Information sharing and the use of economic evidence in cartel cases

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Summary

Communication between the parties is a *sine qua non* condition for a cartel to hold. Yet, the literature and the legal practice are not consensual on which type of information sharing signals the existence of a cartel. In this paper, we describe a recent Portuguese cartel case in the wholesale market for salt (decided in 2006 and confirmed by the Courts in 2007), which was in place for around eight years and where information sharing between the (four) infringing parties revealed to be crucial for the cartel's monitoring and lengthy duration. The parties shared information on customers, prices, and output. However, the most relevant communication among them concerned their shares within the cartel (not necessarily their own market shares).

This case is highly instructive because: *(i)* it highlights the importance of information sharing as instrumental to the cartel's monitoring and sustainability; *(ii)* it was the first hard core cartel condemned by the Portuguese Competition Authority (PCA) with direct proof of its restrictive object and indirect proof (economic evidence) of its restrictive effect on competition; *(iii)* it illustrates how evidence on information exchanged can be used to compute the economic benefit collected by cartelists; and *(iv)* its prohibition by the PCA was confirmed by the two Courts (First Instance and Court of Appeal).

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Briefly, the four firms agreed on target sales quotas (in tons) among themselves, discriminated between two types of customers: the industry and the food sector. In order to sustain the cartel, they set a compensation scheme which implied that at the end of each year – when they would know their total annual sales – firms whose sales exceeded their quota would pay an agreed compensation to those selling below their quota. This meant that only at the end of the year they would know whether they would pay or receive those compensations.

In order to monitor the compliance of the agreement and the compensation scheme, the parties set up an extremely complex and sophisticated information exchange mechanism involving, in particular, the appointment of one of the firms as the internal cartel's manager. Moreover, these firms shared information outside the core of the quota-fixing agreement, including information on customers, on firms outside the cartel, and on commercial practices.

The PCA found hard evidence (documentary and testimonial) of the cartel after carrying out dawn raids on the involved firms' premises. This evidence was sufficient to prove the existence of the cartel for its restrictive object. Furthermore, another important issue raised by the case was the use of evidence on information exchange for the mathematical calculation of the economic benefit value (around € Millions 5.2) the four firms collected from the cartel. This computation served as indirect proof (economic evidence) of the cartel's restrictive effects, which enabled the PCA to prove the restrictive object and effect of the cartel, both upheld by the Courts. Actually, even in the absence of direct proof, this economic evidence could have sufficed to proof the existence of the cartel.

Finally, this case highlights the importance of presenting economic reasoning in an understandable but not less precise way to non-economists, in particular to Judges and Public Prosecutors. Because competition law enforcement involves the joint work of lawyers and economists, it brings an important contribution to a better mutual understanding of each others' way of thinking and scientific language. This experience is likely to produce positive results, as shown by the salt cartel case, insofar as economic evidence is presented in a simplified and intuitive way.

Plan of the paper: 1. Introduction (including review of the economic literature and legal practice); 2. Importance of information sharing in sustaining cartels; 3. Case study: the Portuguese "salt cartel" (with the mathematical proof of the economic benefit value in appendix); 4. Final comments.