COMPETITION LAW

REMEDIES:

PRIVATE RIGHTS OF ACTION

&

CRIMINALISATION

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An tÚdarás Iomaíochta
&
Commissioner
U.S. Federal Trade Commission
WHAT are the possible sanctions?

- Fines.
  - Individuals.
  - Companies.

- Action for damages by injured parties.
  - Individuals.
  - Companies.

- Disqualification as a director.

- Custodial sentences.
Today Most Trading Countries Have Antitrust Laws

Just for example---

Albania, Argentina, Armenia, Australia, Austria, Barbados, Belarus, Belgium, Brazil, Bulgaria, Canada, Costa Rica, Cote d’Ivoire, Croatia, Cyprus, Czech Rep., Denmark, Estonia, European Union, Finland, France, Germany, Greece, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Kenya, Korea, Latvia, Lithuania, Macedonia, Malta, Mexico, New Zealand, Norway, Netherlands, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Romania, Russia, Slovak Rep., Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, ROC-Taiwan, Thailand, Turkey, Ukraine, Uzbekistan, Venzuela, Zambia --PLUS an additional 35+ countries.
Most jurisdictions have opted for a system that is principally dependent on the levy of fines for antitrust violations.
Cartel Remedies

How can we optimally deter its occurrence?
“there is a place for sanctions against natural persons, placing them at risk individually for their conduct. Such sanctions can complement organisational fines and provide an enhancement to deterrence.”

“The prospect of spending time in jail can be a powerful deterrent for business people considering entering into a cartel arrangement.”

Accordingly the Committee recommended that member countries consider the introduction of criminal sanctions for competition offences.
“The prospect of spending time in jail will be the most powerful deterrent for business executives considering entering into a cartel arrangement.”
Our stock of knowledge--

- We know a lot about the substantive law and the underlying economics because these subjects have been studied by a great many people for a great many years.
Antitrust Sanctions

Presume that other sanctions favoured over custodial sentences.

John Stuart Mill
Preference for "the least cruel mode in which it is possible adequately to deter ... the crime."
Speech in Favour of Capital Punishment, Parliament, April 21, 1868
Recent Cartel Cases
with international cooperation

Graphite Electrodes $649,000,000

Citric Acid $237,000,000

Vitamins $1,738,000,000

Lysine $298,000,000
But do fines effectively deter?
Ireland has proscribed price-fixing, and considers what sanctions ought be employed to deter violations.

Note that it considers sanctions in the context of deterrence, rather the other reasons why societies punish.
Thinking seriously about deterrence--

As long as we get to keep some of the money, price fixing is a good idea.
Thinking about deterrence--

- So, shouldn’t we obtain optimal deterrence if the price fixer gives back what he or she took in the form of either fines or compensatory damages?
Unfortunately, cartel authorities catch only a small percentage of price-fixers. Indeed, the evidence suggests about 85% get away. The work of the Cartel Police.

So we have to adjust the fine to account for the probability of detection, prosecution and punishment.
PENALTY ADJUSTED BY PROBABILITY OF DETECTION & PUNISHMENT

- An Introduction to the Principles of Morals and Legislation.

JEREMY BENTHAM
1748-1832
Knowledge Gaps

1. This calculus assumes risk-neutrality. Person indifferent between $10 fine and one-in-ten chance of $100 fine.

2. Although Posner briefly suggests risk-neutrality is appropriate to an antitrust analysis, there is no real research on this subject.

DISSERTATION TOPIC????
Unfortunately, cartel authorities catch only a small percentage of price-fixers.

Indeed, the evidence suggests that about 85% get away.

The Cartel Police at work
Knowledge Gaps


2. But this is consistent with data on theft crimes generally.

DISSEMINATION TOPIC????
Thinking about deterrence--

- What else do we think we know about price fixers?
We believe that price fixing cartels have an average lifespan of about 5 years. Recent studies suggest longer.
There is very little on this point, although most have assumed a five year period. Connor suggests 7-8 years is more appropriate. Connor, Private International Cartels, Purdue Univ. Working Paper (2003).
If price-fixing is stealing—

AND that prices are increased on average by about 10%.
Knowledge Gaps

1. These data are urban legend and probably come from one study of the 1980 US road building cases.

If price-fixing is stealing--

AND that profitability is increased on average by about 5%.
Fines below 150% of annual turnover will not deter.

See Wils, Does Effective Enforcement of Articles 81 & 82 EC Require Not Only Fines on Undertakings but also Individual Penalties, in Particular Imprisonment? in Effective Private Enforcement of EC Antitrust Law (C. Ehlermann ed. 2002)
So assume--

Fines below 150% of annual turnover will not deter.

60% of firms would not be able to survive without bankruptcy.

See Wils, Does Effective Enforcement of Articles 81 & 82 EC Require Not Only Fines on Undertakings but also Individual Penalties, in Particular Imprisonment? in Effective Private Enforcement of EC Antitrust Law (C. Ehlermann ed. 2002)
Do we have the stomach for corporate capital punishment?

- Costs to employees—as they are rendered redundant.
- Cost to tax base—as the company closes.
- Cost to communities—with the loss of the company.
- Cost to suppliers—who will lose a customer.
What is the lesson?

- Fines and damages, as implemented, are really a license fee.

- They do not deter, but are simply of the cost of doing business—albeit an illegal business of stealing what does not belong to you.
What do we learn from this?

- Politically, fines that will deter are a “non-starter.”
- Therefore, fines are not going to provide adequate deterrence.
- The Oireachtas wisely provided for custodial sentences.
Complimentary Accommodations for Price Fixers
Courtesy of the Irish Prison Service

- Scenic Views
- Meals Included
- Exercise Facilities
- Supervised Activities
- Other Interesting Guests
A short detour to America--

- As the country with the longest active competition regime, is there anything to be learned by looking at the American experience?

- Domestic price-fixing has declined dramatically in the past twenty years.
Judge Renfrew sentences convicted price fixing defendants to address Rotary clubs on the “evils of collusion.”
Impact of Antitrust Enforcement

- Criminal Penalties—Felony
- Prison sentences
- Fines

In the Vitamin Cases
$500,000,000 by Hoffman-LaRoche
$225,000,000 by BASF AG
United States v. Taubman

A. Alfred Taubman

Chairman & CEO, The Taubman Co.
76 years old; homes in NY, London, Palm Beach; Gulfstream; net worth $860,000,000.
Director—
  - Chase Manhattan Bank
  - Macy's
  - Benefactor—
    - The Taubman Center of Brown University.
    - Taubman College of Architecture of the Univ. of Michigan.
    - Taubman Health Care Center, Univ. of Michigan.
    - Taubman Library, Univ. of Michigan

INMATE
U.S. Bureau of Prisons
Michael Andreas

- Son of Dwayne Andreas
- Godson of former presidential candidate and Vice President Hubert Humphrey
- Vice Chairman of the Board, ADM

(Our competitors are our friends; our customers are our enemy).

INMATE U.S. Bureau of Prisons
SANCTIONS

- “In the last fiscal year, defendants in [antitrust] prosecutions received more than 10,000 days of jail time—a record high—with convicted individuals receiving sentences averaging 18 months....” Ass’t Attorney General R. H. Pate, July 24, 2003.
NEW DATA

- Last generation of cartel cases: immunity in US, Canada & Europe followed by prosecutions in those jurisdictions.
- Current generation of cartel cases: immunity in US, Canada & Europe followed by prosecutions in all those jurisdictions but the US.
Jurisdictions with custodial sentences.
These thoughts are consistent with my own observations as a practicing attorney.

Attorneys having a chat.
Corporate reactions to civil litigation and criminal investigations.

- Most large companies have a routine in place to handle the arrival of a piece of civil litigation. Counsel is retained, experts hired, etc.

- It is a different kettle of fish when a criminal inquiry is initiated!
Alien terrain for Managing Director--

“Booking Room”
More familiar managing director terrain.
Not Prison!
Price fixing means that output goes down and prices go up. Sellers capture part of the consumer surplus that would normally accrue to buyers.
Who owns the consumer surplus?

- The Oireachtas has created a property right in part of the consumer surplus.

- And—importantly—vested that right in buyers.

- This is, of course, consistent with the law and policy of other Western countries.
The same view prevails in the elsewhere:

Sir John Vickers
Chairman U.K. OFT
“cartels are like theft, criminalisation makes the punishment fit what is indeed a crime”

Hon. Joel Klein
Former U.S. Ass’t Attorney General
Price-fixers are nothing more than “well-dressed thieves.”
PUT DIFFERENTLY—
PRICE FIXING IS STEALING!
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