

Unclassified

DAF/COMP/GF/WD(2006)12



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

15-Dec-2005

English text only

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from United States

-- Session II --

This contribution is submitted by United States under Session II of the Global Forum on Competition to be held on 8 and 9 February 2006.

JT00196027

Document complet disponible sur OLIS dans son format d'origine
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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. The United States' position on the importance of an effective anti-cartel enforcement program has long been clear. Detection and prosecution of hard core cartels has always been, and remains, a primary law enforcement priority.¹ There is a broad consensus that hard core cartels – whether in the form of price-fixing, output restrictions, bid rigging, or market division – are the most egregious of antitrust law violations; in the words of our Supreme Court, these acts of collusion are the “supreme evil of antitrust.”

2. The term “hard core cartel” is not defined in U.S. law, regulations, or guidelines, but the concept is well-understood. As stated in the antitrust offenses section of the United States Sentencing Commission Guidelines,² there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. ... The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual anticompetitive effect.

3. In the U.S., cartel conduct is treated as *per se* illegal. A *per se* rule for evaluating hard-core cartel conduct focuses solely on the conduct. This approach does not require any proof of harm to competition and does not allow parties to claim an efficiency justification. Hard core agreements, because of their pernicious effect on competition and lack of redeeming economic value, are conclusively presumed to be unreasonable and therefore illegal, without elaborate inquiry as to the precise harm they have caused. Moreover, under a *per se* analysis, companies are not entitled to attempt to demonstrate the alleged reasonableness or necessity of the challenged conduct. For example, price fixing cannot be justified by arguing that it was necessary to avoid cutthroat competition, or that it resulted only in reasonable prices. The *per se* approach provides certainty with respect to the legality of specific conduct.

4. In the U.S., cartels are prosecuted as criminal offenses under the Sherman Act. Section One of the Sherman Act provides that “[e]very 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 declared to be illegal.” Criminal violations of the Sherman Act are punishable by fines of up to \$100 million for corporate defendants and \$1 million for individuals. Fines may also be set at double the gross amount gained by the defendants or lost by the victim. Criminal violations by individuals of the Sherman Act are also punishable by up to ten years' imprisonment. If a private civil suit follows a government action under the Sherman Act in which the defendant has been found liable, the plaintiff may use the earlier judgment as *prima facie* evidence of a violation. Private parties can obtain injunctive relief and are generally entitled to treble damages, as well as recovery of reasonable attorneys' fees, for violations of the antitrust laws. The U.S. Government can also sue for treble damages to recover for injury to its business or property resulting from an antitrust violation.

5. To prove concerted action, “there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). Furthermore, “it is generally believed ... that an agreement involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act.” *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 654 (7th Cir. 2002)(Posner, J.).

6. The DOJ usually proceeds with prosecution only when there is direct evidence of an unlawful agreement. In cases where a defendant does not plead guilty, the direct evidence offered most often takes the form of testimony from a cartel participant, who may be a leniency applicant, cooperating witness, or immunized co-conspirator, but can also include video- or audiotapes or documents providing direct evidence of the unlawful agreement.

7. Only in unusual circumstances will the DOJ proceed with a criminal prosecution when direct evidence is lacking. One such case, *United States v. Champion International Corporation*, 557 F.2d 1270 (9th Cir. 1977), involved bid rigging by firms purchasing timber at auctions held by the U.S. Forest Service. Before the period covered by the indictment, the firms engaged in “intensely competitive bidding.” The trial court found that at a certain point this competitive process ended when one defendant found no competing bidders against him in a small auction and decided “to experiment” later that day by not bidding on another sale. “The trial court agreed with the defendants that a new bidding pattern had thus developed by ‘normal economic forces’, presumably in a noncollusive evolution.” *Id.* at 1273. From these “innocent beginnings,” representatives of the defendants began to meet and discuss future sales and their relative desirability to each firm. “Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants ‘had an understanding’ about bidding.” *Id.* The Court of Appeals upheld the trial court’s finding that circumstantial evidence proved the existence of the agreement, even though the DOJ was unable to introduce direct evidence of an express agreement.

8. Fuelled by the prospect of treble damages, allegations of hard core conduct are frequently litigated between private parties in U.S. courts, and are often based on circumstantial evidence.

9. Because price fixing is a *per se* violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs. In the absence of such an admission, the plaintiff must present evidence from which the existence of such an agreement can be inferred.... The evidence upon which a plaintiff will rely will usually be ... of two types – economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types ... : evidence that the structure of the market was such as to make secret price fixing feasible (almost any market can be cartelized if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies); and evidence that the market behaved in a noncompetitive manner. Neither form of economic evidence is strictly necessary, since price-fixing agreements are illegal even if the parties were completely unrealistic in supposing they could influence the market price. *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 654-55.

10. There have been and continue to be many private cases seeking damages based on allegations of unlawful cartel agreements. In the absence of direct evidence of an agreement, courts have considered a wide range of economic evidence that might support a finding that a market is conducive to price-fixing. Judge Richard Posner, a leading antitrust scholar, lists the following possible indicia, all of which can be subject to ambiguous inferences and are highly fact dependent:³

- the market is concentrated on the selling side;
- there is no fringe of small sellers;
- demand at the competitive price is inelastic;
- entry takes a long time;
- the buying side of the market is unconcentrated;

- the product is standardized (not customized);
- the principal firms sell at the same level in the chain of distribution;
- price competition is more important than other forms of competition;
- there is a high ratio of fixed to variable costs;
- there are similar cost structures and production processes;
- demand is static or declining over time;
- prices can be changed quickly;
- the market operates with sealed bids;
- the market is local;
- competing firms cooperate legally on other matters;
- the industry has a history of cartel behaviour.

11. He lists other types of economic evidence that can demonstrate “the existence of collusive pricing even though no overt acts of collusion are detected”:⁴

- fixed relative market shares
- marketwide price discrimination
- exchanges of price information
- regional price variations
- identical bids
- price, output, and capacity changes at the formation of the cartel
- industry wide resale price maintenance
- declining market shares of leaders
- amplitude and fluctuation of price changes
- demand elastic at the market price
- level and pattern of profits
- market price inversely correlated with number of firms or elasticity of demand
- basing-point pricing

- existence of exclusionary practices

12. One leading antitrust treatise describes the use of circumstantial evidence in private cases as follows:⁵

[L]ower court decisions consistently have held that conscious parallelism, by itself, will not support a finding of concerted action. While some decisions have suggested that parallelism is a factor 'to be weighed, and generally to be weighed heavily,' other facts and circumstances, often referred to as 'plus factors,' typically must be combined with evidence of conscious parallelism to support an inference of concerted action. The courts emphasize that these plus factors should not be viewed in a vacuum but should be considered as a whole against the entire background in which the alleged behaviour takes place.

Courts generally have not articulated a specific hierarchy of plus factors. Nonetheless it is possible to identify some broad patterns from the relevant decisions. Among the most important plus factors are those that tend to show that the conduct would be in the parties' self-interest if all agreed to act in the same way but would be contrary to their self-interest if they acted alone. Evidence satisfying this requirement has included artificial standardization of products and raising prices in time of oversupply. Giving pretextual reasons for action also has been considered a strong plus factor. Conversely, where each defendant has legitimate business reasons that rationally would lead it to engage independently in the challenged conduct, an inference of conspiracy based solely on that conduct is improper. Similarly, when the defendants would have little motive to engage in the alleged conspiracy, the courts will require the plaintiff to introduce additional evidence before permitting the fact finder to infer concerted action.

Less determinative in the hierarchy of proof is evidence that indicates an opportunity for collusion. This plus factor includes evidence of correspondence, meetings, or other communications among the alleged conspirators, especially when quickly followed by simultaneous identical actions. This plus factor also includes similarity of language, terms, and conditions used by alleged conspirators where ... such similarity is improbable absent collusion. ... [S]everal courts have held that meetings or other communications among conspirators, which show no more than a 'mere opportunity to conspire,' are insufficient, by themselves, to support an inference of conspiracy, at least where the defendants offer plausible, legitimate business justifications for the communications.

13. Some Thoughts on an Effective Anti-Cartel Program

1. A *per se* rule prohibiting hard core cartels is efficient and predictable, and greatly simplifies the investigation and prosecution of the most harmful antitrust offenses. It properly focuses the inquiry on the existence of an unlawful agreement, and runs no risk of deterring beneficial business conduct. As stated by Judge Bork,⁶

Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market. There is no unfairness in applying the *per se* rule to parties whose agreement was useless, since their intent was wrongful. This consideration bears more properly on prosecutorial discretion in bringing such cases and on judicial discretion in imposing penalties. The *per se* rule against naked price-fixing and market-division agreements is thus justified not only on economic grounds but also because of the rule's clarity and ease of enforcement.

2. Agencies should focus their enforcement efforts on cases where direct evidence is available, and on obtaining the necessary investigatory tools to uncover this evidence. An effective leniency program is the best tool for acquiring such evidence, along with physical evidence obtained from searches and testimony from direct participants testifying under a grant of immunity or pursuant to a plea agreement.
3. In our experience, prosecutions that depend on complex, indirect economic evidence should be a much lower priority for agencies. The types of circumstantial evidence described above that are used in private cases in the U.S. tend to be ambiguous, and require detailed and highly fact-specific expert testimony to provide context. For this reason our Supreme Court has properly imposed a high standard for plaintiffs in these cases: “To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of §1 must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.” *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)(citations omitted).

NOTES

1. When a matter is before the Federal Trade Commission (FTC) and it determines that the facts may warrant criminal action against the parties involved, the FTC notifies the DOJ and makes available to the DOJ the files of the investigation. If the DOJ determines that a matter should be referred to a grand jury for criminal prosecution, it will request that the FTC transfer the matter to it. If, on the other hand, the DOJ decides not to pursue the matter with a grand jury, then the FTC may proceed with its own civil investigation. In addition, for some *per se* horizontal offenses which could be prosecuted criminally, the agencies may decide on rare occasions, based on particular factual circumstances suggesting that criminal prosecution would not be appropriate, to proceed instead by means of civil proceedings.
2. United States Sentencing Commission, *Guidelines Manual*, §2R1.1 Commentary (Nov. 2005).
3. Posner, Richard A., *Antitrust Law* (2d. ed.), University of Chicago Press (2001), pp. 69-79.
4. *Id.* at 79-93.
5. ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed. 2002), pp. 10-15.
6. Bork, Robert H., *The Antitrust Paradox*, The Free Press (1978), p. 269.