

Interplay Between Antitrust and Criminal Law in Europe

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In Europe, the interplay between antitrust and criminal law at the national level may vary significantly by jurisdiction. Some European Union member states, such as the United Kingdom, Ireland, and Romania, have criminalized competition law. Other jurisdictions, such as Germany and Italy, do not envisage criminal penalties for anticompetitive practices; however, such conduct may sometimes qualify as a separate criminal offense.¹ The following cases, across Europe, show that there appears to be a general trend towards more effective enforcement against serious antitrust violations – including by means of criminal penalties against individuals – and not only in the countries with criminal competition laws.

In the UK, the Enterprise Act, effective in June 2003, set up a new framework to prosecute, on a criminal basis, individuals found responsible for the establishment and implementation of hard-core cartels. The UK national competition authority, the Office of Fair Trading (OFT), was granted additional investigatory powers and a new Cartel Investigation Branch was created to deal specifically with criminal investigations. In addition, the Enterprise Act removed an obstacle to the extradition of UK citizens to countries with criminal competition laws, which was due to the lack of an equivalent criminal offense in the UK. This issue was highlighted in 2002, in the Sotheby's and Christies case², when Christies' Chairman, Anthony J. Tennant, could not be extradited to the United States.

Notwithstanding the new rules, in the first five years following the adoption of the Enterprise Act, the OFT did not impose any criminal penalties for antitrust violations, leading some commentators to call into question the OFT's ability to successfully prosecute price-fixing crimes. In June 2008, however, three UK businessmen became the first individuals to be convicted under the new cartel offense provisions, as they pleaded guilty to bid rigging in the marine hose sector. They were sentenced to prison terms ranging from 20 months to two and a half years and disqualified from acting as company directors for five to seven years. In addition, two of the three individuals were also ordered to surrender assets totaling £1 million as they benefited personally from the cartel.

Romania is another European country where criminal liability for competition violations has for many years only existed in theory. According to the Romanian Competition Act (Law No 21/1996), individuals contributing significantly to anticompetitive agreements or practices can be imprisoned for up to four years and disqualified from their current positions. However, no criminal penalties were imposed until December 2009, when, in the context of a price-fixing cartel case in the wheat storage market, the Competition Council found that the president of the association of wheat storage undertakings had a "determining role" in "conceiving, organizing or performing" the price-fixing scheme. The Council therefore referred the matter to the criminal investigation bodies.

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Therefore, in recent years, countries that have criminalized competition law violations seem to be using this tool in a more effective way, in order to ensure a higher degree of deterrence. On the other hand, in countries such as Germany or Italy, where antitrust violations are not considered criminal offenses, alleged anticompetitive conduct is increasingly subject to criminal prosecution, as long as it qualifies as a separate criminal offense.

Bid rigging is a traditional example of potential anticompetitive conduct that may be sanctioned with both administrative fines (as an antitrust violation) and criminal penalties (under the national criminal law regimes). For example, in Germany, according to the Federal Supreme Court, bid rigging could, depending on the circumstances of the individual case, also be regarded as a particular form of fraudulent misconduct. Therefore, if the Federal Cartel Office (FCO) discovers cases involving bid rigging, it will refer the proceedings against individuals to the public prosecutor under Section 298 of the German Criminal Code, which provides for a jail sentence up to five years. This was the case in February 2011, when the FCO fined three manufacturers of fire-fighting vehicles for alleged price fixing and quota agreements and referred the top management of the companies involved to the public prosecutor's office for examination under criminal law.

The 2009 pasta cartel case in Italy provides a more uncommon example of alleged anticompetitive conduct prosecuted as a criminal offense. Following a fine imposed by the Italian Competition Authority against most Italian pasta manufacturers for price fixing in Italy, the Rome prosecutor's office launched a criminal investigation charging some of the larger producers of "speculation on the price of consumer goods." The criminal investigation proceeded under article 501 *bis* of the Italian Criminal Code, which had been applied in few cases in the past. Interestingly, the investigation targeted the same conduct and concerned the same documents that had been collected during the antitrust proceeding before the Italian Competition Authority, demonstrating a certain level of

cooperation between antitrust and criminal authorities.

The above cases clearly show the will to punish serious antitrust violations by means of criminal penalties, because of their higher degree of deterrence. When evaluating the risks related to their potential involvement in antitrust violations, multinational companies and their top management are therefore well advised to consider the above general trend in Europe.

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¹ The EU countries that have criminalized competition law violations are Cyprus, the Czech Republic, Denmark, Estonia, France, Greece, Hungary, Ireland, Latvia, Malta, Romania, Slovakia, Slovenia, and the UK. The EU countries that do not envisage criminal penalties for anticompetitive practices are Austria, Belgium, Bulgaria, Finland, Germany, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Spain, Sweden; "Are there criminal sanctions? What are these? What are the relevant provisions?" in "Antitrust

Encyclopedia - Concurrences - Review of competition laws" available, under subscription, at http://www.concurrences.com/nr_one_question.php3?id_rubrique=644.

² *United States v. Taubman*, No. 01 CR 429 (GBD) (S.D.N.Y. May 2, 2001).