CARTEL AS THE ANTICOMPETITION AGREEMENT

Davit Basiashvili
Professor, Georgian Technical University

Slava Fetelava
Professor, Grigol Robakidze University

ABSTRACT

The work deals with the practical aspects of cartels, both the legal regulation of actions restricting competition and their detection and prevention. Emphasis is placed on the role and importance of competition law in assessing the total economic damage caused by the disregard of competition law by economic agents in the relevant markets and the concerted actions of cartels.

The discussion for horizontal (agreement/concerted action between competing economic agents operating in the same product market) and vertical (agreement/concerted action between non-competing economic agents operating in different product markets) cartels is carried out.

Key Words: Cartel, Agreement, Terms of Trade, Restriction of Competition, Sanction, Pricing Algorithm, Agency, Regulated Sector, Business Environment

CONTENT

The word cartel[1] comes from the Italian word cartello, which means a “leaf of paper” or “placard”, and is itself derived from the Latin charta meaning “card”[2]. The concept of cartels originated in the context of business and economics, referring to agreements/colusion between two or more economic agents to control prices, limit competition and regulate production levels in a particular industry. Over time, the term “cartel” has come to encompass a broader range of collusive practices among business entities, including: fixing prices or other terms of trade, setting production or sales quotas, dividing markets, restricting imports or exports, and/or acting in a restrictive manner on competition against competing economic agents remaining outside the cartel.

Due to their hidden nature, the detection of cartels remains a significant challenge, and competition authorities resort to various ways to encourage the cooperation of economic agents in the investigation process.

Generally, there are two types of cartels: horizontal and vertical. During the horizontal, competing economic agents operating in the same commodity market unite in a cartel, while the vertical, non-competing economic agents operating in different commodity markets agree with each other on the processes of sale and production of goods at different levels.

However, it is a fact that an agreement between competing economic agents can reduce, exclude or strengthen competition. For example, agreements on pricing or the seperation of buyers reduce competition and are always prohibited. However, on the other hand, individual agreements can increase the effectiveness of competition. For example, competitors may agree on joint investments or research that economic agents could not undertake separately. Accordingly, such an agreement leads to a reduction in production costs and belongs to the category of permissible agreements.

As for vertical agreements, such an anti-competitive action may take place, when a dominant producer/service provider economic agent offers products/services under preferential conditions to a participating seller/service receiving economic agent, while wraps other economic agents by discriminating conditions. However, it should be noted that such an action creates a risk of restriction of competition only if the parties to the agreement (separately or taken together) occupy a dominant position and have market power.

Based on the above, it is of great importance for competition authorities to detect and sanction collusive actions because it is obvious to determine their potential harm and, accordingly, to understand the potential benefits of their deterrence. The business practices of market traders, guilds and governments have always been subject to scrutiny and not-so-mild sanctions, as is clear from the European Commission’s 2019-2023 the amount of detected and imposed fines were 3.7 billion euros[3].

1 The definition of cartel does not exist at the legislative level of Georgia and the European Union. However, the word "Cartel" is found in the EU Directive - DIRECTIVE 2014/104/EU OFTHE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104

2 https://en.wikipedia.org/wiki/Cartel#:~:text=The%20Italian%20word%20became%20cartel,prisoners%20from%20the%201690s%20onward.

3 https://competition-policy.ec.europa.eu/document/download/b19175c3-c693-410b-b669-27d4360d359c_en?filename=cartels_cases_statistics.pdf

The legal foundations of competition have a long history. It actually dates back to ancient Rome. The "Lex Julia de Annona"[4], the "Edict on Maximum Prices"[5]and the "Constitution of Zeno[6] " are evidence that even in ancient times, the importance of fair trade and competition was relevant to maintaining a successful economy. term "monopoly" is mentioned for the first time.

Later, already at the end of the 80s of the 19th century, legal norms of competition began to be adopted in a more established, more or less perfect form. It was first adopted in Canada under the name of the "An Act for the Prevention and Suppression of Combinations in Restraint of Trade" in 1889, i.e. one year before the United States of America adopted the well-known "Sherman Act" (1890) at the federal level. According to which - " Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person[7] who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine".

Detection and prevention of actions restricting competition (agreements, decisions, agreements) within the European Union is carried out by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Article 101(1) specifically prohibits agreements, decisions and concerted practices that restrict competition. The Fundament of EU member state internal competition law is the Treaty on the Functioning of the European Union .

Cartels are agreement/or concerted practice between two or more economic competitors aimed coordinating their comitative behavior on the market and or/ influencing the relevant parameters of competition through practice such as the fixing of purchases or selling prices or other trading conditions, the allocation of production or sale quotas, the sharing of markets including bid-rigging, restriction of imports or exports and/or anti-competitive actions against other competitors.

Agreement. It takes place from the moment when two or more business entities together intend to act on the market with concrete and specific way. There are many examples of concerted actions in international practice

Concerted action. A concerted action is a coordinated action by more than two of these economic agents that reduces competition. A concerted action differs from an agreement in that a concerted action is already an act actually performed, whereas an agreement may exist in verbal or written form.

Decisions of associations of economic agents. Associations and various similar unions express the commercial interests of economic agents participating in it, whose decisions affect the market behavior of economic agents united in the association.

The Georgian competition law, with the some of certain exceptions (except for the procedural issues of the agreement with agency on the state aid), is in full compliance with the legislation of the European Union,

As for the results of the practical activities of the Georgian Competition and Consumer Protection Agency, many cases of horizontal and vertical agreements were detected and prevented. In particular, in the part of horizontal anti-competitive agreements: Pharmaceutical Case (oncology drugs) – the four pharmacy companies were fined by 53 million Laries; Petroleum products import/sale cases, where the direct or indirect price fixing was confirmed – 5 compunies were fined by 4 million Laries and Online cinema tickets sale 3 undrtakers were fined 1.6 million Laries.

CONCLUSION

Based on the above, it can be unequivocally said that the provisions of the competition law currently in force in Georgia - in the ditection and preventing cartels as actions restricting competition, are in full compliance with the advanced international practice and, first of all, similar norms of the EU countries.

However, it is worth noting that the development of contemporary digital technologies and technologically advanced tools, such as the development of pricing algorithm models, in which many companies are operating, increasingly and rapidly changing the competitive landscape and diversifying the ways of making coordinated commercial and strategic decisions[8].

It is worth to take consideration that the widespread use of algorithms is increasingly in the focus of competition agencies, as these models can make it easier to reach and maintain deals between entities without any formal agreement and/or human factor and interac-

4 https://www.linkedin.com/pulse/competition-law-roman-era-in-depth-look-antitrust-laws-parimal-wagh

5 https://en.wikipedia.org/wiki/Edict_on_Maximum_Prices#:~:text=The%20Edict%20on%20Maximum%20Prices,all%20important%20articles%20and%20services.

6 UNLAWFUL TRADE COMBINATIONS IN HISTORY, By Thomas W. Shelton, https://www.jstor.org/stable/25709475?seq=1

7 As defined in the Sherman Act, "person" means a corporation or association organized under the laws of the United States, any territory, state, or foreign country.

8 OECD (2017), Algorithms and Collusion: Competition Policy in the Digital Age www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm

tion, which makes concerted practices even more noteworthy for detection and disclosure issues by competition agencies. Accordingly, in this direction, Georgian executive institutions of competition of and regulation bodies sector, have accumulated significant practical experience in recent years, individually or jointly, will have to direct more coordinated efforts in this direction. As in the enforcement of competition law as well as the detection and the prevention of cartels, gives the basis for conclusion, that the business environment in Georgia will be even more protected and successful in the future.

REFERENCES:

1. The definition of cartel does not exist at the legislative level of Georgia and the European Union. However, the word "Cartel" is found in the EU Directive - DIRECTIVE 2014/104/EU OFTHE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104
2. https://en.wikipedia.org/wiki/Cartel#:~:text=The%20Italian%20word%20became%20cartel,prisoners%20from%20the%201690s%20onward
3. https://competition-policy.ec.europa.eu/document/download/b19175c3-c693-410b-b669-27d4360d359c_en?filename=cartels_cases_statistics.pdf
4. https://www.linkedin.com/pulse/competition-law-roman-era-in-depth-look-antitrust-laws-parimal-wagh
5. https://en.wikipedia.org/wiki/Edict_on_Maximum_Prices#:~:text=The%20Edict%20on%20Maximum%20Prices,all%20important%20articles%20and%20services
6. UNLAWFUL TRADE COMBINATIONS IN HISTORY, By Thomas W. Shelton, https://www.jstor.org/stable/25709475?seq=1
7. As defined in the Sherman Act, "person" means a corporation or association organized under the laws of the United States, any territory, state, or foreign country.
8. OECD (2017), Algorithms and Collusion: Competition Policy in the Digital Age www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm