Regulating Cartels in Europe

A Study of Legal Control of Corporate Delinquency

CHRISTOPHER HARDING and JULIAN JOSHUA



CONTENTS

| Tables of Treaties, Legislation, and Notices Glossary of Key Terms XX XXII Introduction: Talking about Cartels: The Main Elements of Analysis and Discussion 1. Epistemology: the control of cartels as a subject 2. Political economy: the phenomenon and concept of the anti-competitive cartel 3. Legal control: competition law as a model of regulation 4. Drama: cartel control—the main actors 5. History: a twentieth-century overview of European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of legal action |
|---|
| Introduction: Talking about Cartels: The Main Elements of Analysis and Discussion 1. Epistemology: the control of cartels as a subject 2. Political economy: the phenomenon and concept of the anti-competitive cartel 3. Legal control: competition law as a model of regulation 4. Drama: cartel control—the main actors 5. History: a twentieth-century overview of European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of |
| Elements of Analysis and Discussion 1. Epistemology: the control of cartels as a subject 2. Political economy: the phenomenon and concept of the anti-competitive cartel 3. Legal control: competition law as a model of regulation 4. Drama: cartel control—the main actors 5. History: a twentieth-century overview of European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of |
| Elements of Analysis and Discussion 1. Epistemology: the control of cartels as a subject 2. Political economy: the phenomenon and concept of the anti-competitive cartel 3. Legal control: competition law as a model of regulation 4. Drama: cartel control—the main actors 5. History: a twentieth-century overview of European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of |
| Epistemology: the control of cartels as a subject Political economy: the phenomenon and concept of the anti-competitive cartel Legal control: competition law as a model of regulation Drama: cartel control—the main actors History: a twentieth-century overview of European cartel control International relations: the global dimension Pathology: antitrust delinquency as the target of |
| Political economy: the phenomenon and concept of the anti-competitive cartel Legal control: competition law as a model of regulation Drama: cartel control—the main actors History: a twentieth-century overview of European cartel control International relations: the global dimension Pathology: antitrust delinquency as the target of |
| of the anti-competitive cartel 3. Legal control: competition law as a model of regulation 4. Drama: cartel control—the main actors 5. History: a twentieth-century overview of European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of |
| 3. Legal control: competition law as a model of regulation 4. Drama: cartel control—the main actors 5. History: a twentieth-century overview of European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of |
| of regulation 4. Drama: cartel control—the main actors 5. History: a twentieth-century overview of European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of |
| 5. History: a twentieth-century overview of European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of |
| European cartel control 6. International relations: the global dimension 7. Pathology: antitrust delinquency as the target of |
| 6. International relations: the global dimension7. Pathology: antitrust delinquency as the target of |
| 7. Pathology: antitrust delinquency as the target of |
| - · · · · · · · · · · · · · · · · · · · |
| legal action 7 |
| |
| I. Business Cartels: Sleeping with the Enemy |
| 1. A history of ambivalence: is it a criminal law rap? |
| 2. Defining cartel arrangements |
| 3. The co-operative instinct: 'the customer is |
| our enemy' |
| (a) Collusion: the main defences |
| 4. The macro-economic context: typical markets? |
| (a) Markets: areas of trade and production |
| (b) Markets: private or public management 24 |
| 5. The micro-economic context: the quest for |
| supracompetitive profit 29 |
| 6. Cartel dynamics: the cartel as a private |
| treaty regime 32 (a) Inside looking out 32 |
| (a) Inside looking out (b) The business community: 'I wanna be closer to |
| you than I am to any customer' 34 |
| (c) Internal organization: the leader and the pack 36 |
| 7. Mapping the discussion 37 |

| Π. | Models of Legal Control: North America | |
|------|--|----|
| | and Europe | 39 |
| | 1. Atlantic crossing: the usual suspects, but | |
| | differing perceptions and models of legal control | 39 |
| | 2. Surveying perceptions of the subject: the debate | |
| | on cartels | 41 |
| | 3. The North American tradition: the delinquency | |
| | of the business cartel | 46 |
| | (a) Part of the American way of life | 46 |
| | (b) The crime model | 49 |
| | 4. The European experience: a culture of toleration | 52 |
| | 5. The Quest for <i>mens rea</i> : differing perceptions of | |
| | antitrust delinquency | 55 |
| | (a) 'Conduct-oriented' antitrust: the cartel as a conspiracy | 57 |
| | (b) 'Outcome-oriented' antitrust: the cartel as an | |
| | instrument of damage | 59 |
| | 6. The dilemma for European cartel regulation: | |
| | which model? | 60 |
| | Appendix 1 | 61 |
| | | |
| III. | . Cartels in Europe, 1870–1945: Das Kartellproblem | 63 |
| | 1. The centrality of the German experience: the | |
| | 'land of cartels' | 63 |
| | 2. Cartels in economic longitude: industrialization | |
| | and economic downturn | 65 |
| | 3. Wilhelmine cartels as vehicles for order | |
| | and stability | 67 |
| | 4. The arguments against cartels and the need for | |
| | regulation: das kartellproblem | 71 |
| | 5. The wider European picture: respectable and | |
| | necessary or suspect and delinquent organizations? | 75 |
| | 6. The mid-century watershed | 82 |
| | | |
| IV. | Cartels in Europe, 1945–70: From Registrable | |
| | Agreement to Concerted Practice | 84 |
| | 1. Post-war debates: back to the drawing board | 84 |
| | 2. The political perspective: the cartel as a tainted | |
| | organization | 85 |
| | 3. Cartels and international trade: early attempts at | |
| | international regulation | 88 |

| 4. The emergence of national regulation of | |
|--|------------|
| cartels in Europe | 96 |
| 5. The national position(s): stocktaking in the | |
| mid-1960s | 100 |
| (a) Austria | . 100 |
| (b) Belgium | 101 |
| (c) Denmark | 102 |
| (d) Finland | 102 |
| (e) France | 102 |
| (f) Germany | 104 104 |
| (g) The Netherlands (h) Norway | 104 |
| (i) Sweden | 103 |
| (j) Britain | 100 |
| 6. The Common Market context | 107 |
| | 100 |
| 7. The European cement market: the hardening of cartel control | 112 |
| of cartel control | 113 |
| V. A Narrative of Cartel Regulation in Europe, | |
| 1970 to the Present Time | 117 |
| 1. Reading a history of regulation and enforcement: | 11, |
| a 30 years' war | 117 |
| 2. The early years of litigation | 118 |
| 3. The fairly years of hugation 3. The lull in litigation, 1975–85 | 128 |
| | 130 |
| 4. European cartel litigation: a new legal industry | 136 |
| 5. Recovering the initiative in enforcement | 140 |
| 6. Changing modalities of enforcement | 140 |
| VI. Proof of Cartel Delinquency: Fashioning the | |
| European Cartel Offence | 143 |
| 1. 'Delinquency inflation' and the emergence of the | |
| problem of antitrust evidence | 143 |
| 2. Economic evidence: the significance of market | |
| context | 145 |
| 3. Economic evidence: the problem of parallel | |
| behaviour and 'tacit collusion' | 147 |
| 4. Testing oligopoly argument under European law | 151 |
| (a) The argument in Dyestuffs | 151 |
| (b) The argument in Wood Pulp | 153 |
| 5. Forging the cartel offence: marshalling the evidence | 100 |
| and framing the charge | 159 |
| 6. Collecting persuasive proof of cartel participation | 164 |
| o. Confeculty dersuasive proof of carter participation | 104 |

| VII. Judicial Review of Cartel Control: Testing | |
|--|-----|
| the Evidence and Due Process | 170 |
| 1. The role of the Community Courts | 170 |
| 2. Testing the evidence: the Court of First Instance | |
| rolls up its sleeves | 174 |
| (a) The clamour for stronger review: the cartels strike back | 176 |
| (b) Exercising an 'unfettered evaluation of evidence' | 180 |
| 3. Judicial review and the search for due process: | |
| firing the 'big guns of constitutional artillery' | 183 |
| 4. The nature of the Commission's procedure | 184 |
| 5. Investigations and the collection of evidence | 190 |
| 6. Effective rights of defence and 'access to the file' | 197 |
| 7. The balance of legal protection | 201 |
| (a) The significance of procedure and procedural | |
| violations | 202 |
| (b) Different kinds of rights | 204 |
| 8. Postscript: the epistemology of the debates on | |
| judicial review | 206 |
| VIII. Negotiating Guilt: Leniency and Breaking the | |
| Code of Silence | 209 |
| 1. The psychology of business truce: 'your | 207 |
| cheating heart' | 209 |
| 2. Leniency: the American model—designing the | 207 |
| irresistible offer | 213 |
| 3. Leniency: the EC model: a 'prisoner's | 213 |
| dilemma' playground | 216 |
| (a) The St Valentine's Day Notice | 219 |
| 4. A European 'patchwork' of leniency: 'amnesty | |
| international'? | 222 |
| 5. The lessons of leniency | 226 |
| 3. The lessons of temency | 220 |
| IX. Sanctions: Dealing with Business Delinquency | 229 |
| 1. Sanctions, censure, and effectiveness | 229 |
| 2. The repertoire of sanctions | 230 |
| (a) Orders to desist | 231 |
| (b) Compliance programmes | 234 |
| (c) Claims for compensation | 236 |
| 3. The penal option: financial penalties | 240 |
| (a) The legal character of EC fines | 240 |
| (b) The Commission as a sentencing authority | 242 |
| (c) Sentencing discounts and 'plea-bargaining' | 248 |

4. Prospective: the globalization of cartel regulation?

(a) Globalizing forces: the global economy

(b) A globalized regulation?

Bibliography

Index

284

285

286

291

299