

**University of Oxford  
Centre for Competition Law and Policy**

**Criminalising Cartels:  
A Critical Interdisciplinary Workshop on an International  
Regulatory Movement**

**Thursday 12 November 2009  
Pembroke College, Oxford**

**Outline of Papers**

**WOUTER WILS Cartel Enforcement and Criminalisation: An Overview**

In this introductory talk, an overview will be given of the debate on and practice of criminal cartel enforcement in Europe, in the recent past and foreseeable future, including the arguments in favour and against such enforcement, and the institutional, legal and political complexities.

**JULIAN JOSHUA Does Cartel Criminalisation Have a Future Outside of the United States? Insights from the United Kingdom Experience**

This paper will entail a critical review and analysis of the experience in enforcing the cartel offence in the United Kingdom since the passage of the Enterprise Act 2002. To date, only two prosecutions have been brought. Attempts to prosecute pre-Enterprise Act price fixing as common law conspiracy to defraud have proven a costly failure. These cases have been controversial and, in various respects, damaging to the credibility of the Office of Fair Trading as an enforcement agency, if not to the criminalisation project generally. The paper will explore the reasons why there have been so few cases, as well as examine the outcomes and implications of those that have been brought. Lessons for definition of the offence, enforcement policy, agency competence and investigatory powers will be considered. More broadly, the paper will address the issue whether the UK criminalisation project was ill-conceived from the beginning and whether criminalisation of cartel conduct has a viable future outside the United States.

**MICHAEL OKANE Practical Issues Arising from Concurrent Criminal Prosecutions in the UK and Overseas**

This presentation will analyse from a practitioner perspective some of the developing areas in the UK following recent criminal prosecutions. Such areas include the interaction of the UK disclosure rules with the regimes abroad and the extent to which they may undermine foreign and domestic leniency programmes, the principle of double jeopardy and the extent to which this has been eroded by the Marine Hose case, as well as the need for transparency and uniformity of approach between competing prosecuting agencies.

## **CARON BEATON-WELLS Milestone or Roadblock? Cartel Criminalisation and the Australian Consumer and Competition Commission**

Australia's competition authority, the Australian Competition and Consumer Commission (ACCC) instigated and led the campaign to criminalise cartel conduct in Australia. The new cartel regime took effect in July 2009 and undoubtedly will have profound implications for the ACCC. The question is whether criminalisation should be seen as the crowning glory for an agency that has been so effective in embedding competition law in the psyche of Australian governments, businesses and members of the general public. On one view, criminalisation should be credited with providing the ACCC with increased profile and powers and ultimately for strengthening its standing and role as the guardian of competition in the Australian economy. However, in this paper it is argued that, to the contrary, there are reasons to consider criminalisation a poisoned chalice. Presiding over a criminal regime will see the ACCC enter possibly its most challenging phase yet - fraught with strategic risk, technical difficulty, questionable enhancement in enforcement effectiveness and ultimately potential loss of the respect and credibility on which the agency so successfully drew in its campaign to make cartel conduct a crime.

## **CHRISTINE PARKER Criminalisation and Compliance: The Gap Between Rhetoric and Reality**

The primary justification for criminalisation offered by government and regulators is that criminal penalties, especially jail, will deter non-compliance better than civil penalties. Empirical evidence of an increased deterrent impact from criminalisation is, however, far from clear. The paper will examine whether there is empirical evidence that cartel criminalisation has or will improve compliance through either greater deterrence or other compliance mechanisms such as building normative commitment to the prohibition on cartel conduct. The paper will draw on existing empirical literature that tests what factors influence compliance and non-compliance among business firms and individuals, including literature on experiences of cartel enforcement and criminalisation in Australia, the UK and US. The argument of the paper will be that although the rhetoric might suggest cartel criminalisation to be a quick fix compliance boost, careful understanding of the empirical evidence shows that criminalization of any conduct, including cartel conduct, will only achieve behavioral change in certain circumstances.

## **CHRISTOPHER HARDING Recidivism, Criminalisation and the Growth of the Anti-Cartel Enforcement Industry**

The starting point of this discussion is the quandary underlying contemporary enforcement of the competition rules against cartels: that, despite an increase in the resources and legal sophistication of enforcement efforts, the amount of cartel offending remains impressively large. The subject gives rise to three main questions. The first question is one of empirical enquiry: what is really known about the extent and nature of cartel activity and how may the dark figure of such activity be reliably calculated? To what extent is such a calculation affected by the discoveries arising from an increased level of enforcement and the revelations of leniency programmes, and also by the legal and prosecutorial definition of cartels? The second question is criminological. In so far as there is a problem of cartel recidivism, how may that be understood and explained? Is that a matter of corporate or individual delinquency, or both, interrelated in a complex and poorly understood way? Are the impulses towards cartel offending economic or criminological in character, driven by profit motive or by an independent delinquent urge? The third question draws upon the sociology of organisations. Concern about cartels the battle against cartels - has become a significant legal reality, of global proportions. There is little indication that this battle will diminish in the foreseeable future and it appears that both cartels and enforcement agencies are determined to

continue to engage in the fight. Has the cartel problem and anti-cartel enforcement become an established way of life, with its own dynamic, embodying an increasingly entrenched set of business and professional interests long may the battle last? In this way the emergence of the anti-cartel enforcement enterprise provides a fascinating study of regulatory development and legal expansion.

### **STEPHEN WILKS Criminalisation in the Context of Britains Traditions of Negotiated Regulation**

Criminalisation can be regarded as an extreme case of juridification whereby activities formerly constrained only by economic imperatives and social norms become subject to control through the apparatus of the law. In Britain that transition can be compared to the shift from negotiated self-regulation, what Moran calls club government, to a modernised framework of clear principles, rules and independent enforcement. The paper will speculate on the degree to which the traditions of negotiated regulation have affected the design and enforcement of the criminalisation provisions. As part of that discussion it will employ Morans analysis of policy fiascos, seek to identify unanticipated consequences of criminalisation, and explore the possibility that the provisions are counter-productive.

### **ANDREAS STEPHAN Cartel Criminalisation: The Role of the Media in the 'Battle for Hearts and Minds'**

This paper will consider the importance of information dissemination through the media to the process of criminalisation. In particular, in challenging prevailing attitudes, lending legitimacy to cartel laws and encouraging normative compliance. The role of the media in changing attitudes to other unlawful behaviour will be considered, as well as a discussion of why competition law cases tend to be under-reported in mainstream media outlets, despite imprisonment and unprecedented levels of pecuniary fines.