

Hüschelrath, Kai

Research Report

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ZEW policy brief

by Kai Hüschelrath – Centre for European Economic Research (ZEW)

Cartel Enforcement in the EU: Leniency Programmes and the Appeals Process

Essential Issues

Fighting cartels is a major priority of EU competition policy. Acting in concert with national competition authorities in the EU, the European Commission (EC) has made considerable efforts to promote competitiveness by detecting and punishing cartels. These efforts are visible not only in the increasing number of cartel cases, but also in the substantial rise in the average fines imposed per cartel member.

While the successes of past years in fighting cartels clearly hinge to some extent on various policy reforms, many commentators argue that the introduction of the EC leniency programme (LP) in 1996 is likely a key enabler. Generally, LPs offer violators a fine reduction or even full amnesty from fines if they disclose an infringement to the responsible authority and cooperate during the subsequent investigation. Below, the key results of an empirical ZEW study on the determinants of self-reporting under the European LP are presented.

Given the substantial increase in both the number of detected cartels and the average fine per cartel member, it comes as no surprise that an increasing number of convicted firms have considered filing an appeal against EC decisions. Below, the characteristics of firms filing an appeal and the factors that determine their success in terms of fine reduction are discussed.

Research Question and Relevance

- ZEW constructed a detailed database of all cartel and cartel appeal cases ruled on by the European Commission, the General Court (GC) or the European Court of Justice (ECJ) between 2000 and 2012. The database combines case-related, firm group-related and firm-related information.
- In an empirical study on the European Leniency Programme, ZEW researchers investigated the determinants of self-reporting. The results show that the probability of a firm becoming a chief witness increases in conjunction with its status as a repeat offender, the size of the expected basic fine, the number of countries active in one group as well as the firm's market share in the cartelized market.
- In an empirical assessment of the European appeals process in cartel cases, ZEW researchers studied both the characteristics of the firm groups filing an appeal and the factors that determined their success in terms of fine reduction. The results show that some characteristics only affect the probability of filing an appeal, while other factors influence both the probability and the success of an appeal.

Key Messages

ZEW's Database on EU Cartel Cases

Data Source for the Studies

The availability of a suitable database is a necessary precondition for any empirical assessment of cartel enforcement in the European Union. In 2011, ZEW started to construct a detailed database of all cartel cases decided by the European Commission since 2000. The current database contains information on all cartel and cartel appeal cases decided by the EC, the GC and the ECJ between 2000 and 2012. The data were collected from decisions and press releases published by the EC in the course of its investigations as well as from judgment documents provided by the online platform CVRIA.

In particular, the database combines case-related, firm group-related and firm-related information. At the case level, information such as the cartel type, cartel duration, number of cartel members, affected industry, relevant geographic market(s) and imposed overall fines are available. With a view to firm- and group-specific data, the database contains information on the individual length of cartel participation, the fine amounts imposed by the EC, whether the firm applied for leniency or appealed the EC decision and the value of fine reductions following a successful leniency application or appeal. Furthermore, specific factors that are relevant for the calculation of the fine, including aggravating and mitigating circumstances or repeat offenders, have been documented as well.

Study 1: Leniency Programmes as an Instrument for Uncovering Cartels in Europe

Introduction of a European LP in 1996

In many industrial nations leniency programmes have become an indispensable tool for uncovering cartels. Firms that are involved in a cartel benefit from these programmes in the following way: as active key witnesses, they can reduce or even entirely avoid the threat of financial penalties – depending on the quality and novelty of the evidence they provide. A recent empirical study by ZEW shows how the characteristics of participants in leniency programmes differ from those of other firms that have been fined by the European Commission for cartel violations.

In 1996 the European Commission's Directorate-General (DG) for Competition carried out its first leniency programme for firms participating in cartels. In so doing, the DG followed the example of antitrust authorities in the United States, whose national leniency programme had already undergone extensive reforms in 1994. Since the initial design of the European leniency programme left some questions open from the perspective of firms, the Commission redesigned the programme in 2002 by introducing a transparent fine reduction scheme. The scheme made it easier for firms to identify the conditions in which they could expect full amnesty from a financial penalty. In 2006, as part of a further reform, some additional adjustments were made for the purpose of clarifying which firm had been the first to make the Commission aware of an existing cartel. These adjustments were designed to address the problem of competing leniency applications of varying quality.

Optimal Design of Leniency Programmes

Given that the leniency programme has become such an important instrument for combating cartels, questions have arisen concerning the optimal design of the programme as well as the incentive effects it produces for cartel members. Along with theoretical considerations, empirical studies provide an important basis for evaluating cartel policy and contribute to a better understanding of how leniency programmes work.

Characteristics of Participating Firms

The collapse of a cartel or the exit of a cartel member from illegal arrangements are the outcomes of heterogeneous individual decisions. Since applications for leniency status are rarely submitted simultaneously, it makes sense to examine what distinguishes the firms that submit such an application from those that do not.

The ZEW researchers based their empirical analysis on 76 decisions made by the Commission on cartel violations between 2000 and 2010. There were a total of 442 companies included in the list of firms involved, including their co-defendant subsidiaries. The researchers examined how the firms that won complete cancellation of the fines differed from those ultimately fined by the Commission.

The study concluded that prior to the introduction of the revised leniency programme, repeat offenders were only likely to become cooperative if their previous financial penalty exceeded a certain amount. On the whole, however, after the 2002 revision of the leniency programme, repeat offenders were generally more inclined to become cooperative witnesses. The greater the base amount of the financial penalty against a cartel member, the more likely it was that this firm would testify against its former accomplices. There was a positive correlation between leniency status and the extent to which the company group was multinational. A positive correlation was also found between leniency status and a firm's market share in the cartelized market.

From a policy perspective, the study not only confirms existing research by finding a close positive relationship between the level of fines and the incentive to self-report. It also corroborates the value of policy reforms that aim to improve self-reporting incentives for repeat offenders and for cartel firms with high market shares. Furthermore, an extension of international cooperation among competition authorities is likely to further increase the effectiveness of the European leniency programme through the promotion of incentives for cartel members to self-report their involvement in an illegal agreement.

Incentives for Cooperation

Study 2: The Appeals Process in European Cartel Cases

The losing party in a judicial verdict or administrative decision has the option of having their arguments reheard in an appeals process. To date, little research has been conducted on the company characteristics that impact the likelihood of filing and winning an appeal. A recent empirical study by ZEW on cartel cases finds the following: the greater the amount of the original fine, the likelier it is that a firm will succeed in obtaining a reduction of the penalty through an appeals process.

EU competition law provides for a one- or two-step appeals process. In the first instance, a cartel member objecting to the European Commission's determination of a fine can file an appeal with the General Court (GC), which is an EU court downstream from the European Court of Justice. The firm that has been fined by the EC can raise objections to the amount of the fine as well as procedural, evidentiary and material aspects of the case. The GC can revoke the fine imposed by the EU Commission, increase or decrease the amount of the fine or review the EC's entire decision.

In the second instance, the unsuccessful party at the first instance (i.e. the convicted firm or the European Commission) can turn to the European Court of Justice, the highest court of appeal in Europe. The Court of Justice can likewise revoke, raise or lower the fine, however, it limits itself to questions of law and has no jurisdiction to review the facts or analyse the evidence.

ZEW investigated the characteristics of companies that choose to appeal. In addition, the researchers sought to determine the factors that contribute to the success of an appeals process. For this purpose, they considered data from 467 groups of firms that were involved in 88 cartels and were issued a fine by the EC between 2000 and 2012. A number of the firms under examination had filed an appeal with the EU General Court, and some of them had gone on to file a further appeal with the European Court of Justice.

The ZEW analysis shows that, on average, the convicted firms belonged to a cartel for 83 months. The average fine handed down by the EC amounted to 31 million euros. About five per cent of the convicted companies were cartel leaders and close to nine per cent were repeat offenders.

Empirical Study of Cartel Appeals Cases

Success Factors in the Appeals Process

High Transparency of Judicial Decision- Making Important

About half of the company groups examined (234) filed an appeal. Of these, a total of 47 per cent were successful. This means that approximately a quarter of all companies examined succeeded in getting the court to reduce the original amount of the fine imposed by the EC – by an average of 8.4 million euros. Among the 109 successful appeals, 34 per cent were accepted on the basis of material grounds, and 20 per cent due to incorrect calculation of the fine.

According to the study, a firm's chances of success in appeals proceedings are greater if it cites more than one justification for the appeal. By contrast, the chances of a successful appeal diminish when there are multiple appellants and when the EC has prevailed in the appeals proceeding at the first instance. When firms cite primarily material grounds and incorrect calculation of the fine in their appeal, the fines are reduced more sharply than for all other cited justifications. In addition, the greater the original fine imposed by the EU Commission, the greater the reduction upon appeal.

From the viewpoint of political decision-makers and the participating courts of appeal, the ZEW findings suggest the advisability of increasing the transparency of the administrative and judicial decision-making process – for example, by issuing clear guidelines for rendering judgments. An increased transparency would also reduce the number of frivolous appeals because they are unlikely to succeed. Another finding uncovered by ZEW researchers should provide further incentive for reform: both repeat offenders and cartel leaders can count on reduced fines after an appeals process. This runs counter to the deterrence concept in European competition law that seeks to punish cartel leaders and repeat offenders more harshly. Thus, the researchers recommend that cartel leadership and recidivism should be weighted even more severely in the definition of aggravating circumstances when setting fines.

Further Information

Researcher

- Prof. Dr. Kai Hüschelrath
Head of the ZEW Research Group “Competition and Regulation”,
e-mail: hueschelrath@zew.de, phone: +49 621 1235-384

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