

Editorial – Cartel Revolution and Evolution

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THE CARTEL REVOLUTION

The control of cartels, and the academic discussion which surrounds those controls, has changed dramatically in recent years. Going back only ten years it would have been difficult to predict that cartel regulation would effectively become a subject in its own right within competition law; but now it is clear that the cartel, and its regulation, is worthy of unique study. This issue of the review, the second in two years to focus on the topic, again seeks to further that debate.

It is interesting to note that the EC was arguably at the centre of the current cartel ‘revolution’. While the US has always been seen as the centre of antitrust enforcement, it is potentially falling behind European ‘upstarts’ like DG Comp and the OFT in the war against cartels. Both the European authorities and the DoJ must however look over their shoulders to keep an eye out for important developments in Australia; where the ACCC is likely to be granted significant new powers to challenge cartel activity in 2009.

Several of the issues of import are canvassed fully by the papers in this issue of the Review, but to place them in some form of context it is useful to take an overview of recent and upcoming developments here.

CARTEL REGULATION OR CARTEL LAW?

The contemporary debate regarding cartels tends to take a very different hue to many debates in competition/antitrust law. As the questions surrounding the economic harm caused by cartels are relatively settled there is a limited role for ‘traditional’ normative antitrust economics in this debate. Thus the questions worthy of debate fall more squarely into the legal domain. But that is not to say that the lawyers have things all their own way - the debate enjoys a significant contribution from two significant ‘extra-legal’ sources. The first is the wider academic debate in the growing body of regulatory scholarship. The study of regulation, as a subject in its own right, is relatively new, and while ‘regulationists’¹ would accept the law as part of their subject they throw their net much more widely and seek to examine any instruments which seek to ‘control, order or influence the behaviour of others’.² This wider view of how one might go about controlling cartel behaviour has clearly been an important influence on the

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¹ I am not sure if there is an accepted term for a group of regulation scholars, but here I do not refer to the Franco-Marxist school of economic thought or to its usage in the debate over the control of prostitution and communicable diseases.

² Black, ‘Critical Reflections on Regulation’ (2002) 27 *Aus J of Legal Philosophy* 1.

development of the contemporary European cartel regime. Much of cartel policy stems from ‘soft law’ documents and changes in the practice of enforcement agencies. While there has been little change to the headline legal provisions there has clearly been significant change in practice, and perhaps more importantly, the expectations of the legal and business communities. The understanding and expectations of the public in relation to cartels is discussed in Andreas Stephan’s enlightening paper in this issue of the Review.

Regulatory theory has also been used in more direct ways, either where regulation scholars, such as Christine Parker³ or Karen Yeung,⁴ look at competition enforcement as part of their work, or where competition lawyers draw on regulatory ideas, such as deterrence theory, in their work.⁵ In their seminal text, *Regulating Cartels in Europe*,⁶ Harding and Joshua clearly indicated how the debate had moved on.

The expansive nature of the study of cartels is also indicated by a more recent phenomenon. As cartel behaviour is criminalised in more jurisdictions it brings another branch of scholarship to bear on the debate, that of criminology. Criminologists have long used US antitrust as an example of white collar crime; it is now time for competition lawyers to get insights from wider criminology scholarship to better understand the impact and usefulness of the criminal law in regulating cartels.⁷

CARTEL PENALTIES

A more specific area of development is the increasing level and diversity of cartel penalties. In this issue Connor discusses cartel penalties in the US. In light of cartel regulation’s important place in antitrust it is perhaps worrying that it suggests enforcement levels are falling. It is interesting to compare this with the position in the EC where it appears that cartel fines have increased dramatically in recent years.⁸ Part of this can be attributed to the DG Comp’s 2006 Fines Notice,⁹ but there appears to be an increase in the frequency of fines being imposed in addition to the increase in the

³ See, for instance, C Parker & V Nielsen, ‘How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance with the Trade Practices Act’ (2008) 32(2) Melbourne University Law Review 554-608.

⁴ K Yeung, ‘Does the Australian Competition and Consumer Commission Engage in ‘Trial by Media?’ (2006) 27 Law & Policy 549-577.

⁵ The work of deterrence work of Becker has clearly been of influence in the work of Conner & Lande and Wils. See JM Connor & RH Lande, ‘The Size of Cartel Overcharges: Implications for US and EU Fining Policies’ (2006) 51(4) Antitrust Bulletin 983, and WJ Wils, ‘Optimal antitrust fines: theory and practice’ (2006) 29(2) W Comp 183.

⁶ C Harding & J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford, OUP, 2003.

⁷ See, for example, A MacCulloch, ‘Honesty, Morality and the Cartel Offence’ [2007] ECLR 355-363 and C Beaton-Wells & F Haines, ‘Making Cartel Conduct Criminal: A Case-Study of Ambiguity in Controlling Business Behaviour’ (2009) Australian and New Zealand Journal of Criminology, forthcoming.

⁸ See DG Comp, ‘Antitrust: Commission action against cartels – Questions and answers’, MEMO/09/32, 28 January 2009.

⁹ Commission Notice, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, C210/2.

basic amounts. The recent imposition of the first prison sentences and Competition Disqualification Orders in the UK in the Marine Hoses case also indicates the increasing range of cartel penalties in the UK.¹⁰ Increasing the range of penalties available of the use of cartels is also a matter of controversy in Australia where a new criminal provision aimed at cartels is expected to be enacted in the summer of 2009. While the Australian provision has bi-partisan support in the legislature the wording of the offence itself has been the subject of heavy criticism.¹¹

As competition law moves further into criminal territory it raises, as yet unanswered, questions in the UK as to whether juries will be willing to convict in cartel cases where prison terms are a real possibility. Andreas Stephan's paper suggests that the UK public do not yet see cartel behaviour as falling at the serious end of the criminal spectrum. A good deal of public education may be necessary to improve their understanding.

DIRECT SETTLEMENT, LENIENCY & PRIVATE ACTIONS

The recent introduction of DG Comp's direct settlement system,¹² and the OFT's continued use of 'Early Resolution' settlements, indicate the importance of reducing the cartel enforcement burden for antitrust authorities. The incentive for early settlement, for the target undertakings, is a fine reduction and, perhaps, a reduction in the reputational harm caused by the publicity surrounding a prolonged cartel case. One, as yet unanswered, question is the practical impact of such fine reductions on the impact of leniency programmes. Zingales paper in this issue examines the design of leniency schemes and their rationale in detail. The threat to leniency from settlement is arguably small, but that is not the case for private actions seeking damages. Moves are being made to facilitate more compensation claims in relation to cartel cases in Europe by both DG Comp and the OFT.¹³ The clear risk is that the increasing threat of private actions, for which a leniency application gives little protection, may discourage cartelists from leniency and have the perverse effect of stabilising cartels. While the authorities are aware of that threat the effect of any increase in compensation claims is still to be seen.

DUE PROCESS AND HUMAN RIGHTS

Another important theme which plays an important part in the recent history of cartel enforcement is the importance of the rights of the defence. Because of the increase in the level of fines Commission cartel decisions are almost always challenged before the European Courts. While challenges are now the norm, those challenges are very rarely

¹⁰ *R v Whittle & Others* [2008] EWCA Crim 2560. It is interesting to note that the CA appeared to be much more lenient in sentencing than the trial judge.

¹¹ See C Beaton-Wells & B Fisse, 'The Cartel Offences: An Elemental Pathology', LCA-FCA Workshop, 4 April 2009.

¹² See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008, C167/1.

¹³ See Commission White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, and OFT, Private actions in competition law: effective redress for consumers and business, OFT916resp, November 2007.

based on the facts. As most cases are based on a number of leniency applications it is difficult for those involved to deny the existence of the cartel. Most challenges are based on the due process issues and procedural failings or the level of the fine. Aslam and Ramsden address the issues surrounding dawn raids in their paper, but there are also numerous issues surrounding the transparency and independence of the decision-making process within DG Comp.¹⁴ The increase in these challenges may explain the Commission's desire to move towards direct settlement, but as that procedure does not allow for an agreed fine or a waiver of the right to appeal challenges look likely to continue to a significant extent.

CONTINUING CARTEL EVOLUTION

While it is clear there has been a 'cartel revolution' in the last years, it is also clear that the process of development is still ongoing. It appears that the revolution was not a one-off event; it merely signalled a longer period of evolution in cartel regulation. The opening up of cartel enforcement to a range of new influences suggests that a second period of innovation could take cartel regulation in interesting new directions. The fact the Review returned to this topic twice in two years indicates the extent of scholarship in this area. The ongoing debates surrounding the developments in criminalisation, settlement procedures and private actions, and their impact on the current leniency system, also indicates that much remains to be resolved during the evolution of cartel regulation.

¹⁴ See, for instance, A Andreangeli, 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?' (2005) 2(1) *CompLRev* 31, and A MacCulloch, 'The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' (2006) 26(2) *Legal Studies* 211-237.