

Better Cartel Deterrence Through International Solidarity

Introduction

Price fixing and bid rigging cartels are undoubtedly the most egregious anticompetitive practice in the world. They harm consumers in both developing and developed countries because of their upward impact on prices and they also provide the luxury of being inefficient.

Thus, cartel busting is often the most important activity of competition authorities around the world. While enforcement is quite effective in many developed countries, it is lacking in the developing world, because of resource constraints and lack of experience.

Nevertheless, the impact on developing countries of cartels is significant. It is estimated that in 1997 around US\$81.1bn or a sum equivalent to 6.7 percent of the imports of developing countries came from industries covered by sixteen international cartels. The magnitude of their adverse impact is highlighted by the fact that the cartelised price exceeded the competitive price by 20-40 percent, resulting in overcharges of \$16bn - \$32bn. It has to be noted that these cartels are only the ones that have been uncovered.

In recent times, record fines of more than \$500m have been levied by the UK and US competition authorities on British Airways (BA) for cartelization with Virgin on its transatlantic flights. The fines levied on the airlines will be credited to the treasuries in the US and UK and only affected citizens who have filed private action suits against the said airlines will be compensated through damages. However, affected consumers from the developing world will not be able to claim any compensation. Given the global impact of such cartels, it is surely only fair and fitting that a portion of these fines be used for strengthening institutions that enforce fair competition and deter cartels in the developing world.

Creating an International Competition Fund managed by a credible intergovernmental organization would enhance world-wide deterrence of cartels while remedying the harm caused to the developing world. To enable the creation of such a fund, national laws will need to be amended to allow a transfer of fines and damages on a proportionate basis.

Context

In the past cartels have often appeared to be largely national or regional in scope, now they encompass several continents and fall under the jurisdiction of several competition authorities applying similar rules. Economic globalisation has made it imperative to improve global governance in competition matters.¹ In this context, the current practice in developed countries of looking at international cartels from a purely domestic perspective and penalising them accordingly may make sense in a local legal context but does not do justice to victims from developing countries without remedial measures.

Moreover, it also allows cartels to retain at least a part of their returns from illegal activities. This in turn implies that such penalties are not a strong enough deterrent for cartel activities. Thus, it is in the interest of even developed countries to identify the harm done by cartels in developing countries and penalise them for such harm. The benefits of such action would accrue to developed countries in the form of a lower incidence of cartels. The international community therefore has to develop the means and demonstrate the will to protect consumers everywhere, promote economic democracy and deter cartels both within and across borders.

A system that distributes awards for damages to all victims instead of a few also has a definite moral advantage. In advanced countries fines accrue to the national treasury, while damages can also be claimed by victims under their national laws. However, such a

compensation mechanism still does not do distributive justice. A large proportion of the ill-gotten gains of cross-border cartels is often at the expense of consumers in developing countries. Thus, a portion of the proceeds from damages should ideally be used in favour of the affected.

The economic problems arising from cross-border cartels must be solved collectively since there is no international body with powers to enforce compliance. Fortunately there are informal and formal mechanisms which can promote cooperative action by various national competition agencies against cartels.

International cooperation on sustainable development issues should ensure that the adverse effects of anticompetitive practices on development are addressed in such a way that all affected countries are adequately and fairly compensated. This includes promotion of universal access of victims to compensation for damages in the case of private antitrust enforcement and a stress on doing justice to developing countries without functional competition regimes in the case of public enforcement.

Notably, unequal distribution of fines and damages levied on international cartels between the developing and the developed world would accentuate economic imbalances and contribute to the widening of the North-South gap. Therefore, the national governments should demonstrate a commitment to remove the inequities in the distribution of proceeds from fines and damages on cartels by adopting suitable legal provisions.

Current Deficit

In order to combat international anticompetitive practices, especially cartels, thinking globally instead of limiting one's thinking about justice to national territories is a must. Therefore, the idea of the International Competition Fund, which would have a deterrent effect, should not simply be dismissed because of current practical obstacles such as the absence of a legal mandate.

Many adverse effects of international cartels are left uncompensated and societies and economies often have to absorb that loss. For instance, estimated overcharges on vitamin imports from 1990-1999 into 69 developing economies was US\$ 1271,51 mn.² Moreover, when international competition cases are handled in a particular jurisdiction the compensation process does not benefit non-resident consumers at all, unless a special foreign compensation scheme is set up. This situation is evidently unjust, incompatible with the idea of natural justice, and at odds with the principles of promoting international development according to the Millennium Development Goals.

Millennium Development Goals

According to the United Nations Millennium Declaration the nations of the world must share responsibility for managing global economic and social development. No individual and no nation must be denied the opportunity to benefit from development. In addition, the principle of solidarity requires that global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit the least deserve help from those who benefit the most.³

Even though the international community is committed to the creation, at both national and global levels, of an environment conducive to development and the elimination of poverty, success in meeting these objectives depends on various external and internal factors. The Millennium Declaration expresses shared values and a general commitment to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system⁴. Thus, the objectives and proposed working of the International Competition Fund, by aiming to reduce inequities in the disbursement of fines and damages levied on international cartels, mirrors the Millennium Development Goals.

Benefits of Establishment of the Fund

The battle against international anticompetitive practices (IACPs) is of course one that countries cannot fight alone. An international partnership against IACPs with accent on strengthening of competition regimes in developing countries will yield the following benefits:

- more rigorous enforcement of competition laws around the world;
- direct contribution to the development of affected regions;
- deterrence and punishment of anticompetitive behaviour world-wide; and
- benefits to disadvantaged groups through the award of damages or penalties

Positive Comity

In antitrust enforcement competition agencies consider international comity, which reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation".⁵

Thus, in determining whether to seek particular remedies in a given case, each agency must take into account affected significant interests of any foreign sovereign state. Moreover, under many antitrust enforcement cooperation agreements, for instance the US and EC one, an antitrust authority may ask the other party's antitrust authority to take measures against activities that violate the latter's competition laws and that harm the requesting country's commerce.

Considerations for fixing the pecuniary amount of fines or (class action) damages should take into account the fact that anticompetitive practices harming the world economy will most probably not be challenged and adequately remedied in jurisdictions in developing countries, given the lack or ineffectiveness of foreign enforcement.

Competition authorities should, in consistency with the principles of comity and related obligations under various international agreements, take into consideration aspects of international development affected by the anti-competitive practice under consideration before deciding on the magnitudes of fines. In doing so the agencies may consult with concerned foreign governments so that the levy of fines reflects the substantial and purposeful harm caused by international cartels to their concerned economies. In addition, disgorging of monetary amounts by wrongdoers for harm done in developing countries or admissions by firms, which a developing country authority can use to gain local justice, should be a precondition for any settlement.

Reform and a Workable Mechanism

A decisive step towards remedying the situation would be creation of the International Competition Fund. The rationale behind its establishment is not only the promotion of policy, legal and institutional reform to prevent further marginalisation and exclusion of certain groups and regions but also effective deterrence of IACPs around the world. In addition, it is necessary to provide an international perspective to antitrust fining and the award of damages and ensure the protection of consumers' rights.

The international community is best placed to create a conducive international climate and persuade national legislatures to adopt amendments of respective national laws, thereby enabling remittance of fines (and transfer of awarded damages resulting from class action cases) into the International Competition Fund. Under their auspices a guideline could be drafted to provide a starting point for the envisaged reform. Subsequently, international guidelines and recommendations could invite national legislatures to adopt, in accordance with agreed principles, legislative measures for the determination of fines and damages in international antitrust cases as well as distribution of the collected funds.

Sources for financing the Fund

The Fund would essentially be financed by levied fines and damages in international cartel cases. In addition, sums of money could be contributed by wrongdoers as part of a voluntary or mandated settlement of cartel charges. The following two options are discussed below for further reflection and possible action:

a) Private enforcement

Private enforcement provides compensation for the infringement of an individual right by anticompetitive behaviour. Such damage actions complement public enforcement activities by providing additional financial sanctions against the infringer and compensation for those who have suffered losses⁶; thus they have both compensatory and deterring effects.

Class Actions

Victimised consumers of cartels are numerous and it is impossible to identify all of them. Class actions are a procedural device by which individuals or entities can pursue damages in a representative capacity on behalf of all similarly situated claimants. Indeed, class actions spur private enforcement seeking monetary damages, because it is procedurally more convenient and practical to aggregate the damages of a large group of consumers than to initiate private enforcement actions against cartels/monopolists when damage done to a single individual is negligible in magnitude.

Though monetary damages and procedures for class actions are slowly becoming the norm in many jurisdictions, only 13 out of 30 OECD countries provide for class actions. In the developing world, countries like India too provide for it. Thus, there is a need for special procedures for facilitating class actions to protect consumer interests world-wide. Perhaps, a new instrument such as international antitrust class action, which could be filed on behalf of affected non-resident consumers, could help to fight international cartels. In addition, victims could bring up class actions either directly or via consumer organizations to prevent abusive and speculative lawsuits.

Unclaimed Damages: *Cy pres* awards

Some countries have devised a special way of dealing with monetary awards in antitrust class action cases, where victims are numerous and cannot be identified. In such cases, courts often stipulate that the awards be used for promoting public interest.

In the USA, unclaimed awards from the settlement of antitrust class-action lawsuits are put into a trust to be used only for purposes closely related to the nature of the law suit, for instance research and education on competition issues. This creative use of money is called "*cy pres*" doctrine, which means 'next best use'. The practice allows for use of the damages paid by the antitrust violator, when the injured cannot be identified and compensated. For instance, the George Washington University Law School was given about \$5 million from an antitrust settlement in a Washington case concerning a chemical business.⁷

The above-mentioned case was domestic. However, in the case of international cartels no awards are usually

Box 1: Underdeterrence would harm the American market

In *Empagran S.A. v. F. Hoffman-LaRoche*, (DC Cir 2003), the plaintiff sued the defendant on behalf of all foreign purchasers of certain vitamins and vitamin mixes, for damages arising from a worldwide price fixing conspiracy in vitamins. The injuries alleged were the inflated prices paid for the vitamins in foreign markets, and thus reflected the conduct's effect on foreign commerce.

The DC Circuit upheld jurisdiction under Foreign Trade Antitrust Improvements Act, 1982 (FTAIA), holding that the jurisdiction for injuries suffered outside the US was proper only if some private person in the United States, even if not the particular plaintiff in the case under consideration, had also suffered injury as a result of the defendant's illegal conduct.

Because in this case American vitamin purchasers were injured by the same conspiracy, thus foreign purchasers could also sue under American law for their injuries. The court reasoned that only giving American purchasers relief would insufficiently deter global cartels, because cartels would not have to worry about damages to foreign purchasers, and ultimately this under-deterrence would harm the American market.

Source: <http://www.stblaw.com/content/publications/pub434.pdf>

granted outside the domestic jurisdiction because national laws are restricted to national boundaries. Thus, harmed consumers from developing countries are unable to claim any compensation at all, as they do not have a *locus standi*, and cannot even pursue the same within their own jurisdictions, given a non-existent, ineffective or poorly resourced competition agency in their countries.

Creation of the International Competition Fund would help to remedy the situation by giving the judiciary the opportunity to consider global harm done by international cartels, set the rewards accordingly and direct a proportionate award to the ICF, specifically for programmes strengthening competition enforcement around the world.

A logical argument for an International Competition Fund can be articulated on the economically sound reasoning expressed in the *Empagran S.A. v. F. Hoffman-LaRoche* case in the USA; even though the judgement was reversed by the U.S. Supreme Court. It should be noted that the Supreme Court's decision was intentionally limited to the specific situation of an "independent foreign effect", because the case involved complex policy questions better addressed by political branches rather than judiciary.⁸

b) Public enforcement

Public enforcement compared to private enforcement is more strategic and selective in nature. That is why states should have means to ensure that international cartels are effectively deterred and deprived of their illegal fruits. This can be done by embracing special rules for remedying international cartel cases that would take into consideration the harm to the world economy as an aggravating factor. Subsequently, the amount of a penalty would be increased.

In such cases, the fines levied on international cartels should not be solely deposited into treasuries in enforcing countries, as is the case. A fair part reflecting retribution against harm to the world economy should be used for international development purposes, especially in the field of competition law.

Empowering national competition authorities to allocate a certain proportion of the fines levied from international cartels to the International Competition Fund will facilitate the use of such funds for the

strengthening of competition regimes in developing countries. Funds could also specifically be targeted to the same sector where the initial harm occurred.

Fund Management

Rigorous checks should be in place to ensure that funds collected are spent effectively and in an accountable manner to build functioning competition regimes. In the absence of a specialised international competition enforcer and in view of the complementary relationship between trade and competition policy, the World Trade Organisation is a workable option to house an International Competition Fund. The WTO possesses the advantages of a very broad membership and a tradition of enforcing binding rules. Alternatively, OECD or the World Bank could house and oversee the administration of the ICF.

Given that the rationale behind the establishment of the ICF relates to prevention being better than cure, the Fund will be used to assist countries, notably developing and least developed, in progressively establishing effective enforcement mechanisms at the domestic level. It would also help to bridge the gap between developed and developing countries, strengthen their cooperation and contribute towards better addressing anti-competitive practices at the international level. In a nutshell, ICF would provide strengthened and adequately resourced assistance to respond to specific needs.

Moreover, such an international partnership might involve development of a global capacity building facility in dealing with competition issues. Such an artificially created global public good can be used to provide training to competition practitioners from across the world and constitute a global hub for interaction among

competition authorities and consumer groups from the world over. Thus, unnecessary duplication of training facilities may be avoided, network externalities from global interaction generated and economies of scale and scope in capacity building, otherwise unattainable, facilitated by the large magnitude of funding arising out of pooled resources.

Conclusion

It is always easier to agree at an international level on the definition of a problem than to take action to remedy it. However, improving economic efficiency and equity are two principles that can lay the foundation for laws dealing with international development. The concept of an International Competition Fund is based on this principle of equity. Though its implementation poses a challenge, this is of no greater scale than many others for which successful resolutions have been found. Inertia does not help those injured by anticompetitive behaviour, nor strengthen the world economy. The establishment of the ICF would contribute to the promotion of a competition culture, better harnessing of the development potential of globalisation and the disciplining of anticompetitive practices in global markets.

The spirit of a North-South partnership dictates that the international community has a moral obligation to pay attention to the hardships caused to developing countries by international cartels. Therefore, all global actors should adopt a global problem solving approach to increase respect for consumer rights world wide and use their considerable influence to support rather than undermine the efforts of developing countries in this regard.

Recommendations

Consumer organisations therefore:

- Call on the international development and competition communities to formulate and promote fair principles for penalising and awarding damages in the context of international cartels and to develop a globally acceptable framework for managing the collected funds under the International Competition Fund.
- Encourage the strengthening of North-South cooperation and partnership to create a consensus on norms and practices
- Recommend the enactment of provisions in national (competition) legislations enabling fair and non-discriminatory use of fines and damages, which result from cross-border anticompetitive practices, for the benefit of resident and non-resident consumers.

Endnotes

- 1 <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/399&format=HTML&aged=0&language=EN&guiLanguage=en>
Speech of Mario Monti, Commissioner for Competition Policy
- 2 *Bridging the Differences* (2003), Alan L. Winters and Pradeep S Mehta (Eds), CUTS, University of Sussex and European Institute for Asian Studies
- 3 <http://www.un.org/millennium/declaration/ares552e.htm>
- 4 <http://www.un.org/millennium/declaration/ares552e.htm>
- 5 Dan K. Webb, Robert W. Tarun, Steven F. Molo, *Corporate Internal Investigations*, 1993
- 6 <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/489&format=HTML&aged=0&language=EN&guiLanguage=en>
- 7 http://www.nytimes.com/2007/11/26/washington/26bar.html?_r=1&adxnnl=1&adxnnlx=1206695533-FBTWnsoFZ1JD7D8PrD6qYg&oref=slogin
- 8 Jonathan T. Schmidt, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, available at <http://www.yale.edu/yjil/PDF/Schmidt.pdf>



International Network of Civil Society Organisations on Competition is an international network of over 120 members from CSOs, research institutions and parliamentarians spread in 53 countries of the world engaged in promoting a healthy competition culture across the globe.

Comments on this draft are invited at: incsoc@incsoc.net