

Cartels & Collusive Conduct

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Overview

- ◆ Introduction
- ◆ Inside a cartel
 - Case examples
- ◆ Anti-cartel enforcement
 - Legislation/sanctions
 - Investigative tools/process
 - Amnesty/leniency

Introduction

- ◆ Cartels:
 - Damage efficiency, innovation and choice
 - Impose unfair costs on consumers in all affected countries
 - higher prices/lower output
 - Distort normal market forces and competitiveness
 - Reduce FDI confidence
- ◆ A top regulatory priority in many jurisdictions worldwide

Introduction

- ◆ **EU Competition Commissioner Mario Monti**

“Cartels are cancers on the open market economy...[b]y destroying competition they cause serious harm to our economies and consumers.”

- ◆ **US DoJ Assistant Attorney General R.H. Pate**

“Anti-cartel enforcement should...be a primary priority for every antitrust agency. Cartels are an attack against free market economies...Cartels victimize not only disadvantaged groups but also frequently victimize large businesses.”

- ◆ **OECD:** *“...hard core cartels are the most egregious violations of competition law...”*

Introduction

- ◆ Global cartel enforcement is at all-time high
 - Enforcement
 - Fines/sanctions
 - International consensus/cooperation
 - Legislative reform
- ◆ Companies are responding
 - Compliance programmes
 - "House cleaning" & immunity/leniency seeking

Inside a Cartel

- ◆ What is a cartel?
 - OECD definition of a “Hard core cartel”

“...an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids, establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.”

Inside a Cartel

- ◆ Susceptible markets/companies
 - Markets with few competitors
 - Homogeneous products/non-dynamic markets
 - Existence of a “communications facilitator”
 - Trade associations
 - Price/output transparency
 - Depressed markets/overcapacity
 - Recently acquired companies/M&A

Inside a Cartel

- ◆ But cartels not limited to “old economy” or “basic industries”
 - Vitamins/food additives/beer
 - Financial services
 - Auction Houses
 - Airline Transport
 - Hi-tech

Inside a Cartel

- ◆ Common phases
 - Start-up - trade association/depressed market
 - Developmental - first secret meetings, establish membership, “compensation”, monitoring
 - Operational - meetings/contacts established and working; punishments for cheating
 - Breakdown I - significant cheating/defector/new entrant/significant market change
 - Breakdown II - prosecution/whistleblower

Case Example (I)

Methionine (EU Decision - July 2002)

- ◆ Product: amino acids - animal feed supplement
- ◆ Participants: Major EU and Japanese companies
- ◆ Infringement:
 - Agreement on price targets/price increases
 - Shared assessment of volumes, market shares
- ◆ Method of implementation:
 - Monitoring via information exchange
 - Regular multilateral meetings

Case Example (I)

Methionine

- ◆ Operation and development:
 - 1st phase (1986-1989): smooth implementation, upward price trend
 - 2nd phase (1989-1990): one member defects; new market entrant; agreement on increasing prices
 - 3rd phase (1991-1999): fear of detection; cheating; formal cartel meetings cease, whistleblower
- ◆ Total EU fines of approx. €127 million

Case Example (II)

Belgian breweries (EU Decision - December 2001)

- ◆ Product: beer
 - Declining market
- ◆ Infringements:
 - Non-compete pact among competitors
 - Price fixing & customer allocation
- ◆ Method of implementation
 - CEOs/to management met to initiate and monitor the “gentlemen's agreements”

Case Example (II)

Belgian breweries

- ◆ Operation and development:
 - Initial price fixing for retail sector and limits on investments in HoReCa
 - Initial agreements extended substantially to include general non-aggression pact, market sharing in HoReCa
 - Interbrew knew of antitrust risks but went ahead
 - Commission “dawn raids”
- ◆ Total amount of fines: €91 million

Case Example (III)

Carbonless paper (EU Decision - December 2001)

- ◆ Product: self-copying paper
- ◆ Participants:
 - Mainly members of trade association
 - Nearly all European supply was derived from cartel members
- ◆ Declining market/overcapacity
- ◆ Infringement: price (increase) fixing/market allocation

Case Example (III)

Carbonless paper

- ◆ Method of implementation:
 - High level and national/regional meetings
 - Exchange of information to monitor compliance
 - Punishment threat to deter defection
- ◆ Detection of the cartel
 - Whistleblowing by a cartel participant
- ◆ Total fines of about €314 million imposed

More Examples

- ◆ **Vitamins** - substantial international cartel with substantial international enforcement
- ◆ **Chemicals 2002** - coordinated US/EU raids; on-going
- ◆ Notable quotes
 - *“The competitor is our friend, and the customer is our enemy”* - **Lysine cartel**
 - *“Better erase this email...unless you like the taste of prison food...”* - **internal audit email**
 - *“PS - I do not believe it is appropriate that, as competitors, we communicate in this way - could we please restrict future discussions to verbal.”*

Enforcement - Legislation

◆ Legislation

- EU - Article 81
- US - Sherman Act, S.1
- Basics - prohibiting agreements between competitors that involve price fixing, output restrictions, market/customer allocation, bid rigging
- Trend is toward increasing powers of investigation and sanctions

EU Legislative Reforms - Aiding Cartel Enforcement

- ◆ Regulation 1/2003 (effective May 1st, 2004)
 - Commission to focus resources on cartel enforcement
 - Changes will remove role in “contractual” disputes
 - Power to search homes of directors and other staff (reasonable suspicion that business records kept there)
 - Power to interview persons (voluntary)
 - Increased fines on parties for supplying incorrect or misleading information/harsher periodic penalties

Enforcement - Sanctions/Civil Actions

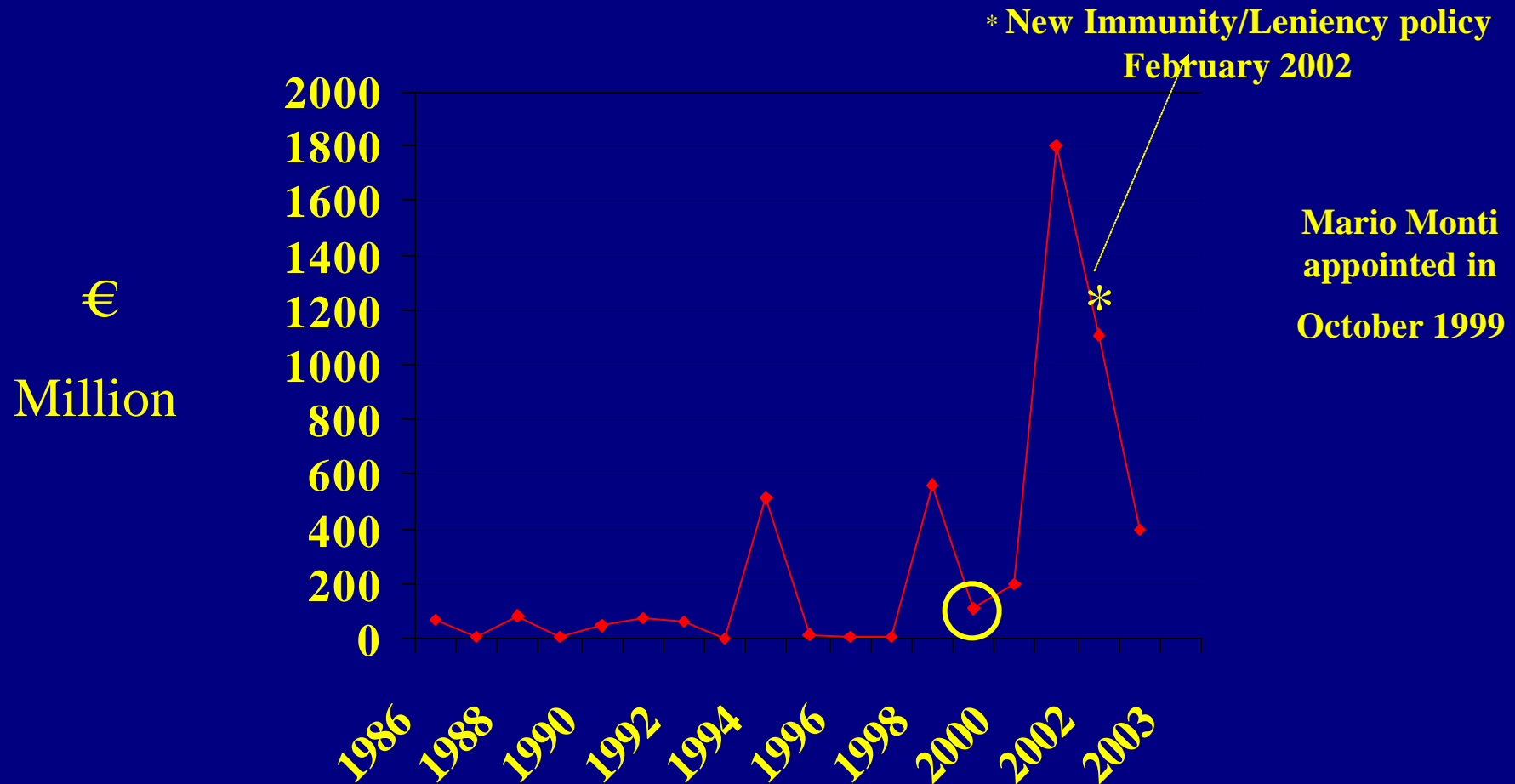
- ◆ Sanctions - fines (criminal/civil), jail, restitution
 - Europe
 - typically administrative systems w/fines
 - trend toward higher fines - EU and national
 - some criminal sanctions exist
 - disqualification of directors - UK
 - US, Canada - civil fines and criminal fines/sanctions -US considering stronger penalties
- ◆ Civil actions - US leads, Europe slowly following

Fines - The European Commission

Example

- ◆ Total fines in 2003 = €500 million
- ◆ Total fines in 2002 = €950 million
- ◆ Total fines in 2001 = €1.8 billion
 - Amount of fines in 2001 = higher than all fines assessed between 1969 and 2000
- ◆ Highest individual fine = €462 million (Hoffman LaRoche in *Vitamins*)
- ◆ Highest fine for single infringement = €249 million (Lafarge in *Plasterboard*)

Fines - The European Commission Example



Investigations

- ◆ Typical tools
 - Written requests for information
 - “Dawn Raids”
 - Immunity/leniency programmes
 - Surveillance

Investigations - Written Requests

- ◆ EU - “Article 18” letters
 - Power to request “all necessary information” in connection with all manner of competition investigations
 - The Commission commonly addresses information requests to companies outside EU territory
- ◆ European national regimes - similar powers
- ◆ US/Canada - subpoenas

Investigations - Dawn raids

EU Example (I)

- ◆ “Dawn Raids” - on the spot “surprise” investigations by Commission and assisting national officials:
 - Premises located within the territory of the EU (companies need not be EU incorporated)
 - Access to all parts of the sites including vehicles
 - Access to all documents including electronic
 - Interviews and oral explanations
- ◆ Search limited to scope of Decision authorising raid

Investigations - Dawn raids

EU Example (II)

- ◆ Non-business premises search requires (i) reasonable suspicion records are there and (ii) judicial oversight
- ◆ In practice, Commission will raid all known suspects simultaneously
- ◆ Raids often take 1-2 days
- ◆ Commission takes copies, not originals
- ◆ Privileged documents - a dilemma
- ◆ Possibly heavy fines for failure to comply
- ◆ International coordination of raids

Investigations - Dawn raids

Effects

- ◆ Often other problematic documents are discovered
- ◆ Raid triggers internal audits of raided companies and the “*domino effect*” often begins:
 - Internal audit leads to leniency application
 - Internal audit often leads to evidence of other cartel activity
 - Immunity sought on other cartel activity
 - Immunity application leads to new rounds of raids
- ◆ Public statements - regulators/companies

Investigations - Immunity/Leniency

- ◆ A very successful tool for uncovering and destabilising cartels
 - Incentives and good procedures are key
- ◆ US DoJ “Amnesty” programme - the innovator
- ◆ EU “Immunity/Leniency” programme - recently improved
- ◆ Recent increase in EU national programmes
- ◆ Australia, Brazil, Canada, South Africa programmes

Investigations - Immunity/Leniency

Common features

- ◆ First company to “confess” receives immunity from fines/prosecution
- ◆ Sets up a “race” to the regulator
- ◆ Reductions in fines (Leniency) available for those that come later
- ◆ Continuing obligation to provide information during investigation
- ◆ Must withdraw from cartel before application
- ◆ “Ringleaders”/coercers excluded from immunity

Investigations

EU Example - Immunity

- ◆ 2002 “Immunity/Leniency Notice” creates two levels of applicant for which full immunity may be available
 - The first to submit evidence to enable the Commission to adopt a decision or carry out an investigation
 - The first to submit evidence which enables the Commission to find an infringement
 - Conditions: cooperate, terminate and no “coercion” of others during cartel

Investigations

EU Example - Leniency

- ◆ Reduction in fines possible for applicants not meeting criteria for full immunity but who nevertheless provide the Commission with evidence which represents “significant added value”
 - 30-50% reduction for the first to do so
 - 20-30% reduction for the second to do so
 - up to 20% for subsequent undertakings
- ◆ Condition: terminate participation

Investigations

EU Example - In Practice

◆ Practice

- Commission views notice as a great success:
 - Over 45 applications for immunity since start of 2002 policy/ 30 applications for leniency
 - Added extra staff to cope with applications
 - Harmonisation with US policy has enabled more cooperation/waivers of applicants
- Some “teething pains” on procedure

Chemicals Industry: 2002-2004

Example - Immunity + “Domino effect”

- ◆ New EU Immunity/Leniency Notice - February 2002
- ◆ Whistleblower in about June 2002
- ◆ Simultaneous US and EU raids in September 2002
- ◆ Client internal audit immediately following raids
- ◆ Client discovers several other cartels during audits
- ◆ Client seeks immunity for other cartels in neighbouring markets - succeeds in EU, US, Canada
- ◆ Commission raids likely original whistleblower and other companies and a trade association
- ◆ Still in process - likely decisions not until 2004/2005

Other Issues

- ◆ Investigations
 - Privilege
 - US discovery issues
 - Paperless procedure
 - Self-incrimination
- ◆ ICN - Cartel Committee agreed in May 2004

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