

The UK Cartel Offence: Lame Duck or Black Mamba?

December 2008

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CCP Policy Briefing

BACKGROUND

- The Criminal Cartel Offence was adopted in the UK to ensure that the consequences of businessmen's collusive acts are not borne solely by the corporation and its shareholders and to enhance deterrence in cartel enforcement. Under s.190 Enterprise Act 2002, an individual who 'dishonestly' agrees to cartel conduct such as price fixing can face imprisonment for up to five years and/or an unlimited fine.
- The criminal offence promised to compensate for a shortfall in deterrence caused by undertakings' limited ability to pay administrative fines, potentially complementing cartel enforcement on both the UK and Community levels.
- However, the first convictions resulted from a US plea bargain in 2008 and, five years after the Enterprise Act came into force in the UK, the cartel offence's first real test - a hard fought 'original' prosecution brought by the Office of Fair Trading or Serious Fraud Office - remains elusive.

METHODOLOGY

- The author examines the efficacy of mechanisms designed to enhance deterrence in cartel enforcement in the UK.
- The analysis draws on a review of the deterrence literature, a survey of public attitudes to price fixing and a survey of individuals imprisoned for international cartel offences under the Sherman Act.

KEY FINDINGS

- The author identifies three obstacles to increasing the number of convictions under the cartel offence and ensuring they have a deterrent effect.
 - (i) First, relatively weak perceptions of cartels persist in the UK. It was envisioned that convictions would remedy this, but prosecutors will continue to be very selective about the cases they bring to trial if there are doubts as to whether price fixing alone is viewed as objectively dishonest.
 - (ii) Second, any increase in criminal enforcement risks discouraging leniency applications to the European Commission, because corporate immunity granted on the Community level does not automatically protect employees from criminal prosecution in national courts. There is no conclusive mechanism for direct settlement, as there is in the US.

(iii) Third, sizeable benefits and purportedly low detection rates mean deterrence may be weak if custodial sentences do not become the norm.

POLICY ISSUES

- The Office of Fair Trading would benefit from clarifying its policy on no-action letters.
- The high potential benefits from a cartel infringement and the purportedly low detection rates must be met with a severe sanction, especially as this also makes detection through leniency applications more likely.
- It is important that Director Disqualification Orders and similar innovations supplement the deterrent effects of imprisonment and may help to change attitudes within industry.
- The long-term success of the UK criminal offence may hinge on the competition authority's ability to increase public awareness and understanding of cartels, their harmful effects, and of prosecutions. This should serve to encourage normative compliance and give prosecutors the confidence to bring more criminal cases to trial.

THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

The full working paper (CCP Working Paper 08-19) and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

ABOUT THE AUTHOR

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