. Procedural lacunes in uniform regulation of international relations during cartel investigations have different nature, which is manifested in developing countries' problems with assessing the risks for their markets associated with international cartels being identified and investigated by developed countries, as well as the problems with pursuing recovery for damages from the cartel's activities in commercial courts of other countries with specific legal systems. Besides, the existing practice of applying national legislation of certain countries to international cartel cases in different counties creates a political problem related to the breaching of a country's sovereignty and protecting its national interests.

Keywords: Cartel, competition protection, international act to combat cartels, politeness principle, interactions between antitrust and law enforcement authorities

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1. Introduction

The problems of protecting competition and combating the most widely-spread and dangerous offenses against it, committed, among others, by cartels, are widely discussed by the global community at such organizations as the UN, WTO, OECD, EAEU, APEC, BRICS, and ISS. Nevertheless, the world currently lacks any special international conventions aimed at protecting competitions against cartel agreements that would be obligatory for the countries subjecting to it.

Some international acts gradually create a legal framework to determine the key goals of competition protection policies and the clearer regulations for the interaction between industry-specific and law enforcement authorities in specific countries. Besides, every international organization stipulates criminal liability for breaching competition rules in their legal and other documents where they specify bases, actions, and other liability provisions. The existing rules could be used as the basis for the future convention on combating cartels. The biggest problems in the development of such a convention may include the lack of a uniform approach to understanding key notions, 'cartel' first of all, as well as various appraisals of its public danger, and the failure to comply with the politeness principle set out in the antitrust legislation of many countries. The implementation of this principle should promote efficient cooperation between law enforcement and antitrust authorities of different countries. The aforementioned problems led to the emergence of bilateral agreements on cooperation in terms of implementing the competition laws between the US, EU, Canada, Japan, Russia, Vietnam, Brazil, South Korea, Australia, China, and other countries. One of the key points in such agreements is the information exchange, which cannot completely satisfy the needs of antitrust and law enforcement agencies that investigate relevant cases (Konieva, 2017).

Settling down similar issues is becoming more relevant due to the spread of international cartels, whose activities harm countries a lot more than national cartels. The existing positive experience of enacting and applying international conventions on combating transboundary offenses (Tenishev & Khamukov, 2016) signifies that countries can reach a consensus on many controversial points in the agreement to prevent illegal and publicly dangerous activities.

It is expected that the EAEU will prove the most efficient in combating international cartels (Maximov, 2017). A uniform international act could cover a significantly larger number of parties irrespective of their economic development and eliminate the existing problems with investigating the relevant cases. According to the memo of the UNCTAD secretary on Transboundary Anticompetitive Practice: the Problems of Developing Countries and Transition Economies of April 12, 2012, very few developing countries can combat international cartels effectively. The discovered asymmetry exists due to several reasons that are associated with the lack of comprehensive interaction between countries in identifying international cartels. The situation has not changed over the recent years, as evident from another UNCTAD document, the memo of the UNCTAD secretariat on the International Cooperation Following Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: the Enactment of Governing Principles and Procedures that was prepared during the eighth UN Conference on the reviewing of all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices held in Geneva on October 19-23, 2020.

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2. Problem Statement

2.1. Since cartels are highly latent and difficult to investigate, the cooperation of antitrust and law enforcement agencies of different countries becomes crucial for the protection of competition on the international level. The lack of a uniform understanding of the key aspects of interactions between countries, one of which might not be interested in the investigation success due to the national interest in the company offending the cartel ban, creates significant obstacles to solving fair competition problems both on the internal and global commodity markets. We can identify an exemplary set of problems that must be solved when investigating transboundary cartel cases.

2.2. The lack of a uniform international definition of a 'cartel'. This notion can be interpreted differently both in national legislation and in international acts, which makes it unclear what should be understood as a cartel.

2.3. The impossibility of applying uniform international conventions on combating crimes to people who create a non-criminal cartel, i.e. the laws of their countries do not specify criminal liability for this. As a result, the anti-competition agreements that do not induce criminal charges are out of the scope of the international crime conventions.

2.5. Extraterritorial effects of national antitrust laws. This is typical of many national antitrust laws. In practice, it leads to the impossibility of applying international mechanisms to multinational anti-competition practices or their extensive use by an interested state.

2.6. The infringement of the interests of the developing countries when investigating international cartels. Developing countries have more problems investigating international cartels than developed economies for various reasons.

2.7. The lack of legal bases for the cooperation of national authorities of different countries to protect competition. Not all national laws stipulate that the antitrust or law enforcement agencies can share information about identified cartels with foreign authorities. Moreover, similar cooperation problems are often to be found between the antitrust and law enforcement agencies within one country.

2.8. The absence or underdevelopment of leniency (loyalty) programs can have a significant impact on the efficiency of internal or international cartel identification.

2.9. The problems with pursuing cost recovery from the members of international cartels through commercial courts. A lot of problems arise for collective plaintiffs when they try to recover the damages associated with the international cartel activities due to the legal practices and substantive laws of the country that considers the complaint.

3. Research Questions

The study of international acts, national legislation sources, their application practices to protect competition in general and combat cartels in particular that determine the scope of relationships between the countries with respect to the aspects in question, as well as the problems with their implementation.

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4. Purpose of the Study

4.1. This research work is aimed at identifying the key problems associated with international cooperation when investigating transnational cartel cases and their potential solutions.

5. Research Methods

We used universal, empirical, and theoretical methods of scientific knowledge in our work.

6. Findings

6.1. Cartel is understood very differently in international law and national legislation of different countries. The Resolution that approved the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices accepted in 1980 by the UN Conference on Restrictive Business Practices under the auspices of the UNCTAD defines these as formal, informal, written, or oral agreements that restrict the access to markets or restrict competition in other ways, have or may have a negative impact on international trade, and corresponding with one of the forms of restrictive business practices. At the same time, the notion of the aggressive cartel was introduced in the Recommendations of the OECD Council on the efficient counter-actions against aggressive cartels enacted on March 25, 1998. It stands for an anti-competition agreement, a concerted anti-competition practice, or anti-competition arrangements between competitors on price fixation, unfair bidding (tender fix-up), putting restrictions or quota on production, or market sharing through the distribution of clientèle, suppliers, territories, or trade areas. Aggressive cartels do not include agreements, concerted actions, or arrangements that are associated with rational and legal cost reduction, directly or indirectly excluded from the jurisdiction of national laws of the participating countries, or allowed according to these laws. Thus, the cartel can be interpreted differently in international law.

6.2. Cartel is understood differently in national legislations as well. We should note two components of the cartel as a notion that can be mentioned in national laws to characterize this phenomenon: 1) coordinating the actions of economic entities and (or) 2) bidding agreements. For instance, Russian Federal Law No. 135-FZ on the Protection of Competition of 26.07.2006 separates coordinated actions from the cartel notion, while the antitrust legislation of European countries is based on the provisions of the Treaty on the Functioning of the European Union in its article 101 classifies coordinated actions as cartels. Bidding agreements in the majority of the cases are classified as cartels, even though their nature differs significantly from the classic commodity market cartels because they are based on cheating on the buyer (bidding organizer) if the latter does not have an agreement on eliminating or preventing competition. The correctness of this assertion is confirmed by a different approach to the prosecution for bidding agreements and classic commodity market cartels reviewed in clause 6.3.

6.3. Another aspect of the problem in question is the difference in the public menace of various forms of concerted antitrust practices as perceived by the governments. For instance, § 298 of Germany's Penal Code on the Agreements that Restrict Competition in Product Sales in its section 26 Punishable Offences against Competition provides liability only for bidding agreements rather than any cartels.

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Besides, the illicit conduct of the parties to agreements or concerted actions can be classified as fraud in practice (§263 Germany's Penal Code), which causes problems with identifying all the necessary elements of a crime (Hellman et al., 2020). French legislation differentiates between the criminal liability for cartels and bidding agreements, the latter being classified as fraud. France's Penal Code provides criminal liability for bidding offenses in Section 2 on Fraudulent Crimes (art. 313-6). The Russian legislation differentiates between the liability for cartels and concerted actions. The latter may only create civil liability, while bidding agreements cause criminal liability as well as the classic commodity market cartels.

6.4 The public danger of cartels is assessed differently, and, as a result, the same actions create criminal liability in some countries and only civil or administrative liability in others. As a result, it becomes impossible to apply the existing international conventions to combat crime to non-criminal cartels, in particular the UN Convention on the transnational organized crime of December 12, 2000 (Maximov, 2017). If we look at criminal anti-competition agreements, the practical application of this convention might be hindered by the presence of national strategic interests of a country that are linked to the activities of the economic entity that breaks the cartel laws.

6.5. The next problem lies in various aspects of the interaction between antitrust and law enforcement agencies of different countries when they investigate international cartels, including the politeness principle which manifests itself in the restriction of extraterritorial effects of their national antitrust laws. In practice, there are situations when the antitrust agency of one country does not take into consideration the peculiarities of national antitrust laws and economic development features of the other country and applies its rules to the transactions executed outside its jurisdiction that do not impact its country's market (Choi et al., 2020; Zelger, 2020). Such situations lead to the breaching of other counties' sovereignty and, consequentially, international conflicts, and tensions.

6.6. Investigating international cartels is especially difficult for developing countries. Public announcements made by developed countries about their involvement with the investigations of international cartels might not have any information significant to other countries, which are forced to investigate the influence of international cartels on their markets independently. These countries might have other problems that can hinder investigation significantly because of the absence of uniform cooperation regulations. This problem is partially caused by their internal laws that do not describe the bases of interaction with foreign authorities and even domestic antitrust and law enforcement agencies in order to identify and investigate international cartels. Even within the EAEU, such regulations can only be found in the laws of the Republic of Belarus (art. 17 of the Law No. 94-FZ of 12.12.2013 on Countering Monopolist Activities and Developing Competition) and Kazakhstan (art. 90-5 of the Business Code of the Republic of Kazakhstan No. 375-V ЗРК of 29.10.2015). In addition, these laws may stipulate some restrictions to the interactions or some provisions that can become obligatory for another country. For instance, the US Law on International Antitrust Law Enforcement of 1994 provides that a foreign country may receive help if its antitrust laws implemented by the respective agency are criminal ones.

6.7. Despite some very reserved views of leniency for criminal cartels (Beaton-Wells, 2017), such programs may be crucial for the efficient cooperation of antitrust and law enforcement agencies from different countries. Previous research showed that if leniency laws are implemented in a country, the cartels become more vulnerable (De, 2010). These programs proved their efficiency over time (Jaspers, 2019), and

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their mechanisms turned out beneficial in investigating international cartels, which led to the respective changes in national legislation in some cases. According to the Japanese antitrust laws, Japan's Commission on Fair Trade may communicate leniency requests to the authorities of other countries with the claimant's consent (Ezaki et al., 2020). Therefore, the presence of a loyalty program in a country may provide other countries with the information necessary for the cartel investigation. Not all countries have a loyalty program at all, not to mention the one with the provisions mentioned above. In practice, this hinders the required information exchange and significantly reduces these opportunities.

6.8. International cartel investigation is associated with yet another type of problem: recovering the damages done to the economic entities from the cartel. Complicated jurisdictions, choice of law, and procedural matters are among the problems that claimants face during arbitration in several national courts (Scarpulla, 2015). We believe that the institutionalized interactions between the antitrust and law enforcement authorities that provide each other with the necessary information could help solve such problems by simplifying the access to this information for the claimants. Moreover, we think it necessary to develop a specialized judicial body based on this document, which could entertain collective suits on recovering damages from international cartels.

6.9. While it is obvious that solving all of the problems associated with international cartel investigation is impossible, settling down many important issues can be achieved through uniting countries within the framework of an international act on combating cartels that would be based on common interests. This principle is the basic one for the establishment of various international, intergovernmental, and interagency contacts. The common interest principle can be applied at any of the levels specified but we believe that it can be more efficient in the implementation of bilateral and regional intergovernmental agreements at the initial stages of combating cartels. The efficiency of this practice is confirmed by the positive effects of applying the Agreement on Cooperation in Competition Protection between the Government of the Russian Federation and the Republic of Belarus of 27.02.2019. These effects were pointed out to the author during the interviews with the representatives of the Russian Federal Antimonopoly Service.

7. Conclusion

Antitrust laws and problems caused by their implementations remain a complicated topic for discussion on the international level despite seemingly intensive action to solve them. This is caused by a number of economic, legal, and political problems.

The international practice, which often features cross-industry disputes, calls for an international cartel act that would include criminal, administrative, and civil bases for their solution, as well as framework procedures.

The enactment of a uniform international act on combating cartels is desirable because it can cover a large number of countries but not very probable because of its potential efficiency since it is difficult to reach a compromise on issues that are very sensitive for all of the parties because they are linked to their national interests. Nevertheless, such a document could help with the following: standardize the understanding of a 'cartel' in international law; waive the use of the extraterritorial principle for the application of antitrust laws to cartels that do not impact the country featuring this principle; respect the

interests of all the countries involved with the cartel investigation through the unification of their efforts; approve and improve leniency programs; respect the interests of corporate claimants in suits for the recovery of damages caused by international cartels, and the establishment of a specialized court of law to entertain collective suits concerning international cartels.

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