

The Cartel Evidence Process: A Review of Business Competition Law in the Case of the Swedish Scania Trucking Company

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Abstract

This article discusses the issue of cartels in business competition law. The discussion took the case of a cartel carried out by a well-known Swedish truck and bus manufacturer, Scania. In 2017, European Commission member on competition, Margrethe Vestager stated, the European Commission had found that Scania violated EU antitrust rules. The company colluded for 14 years with five other truck manufacturers on pricing trucks and to charge new technology to meet stricter emissions rules. According to the European Commissioner, Scania has been practicing cartels since 1997 and has been going on for 14 years. Scania colluded with five other companies, namely: MAN (Germany), DAF (Netherlands), Daimler (Germany), Iveco (Italy), and Volvo (Sweden)/Renault (France). The case will be discussed using a qualitative method, with discussions on business competition law, cartel theory, and the theory of proof of cartel business competition acts. It is not easy to prove the existence of a cartel and cartel actors can exercise their right not to receive sanctions by appealing and defending their arguments. Solving the cartel, takes a long time and allows developing other problems.

Keywords

cartel; business competition; Scania



I. Introduction

The European Union is an economic and political organization or supranational union which now consists of 27 member states bound by a treaty, which establishes the goals, institutional rules and relations between the European Union and its member states. Organization must have a goal to be achieved by the organizational members (Niati et al., 2021). The success of leadership is partly determined by the ability of leaders to develop their organizational culture. (Arif, 2019).

The two treaties that form the constitutional basis of the European Union are: Treaty of European Union (TEU) or known as the Maastricht Treaty, previously known as Treaty Establishing the European Community (TEC). This treaty marked the process of creating an increasingly closer union among Europeans. Another one is the agreement on the functioning of the European Union/Treaty of Functioning European Union (TFEU). The two agreements have the same legal value.

Based on article 3 paragraph 3 TEU, the European Union was deliberately formed to create or create a common market. In this market economy system, as far as possible, there is price stability with competitive business competition and is not distorted/disturbed. That is, business actors do not have obstacles to carry out economic activities. So that business actors can compete properly and fair. If not, then as a result, not only business actors will suffer losses, consumers will also be affected. Regarding the internal market with a system

that ensures business competition in the market is not distorted, the legal basis is in accordance with Protocol No. 27 which is attached to the Lisbon Agreement (OJ 2010 C 83, p. 309).

The objective of European competition law, which is to build a competitive market economy through good and effective competition rules, remains the focus of EU policy. This can be seen in article 3 paragraph 1 (g), that the activities of the European Union, including the institutions in it, ensure that the business competition system in the common market is not disrupted.

To regulate business competition itself, the legal basis is regulated in the European Union Agreement with two articles, namely Articles 101 and 102. Actually, each member country also has its own rules, but they have been harmonized with the provisions of the European Union. So, although the matter of business competition is only regulated in those two articles, the provisions for the domestic market of European Union member countries have adapted and adopted the principles of the provisions of the European Union, considering that the two articles on business competition are also input from the member countries of the European Union. In addition, the decisions of legal cases in business competition are also a reference for further problems in this field.

This business competition law is not standard. If it is standard, it can limit the business competition process itself. Business competition law is more about bridging what is allowed and prohibited by business actors. So, actually this law is to protect the competition process itself. This means that business actors can compete in the free market freely, across countries, to achieve the welfare of the European community and strengthen the common market. However, this free competition does not mean being as free as possible, but rather by following the regulatory framework that must be obeyed. It is as stated in article 4 article 119 TFEU.

In conducting business competition, supervision is carried out by the European Commission. This institution monitors the business competition process. If there is a practice that violates the rules, the Commission has the authority to investigate it and stop the violation. In addition, globally, the European Union cooperates with global and national bodies to assess possible violations. A number of internal examinations and legal reviews were also carried out by the European Court.

If any business competition rules are violated, business actors will face serious penalties.

II. Review of Literature

In business competition law, the prohibition of unfair competition practices in the form of cartels is stated in Article 101 TEU. Inside it prohibit the existence of anti-competitive agreements between two or more independent market operators. The prohibition of this cartel is because it is not in accordance with the internal market, has reduced or limited competition, and can affect trade between member countries because the perpetrators take a lot of advantages.

2.1 Cartel Theory

A cartel, when viewed from a legal definition, is the existence of a group of companies with similar or homogeneous products and independent, then join forces to set prices, limit production, or share the market among these business actors.

The cartel actors also commit collusion. They make deals by reducing incentives for providing quality and innovative new products and services .

In a broad sense, a cartel is an explicit form of collusion. The perpetrators want to get mutual benefit from the member companies. The behavior in this cartel is like that of a monopoly. So there are restrictions on production, raising and setting market prices in order to obtain higher profits.

Of course, so that business competition runs well and does not fall into the unfair business competition of cartels, then what business actors must do is not to fix the price of a product, not to limit its production, and not to share the market or exchange important information about the company.

Agreements are not prohibited and can be justified if they benefit consumers and the economy as a whole, such as agreements on research & development and technology transfer.

In addition, for a company with a large share and a dominant position, what is prohibited is: charging consumers too high prices, charging unrealistically low prices so that competitors exit the market, and imposing certain trading conditions on business partners.

2.2 Circumstantial Evidence Theory

The cartel is a unique problem, because the actors enter into an agreement or agreement secretly and verbally in setting prices and allocating the market for a product. To prove the existence of this cartel is done by direct evidence (direct evidence/hard evidence) and indirect evidence (indirect evidence/circumstantial evidence). It is not easy to get direct evidence because the cartel actors carry out their work secretly and secretly.

Generally, what can be direct evidence of the agreement is in the form of written evidence such as printed and electronic documents from the perpetrators who carried out the cartel act.

Meanwhile, this indirect evidence is in the form of evidence of communication between cartel operators explaining the terms of an agreement between the actors as well as economic evidence regarding the market and the behavior of the actors participating in the cartel indicating concerted action.

This circumstantial evidence can be used to prosecute cartel evidence, although it can be difficult to interpret situationally. So it is necessary to consider the case as a whole and its cumulative effect, not per item. In addition, it is subject to economic evidence with its analysis that needs to be carefully proven in its proof.

In the case of business competition law, circumstantial evidence consists of communication evidence and economic evidence. Evidence of communication is the fact of a meeting and/or communication between competitors even though there is no substance from the meeting and/or communication.

Organization for Economic Co-Operation And Development(OECD) provides criteria for evidence of communication in the form of: recordings of telephone conversations (but not their substance) between competitors, or trips to a common destination or participation in meetings, for example during a trade conference; other evidence that the parties communicated on the subject for example, minutes or meeting notes showing prices, demand or capacity utilization were discussed; internal documents that attest to knowledge or understanding of competitors' pricing strategies, such as awareness of future price increases.

Evidence of economic analysis is evidence that consists of two stages in the form of structural analysis directed at proving whether it is possible for a cartel agreement to occur

in the relevant market (relevant market) and behavioral or change analysis aimed at proving whether the behavior in the relevant market is consistent with cartel behavior and not competitive behavior.

III. Research methods

The discussion of this Scania case study is carried out qualitatively by using secondary source data, from the results of the legal case process. In analyzing the evidence of business actors conducting cartels, the European Commission seeks to obtain hard evidence. Thus, the name Leinency Program emerged in 2006. Manufacturers of MAN were then the first to take the initiative to cooperate with the European Union, by providing evidence they knew in the form of e-mails, documents or telecommunication conversations, so that MAN was pardoned without being penalized.

IV. Results and Discussion

In the land transport sector, trucks are one of the main means of transporting goods that are important in the European internal market, both for companies and consumers. Total numbertrucks on European roads there are about 30 million trucks, accounting for three quarters of the transport of goods in Europe.

The market saw a substantial impact in terms of the number of trucks on European roads as well as a price increase of around 20 percent for trucks in the medium and heavy classes of 6 tons - 16 tons, without any reason to affect the market. Whereas the price of vehicles for transportation depends on competitiveness in the market. The Commission then conducted an investigation into the medium and heavy trucks.

In EU competition law Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement prohibit cartels and other restrictive business practices. Also includes the prohibition of dominant position in article 102. Based on this rule of law, Scania has committed a cartel violation, with the following characteristics:

1. Has entered into an agreement with a concerted action secretly orally with a company that produces similar/homogeneous goods. Concerted action is an action that is planned, regulated and agreed upon by the parties jointly with the same goal, each of which commits the act is not bound either in writing or verbally but they have the same goal. Perpetrator concerted action will be held accountable for joint actions even if he does not bind himself, concerted action always identified with conspiracy.
2. Entered into an agreement to set prices and increase gross prices in the EEA for medium and heavy trucks of 6-16 tons in size. This gross price list relates to the manufacturer's industrial price set by each company, The price paid by the buyer is the final price based on further adjustments, at local and national and local levels.
3. transfer the burden of emission technology costs that must comply with European standards on these medium and heavy trucks, to consumers/customers, conducting collaborations and marketing campaigns.
4. Dominant position, with producers in a homogeneous market and in a limited product class, and occupying a dominant position of 50 percent. This affects the interests of society. Consumers cannot make product choices.

This joint violation is an anti-competitive action that should be carried out competitively. The harmful impact will affect the interests of society/consumers in the

European Economic Area. Consumers have no choice of products due to production restrictions and product price controls.

To prove that it is true that there has been a violation regarding the cartel, the European Commission needs to find the evidence. Meanwhile, direct evidence or hard evidence is difficult to obtain, considering that the agreements made by the producers were carried out secretly and verbally. Another method used by the European Commission is by using the Leniency Program, which is a concept where cartel actors/companies indicated as cartels are willing to provide data and information and confess to the European Commission about the cartel, they will receive incentives/compensation and may even avoid punishment. The leniency program is quite effective in examining cartels. Since the introduction of this cartel procedure in June 2008, the Commission has enabled the Commission to implement a simplified and streamlined procedure for resolving this cartel problem. The settlement is based on Antitrust Regulation 1/2003. It will also benefit parties who decide more quickly and reduce the fine by 10 percent for acknowledging the existence of a cartel. So, it's very encouraging to have Whistle blowing.

The first cartel participant who confesses will be given full immunity. The reason for this is because the cartel will destabilize where its members cannot trust each other to remain silent.

A member of the MAN company as a whistleblower reported MAN's participation in the cartel voluntarily. This disclosure saved MAN from a fine of around 1.2 billion euros and based on Commission Waivers Notice of 2006, MAN received full immunity. Volvo/Renault, Daimler and Iveco who also cooperated to help the Commission prove the existence of the cartel. All acknowledged their involvement and agreed to settle the case and get a fine.

Based on the 2008 Notice of Settlement, the Commission applied a 10% reduction to the fines imposed. The five producers have 3 months to pay the fine. The proceeds of this fine go into the EU budget and to pay membership contributions in the European Union.

Any person or company affected by anti-competitive behavior as described in this case may take the matter to a Member State court and seek redress. The Court's case law and Council Regulation 1/2003 both affirm that in cases before national courts, the Commission's decision constitutes binding evidence that the conduct occurred and was illegal. Even though the Commission has fined the company concerned, compensation can be given without deducting the Commission's fine.

The Antitrust Damages directive, which Member States must implement in their legal systems, makes it easier for victims of anti-competitive practices to seek redress.

The whistleblower's confession is the first step in the European Commission's investigation to determine the existence of the cartel. Previously, MAN had applied for his immunity. In January 2011 the Commission conducted unannounced inspections of the trucking companies that produced the medium and heavy trucks. Without compromising the results of the investigation,

Commission members submit their objection letters to 6 truck manufacturers. The Commission has informed the manufacturers of these medium and heavy trucks that they may have coordinated their truck pricing behavior in the European Economic Area (EEA).

Such behavior violates Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the Treaty on the EEA, which prohibit cartels and restrictive business practices. .

Having the Commission's notice in writing in the Statement of Objections sent to the truck manufacturers is a formal step in the investigation into alleged rule violations EU antitrust. Parties may examine their investigative documents, respond in writing, or request

a plea hearing before representatives of the Commission and national competition authorities.

From the use of the parties' right of defense, the Commission has collected a number of evidences of violations, so that it can issue a decision to prohibit the violation and impose a fine .

Evidence of violations obtained by the European Commission in addition to direct evidence (hard evidence) which is generally difficult to obtain, and also indirect evidence (circumstantial evidence), which include:

- Confession of a whistleblower who voluntarily provided information to the European Commission regarding his participation in the cartel.
- The first meeting in Brussels served as the starting point for the truck cartel. A meeting was held between senior managers of truck manufacturers at a hotel on January 17, 1997.
- A meeting of truck manufacturers on the sidelines of trade shows or other activities. Meetings are held between 1997 and 2004. These events and activities are considered risky, because although it is normal for fellow business actors to have conversations, there can also be an exchange of information that develops into a violation of competition law.
- Evidence of communication in the form of telephone conversations and e-mail documents. Discussions were held with the head office to discuss the determination of truck prices, price increases, and the introduction of new emission standards which were carried out around August 2002 to 2004 onwards.
- Coordination of timing for introduction of emission technologies for medium and heavy trucks to meet European emission standards and coordination of costing charged to consumers.

In its investigation into the timing and cost of this European standard emission technology, the Commission did not show any link between the cartel and allegations of avoiding use of this system in trucks. Because for consumers themselves there are advantages in terms of using this technology and the market has no effect because the market is also small

The Commission's decision at trial is considered binding evidence of anti-competitive behavior. Scania itself denies all allegations of misconduct. For that Scania exercised its right to appeal. Share any individual or business who thinks he or she has been affected by this anti-competitive behavior can sue in national courts for damages. In the case of this truck cartel, Scania's latest fine is now more than double what it was before. But for Scania this is not the end.

General Court of the European Union on 18 June 2020, heard the truck manufacturer Scania's appeal against the European Commission's decision adopted in 2017. In its appeal, Scania questioned the reasons for the General Court to carry out its entire appeal in private and without publication. In fact, in the case being discussed, it is necessary to listen to the arguments in private. In article 31 of the European Court of Justice, it is also clearly stated that closed hearings for courts are the exception, not the rule. The trial shall be open except at the request of the parties themselves. The determination of closed court decisions should be for serious reasons, due to security considerations or the interests of the parties in the trial, as developed in Article 109 of the Rules of Procedure of the General Court.

While the Scania case is related to interactions with other truck manufacturers, there are no business secrets related to national security. So, the problem is far from a serious problem as referred to in article 31. Of course this is a concern for parties with an interest in justice and transparency in cases that need to be known to the public.

V. Conclusion

A cartel is an unfair business competition and a serious problem that needs to be addressed in the EU competition law. The Commission investigated the concerted action by 6 truck manufacturers, namely Scania, MAN, Volvo/Renault, Daimler and Iveco, to reduce competition.

The cartel practice carried out by the truck manufacturers is a violation of the European Union's competition rules. To prove the existence of a cartel is not easy. Because the cartel actors made the agreement secretly and secretly. So, the Commission needs to make efforts to prove it.

The evidence obtained can be direct evidence (hard evidence) such as documents, or other written agreements and indirect evidence (circumstantial evidence). Such as confessions of cartel actors regarding their participation/involvement in cartel practices. This recognition was encouraged through the existence of the Leniency Program, which was considered effective in examining cartels.

The existence of a whistle blower or the acknowledgment of the perpetrators/members of this cartel is the circumstantial evidence for the European Commission against the existence of the cartel. Subsequently, it became a formal step for the Commission to carry out further investigations and carry out legal settlements.

The company/perpetrator who gives the first confession can get a leniency in the sentence of a fine and even avoid a fine. The number of fines given to these parties shows the seriousness of the Commission. This takes into account the wide area of sales of medium and heavy trucks in the European Economic Area, the duration of the offenses committed for 14 years, from January 17, 1997 to January 18, 2011, as well as the combined size of the market from the perpetrators, and others.

Scania rejected the arguments presented by the Commission, so that Scania did not receive any reduction in fines. Scania chose to use its right of self-defense to appeal. There is no time limit for the settlement of anti-competitive behavior in a legal process. This depending on the level of complexity of the case, the ease of cooperation between the parties and the Commission, as well as the efforts and process of implementing their defense rights.

The Commission in carrying out this settlement effort aims to maintain competition in the truck industry and protect the interests of consumers. This is to ensure that the public/consumers are not faced with the price provisions for trucks that are illegally agreed upon by the alleged perpetrators and to protect consumers from rejected innovative products.

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