

**Detering Cartels: Is criminalisation the solution?**  
**Lessons from the UK**

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# Overview

Introduction

The UK Criminal Cartel Offence

- Problems with the original offence (practical, substantive and theoretical)

What is the Criminal Law?

- And what role should it play in deterring cartels?
- Problems which may remain in spite of reform

Are there are other solutions?

- Criminal or Civil?

# A global trend towards cartels

*'the supreme evil of antitrust'* US Supreme Court in *Trinko*

A growing international acceptance that 'hardcore' cartel activity poses a serious threat to economies and consumers



Most antitrust systems treat as 'automatic' violation of the rules

*the 'most egregious' violation of competition law* OECD

Cartels are '*cancers on the open market economy*' Mario Monti



But how to reflect seriousness and ensure the effectiveness of rules against them and that cartel activity is detected, deterred and punished?

# Tough sanctions required: against corporations *and* individuals?

US: violation of SA felony (public / private civil enforcement also possible)

Corporate fines

Individuals: imprisonment and/or fines

US - with ICN/OECD and greater cooperation between competition agencies

Global enforcement trend: enhanced sanctions for cartels and leniency programmes

But achieved through variety of different legal techniques

Principally criminal law

Eg Ireland

Civil law

Eg EU (administrative process)

Combination (criminal and civil)

UK

# For example, EU

## Regulation 1/2003

- Decisions adopted by the Commission using its administrative procedure '*shall not be of a criminal law nature*' (acts as an integrated decision-maker)

## Nonetheless

- Strong rhetoric against cartels
- Growing numbers of decisions and fine levels and leniency programme adopted and honed
  - More criminal feel – indeed accepted that penalties are *criminal charges* for the purposes of ECHR, article 6 (below)
- But, even so can fines be higher enough to deter cartel activity?
  - A growing consensus that they cannot be?
  - Should sanctions recognise role played by individual in instigating, or not preventing, cartels?
  - Many jurisdictions introducing/ considering criminal regimes for cartel behaviour

# UK – mixed approach

## Undertakings subject to Article 101/CA98

- Administrative regime and sanctions
- But note: EA, s 204 introduced CDOs for *directors* of companies found guilty of EU/UK competition law infringement (this power has not yet been used)

## Criminal offence applicable to individuals (since 2003)

- To supplement corporate fines – to *focus the mind* of potential cartelists
- More likely to deter and fairer
- For individuals who dishonestly engage in cartel agreements
- Dishonesty to ensure offence n/a to conduct lawful under civil regime, to reflect seriousness of offence, to make custodial sentences more likely and to reduce risk of it being characterised as national competition law
- Other possible deterrents to cartel activity not considered

Despite 'trend' deployment of criminal enforcement models outside of the US has not proved to be easy

### For example

- Even where competition authorities have successfully prosecuted infringements, in some jurisdictions courts have been unwilling to imprison offenders (e.g., Ireland/Canada)

### UK Criminal cartel offence

- During first 10 years, only 3 individuals, in relation to a single cartel - the *Marine Hoses* cartel, were convicted and sentenced to prison
- Collapse of BA trial
- Contrast to 6-10 prosecutions envisaged per year
- BIS: the deterrent effect of the cartel offence has consequently been weaker than intended

## UK Government response to 'failure' to remove and replace the dishonesty requirement

But sufficient to address the problems and tensions within the current system and provide appropriate and effective mechanism for invigorating cartel enforcement?

Incorporation of dishonesty test may have been *a* factor which led cartel regime to falter but it is not clear that was the *only* factor?

Broader issues – especially those arising from the parallel operation of civil and criminal cartel regimes not considered

Requires a consideration of wider factors



# Three problems with the current parallel civil/criminal cartel regime

## Substantive complications

- Criminal offence not to catch conduct which would not violate civil offence (how to distinguish cartels from eg information sharing or benign horizontal cooperation)
- Dishonesty – imperfect mechanism and did not exclude economic evidence in fact

## Procedural complications

- Parallel investigations required - different enforcement powers (and possibly agencies) etc (Marine Hoses and BA)
- Very different skills – integrated decision-maker and prosecutor? Procedural failings partly responsible for collapse of BA prosecution?

Theoretical complications: the blurring of the line between criminal and civil law in the regulatory context

## First, criminal law: used as a mechanism simply for achieving a regulatory objective

Outside the traditional realm of criminal law: not response to moral outrage but to increase deterrence – Traditionally, British public not disapproving of cartels but tolerant of them (contrast to the position in the US)

Difficulties compounded by incorporation of dishonesty requirement – requires juries to assess whether the defendant's conduct was dishonest according to the standards of ordinary and reasonable people, and that the defendant knew this (*R v Gosh*).

Dishonesty requirement to reflect seriousness and to *generate* stigma but *presupposes* a sense of dishonesty to function

The bootstraps problem; and BIS – the reason for the failure (Consultation Document, para. 7.8)

Theoretical complications: the blurring of the line between criminal and civil law in the regulatory context

Secondly, variety of enforcement tools to achieve regulatory strategy:

- Criminal and civil offences overlap
- Administrative sanctions severe and often indistinguishable from criminal sanctions
- Encourages side-lining of criminal offence (used as last resort) and administrative regime operating as a substitute for it (complaint: administrative proceedings taken on an increasingly criminal feel)?

Blurring contributed to by case-law of ECtHR?

- In certain circumstances (including it seems in relation to competition law - *Menarini*) criminal charges can be imposed in an administrative procedure

Is the message about 'criminality' undermined when

- Equivalent/identical conduct is not criminalised (conduct of undertakings)
- Criminal prosecutions are not brought even though reprehensible conduct taken place eg construction and construction recruitment forum (2009) (criminal law over-used but under-enforced)

# Government Consultation and ERRA

Attempts to deal with substantive problem

But does not deal with procedural problem or, fully, with theoretical problems

- What is criminal law?
- Is it justifiable as a mechanism to deter cartel conduct and shape public consensus against it and, if so, how should it interact with an administrative regime?
- Or will problems remain?
- Are there any alternatives to enhance deterrence?

# What, if anything, is different about criminal law?

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Descriptive criteria unhelpful?

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A deontological approach: Lamond (2007) – criminal law constitutes the most serious form of censure and condemnation open to a community

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An economic approach: criminal law as a form of 'preference-shaping disincentive' (Bowles, Faure and Garoupa, 2008)

# The economic approach to criminal law

Begin with Cooter's (1984) distinction between prices and sanctions (which need not be criminal)

Then determine how sanctions can be made effective, e.g. low probability of detection suggests higher sanction.

Then determine who should best apply them. If exclusively private actions create perverse incentives, suggests state/public intervention

If state intervention, administrative or criminal? Administrative enforcement has advantages (e.g., specialization) but also disadvantages (e.g. agency capture).

NB the greater the sanction, the greater the potential error cost therefore the greater the need for counterbalancing procedural protections.

# But

This does not explain why it is that nevertheless 'every society sufficiently developed to have a formal legal system uses the criminal-civil distinction as an organizing principle' (Robinson 1996).

- Why waste the higher procedural protections of the criminal law when only minor sanctions are at stake?
- Why not have one unitary system with procedural protections appropriate to the sanction at stake?

# The distinctiveness of Criminal Law

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The answer is that criminal liability signals moral condemnation of the offender, and 'a distinct criminal justice system is the only way to effectively express condemnation and to gain the practical benefits of doing so... by creating a special *criminal* label and widely disseminating the notion that this label has a different, condemnatory meaning, the system enhances its ability to communicate a clear condemnatory message' (Robinson, 1996)



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# Implications:

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Even those who approach criminal law from a utilitarian or economic perspective should want to sharpen the civil/criminal distinction (Robinson, 1996)

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Convergence between Lamond's desire to retain the 'doctrinal purity' of criminal law, lest we should otherwise 'dilute its expressive role in social life' and the fact that even those who see criminal law as a 'preference-shaping system of disincentives' rely on the role of stigma as a potential disincentive. (Bowles, Faure and Garoupa, 2008, Khanna, 1996)

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From both perspectives, deontological and economic, the distinctiveness of criminal law arises from its unique ability to signal society's moral condemnation of a particular activity, and this requires it to be kept separate from civil liability

# Implication for criminalising cartels

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The key implication of this unique feature of criminal law is that it must be used sparingly.

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It is true that, especially in the context of 'white collar' crime 'the public learns what is criminal from what is punished, not vice versa' (Coffee, 1992)

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BUT, if we stray too far too often from criminal law's basis in community morality we will undermine that moral signalling function

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If criminal law to play a role in shaping public view must be understood why conduct worthy of moral opprobrium and why singled out from other behaviour

# The cartel experience

This theoretical warning seems precisely borne out by the practical experience of criminalising cartels in the UK

- The EA02 offence sought to harness community morality by including an element of dishonesty in the definition of the offence
- But could not create a sense of moral censure because it presupposed such a sense of dishonesty and relied on it in order to function

# Enterprise and Regulatory Reform Act (ERRA) 2013

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Removes the dishonesty element of the offence and instead makes provision for when the offence will not be committed or when defences apply

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Will this fare better? Arguably not.

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It *may* make it easier to secure convictions BUT this does not mean it will be successful in its overall aim to generate moral opprobrium for cartels. Problems seem to remain:

No attempt has been made to analogise cartel activity with the core of the criminal law and to help shape public censure

- Not explicitly linked to deception/ breach of some other moral norm
- Such a step is important to *justify* use of a criminal offence
- No clear signal as to why cartels should be treated differently from other types of anticompetitive agreements and conduct – breach of which may be severely punished under the civil offence (€1b fine for Intel)- the problem of ‘non-felonious villainy’ (Katz, 2002).

Only individuals are liable for the criminal offence and only undertakings are liable for administrative sanctions (non-felonious villainy again)

- No clear line between criminal and non-criminal behaviour (as in US/Canada)
- No moral justification for distinction (rather practical) and treating undertakings differently?
  - Criminalisation of conduct of corporations can be intelligible;
  - Cannot always attribute blame to individual and not company?

Is the new offence sufficiently clear?

- Drafting of new offence not a model of clarity
- Fear that it will catch and so deter benign behaviour – (but BIS – desire to achieve a competition regime for growth)
- How are defences in particular to operate and be interpreted?

Is criminalisation efficient – especially when operates concurrently with civil regime?

- Different investigatory powers and rules (cumbersome)
- Will criminal proceedings be attractive to CMA:
  - more resource intensive;
  - harder to bring (and win) than administrative ones (uncertain scope of defences)
  - fear that judges will not imprison
- Administrative sanctions are still more efficient

# The ERRA 13 – possible outcomes

If, therefore the new cartel offence still does not carry societal moral stigma, this may have various problematic results:

- (1) The moral signalling function of the criminal law will continue to be undermined;
- (2) Judges may not be prepared to impose sentences of imprisonment.
- As a result of (1) and (2), as well as damaging the criminal law more generally, the offence may not provide the deterrent effect for which it was created.
- And if (1) and (2) are true, then an increased number of convictions makes the problem *worse*, not better.

# Alternatives to criminalisation

Government has not consulted on full range of variables applicable – criminal/civil and/or legal/natural persons

Criminal corporate liability can be intelligible – but not desirable in cartel context?

Strengthen civil enforcement mechanisms: sanction and enforcement insufficiency

- Greater use of CDOs (Khan)?
- Broader range of administrative sanctions (for corporations, see Fisse *and* wider category of individuals) could be considered? E.g.,
  - Individual fines - in an un-indemnifiable manner, but this has potential disadvantages (e.g. overcaution, see Kraakman (1983));
- Address enforcement insufficiency rather than sanction insufficiency (see Kraakman);
  - Public enforcement (*qui tam* actions - leniency)
  - Private enforcement (Commission Directive and UK Government measures)



# Conclusions

Attempt to use the criminal law to increase deterrence and/or moral opprobrium of activities which are not already widely regarded as being immoral runs the risk of damaging the condemnatory role of criminal law in general

Such steps only sparingly and where this danger can be reduced to an absolute minimum

Criminal should not deviate too far from what is regarded by the community as being reprehensible and deserving of such stigma

Care with 'preference-shaping system of disincentives'

- Should not stray too far, too often, from its origins in community morality in case undermine the impact of that morality which was one of the reasons for seeking to harness the criminal law in the first place.
- Whether we start from a deontological or an economic perspective, reason to be wary of consequentialist, forward-looking reasoning which undermines the backward-looking force of criminal law.