New Zealand Ministry of Economic Development :

Cartel Criminalisation Proposal

Submission on Discussion Document

Professor Christopher Harding, Department of Law and Criminology, Aberystwyth University, Wales UK.

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Detecting and deterring cartels

There is now a strong global consensus regarding the economically harmful nature of hard core business cartels and thus a convincing argument in favour of a strong regulation of cartel activity as perpetrated by both corporate actors and individuals managing and working for such companies. Over the last 15 years there has been a notable tendency towards the criminalisation of cartels in a number of jurisdictions around the world, but the case for criminalisation is not a foregone conclusion and there remains scope for debate. The advantages and disadvantages of resorting to criminal law and criminal law sanctions in this particular context still require serious consideration. This much is clear from the extensive debate preceding the recent Australian criminalisation, and the fact that the present New Zealand proposal is sounding out views on the basis of an extensively argued discussion document. At a recent seminar held at the University of Oxford Centre for Competition Law and Policy (November 2009),[1] comprising a range of international expertise, some critical doubts were expressed regarding the effectiveness of criminalisation. Moreover, while Common Law jurisdictions have appeared to take the path of criminalisation with some enthusiasm, there has been greater reservation in some parts of continental Europe – Sweden and Finland have decided against criminalisation, and Austria has partly decriminalised its regulation of cartels.[2]

In principle, criminalisation of cartels should serve two main purposes. The first is expressive : to send a clear message concerning the objection against cartel conduct, based on a recognition of its harmful nature and the degree of moral condemnation of engagement in such activity. The second is dissuasive and in particular deterrent, since the object of regulation is clearly to secure the removal of hard core cartel activity and to establish effective means for doing so.

In the context of cartel activity, neither purpose is wholly unproblematical. The expressive purpose is clear enough in relation to the agreed economic and anticompetitive harm resulting from the operation of hard core cartels, and these arguments are well rehearsed in the Discussion Document. But whether this harm is brought about by conduct which in other respects may be the subject of strong censure

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[1] University of Oxford Centre for Competition Law and Policy, Criminalising Cartels Workshop, Pembroke College, Oxford, 12 November 2009.
[2] For instance, Austria decriminalised its cartel offences (except bid rigging) in 2002, and Sweden decided against criminalisation in 2004.

is more open to question, as is evident from some limited research findings which suggest an ambivalent position within public opinion on the criminality of cartelists.[3]

The deterrent impact of criminal sanctions in this context remains a matter of debate. The matter is complicated by the fact that the agency of cartel conduct is both corporate and individual, so that unravelling the respective corporate and individual roles in the setting up and operation of cartels is not straightforward, and the same is true of any attempt to measure the impact of sanctions on these different actors.[4] The subject is also coloured by the strong official claims on the part of enforcement agencies, asserting a notable deterrent impact from the use of criminal sanctions, especially when combined with leniency programmes. It is necessary to take a step back from such claims and call for more rigorous enquiry into the operation of criminal law in this area. Two things seem to be evident at the present time. First, it seems clear that leniency programmes have enabled enforcement bodies to uncover and prosecute a larger number of cartels, so that the clear-up rate has improved. But, secondly, it is also clear that the ‘dark figure’ of uncovered cartels is impressively large, and that there is a notable level of corporate recidivism among companies that have been prosecuted and sanctioned.[5] While much more research is required on this aspect of the matter, some of the possible reasons for lack of deterrent effect are explored further below.

In principle the costs and benefits of criminalisation and the application of particular criminal law sanctions are fully identified and explored in the Discussion Document, and need not be elaborated upon further here. The focus of this submission will be two problematical features of the criminalisation project, arising from aspects of the subject not as yet explicitly identified or fully understood : first the offensiveness of cartel conduct; secondly, the uncertain deterrent impact of sanctions.

The offensiveness of cartel conduct.

This is clearly relevant to both the design of any criminal offence and the choice of sanctions. For both political and practical legal purposes, a ‘cartel offence’ must capture accurately in its definition the sense of what society finds objectionable in hard core cartel activity. The condemnation inherent in any legislation must be convincing in moral and political terms and also be legally workable in netting the objectionable behaviour.

In the context of early twenty first century economic conditions and economic policy there is little doubt concerning the economic damage inflicted by hard core cartel activity (as understood in the widely accepted OECD definition). But the starting point of discussion is that such damage is first and foremost economic in nature, and moreover is experienced by individuals in society in an indirect and highly dispersed

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[3] See for instance : Andreas Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain,* University of East Anglia Centre for Competition Policy, Working Paper 07-12 (2007).
[4] See Christopher Harding : *Criminal Enterprise : Individuals, organisations and criminal responsibility* (Willan Publishing, 2007), Chapter 6.
[5] John M Connor and C Gustav Helmers, *Statistics on Modern Private International Cartels 1990-2005,* Purdue University Working Paper 06-11, October 2007.

manner. In that respect something like price fixing has an impact on individuals which is not sensibly felt in the same way as, for instance, the theft of a motor vehicle or sudden loss through fraud of pension prospects. Care must be taken, therefore, in comparing hard core cartel strategies with classic criminality such as theft and fraud. To put it another way, how would a jury respond to a defendant's claim that 'no one individual has suffered very much or sensibly because of this action, which is born of a healthy profit motive and has enabled the survival of business here in difficult times, using methods which would be allowable if the business was that of an oil producing country' ? If the answer to the question of what is so bad about fixing prices is largely in terms of an economist's calculation of a proxy, that answer may justify the need for regulation but be less convincing for purposes of saying that the price fixer should be branded as a criminal or face a prison term. It is necessary therefore to identify an aspect of cartel conduct which is offensive, over and above the economic harm flowing from the use of particular anti-competitive strategies.

A convincing case for criminalisation should rest as much on the state of mind and attitude of the cartel actor as much as the harm arising from the conduct. This is what is contained somewhere in the 'fault element' of the Australian offence, the American idea of 'conspiracy' as laid down in the Sherman Act, and (unhappily, it may be argued) the element of 'dishonesty' in the UK cartel offence contained in the 2002 Enterprise Act. Yet this fault element needs to be identified more precisely to make out that moral case, and this is not very easy within the existing vocabulary of collusion and conspiracy. But it is submitted that the clue to strong objection to price fixing and the like lies within those latter concepts of collusive action, comprising a determined conspiratorial defiance of democratically agreed economic policy. A cartelist (corporate or individual) may be seen as criminal through (a) *cognisance*, a clear awareness of the illegality of the conduct; (b) *contumacity*, a strong determination to proceed with that illegal activity; and (c) *covert tactics*, carried out secretly, taking measures to cover the traces and do what is necessary to obstruct anti-cartel enforcement, and justice. The problem of legal definition is one of encapsulating accurately that mindset and attitude in the concise and precise terminology necessary in the drafting of a criminal offence.

In many respects, the concept of conspiracy serves to convey the combination of cognisance, contumacity and covert method referred to above and appears to have served the purpose well under the Sherman Act. However, the American enthusiasm for the concept as a basis for criminal liability is matched by suspicion regarding its use in some other (notably continental European) jurisdictions, and it may come with a certain 'baggage' and overlay of interpretation from its use in other contexts of criminal law (a potential problem with the use of dishonesty in relation to the Enterprise Act offence under UK law[6]). It may also be questioned whether it is necessary, in technical legal terms, to use a term such as 'conspiracy' if both 'intention' and 'knowledge/awareness' are specifically incorporated into the offence definition. For a lawyer, the vocabulary of 'intention', 'knowledge' and 'agreement' would probably be sufficient to convey a sense of determined collusion. The question remains whether, for non-lawyers, such neutral language indicates sufficient moral opprobrium in the absence of more value-laden vocabulary such as 'conspiracy' or

[6] See for instance : Christopher Harding and Julian Joshua, 'Breaking Up the Hard Core : The Prospects for the Proposed Cartel Offence', (2002) *Criminal Law Review* 933.

‘collusion’. It was such a consideration which persuaded the British drafting of the cartel offence to incorporate the concept of dishonesty, in order to indicate the seriousness (i.e. criminality) of the conduct,[7] although there is a strong argument that dishonesty misses the real point of offensiveness in cartel activity. Arguably, however, the express insertion of the words *intentionally* to engage in/implement/facilitate an *agreement/arrangement* in the *knowledge* that it is a *prohibited* hard core cartel activity (from the OECD list) may convey the sense of offensiveness well enough. Additionally, in such a definition the vocabulary of *mens rea* gains colour from that of the *actus reus* if terms such as ‘engage in’, ‘implement’, ‘facilitate’, and ‘cartel activity’ are used in the statutory definition. Indeed, it may be argued that ‘agreement’, ‘arrangement’ and ‘prohibited’ are strictly speaking part of the *actus reus* in any case.

On the question of the *actus reus* it is submitted that the OECD hard core list should be adopted in its simple generic form of the four main strategies. This should be in *per se* form, to avoid difficult argument in legal process regarding economic or market impact. It may be advisable to consider a joint venture defence, and perhaps other defences in relation to permissible forms of horizontal restraint, but these should be drafted as precisely as possible. Finally, the *actus reus* should encompass (a) engagement in an agreement or arrangement; (b) implementation of the latter; and also (c) facilitation of (a) or (b), in order to bring within the scope of the offence key agents of facilitation who are not competitors within the relevant market (e.g. the defendant Whittle in the UK prosecution of individuals involved in the *Marine Hoses Cartel*;[8] the German consultancy firm Treuhand AG, dealt with in the EU proceeding against the *Organic Peroxide Cartel*[9]).

Sanctions, and the problem of uncertain deterrent impact

Defining cartel conduct as criminal is only part of the story. Equally important is the consequent issue of what kind and quantum of criminal law sanctions may be incorporated into the criminalisation. Indeed, on one reading of the recent history of the subject, it is the availability and perceived impact of certain kinds of sanction that have driven much of the process of criminalisation.[10] In particular, two arguments appear to have been influential : first, that financial penalties are not a sufficient deterrent in the context of cartel activity; and secondly, that the success of leniency programmes depends upon the threat of a severe and credible sanction in relation to individuals, i.e. imprisonment (and more specifically, that individuals could be extradited to the US to face prison terms there). In this sense, arguments in favour of criminalisation have been significantly driven by enforcement agencies and serve the needs of enforcement, rather than representing a bottom-up groundswell of popular objection against cartel activity. In much of the recent debate, it is not always easy to disentangle criminalisation argument from imprisonability argument.

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[7] Sir Anthony Hammond and Roy Penrose, *Proposed Criminalisation of Cartels in the UK : Report Prepared for the Office of Fair Trading,*November 2001, para 2.5.
[8] *R v Whittle, Brammar and Allison*, Southwark Crown Court, 10 June 2008.
[9] *Treuhand AG v Commission,* Case T-99/04, (2008) 5 CMLR 13.
[10] See : Christopher Harding, ‘Business Collusion as a Criminological Phenomenon : Exploring the Global Criminalisation of Business Cartels’, 14 (2006) *Critical Criminology* 181.

But in principle the two issues should be taken in turn, and the appropriate questions would be : if cartel conduct is criminal, is it then appropriate to make use of imprisonment, alongside or in preference to other criminal law sanctions ? Again in principle this question should be divided into two parts : (a) would imprisonment be appropriate in retributive terms, and (b) would imprisonment be justified by its likely deterrent impact ? A further question of principle and policy would be : if the answer to (a) is negative, would a belief in a strong deterrent effect by itself justify the use of prison terms ?

At the outset, it has also to be remembered that a cartel offence may be committed by both corporate and individual actors, often working together (in the terms of the Sherman Act, as co-conspirators). Chapter 5 of the Discussion Document favours the application of criminal law and sanctions equally to corporate and individual actors, and it is submitted that this is the correct approach, for the reasons stated there. In the context of cartel activity it is difficult to disentangle corporate and individual agency (both jurisprudentially and in terms of evidence), and it is important to avoid the risk of the scapegoating of individuals by companies. Although it may prove to be a difficult matter for investigation and evaluation, and so perhaps costly in terms of resources, it is correct in principle to consider equally the potential criminal liability of both the corporate and individual actors. Selective criminalisation, especially that in relation to individuals alone (as in the UK) is open to objections based on a potential unjustifiable deflection of criminal liability to individual actors, even if corporate persons may remain liable under non-criminal law. Criminal liability in principle for both kinds of agent would still leave the possibility of some discretion in actual prosecution, depending on the circumstances and evidence in particular cases.

Also, as a general issue, full and careful consideration should be given to a range of possible sanctions following criminal conviction, rather than rush to use imprisonment. The Discussion Paper rightly contemplates the possibility of management banning orders and adverse publicity orders and both should be given active consideration, especially since neither would prove costly (or controversial) compared to the use of prison terms. Corporate probation of some kind might also be worth consideration. A possible advantage of such measures lies in their relevance in targeting more specifically cartel conduct in itself, in a potentially cost-effective fashion. Compared to imprisonment, they may prove ‘smart’.

The first objection to the use of imprisonment is retributive : the argument that it is a disproportionate response to the nature of cartel activity *as perpetrated by individuals.* A convincing case for the use of imprisonment would need to stress the attitudinal as distinct from the market impact factors noted above. There is some evidence of doubt in wider opinion regarding the use of imprisonment in relation to convicted cartelists. (This is outside the US, which arguably tolerates culturally and legally a higher resort to imprisonment more generally.) Such doubt is revealed in some as yet small research into public opinion on the matter,[11] in the slow and limited resort to criminal prosecution or actual prison terms in jurisdictions which have criminalised cartel conduct,[12] specifically in the reduction on appeal of the prison terms imposed in the

[11] Stephan, note 3 above.
[12] For instance : the UK, Ireland, Norway, Japan, Korea.

UK on the first convicted cartelists (the ‘Marine Hoses three’)[13], and in the notably lower conviction rate in contested antitrust criminal (jury) trials in the US.[14]

The rhetoric employed by enforcement agencies tends to assume the retributive appropriateness of prison terms for cartelists, while saying much more about the perceived gains in deterrence. Frequently, American sources are quoted (and frequently these are Department of Justice officials) to the effect that business persons fear the prospect of a prison term above all else,[15] and are likely therefore to think carefully about the risks of engaging in cartel conduct in the first place and more likely later to gamble on a leniency application to gain immunity from prison terms. This will be true up to a point, but it is far from clear where that point may lie. The extent of cartel activity still being uncovered and the resilience of a number of recidivist companies and their executives suggest that there may be a limit to deterrent effect in this context, and a number of reasons for this may be put forward. It may be that the rational and informed cartelist will have some idea of the probability of detection and enforcement action.[16] In particular, cartel investigations and prosecutions are resource-intensive legal processes and enforcement agencies may have to select cases for prosecution, even when leniency programmes are producing more evidence. Indeed, a certain degree of ‘success’ in the use of leniency programmes may now be rebounding on enforcers, who, through limited resources, are burdened with an increasing backlog of cases, some of which are likely to remain on the shelf (since there are time limits for legal action). At the same time canny business persons may be able to calculate the risks of criminal conviction by noting low rates of prosecution and conviction in most jurisdictions, and even the lower rate of conviction in US contested trials, and how jury or judicial feeling may be exploited in defence argument (for instance, the likely problem of proving dishonesty in the UK; or retributive distaste when a bad but successful immunity applicant walks away, leaving erstwhile co-conspirators to face possible jail terms.) Nor should applications for leniency be seen simply and in isolation in terms of fear of imprisonment. Leniency strategies should also be viewed as business decisions, calculating the optimum moment to leave a cartel and gain an economic advantage over the other members of the cartel. Again, it may not be easy in all cases to disaggregate corporate and individual interests, and the identity of such interests may lead companies to support individual executives at risk of criminal prosecution and sanctions. In short, the measurement of the deterrent impact of possible prison terms is problematical, and does not allow for confident assertions of the kind favoured by current enforcement rhetoric.[17]

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[13] UK Court of Appeal (Criminal Division), 14 November 2008, (2008) EWCA 2560.

[14] F Joseph Warin, David P Burns and W f Chesley, ‘To Plead or Not to Plead ? Reviewing a Decade of Criminal Antitrust Trials’ (2006), referred to in the Discussion Document.

[15] For a recent example of how easily this rhetoric is taken on board, see Gregory J Werden, ‘Sentencing Cartel Activity : Let the Punishment Fit the Crime, (2009) *Competition Law Journal.* Similar assumptions are made by organisations such as the OECD. The evidence remains largely anecdotal.

[16] For a study of the probability of cartel detection and prosecution, see : E Combe, C Monnier and R Legal, *Cartels : The Probability of Getting Caught in the European Union,* Bruges European Economic Research Paper No 12, March 2008, estimating an annual probability of 13 per cent in Europe (compared with an estimated 13-17 per cent probability of detection by federal authorities in the US(Bryant and Eckard, 1991)). Both rates would appear reassuring for cartelists.

[17] The measurement of deterrent effect in this context remains problematical, although more research is being commissioned, especially by the UK Office of Fair Trading. A recent example is the research commissioned by the OFT and carried out by Deloitte, which carried out a limited number of

This is not to assert that there should be no place at all for prison terms. There is at least anecdotal and case law evidence of a certain amount of ruthless and predatory business practice of the bullying kind in some cartel cases, and such instances, along with evidence of cynical cover-up operations and subterfuge, may justify the use of more severe sanctions against individuals. But such cases can also be categorised as intimidation and obstruction of justice as much as cartel conduct. However, imprisonment, used selectively and held in reserve as the ultimate sanction to deal with more obviously delinquent behaviour, would be more justifiable in retributive terms in such cases.

Conclusion

In summary, it is submitted that there is a persuasive case in favour of criminalisation of cartel conduct, but care should be taken to ensure that criminal liability and criminal law sanctions should have a convincing ethical, political and legal basis. Such an approach has implications for both the definition of criminal offences and the application of sanctions. In particular, the following main points are submitted in recommendation :

- Criminal liability should apply equally to corporate and individual actors.

- The cartel offence should be a *per se* offence, avoiding argument in trial about economic or market impact, although consideration should be given to a precisely drawn joint venture defence, and perhaps other defences in relation to other categories of acceptable horizontal restraint with cartel like characteristics.

- The offence should emphasise a delinquent state of mind as much as economic damage, the former comprising a cognisant, contumacious (or defiant), and covert mode of action, characteristic of the concepts of conspiracy and collusion.

- The scope of the cartel offence should encompass both competitors within a particular market and key facilitating agents with a role in organising and monitoring the activities of the cartel.

- A possible core definition of the offending conduct would read : ‘It is an offence intentionally to engage in, or implement, or facilitate an agreement or arrangement in the knowledge that such agreement or arrangement comprises a prohibited* cartel activity.

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interviews to establish a cartel abandonment rate following OFT action taken against cartels (*The Deterrent Effect of Competition Enforcement by the OFT,* Research Report by Deloitte, 2007, OFT 963). Questions might be raised about the methodology of the research (see Discussion Document, OFT 963a, March 2008). The research findings were quickly taken up by EU Competition Commissioner Neelie Kroes, to apply the same ‘vale-for-money’ conclusions to the work of the EU Commission.

* list of four OECD hard core cartel strategies (price fixing, market sharing, restrictions on output, bid rigging.)

- A full range of appropriate sanctions should be considered for corporate and individual actors following conviction for the cartel offence, including financial penalties, management bans or disqualification, adverse publicity orders, corporate probation, and (in exceptional cases) imprisonment of individuals.

- Sentencing of convicted corporate and individual offenders should be based equally on retributive and dissuasive or deterrent considerations.

- Prison terms for individual offenders should be reserved for cases of serious delinquency in business conduct (such as bullying and intimidating behaviour, or significant acts of subterfuge or obstruction of justice).