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Editorial - Developing Criminal Cartel Law: Dealing with the Growing Pains

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The Ninth CLaSF workshop was devoted to the subject of Cartels, Leniency and Criminalisation. The extensive and illuminating debate at the Workshop brought out the extent to which jurisdictions across the world are grappling with the development of modern cartel law. While it has been clear almost since the Sherman Act came into force that price-fixing, in the trenchant words of Justice Scalia in *Trinko*, is the 'supreme evil of antitrust'[1] for most of the period since 1890 cartels have not disturbed the development of competition law. This is because, until very recently, as cartels operated in secret they were not caught and as a result very few were prosecuted. For most competition law specialists, cartels were a serious but marginal feature of the competition landscape. In addition, modern economics suggested that, as the optimal strategy for all cartelists was to cheat, most cartels would rapidly fall apart. As a consequence, it was thought that in fact price-fixing, although technically serious, was, in practice, not much of a problem.

The development, in August 1993, by the Antitrust Division of the US Department of Justice of an effective Corporate Leniency Programme for cartels proved a significant number of regulators and economists wrong. The US CLP has been responsible for 'busting' over 40 cartels, with fines amounting to more than $2 billion and the jailing of dozens of executives for participation in price-fixing. It would appear that local, regional and global markets are riddled with cartels; some of them of very long duration. The success of the US CLP did not go unnoticed; the European Commission is now on the third version of its, almost US style, leniency programme. 24 of the 27 EU Member States have also adopted a leniency programme. The EU Leniency Programme, in particular, has been very successful with 167 incoming leniency applications in just over three years and over 50 cartels now under investigation. The success of the US, and EU, in combating cartels has encouraged a 'leniency infection' amongst regulators across the planet. Leniency programmes can now be found on the websites of antitrust regulators from Brazil to South Korea.

As the debate ensued at the Workshop, it became clear that developing a leniency programme is the only the start of the process of putting in place an effective enforcement policy against cartels. One of the major issues that regulators have to tackle is their own understanding of the importance of price-fixing. As the US CLP and the European Commission leniency programme have both established that there are

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1 *Verizon Communications Inc v Law Offices of Curtis and Trinko, LLP* (2004) 540 US 3, 8.

large numbers of cartels of significant duration affecting any economy, and given that price-fixing is the most serious form of antitrust offence, regulators have to re-assess their enforcement priorities. This means, for instance, shifting resources from other areas of work to focus on cartel enforcement, and reviewing existing procedures to see if they are able to cope with the contentious nature of civil administrative cases dealing with price-fixing. On a broader canvas, regulators have to be able to develop an effective outreach programme to the media, political class, and public to explain why price-fixing is so damaging and why heavy penalties are required.

This process has only just started in many states and within the European Union. It is true that the European Commission, for instance, has established a Cartel Directorate and reviewed its fining policy to focus on cartels. However, there is still an enormous amount that needs to be done for DG Competition to take full account of the leniency inspired 'cartel revolution'. It is open to question whether a Cartel Directorate consisting of only approximately 60 staff is really sufficient for the Commission to tackle the 50 cartels now on its books. Equally, there are some particularly tough procedural questions that need answering. One major issue, given the potentially enormous fines that can be imposed on companies for price-fixing and the significant reputational damage that can flow from such fines, is: can the Commission continue to both prosecute and then make a finding that price-fixing has occurred without that issue being argued before an independent judge?

Another major procedural issue discussed at the Workshop was the question of plea bargaining. DG Competition is now in many ways the victim of its own success; leniency applicants are flowing through the door of its Rue Joseph II offices, and as a result the small Cartel Directorate is overwhelmed with work. In part this is clearly due to the large number of cases arriving and the size of the Directorate; however, the existing heavyweight procedural system does not help. In order to deal with one cartel DG Comp officials once they have, received the leniency application, undertaken unannounced inspections, issued Article 18 decisions, required further information, and negotiated with the other cartel members over information received in view of a fine reduction, then have to launch an additional major procedural process. A detailed Statement of Objections is required to be issued; which may easily run to 100 pages plus annexed documents. Time for an extensive reply has to be given, and that reply has to be considered. Thereafter the defendants can ask for an Oral Hearing at which all issues involved in the case, involving significant Commission staffing, will be heard. Thereafter a detailed draft prohibition decision will have to be drafted and put before a meeting of the National Competition Authorities Advisory Committee. Penultimately the draft decision goes to the Commissioner for signing off, before its approval by the College of Commissioners before publication.

There is a very strong argument for saying that, given a leniency application plus unannounced inspections will give DG Competition virtually overwhelming evidence of the existence and operation of the cartel, it must be possible to introduce some form of fast track procedure. One idea that the Commission are considering is the introduction of a plea bargain procedure where defendants admit guilt and the

Commission are thereafter able to adopt a short form decision. This idea clearly has its very positive aspects; however, for such a procedure to work the Commission will also need to deal with several other questions. One issue already referred to is the need for an independent judge in the Commission's administrative procedure. It is difficult to see how the Commission can accept what are effectively 'guilty pleas' without first having the plea authorised by an independent judicial figure. The Commission will also have to consider introducing a much more transparent regime in respect of the level of fines that can be imposed for fear that potential plea-bargainers will be deterred from making guilty pleas because they will be unsure as to the level of fine which they would otherwise pay if they contested the Commission's prohibition decision.

The three papers in this issue of the *Competition Law Review* focus upon one particular aspect of the cartel revolution: the trend toward harsher sanctions and criminalisation in particular. As regulatory, political and media elites, along with the public, have begun to appreciate the number of cartels in operation and the damage that they do to the economy there has been a much greater willingness to consider criminalisation. Peter Whelan, in his article 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law', makes clear that simply fining undertakings apparently large sums of money is questionable; at least terms of deterrence. Whelan first provides a framework for discussing the intellectual rationale for criminal sanction and then goes on to apply those rationales to participation in a price-fixing cartel. He points out the difficulties of imposing a fine commensurate with the likely levels of gain, and the likelihood of detection. Relying on US data a fine would have to be imposed of approximately 150% of turnover. Interestingly recent data on European cartels suggest that European cartels were longer lasting and were more profitable than the cartels analysed in the US data, suggesting that to be effective any recovery would have to be significantly above 150% of turnover.

The paper makes a strong case for the argument that the focus on imposing 'heavy' corporate fines for price-fixing under EC competition law is misplaced. Fines which would provide an effective deterrent of 150% turnover are wholly unrealistic. If such fines were imposed many cartelists would simply go out of business. As Whelan points out, competition policy would in effect inflict significant damage on communities and employees who are entirely innocent of participation in price-fixing. In addition, from a pure competition policy perspective, if firms began to exit the market in significant numbers because of price-fixing fines, the end result would be a much more heavily concentrated market in respect of the few remaining firms in the market place; which would have greater ability to raise prices. A very convincing argument is then made that personal sanctions, preferably including imprisonment, are likely to significantly increase the willingness of corporate executives to avoid price-fixing.

In the second paper in this issue of the review by Mary Elizabeth Curtis and John McNally, 'The Classic Cartel-Hatchback Sentence', the authors discuss the growing pains of criminal antitrust in Ireland. In a fascinating article Curtis & McNally discuss

the successful price-fixing prosecution in *DPP v Manning*.[2] One of the major points made in the article is that Manning was the classic cartel operator, a respected retired executive whose job it was to ensure that no-one cheated on the cartel agreement. He was able to develop what Leslie, in his seminal paper 'Trust, Distrust, and Antitrust',[3] referred to as 'trust factors' to overcome the incentive to cheat - a real issue in a multi-member cartel. He ran the operation, built trust amongst members that the cartel would be operated fairly, hired mystery shoppers to check everyone was respecting the pricing arrangements and operated a penalty-bond system for those who infringed the pricing regime. Furthermore, a competition law consultant was hired at around the time the new criminal antitrust regime came into force in 2002 to examine the pricing regime. This consultant was not given the full information on the operation of the pricing system and gave what amounted to a largely clean bill of health.

Despite the central role of Manning, the hiring of a consultant to give the impression all was well with the pricing regime, and the fact that since the last major cartel case, *Connaught Oil*,[4] Parliament had enacted tougher criminal antitrust legislation, the judicial consequences were modest. The sentence handed down, a one year suspended sentence and a €30,000 personal fine, only represented a very minor increase on the sentence handed down in *Connaught Oil*. In that case the defendant received a fine of €15,000 and a six month suspended sentence. This is despite the fact that the 2002 Competition Act increased the maximum fine to €4 million and up to five years in jail.

There is a real whiff in *Manning* of the first modern criminal antitrust cases in the US; the *Lysine Cartel* where Federal Judges found it difficult to jail individuals. As the Judges pointed out in *Manning* and *Lysine* the defendants were of previous good character and would not reoffend. But as the authors say, 'should previous good character be disregarded in such cases? If most perpetrators have unblemished records, the fact that this may be regarded as a mitigating factor can only further perpetuate the running of cartels and work against deterrence'.

Despite Parliamentary support for tougher prosecution there still seems to be a judicial and prosecutorial reluctance in Ireland, despite the fact that criminal antitrust legislation has been on the statute book since 1996, to deploy criminal law weaponry effectively. No cases have yet been taken on indictment; instead personal fines and suspended sentences are preferred as a compliance strategy.

At least in Ireland there is a criminal antitrust statute on the books which is being applied. Brent Fisse, in his paper, 'The Australian Cartel Criminalisation Proposals: An Overview and Critique', makes clear that in Australia that all that has been provided so far is a detailed press release from the Federal Treasurer. A number of interesting observations are made on the proposals; most notably in respect of the reliance on

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2 *DPP v Manning* (2007) Central Criminal Court 9th February not yet reported.

3 CR Leslie, 'Trust, Distrust, and Antitrust' (2004) 82(3) Texas LRev 517-680

4 *Connaught Oil* known as *DPP v Michael Flanagan* (2005) not yet reported, but details of the case are available from the Irish Competition Authority's website.

dishonesty as an element in the offence. The appearance of dishonesty as part of the offence raises serious questions as to the overall effectiveness of the legislation in holding price-fixers, and in particular major corporations, to account. For as Fisse states:

> 'the requirement for dishonesty of 'knowledge that the conduct was dishonest according to the standards of ordinary people' is a subjective test that will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of mistake of law and self-preferring subjectivised beliefs about the morality of conduct'.

This view was borne out by the experience of the mock Criminal Antitrust Trial in July 2003, at the Regulatory Policy Institute's annual conference at Oxford University, which revealed the extent to which the subjective belief of dishonesty made it very difficult to obtain a conviction. In that case the facts involved a falling market and attempts by competitors to argue that the reason for undertaking the price-fixing was to protect jobs and keep the business running. While that argument would not have been given house room by a regulator the jury acquitted.

The paper also makes an interesting point in comparison with the UK Enterprise Act that criminal liability under the Australian proposals is not limited to individuals but also applies to corporations. Fisse makes an important, an often neglected point, when he says that:

> 'The argument that corporate criminal liability is unnecessary because the only penalty that can be imposed on a corporation is a monetary penalty of the kind already imposed in civil or administrative proceedings is unpersuasive. It fails to take account of the importance of the stigma flowing from the conviction of a company for an offence. It also fails to take consider the possibility of developing punitive non-monetary forms of sanction against corporations'

Despite the detailed press release in February 2005 there has been no draft legislation, despite further promises from the Federal Government. Hopefully the forthcoming Federal Elections in November will provide an opportunity to develop draft legislation and provide a basis for the new administration to tackle some of Professor Fisse's concerns.

At first sight these three papers suggest the development of criminal antitrust law is very problematic and difficult, if not impossible, to establish outside the United States. A more optimistic view is that what these three papers suggest is that we are experiencing the growing pains through which most of the developed world will establish effective criminal antitrust regimes. One major reason to be optimistic is that the driver of change, leniency applications, shows no sign of slowing up. In fact recently it has accelerated. The number of US grand jury investigations into international cartels has increased from an average of 50 grand juries per year to 130; in

part as a result of 'de-trebling' to single damages for leniency applicants.[5] Leniency will mean more cartel prosecutions being carried out in Europe and Australia as well as the United States. As long as leniency in the US and Europe continues to generate large numbers of cases the pressure to increase sanctions and create effective criminalisation regimes will continue.

[5] Masoudi, 'Cartel Enforcement in the United States' (2007) Budapest Cartel Conference 1.