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BUSINESS COLLUSION AS A CRIMINOLOGICAL PHENOMENON: EXPLORING THE GLOBAL CRIMINALISATION OF BUSINESS CARTELS

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Abstract. Over the last dozen years or so there has been a burgeoning of criminal law for purposes of dealing with business cartels in a number of jurisdictions (for instance, the new 'cartel offence' introduced under the Enterprise Act 2002 in the UK). The discussion here provides first of all some account of this process of criminalisation, mapping it in terms of jurisdictions and the legal character of this category of cartel offending. It then seeks to explain and account for the phenomenon and more particularly to determine the extent to which it may be seen either as an element of more forceful prosecution strategy, or alternatively as a sea-change in moral perception and evaluation. Put another way, is this a development led by legal policy, or a genuine shift in outlook, which has produced a new legal policy? It will be argued finally that, in a more pragmatic perspective, the success of the criminalisation project in any case depends on the emergence of a genuine sense of 'hard core' delinquency, without which effective regulation by means of criminal law is unlikely to be achieved. In this respect, a manufactured sense of moral censure, fostered by prosecutors to facilitate leniency programmes, may (outside the US) eventually prove to be a point of vulnerability in such strategies.

Introduction

One of the most striking developments in the international regulation of business activity since the early 1990s has been the emergence of an apparently tougher and more determined policy in relation to the control of business cartels. Such cartels, formed for the purpose of price fixing, market sharing, bid rigging and other restrictive practices, have for some time been regulated by competition law in a number of jurisdictions. However, outside of North America, this regulation has been of a predominantly administrative character, and when penalties have been imposed these have, in legal terms, commonly been of an administrative or civil nature (Gerber 2001). Even in the United States,

where there has for over a century been provision for criminal prosecution under Section 1 of the Sherman Act of 1890 (Peritz 1996), actual enforcement by means of criminal law had been haphazard. In general, therefore, criminal law has historically been marginal to the regulation of cartel activity.

However, during the last dozen years or so, there has been a burgeoning of criminal law for purposes of dealing with business cartels in a number of jurisdictions.¹ On one view, this may be seen as an accompaniment to the US Department of Justice's successful use of leniency programmes as a means of gaining evidence in cartel prosecutions: the realistic prospect of severe sanctions (especially imprisonment for company executives) has proven to be an important component in this strategy (Harding and Joshua 2003: 209–228; Evenett et al. 2002: 25). Moreover, there have been increasingly determined attempts by regulators to educate public opinion as to the harmful character of business cartels.² But, it is interesting also to speculate whether there has also been a genuine shift in perception, comprising a transnational consensus that such arrangements are seriously harmful and delinquent and thus appropriately dealt with as a matter of criminal law. Such a hardening of moral and legal culture may be suggested on the one hand by the emerging vocabulary employed to describe such arrangements as 'hard core', 'egregious' violations, and on the other hand by a growing tendency to relate activities such as price fixing to types of criminal fraud. Whatever the reasons, by the end of the 1990s and first years of the new century, the criminalisation programme had gained real momentum, with an increasing number of new offences (such as that laid down in the UK Enterprise Act of 2002) (Harding and Joshua 2002) appearing alongside that in the Sherman Act in the transnational catalogue of 'cartel offences'. According to the official view, at least, companies face an increasingly probable prospect of administrative fines and civil penalties, while individual businessmen (the masculine terminology is still most appropriate in this context³) also now face the possibility of prison terms and substantial personal fines.

The discussion in this paper provides in the first place some account of this process of criminalisation, mapping it in terms of jurisdictions and the legal character of this category of cartel offending. It then seeks to explain and account for this phenomenon. More particularly the study considers the extent to which criminalisation may be seen as a tactical element within a more determined prosecution strategy, or alternatively understood as the outcome of a sea-change in moral evaluation and perception. Put another way, is this a development led

by legal policy, or a genuine shift in outlook which has produced new legal policy? It will be argued finally that, in a more pragmatic perspective, the success of the criminalisation project in any case depends on the emergence of a genuine sense of 'hard core' delinquency, without which effective regulation by means of criminal law is unlikely to be achieved.

'Talking up' Cartel Delinquency: The Language of Criminalisation

At the outset it may be useful to say something about the way in which business cartels are described and discussed in legal and official parlance, since this is an important manifestation of the process of criminalisation. Indeed, any analysis of the manner and impact of this criminalisation should embrace this important activity of 'talking about cartels'.

It could be observed in the first place that, while the term 'cartel' has quite a complicated etymology (Harding and Joshua 2003: 11–16), its current usage has become predominantly sinister in tone. What the word would now suggest for many people would be the idea of threatening organised crime, as encapsulated in the phrase 'drug cartel'. In the context of competition policy and antitrust law, the term has now come to represent the more delinquent end of the spectrum of anti-competitive activity, and is commonly coupled with the adjective 'hard core' for this purpose. This increasingly sinister connotation can be seen in some of the legal writing on the subject. Taking the example of one of the leading British texts on Competition Law, that by Richard Whish, it is possible to compare the more neutral use of the term 'cartel agreement' in the earlier editions of his book, with the clearly more pejorative approach taken from the fourth edition (2001) onwards, which refers to the keener interest of enforcement agencies in the 'eradication of hard core cartels', and states in an uncompromising fashion that 'on both a moral and a practical level, there is not a great deal of difference between price fixing and theft' (Whish 2003: 454).

Yet, although the term 'cartel' has now undoubtedly acquired this pejorative connotation, its precise meaning remains legally elusive. It is also worthwhile to reflect on its epistemological use.

First, then, the matter of legal definition. In more general, or 'lay' language, there may now be said to be a broadly agreed idea of what is comprised in the notion of a business cartel. The following description,

taken from the UK Office of Fair Trading (OFT) web site, serves well in this way:

“In its simplest terms, a cartel is an agreement between businesses not to compete with each other. The agreement is usually verbal and often informal.

Typically, cartel members may agree on: prices; output levels; discounts; credit terms; which customers they will supply; which areas they will supply; who should win a contract (bid rigging).

Cartels can occur in almost any industry and can involve goods or services at the manufacturing, distribution or retail level.”⁴

But, as with other things in life, it may be possible to recognise the phenomenon but difficult to describe it exactly and this may be part of the problem for lawyers, who do not yet have a precise usage (Harding 2004: 275, 277).⁵ Does the term ‘cartel’ describe a kind of agreement, or a grouping of traders, or an organisation with a conspiratorial purpose? It is frequently used to describe all of those, even within the same statement, as the above example demonstrates. But this is not a merely semantic discussion, since it leads to the question of what is being prohibited and regulated in the law, criminal or otherwise, relating to cartels. For it is possible for legal rules to refer to a number of different activities within the cartel phenomenon: an anti-competitive act (such as fixing prices); the agreement to engage in such an act; the conspiratorial and furtive manner of doing so; or the overall structure of collective planning, decision-making and implementation of all of those. Just to illustrate briefly this range of regulation: Article 81 of the EC Treaty regulates an agreement to fix prices, as does the Sherman Act in the US, although the latter also embraces the notion of conspiracy; whereas the legislation allowing for fines to be imposed under EC law⁶ regulates as well the element of contumacious and furtive behaviour; and the case law of the European Court of First Instance refers to the overall structure (‘the cartel as a whole’)⁷ as a basis for liability for penalties. This slipperiness in the use of legal language then bedevils an understanding of the process of regulation and control of cartels.⁸

In the second place, there may be varying perceptions of the same subject-matter. Just as lawyers tend to be elusive in their use of the term, its use in other disciplinary contexts may be more categorical, but in that way also have a range of connotations. On the one hand, reference may be made to the relatively benign view of the cartel characteristic of earlier twentieth century European commentary:

"In their most usual form they are, above all, designed to prevent or equalise the disturbance in industry caused by commercial or political measures and their frequent oscillations; even at times, to ward them off altogether." (Liefmann 1927: 82)⁹

This is the view of the cartel as a desirable instrument for stability in an uncertain world. This may be contrasted with the much more critical view expressly more recently in the OECD Council Recommendation on Hard Core Cartels:

"Considering that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries ...".¹⁰

And such critical descriptions tend also to employ a colourful range of adjectives to characterise the conduct embodied in cartel activity – 'hard core', 'egregious', 'brazen', 'naked'.

These different perceptions may be based to some extent on different disciplinary perspectives. An economist may see a cartel as a sensibly cost-effective arrangement. Some policy makers, and law enforcement professionals, on the other hand, may be more concerned with the moral offence of contumacious attitude than with measuring economic outcomes. But there is also a more practical point associated with these different perspectives, outside North America at least. On one hand, economists and competition lawyers may be surprised at the arrival of criminal law on the scene.¹¹ On the other hand, criminal lawyers and criminologists may be equally uncertain about the need to include cartel behaviour on the calendar of crime and criminology.¹² These points will be returned to later in the discussion. The main issue to bear in mind for the present is the range of perspectives and assumptions concerning the operation of business cartels, over time, across different subject disciplines, or even within the legal field.¹³ A reading of the literature on business cartels in its widest sense may therefore present both a lack of linguistic precision and a range of interpretations of cartel behaviour. This in itself is an element within the story of cartel criminalisation.

Different Models of Enforcement

The above discussion of linguistic shifts and differences is of course to a large extent bound up with the practice of regulation and enforcement. Historically, as far as business cartels are concerned, there is an

outstanding dichotomy of models of regulation, as between North America and other jurisdictions, or more precisely as between the United States and Europe. In the first place, American *antitrust law*¹⁴ has advanced both more quickly and more forcefully in its regulation of anti-competitive business behaviour compared to its counterparts in European jurisdictions. The condemnation of anti-competitive practices as 'combinations and conspiracies' in the Sherman Act of 1890 has been much more dogmatic and decisive (Peritz 1996) than any European regulation before the later part of the twentieth century. Coupled with this fact is the long-standing provision in the US system for both criminal prosecution and punitive civil claims as a central element in the model of enforcement of antitrust law. In contrast, the European preference has been for a 'softer' approach to regulation and enforcement, broadly encapsulated in the term 'administrative'. The latter model of enforcement comprises a more consensual type of process concerned essentially with the evaluation of anti-competitive outcomes, often based on voluntary registration of agreements and practices, and eschewing condemnatory language and penal or even compensatory sanctions (Gerber 2001). Another way of presenting, and also understanding, these different regulatory approaches is to see one, the American, as being more concerned with business *behaviour*, while the other, the European, has emphasised *economic or market outcome* as the main concern of regulation. Concern with behaviour imports a moral evaluation of the subject, and leads naturally to enforcement through judicial process (criminal and tort law), while concern with market impact is primarily a matter of economic evaluation, more naturally carried out through administrative procedures of registration, examination and negotiated settlement.¹⁵

Any attempt to explain these differences in time and space is likely in itself to be based upon a revealing enquiry into the development of different legal cultures and indicates a significant divergence in the perception of similar anti-competitive phenomena (Harding 2002). Understanding the emergence of a combative American condemnation alongside a degree of tolerance in Europe requires some appreciation of both history and political psychology. In brief, while an American distrust of the concentration and potential abuse of corporate power translated itself into the provisions of the Sherman Act (Sullivan 1991), a differing European history of numerous nation States, trading collaboration and colonial exploitation fostered a rather more ambivalent attitude towards business collusion. This difference in outlook, almost amounting to a clash of legal cultures, is nicely expressed in a

communication by President Franklin D. Roosevelt to his Secretary of State in 1944:

“During the past half century the United States has developed a tradition in opposition to private monopolies. The Sherman and Clayton Acts have become as much a part of the American way of life as the due process clause of the constitution Unfortunately, a number of foreign countries, particularly in continental Europe, do not possess such a tradition against cartels. On the contrary, cartels have received encouragement from some of these governments Cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed”¹⁶

Moreover, that last quoted sentence would prove to have something of a prophetic quality. Although it has taken some time for the American view of cartels to take root elsewhere, certainly by the later years of the twentieth century, for purposes at least of regulating global trade, a tough policy towards the activities of international cartels had gained widespread official support.

In short, therefore, American law has been willing to use the method of criminal prosecution and to apply criminal sanctions (although usually fines and only in recent years has there been more resort to prison terms) to both corporate and individual actors. On the other hand, European systems of cartel control have developed very unevenly at the national level, and generally preferred administrative regulation, which has dealt predominantly with corporate entities rather than individuals within companies. The main exception within the European context - at least to some extent - has arisen from the approach taken by the European Community system of competition regulation. While the EC approach had for some time been predominantly administrative, and indeed could not in any case make use of formal criminal law powers, since the early 1980s it became increasingly characterised by a more confrontational and tough-minded attitude towards cartels as distinct from many other forms of anti-competitive activity (Harding and Joshua 2003: 117-142). In other words, deliberate collusion aimed in particular at price fixing, market sharing and bid rigging, acquired a more definitely delinquent character, which would be subject to penal regulation through the imposition of increasingly large ‘administrative’ fines. The stance adopted by the European Commission as the EC regulatory agency became much more closely aligned to the US Department of Justice (DoJ), seeing itself as a prosecutor of self-consciously delinquent and recalcitrant but also increasingly furtive and

hidden 'hard core' cartels. By the 1990s European cartel regulation had become big legal business, both in terms of the resources devoted to investigation and to a new industry of litigation as the companies appealed vigorously against both the Commission's procedures and the fines imposed upon them (Harding and Joshua 2003: 170–208). Yet, for all this, the EC system of control lacked some of the bite of its American counterpart. The DoJ commanded greater resources, it could employ real criminal law (to some practical and psychological advantage), and arguably there remained some difference in legal tradition, in that European cartels did not seem to suffer the same moral stigma.

The closing years of the century then witnessed an apparent sea change, which is the underlying topic of the present discussion. Europe, and also jurisdictions elsewhere throughout the world, seemed to be engulfed by a project of criminalisation (Harding and Joshua 2003: 258–266). New cartel offences appeared at the national level (as discussed more fully below), the EC Commission completed its programme of 'modernisation' which was intended to allow the Commission itself to devote greater time and energy to cartel regulation, and the advent of leniency programmes (largely based on the successful American model) injected a sense of greater confidence in relation to the detection and successful legal prosecution of major cartels (Harding and Joshua 2003: 209–228). This turnaround in regulation then naturally prompted reflection on convergence and globalisation of cartel control, involving an exportation of the American model to the rest of the world (Harding and Joshua 2003: 270–290).

The reality of these legal developments cannot be denied. There has over the last decade or more been an impressive enactment of new competition legislation across the world, sometimes extending to the use of criminal law for purposes of dealing with cartels. There has been a burgeoning of competition authorities, which are operating at both the national and international levels. There is a developing network of international co-operation in relation to investigation and enforcement, and leniency programmes have rapidly become a common feature of these systems. In the European context there has been a *de facto* harmonisation of competition regulation, using the EC system as the model, and the European Commission is second only to the Department of Justice in the role of global cartel-buster. But even as this development takes place and cartel criminalisation apparently gathers pace, two main questions need to be posed. First, how significant is this process of criminalisation? And in the second place, what (or who) has driven, within a relatively short space of time, this project of criminalisation?

Although it is possible in general terms to refer to a process of cartel criminalisation across a number of jurisdictions in recent years, this broad description tends to mask a complex and inconsistent pattern of legal development. Three main points should be made at the outset about any attempt to survey the topic.

First, there is an issue of definition: the term 'criminalisation' is used here to refer to the use of criminal law 'proper' as distinct from 'administrative' regulation and penalties. Many systems, for instance, impose administrative fines or 'surcharges'¹⁷ in relation to prohibited cartel conduct (the penalties imposed under the EC rules provide one of the significant examples), but these are not part of a formal criminal proceeding or sentence of a criminal court. In some jurisdictions it is possible to make use of both administrative and criminal proceedings. Within the UK, for instance, it is now possible for the Office of Fair Trading (OFT) to impose administrative fines on companies for engaging in such activities as price fixing or market sharing (under the Competition Act 1998),¹⁸ while also criminal proceedings may be brought against individuals, in respect of the offence under Section 188 of the Enterprise Act 2002 (Harding and Joshua 2002), which may then lead to fines or prison terms for the convicted individuals. Such dual systems of regulation complicate the overall picture of legal control and penalty, raising theoretical questions about offence definition, double jeopardy and legal personality, and practical and tactical questions about the operation of law enforcement (Harding and Joshua 2003: 262–266).¹⁹ The main focus of the present discussion, however, is the use of criminal law proper, rather than its interaction with other types of process.²⁰ At the same time, care should be taken in looking at data reported in secondary literature, which may not always clearly distinguish between criminal and administrative penalties.

Secondly, in relation to legislation which provides for the application of criminal law and criminal sanctions, a number of main variables may be noted. In particular, these include: the definition of the offence; the range of anti-competitive practices covered; application to corporate and individual actors; and the range of available penalties. What is revealed then is very much a patchwork of criminalisation, very much subject to local legal factors.

Thirdly, it is important, in judging the significance of any criminalisation, to draw a distinction between prescription and enforcement. It is one thing to enact a law. How that law is enforced, and the extent of

enforcement, may be another matter and it is important to appreciate any difference between law 'on paper' (in its rhetorical and prescriptive role) and law 'on the ground' (in terms of actual implementation and enforcement). That said, it may still be early days for purposes of appreciating the enforcement of criminal law relating to cartels, when so much of this is of recent origin. Nonetheless, there may be signs of potential difficulties in relation to enforcement, and these will be discussed further below. At any rate, it may be helpful in the next stage of discussion to deal separately with prescriptive criminal law and what is known about its enforcement.

Enactment of Criminal Law in Relation to Cartels²¹

The starting point for any survey of criminalisation of cartel activity, is of course North America, and actually in chronological terms, Canada before the United States. The Canadian legislation, the Federal Competition Act of 1889, shortly pre-dates the Sherman Act, but is similar in its approach and coverage. Both in essence outlaw as criminal offences agreements and conspiracies to restrict competition, and these may be committed by both corporate and individual actors, and as co-conspirators. This represents a maximal approach in criminalisation, which defines the offending conduct in broad terms and enables different actors to be legally implicated in the same way within the same cartel or anti-competitive arrangement: the net is cast widely in terms of both conduct and persons. Incidentally, this approach is based on the assumption that different kinds of actor (corporate and individual) are capable of committing the same kind of offence together, while sharing some identity of personality in a material if not in a legal sense. This raises a philosophical query, though not one that may be more fully investigated here.

Having considered the two North American jurisdictions, there is then both a chronological gap, and a shift from an inclusive towards a more patchy coverage in terms of criminalisation. Little of the other criminal legislation pre-dates the late 1980s, and much of it has a more partial or tentative character. A mixed group of European, Latin American and Asian jurisdictions²² now have some provision for criminal liability in respect of competition law infringements, but there is no systematic pattern. In some cases liability can attach only to individuals, in others to both individuals and corporate persons. Sometimes the liability is restricted to particular categories of anti-competitive activity (for instance, only bid rigging in the case of

Germany; only 'serious violations' in the case of Austria; only dealing in primary goods and boycotts in the case of Italy; only 'monopoly' activity in the case of Chile; only market sharing, monopolies and bid rigging in the case of Croatia) or does not apply at all to cartel activity in a substantive sense (only procedural infringements in the case of Switzerland). Within this group, only a small number of jurisdictions have provision for what may be termed a cartel offence as such, and this is frequently of recent origin. A detailed survey and analysis of 'criminal competition law' across these jurisdictions is beyond the scope of this discussion and in any case is unlikely to be productive, resulting in a rather confusing overall picture. The important point is that much of this criminal law provision is, from a comparative perspective, unsystematic, uncoordinated, and local rather than international in its origin.

Of most relevance to the present discussion are the relatively new and specific 'cartel offences', which may be linked to some international effort to regulate cartels. In other words, these are jurisdictions which are to some extent self-consciously targeting cartel activity by means of criminal law within the context of the recent international campaign against cartels. At present, it may be said that the following countries fall within such a category: Brazil (legislation in 1994); France (legislation in 2001); Germany (legislation amended in 1998); Ireland (legislation in 1996, amended in 2002); Japan (legislation of 2002); Korea (legislation of 1980, amended in 2002); Norway (legislation in 2004); UK (legislation in 2002). These jurisdictions, along with Canada and US, may then be seen as a core group for purposes of cartel criminalisation.

Even within this relatively small group of jurisdictions, there is no consistent definition of the cartel offence. As noted above, the German law reserves criminal liability for just one species of anti-competitive conduct, bid-rigging, so giving the offence a relatively narrow scope. This contrasts with the generality of the well-established American and Canadian offences. Or, to provide another example by comparing the British and Irish offences: while the former requires a *dishonest* participation in an agreement to fix prices etc.,²³ for the Irish offence (under the amended Competition Act of 2002), it is sufficient for liability knowingly to fix prices etc. (Andrews 2002: 469) On the face of it, it would then seem more difficult to prove liability (with the additional element of dishonesty, the meaning of which in this context has yet to be more fully explored) under the UK law. The patchy and inconsistent character of this criminalisation across jurisdictions is likely to have implications for international efforts of cartel control, especially for

instance in relation to any calculations being made as to the potential risks or benefits in applying for leniency.

Finally, the significance of what has taken place so far, simply at the legislative level, remains difficult to determine. Admittedly, this group of jurisdictions represents some key countries in terms of the location of international cartel activity. But, it remains to some extent a haphazard development and it is not clear how quickly the group will expand. Australia and Sweden, for instance, have both considered introducing criminal liability in recent years; Sweden has yet to act, and Australia has examined the idea very carefully before deciding to go ahead.²⁴

Enforcement of Criminal Law in Relation to Cartels – ‘An Inherited Treasure Sword’?

But what may be of even more relevance in measuring the significance of this criminalisation is a consideration of the present or likely enforcement of such criminal legislation. Although this (as with many areas of legal enforcement) is a subject which merits much more detailed and thorough-going research, there are already some indications at a more general and comparative level that implementation and enforcement does not match the rhetoric of law enactment, and for a number of reasons.

In this respect, the OECD has been performing a useful monitoring role in relation to the actual experience of putting anti-cartel legislation into effect. Following the OECD Council's stated mission of urging its member States to take more vigorous action against international cartels,²⁵ the OECD Competition Law and Policy Committee was instructed to review the member countries' experience in implementing the Recommendation.²⁶ Subsequent OECD 'country reviews'²⁷ provide some idea of the problems associated with giving effect to criminalisation, when that has been provided for in legislation.

There appear to be a range of problems and disincentives. For instance, in France, where bid-rigging may be prosecuted as a criminal offence, the review states:

“Individuals can be prosecuted, and they face up to four years imprisonment and a fine of 75,000 if they dishonestly take a personal, determinative part in conceiving, organising or implementing a prohibited practice. There has been little if any use of criminal processes in cartel cases, though. Technical impediments in relation to the statute of limitations were corrected in 2001, and the changes

could make cartel prosecutions more feasible. Investigating cartels is difficult and time-consuming."²⁸

In relation to Ireland, the review states:

"Using criminal law processes and penalties against horizontal agreements leads to difficulties and complications. But there is no other way to achieve deterrence through effective sanctions under Ireland's constitution, so the problems will have to be faced and solvedproving secret agreements usually requires first-hand admissions, particularly where the criminal law's high standard must be met."²⁹

For Norway, it is stated:

"Serious sanctions have not been applied yet in Norwegian competition cases. As of the 2000 Annual Report (May 2001), no one had been sentenced to imprisonment of any term Relatively low penalties in Norway may be explained in part by the relative lack of judicial experience The decision to seek penal sanctions is up to the prosecutors. They may be reluctant to do so in part because the treatment of the conduct as criminal is still controversial. In addition, resources are a constraint on criminal prosecutions The prospect of committing so many resources to trials may persuade the prosecutor's office to settle for fines."³⁰

The report for Japan states that:

"Despite the call for increased action, though, Fair Trade Commission (FTC) referrals for prosecution average only about one cartel case per year. Courts have assessed fines and imposed prison sentences, but no one has actually served any prison time yet as the result of a competition law conviction because the sentences have been suspended."³¹

Finally, in relation to Korea, it is stated:

"But the penal sanctions have evidently never been applied In general, Korean courts, like those in Japan and the Nordic countries, are reportedly lenient in cases of economic violations."³²

Taken together, these reports suggest that there exist within these jurisdictions some specific legal disincentives (for instance, evidential difficulties and associated problems regarding resources, or sometimes constitutional difficulties³³), but also an enforcement culture, which is

reluctant to give effect to the shift to criminal law and penal sanctions. For instance, it has been remarked that the Japanese Fair Trade Commission's continuing reluctance to bring criminal actions "has led observers to suggest that criminal sanctions against individuals have become an inherited treasure sword – used only for decoration" (Sanekata and Wilks 1996).³⁴

The Motor of Criminalisation

What has been said already about the emerging pattern of criminalisation hints that there may be more support for this approach to regulation of cartels in some quarters than in others. Certainly, any ground-level uncertainty or reluctance to make use of criminal proceedings may at least suggest the possibility of some lack of conviction as to the degree of moral offending or the nature of the harm inherent in cartel behaviour, or whether it is most appropriately dealt with through the imposition of personal criminal liability rather than corporate administrative liability. Underlying all of this is an important issue of criminal jurisprudence, relating to the offensiveness and damage caused by the behaviour in question – in effect, the justification for making the act criminal. This will be addressed in the final part of the discussion. But first, it would be useful to attempt to trace the actual lines of the apparent process of global criminalisation.

It is generally agreed that the wider movement towards using criminal law coincided with the more determined and vigorous policy on the part of the US Department of Justice towards international cartels, evident from the early 1990s. This point is emphasised for instance by Evenett, Levenstein and Suslow, who comment that:

“By decade's end [of the 1990s], several high profile enforcement actions [by the DoJ] have convinced policymakers in other industrial countries that stronger measures against international cartels ought to be taken. Consequently, corporate leniency programs have been revised or introduced in several countries, international norms for and reforms of cartel enforcement have been proposed at the OECD, and bilateral cooperation developed between a few jurisdictions.” (Evenett et al. 2002: 18)

The tougher approach by the DoJ itself appeared to spring from a sense within the US that international cartel activities were affecting and damaging the American market, in that the latter was increasingly

vulnerable to multinational corporate decisions being taken outside the United States. This perception of 'victimisation' may be extrapolated from official DoJ statements, such as the comment in the DoJ's 2004 *Status Report* that since the mid-1990s, the DoJ 'has employed a strategy of concentrating its enforcement resources on international cartels that victimise American businesses and consumers',³⁵ and that since 1997 the Antitrust Division of the DoJ 'has prosecuted international cartels affecting well over \$10 billion in US commerce'.³⁶ On this reading, the protection of American economic interests required the DoJ to turn its attention to international as well as domestic American cartels, but this would demand more than the traditional assertion of extra-territorial jurisdiction. Such was the complexity of organisation and operation of these globalised cartels that effective action would require some co-ordination of legal enforcement on the part of a number of jurisdictions. As Spratling explained:

"The most typical problem we face in our investigations of international cartels is that key documents and witnesses are located abroad in such cases, national boundaries may present the biggest hurdle to successful prosecution of the cartel the answer: increased cooperation with the Division's counterparts abroad." (Spratling 1997)

The DoJ *Status Report* sets down the necessary strategy of 'increased co-operation with foreign antitrust authorities', itself based upon a number of key tactics: international anti-cartel enforcement workshops (performing an educative role); assistance in locating foreign-located evidence; cooperation and coordination of investigations; legislation and agreements to foster cooperation; and increased foreign enforcement. Criminalisation in other systems is a part of this overarching strategy, not only because it reinforces psychologically the enforcement resolve elsewhere, but because it practically aids processes such as mutual legal assistance and extradition, which may require 'double criminality',³⁷ and so eventually facilitates prosecution within the US legal system.

One key element in this strategy being developed by the DoJ was the persuasion of key political and legal personnel elsewhere of the need to tackle international cartels more effectively, and indeed this campaign of demonisation appears to be a component of the process of criminalisation being discussed here. The DoJ itself appears convinced that a major turning point occurred with the successful prosecution of the Lysine Cartel in 1996-1999 (Connor 2001).³⁸ For a number of reasons

this prosecution and trial achieved notoriety and, in the view of DOJ officials, served to educate both public opinion and official policy-making about the mode of operation and the extent of the damage caused by international cartels. This perception of the impact of the proceedings is described in detail³⁹ by a senior DOJ antitrust official:

“This was a monumental case for the Division’s criminal enforcement efforts because it grabbed the attention of so many groups that we were urgently trying to reach – including the media, US consumers, the business community and foreign governments

....I know that I had friends call me about the case and say “Oh, now I finally get what you do for a living - go and nail the crooks!” When the public viewed the tapes, they saw with their own eyes an unmitigated, undeniable crime of fraud and deceit. One could not have asked for a better introductory lesson for the US public as to why price fixing is a crime and why those who commit it are criminals

.... This case, and more specifically the tapes themselves, had a monumental impact on a number of foreign governments. After the case was tried, we sat down with foreign government officials and played the tapes for them. In most cases we were addressing more than antitrust authorities, because, in many countries, the antitrust officials did not need to be persuaded. They were already well aware of the harm caused by cartel activity, and they were already pushing for reform in their laws or in their investigative powers. Thus, they would arrange for us to meet with key government policy makers, treasury officials who held the purse strings for additional funding, or representatives of influential trade or business groups, so that we could help win them over.” (Hammond 2001a: 4-5)⁴⁰

The impact of this campaign of persuasion was then (in the DoJ’s view) consolidated by the subsequent successful prosecution of the international Vitamins Cartel since that involved ‘a high-visibility consumer product with tremendous media and consumer appeal’. (Hammond 2001a: 5-6)

There is a real sense, therefore, of American orchestration of an international campaign of tougher anti-cartel action, including criminalisation as part of this strategy. The OECD Council Recommendation of 1998 on hard core cartels was sponsored by the United States. This instrument, in urging on Member States ‘effective’ and ‘deterrent’ enforcement action against international cartels, was effectively

encouraging the use of criminal sanctions, and in the OECD context may be seen as a soft law analogy to an EU directive in its mission of harmonising national level legal activity. Although, other States have been less explicit in explaining the origins of their 'conversion' to the cause of cartel criminalisation, DoJ officials have been much less coy about their own role. The process seems very nicely summarised in the words of one such DoJ official:

“The Division has been at the forefront in building a worldwide consensus that international cartel activity is pervasive and is victimising businesses and consumers everywhere” (Hammond 2001b)

However, the question remains: does this also amount to a consensus that cartel activity is *criminal* in itself as distinct from behaviour which should be effectively controlled?

The Criminality of Cartels

While it is now relatively easy to find statements by regulators and government departments indicating the delinquency of cartel behaviour, it is much more difficult to trace similar expressions in wider public opinion, or in media comment. Despite the efforts of the DoJ to reach beyond 'converted' official audiences (Hammond 2001a), there appears to be (at least outside North America) no strong feeling on the part of the wider public about the inherent criminality of price fixing and like practices. Indeed, some of evidence collected by the OECD (referred to above) suggests that such agnosticism on the subject extends as far as the wider legal profession and the judiciary at national levels. In this light, the hortatory and educative material increasingly disseminated by competition authorities appears not so much as evidence of criminality as an attempt to persuade the wider public of such criminality. This is not to suggest that public sentiment in many countries is hostile to criminalisation of cartel behaviour, but rather something more like an indifference: “yes, we can see that these businessmen are breaking the rules, and that there ought to be some legal control, but do we really see them as criminals?”

The need to make out a more convincing case of criminality is perhaps illustrated by the drafting of the new cartel offence under UK law. Section 188 of the Enterprise Act 2002 casts the offence in terms of a dishonest agreement between two or more persons that two or more undertakings will engage in a listed prohibited cartel activity (such as price fixing or market sharing). The striking element

of the definition is the requirement of a dishonest state of mind. This inclusion was based upon the intention to send out a 'serious signal' and 'preclude a defence argument that the activity being prosecuted is not reprehensible' (Hammond and Penrose 2001: 2.5).⁴¹ But it is not easy to find a criminal law term which would more exactly embody the element of 'brazen and contumacious disregard of market and consumer interests' that characterises the delinquency of cartel behaviour. A dishonest state of mind does not serve very well in this respect, being suggestive of mendacity rather than furtive and conspiratorial conduct. In the context of the new British offence, it was evidently felt that juries might require further persuasion regarding the degree of deviance inherent in cartel conspiracies. But proof of dishonesty in this kind of case may itself prove problematical (Harding and Joshua 2002: 937-939) when (and if) the trial of cartel offenders gets under way in the UK.

Underlying this observation, there is perhaps (again, outside North America) a weak sense of criminality in relation to business delinquency more generally. This is illustrated by the low level of academic interest in business crime within the non-American academic community. Slapper and Tombs have commented:

"There remains a curiousness about the absence of academic attention [to the phenomenon of corporate crime]. Certainly in face of lacunae in knowledge, one group to whom we might look are academics: they possess the economic, social and technical capacities/resources to bring to the empirical and analytical fore hitherto neglected social problems the record of academics in terms of corporate crime is not particularly impressive." (Slapper and Tombs 1999: 227)

They go on to cite Punch's view (Punch 1996: 41) that there are two places in particular where one might expect to find the study of corporate or business crime, where business is studied and where crime is studied, 'but neither is actually the site of much energy being devoted to corporate crime' (Slapper and Tombs 1999: 227). By its nature, business crime is not easy to research, and there may be particular disincentives or reasons for its low priority within the research agenda of either business schools or criminology departments.⁴² The outcome is both a lack of knowledge and also some ambivalence regarding the place of business delinquency within the criminal domain. As an expert perspective, this may have some impact in turn on broader public perception. Moreover, some of those

criminologists who have carried out research in this area have expressed doubt as to the effectiveness or appropriate use of criminal law as a means of legal control. Braithwaite, for instance, in his well-known study of corporate crime in the pharmaceutical industry, argued against the use of criminal law in the 'economic' domain of antitrust:

"Another way of stating the problem is to argue that we should move away from the traditional criminal law preoccupation with blameworthiness and focus instead on effects such an approach would return economic content to an area of law which was enacted for economic reasons." (Braithwaite 1984: 192-193)

More recently, Punch has suggested:

"For firms it may well be that withdrawing a licence, recalling a product, and bankruptcy are more effective threats than a criminal prosecution with the threats of fines and imprisonment. Incapacitation and rehabilitation, putting firms effectively 'on probation', may be preferable to a frontal criminal prosecution." (Punch 1996: 261)

Some of these arguments will be considered further below; the present point is that they may also serve to undermine the sense of inherent criminality in antitrust violations.

Finally, there may also be an element in public opinion on the subject which tempers any tendency towards censure with an admiration for business success, even if the latter involves some breaking of rules. After all, marketing managers who fix prices and maximise their companies' profits are in one sense doing their 'legitimate' job well (indeed, that may be their own perception), and that may seem worlds removed from distressing acts of violence or the wanton violation of property rights ('real organised crime'). The affluent and elite context of business crime and cartel activity may even add a kind of glamour to the public perception of the subject. It is interesting to note the media attention generated by the rare involvement of a female CEO in a cartel bust - not long after Diana Brooks, the CEO of Sotheby's, had pleaded guilty to violation of the Sherman Act, there were plans for TV drama based on the case, with Sigourney Weaver in the leading role.⁴³ Such attention does not serve to alienate the price fixer or bid rigger from public empathy.⁴⁴

It would appear therefore that the significant movement towards criminalisation of cartel activity across a number of jurisdictions is a 'top-down' rather than 'bottom-up' process, in the sense that it has been led by transnational enforcement interests rather than a more widespread popular belief in a level of delinquency justifying the moral opprobrium of the criminal law. This is not to put forward such a conclusion as an argument against criminalisation. There are doubtless other situations in which legal opinion has led public opinion in moving towards criminalisation, especially in relatively technical areas of conduct, and to this extent public opinion may need to be formed by expert opinion. In such circumstances, however, for the process of criminalisation to be convincing and meaningful, it is important that the basis for using criminal law is clearly appreciated and that there is no consequent gap between the perception of those who have led the process and other professional or wider public opinion.

In the context of business cartels, the important question thus remains: what is so objectionable about the formation and operation of cartels that the conduct should be regarded as criminal? To answer this question, it should be borne in mind that the concept of crime is about *conduct* as much as *harm*. To return to Braithwaite's argument, referred to above: if competition regulation is only a matter of avoiding economic damage caused to the market and consumers by practices such as price fixing, then it may be that criminal law is not the most effective means of legal control. But that argument is based on the assumption that the area of law in question 'was enacted for economic reasons' (Braithwaite 1984: 193). While that is no doubt true of most competition law outside North America, it is less true of the Sherman Act, with its emphasis on the element of conspiracy and abuse of power as something over and above damage to the market.⁴⁵ The Sherman Act, and the more recent criminalising legislation in other jurisdictions which has taken its cue from the Sherman Act, is concerned with the attitude and mindset of the cartel plotter, and this is the convincing justification for using criminal law.

The success of the project of cartel criminalisation may then depend on how effectively this idea of contumacious, arrogant and furtive business conspiracy is conveyed by policy makers and regulators to other lawyers and the wider public. This is not just a matter of educating opinion through the use of revealing videotapes and recordings of cartel meetings. The moral condemnation of cartel conduct also needs to be

effectively cast in legal language for purposes of encouraging prosecution and securing conviction. The evidence so far from the OECD surveys, discussed above, suggests that there exists in a number of jurisdictions a natural reluctance to think in terms of criminal conviction and prison sentences, or a wariness about committing scarce resources to a process in which conviction may be difficult. It is open to argument how useful a concept such as dishonesty will prove to be in this context. The essential task would seem to be the translation of the enforcement vocabulary of 'brazen, egregious conspiracy' into a legal form which conveys more precisely the moral opprobrium now attaching to cartel plotting. This point appears to have been taken on board by the Australian Committee (the Dawson Review) on the review of the Trade Practices Act when it emphasised the need to resolve definitional problems, and in turn by the Australian Government's endorsement of that view, in its statement that:

"Any new offence must work well in the context of the Australian legal system, because it will only deter if the risk of conviction and substantial penalty are real."⁴⁶

Interestingly, the Australian Government's recent decision to go ahead with criminalisation is based on a policy of sparing use: only in cases where the value of the commerce affected exceeds 1 million Australian dollars, and also requiring proof of a specific dishonesty in the form of an intention to gain dishonestly from consumers as a result of the cartel.⁴⁷

At present, therefore, the new cartel offences appear to have a rhetorical rather than actual character, like the 'inherited treasure sword'. But this may be less of a matter of concern for the US Department of Justice if the formal act of criminalisation abroad serves its own national enforcement needs.

Notes

1. Global Competition Review: Special Publication: Cartel Regulation – Getting the fine down in 25 jurisdictions worldwide (2002). A useful survey of competition law developments worldwide is provided by the series of OECD reports or 'country reviews', under the generic title: The Role of Competition Policy in Regulatory Reform (www.oecd.org/infobycountry) (see further below).
2. See e.g. the Irish Competition Authority's Cartel Watch web page: www.tea.ie.

3. With few exceptions, such as the high profile auction rigging case involving Christies and Sotheby's and the female CEO of Sotheby's, Diana Brooks, who pleaded guilty to offences under the Sherman Act. See further below on this episode.
4. www.oft.gov.uk/html/comp-act/cartels/cartels.html.
5. The term 'cartel' is not used in American legislation or the relevant EC Treaty provisions or legislation. It is used oddly (or characteristically?) in the recent UK Enterprise Act in the heading to a number of sections ('cartel offence') but the text of the legislation refers to 'the offence under Section 188'; and there is no definition of 'cartel' in this legislation.
6. See Article 23 of Council Regulation I of 2003.
7. See Cases T-305/94 etc, LVM and others v Commission (1999) ECR II-931, at 1146.
8. These points are explored more fully in Harding (2004).
9. Such a view also probably provides the basis for the current tolerance of the State-based producer oil cartel, OPEC.
10. OECD Council Recommendation, March 1998, Effective Action Against Hard Core Cartels. C (98) 35/Final.
11. One manifestation of this is the imprecise description of legal process by writers outside the legal field. For example, a recent paper by Evenett et al. (2002) states that 'in December 1999, the EC convicted four European and four Japanese steel manufacturers of price fixing' (2002, at 8). Strictly speaking, the EC lacks any criminal law competence to convict of offences (although it can establish an 'infringement' of Article 81 of the EC Treaty), nor is price fixing in itself the infringement, but rather the agreement to engage in price fixing.
12. Some (although few) criminologists have recently referred to the small amount of interest in 'corporate crime' within the criminological community outside of the US: see Punch (1996) and Slapper and Tombs (1999). This point is discussed further below.
13. See, for example, the discussion of different contemporary understandings of 'cartel law' in Harding and Joshua (2003: 277-284).
14. Again, language is significant. The American term 'antitrust' (literally: *against* anti-competitive combinations) is more explicitly confrontational than the term generally employed in a European context, 'competition law' (a system of regulation to ensure competition, in a more facilitative way).
15. For further discussion, see Harding and Joshua (2003), Chapter 2: Models of Legal Control. Similarly, this bifurcation of judicial (criminal) and administrative process may result in the application of the former to individuals and the latter to companies, as in the case of the recent British legislation.
16. Letter from the President of the United States to the Secretary of State, concerning cartel policies, 6 September 1944: Kilgore Committee, Mobilisation Hearings, Part 16, 2038.
17. Again, the language is significant, 'surcharge' in place of 'fine', suggesting an administrative rather than criminal law process.
18. Competition Act 1998, Section 36. Originally the fines were imposed by the Director General of Fair Trading. See: Director General of Fair Trading (2000). Guidance as to the Appropriate Level of a Penalty (OFT 423, March 2000). The first penalty to be imposed was in relation to a blatant market sharing agreement

between two bus operators: DGF I Decision No CA98/9/2002, Market Sharing by Arriva and FirstGroup, 30 January 2002.

19. In response to double jeopardy concerns, it may be argued that the anti-competitive practice comprises the (corporate) breach of the competition rules, while the planning of the cartel comprises a distinct (individual) breach of the criminal law. This appears to be the assumption of the British Government and Office of Fair Trading; see Joshua, Julian (2002). A Sherman Act Bridgehead in Europe or a Ghost Ship in Mid-Atlantic? *European Competition Law Review* 23, at 232–233.
20. Admittedly, this is to side-step theoretical questions relating to the categorisation of ‘administrative penalties’ and whether they qualify as ‘quasi-criminal law’. For purposes of legal protection under the European Convention on Human Rights such procedures and penalties may be treated as being substantively equivalent to criminal law.
21. Some main overview sources include: Global Competition Review (2000). *Cartel Regulation*; OECD. *The Role of Competition Policy*; OECD (2002). *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws (DAFFE/COMP (2002) 7)*.
22. Austria, Brazil, Chile, Croatia, France, Germany, Ireland, Israel, Italy, Korea, Japan, Mexico, Norway, Slovak Republic, and the UK (see OECD sources, *ibid.*).
23. For further discussion of the construction of the UK offence, see Harding and Joshua (2002).
24. The Australian Government established a review of the Trade Practices Act (the Dawson Review) and as part of this review the Australian Competition and Consumer Commission proposed criminalisation of hard-core cartels. The Review Committee, reporting in 2003, supported criminalisation in principle but urged that problems of offence definition and relationship of criminal and civil penalties should be resolved first (Recommendation 10.1). Following further discussion by a working group, the Government decided to go ahead with criminalisation and introduce new legislation during 2005. See: www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp, and further below.
25. Recommendation of the OECD Council (1998).
26. *Ibid.*, II.3.
27. www.oecd.org/infobycountry.
28. DAFFE/COMP(2003)7. This French offence is cast in similar terms to the UK cartel offence under the 2002 Enterprise Act. It is interesting to speculate whether the components of the offence (especially dishonesty and a determinative role) may appear daunting to prosecutors.
29. OECD (2000). The 2002 legislation in Ireland has now introduced a leniency programme, designed to secure such admissions. But some commentators remain sceptical. Andrews has commented: ‘... On paper at least, Ireland now has by far the most stringent competition law of any EU Member State, and possibly any state outside the United States. But whether this new-found muscle will yield any results in the courtroom remains uncertain.’ See Andrews (2002), at 473.
30. OECD (2003). Complex criminal cases require a minimum of two lawyers in court, and if a prison sentence is sought the case must go to the High Court.
31. OECD (2003). The FTC appears to have been most vigorous in relation to ‘pervasive’ bid-rigging in the field of public procurement.
32. OECD (2000).

33. See, for instance, the account of the new leniency programme in Brazil by de Araujo, Karla Vanessa MM, Petrozziello, Paola R., and Castillo, Anna Garcia (2003). *European Union and Brazil: Leniency in Cartel Cases – Achievements and Shortcomings*. *European Competition Law Review* 24, 463.
34. The intention behind the new British legislation may also be to apply it very selectively to worst offenders: see Harding and Joshua (2002), at 944.
35. This vocabulary of victimisation has been widely employed by DoJ officials – e.g. Gary Spratling, addressing a criminal antitrust workshop in Phoenix in February 1997: “international cartels cannot and will not be permitted to victimize American businesses and customers with impunity” (Spratling 1997).
36. Department of Justice (2004). *Status Report: An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program*.
37. ‘Double criminality’ is a well-established requirement in international legal practice for cross-jurisdictional co-operation: that the offence or conduct in question is treated similarly in both jurisdictions, in terms of categorisation as a criminal offence.
38. One of the most notorious aspects of the case was the secret recording by the FBI of a cartel meeting; the video and audio tapes provided dramatic evidence of the inside working of a major cartel, including the famous line ‘the customers are the enemy.’
39. Department of Justice publications, especially occasional papers presented by officials and policy statements, supply detailed factual accounts and frank argument and analysis, so providing an insight into the ‘inside’ view of the American antitrust enforcement profession.
40. Another aspect of this persuasive strategy is the provision by the DoJ of technical assistance to newly established competition authorities, especially in African and Central and Eastern European countries.
41. Although an ‘independent’ report, it is widely regarded as a significant *travaux préparatoire*; it was probably influential in respect of the importation of the element of dishonesty into the new offence.
42. See Punch (1996) for an especially informative analysis of research agendas in both sections of the academic community. Slapper and Tombs (1999) suggest that an academic engagement with business crime virtually requires a self-conscious political stance.
43. Although, press reports in February 2002 indicated that the actress’s research for the role was frustrated by Brooks’ refusal to talk to her, in contrast to her willingness to talk to the DoJ after pleading guilty, in order to gain a lenient sentence!
44. In that smart, high-powered business activity may engender a certain admiration, in comparison with ‘down-and-out’, tawdry criminality.
45. See for instance the policy perspective presented by the ‘Roosevelt Letter’ (1944).
46. www.treasurer.gov.au/tsr.
47. www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp.

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