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Brief 462366 / 2000 / OSCOLA / 2.1

'Cartels are one of the most harmful forms of anti-competitive conduct possible, which the civil law has proved ineffective in deterring and punishing. Subsequently, the UK's criminalisation of such behaviour via s.188 of the 2002 Enterprise Act is a laudable decision, and furthermore the offence is well constructed to achieve stronger regulation'.Discuss.

Introduction

It is widely recognised by the vast majority of commentators that cartels possess the potential to significantly harm the economy and disastrously distort markets; indeed, observers do not shy in damning cartels as ‘the biggest global financial fraud’ and ‘the supreme evil’ of antitrust. In contrast, there is significantly less unanimity on the matter of how best to combat cartel behaviour. Recent decades have seen a global upsurge in state regulation, initially primarily in the civil arena, and now increasingly via the criminal law as more states seek to follow the USA’s example of including criminal sanctions as part of an ‘aggressive’ regulation strategy.

The UK is a prime example of such a state, with the decision to supplement the civil competition enforcement regimes with the introduction of a criminal offence for cartel activity, as per s. 188 of the 2002 Enterprise Act. This move has been met with strongly mixed reviews, with proponents submitting it represents a desirably stronger response to cartels, whilst opponents retort it is ‘great for a headline but not much else’. Critics submit that s. 188 is an inappropriate misuse of the criminal law, and further that use of a criminal offence alongside civil leniency programmes is fundamentally irreconcilable. Moreover, s. 188 can be viewed as poorly constructed, and ill designed for practical application. On this basis, it will be asserted that the case made against s. 188 is compelling from both an academic and substantive perspective, and subsequently that the UK’s approach to regulating and deterring cartel behaviour would benefit from repealing s. 188.

Context

As aforementioned, there is little disagreement that cartel behaviour holds the potential to cause severe disruption to a state’s market; it rises above other forms of hardcore anti-competitive behaviour in that it objectively undermines the concept of the free and competitive liberal marketplace. However, more than undermining the theoretical underpinnings of the EU’s open market, empirical studies have shown that cartels operate significantly to the pecuniary detriment of the consumer and state alike. Thus, s. 188 was introduced, stating that ‘an individual is guilty of an offence if he agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements [that constitute or are akin to a cartel].

As with any criminal cartel offence globally, s. 188 was introduced to supplement (rather than replace) an existent civil enforcement regime, with many commentators contending that the pairing is both awkward and unnatural. Whilst the civil regime covers ‘undertakings’ generally (the EU’s specifically devised term to cover all entities engaged in economic activity), the criminal approach is necessarily only applicable to the high-level individuals involved in cartels. Nonetheless, the implementation of both is supervised by the UK’s national competition authority, the Competition Management Authority.

Track Record

Despite that s. 188 was enacted approximately fifteen years ago, the number of cases which have been prosecuted under it is remarkably low; indeed, in the initial ten years following s. 188’s introduction, only the cases of R v. Whittle, Allison and Brammer (Marine Hoses) (2008), R v. George et al (British Airways) (2010) and Galvanized Steel Tanks (2016) arose, of which only the former saw a successful prosecution. On one hand, it could be argued that the number of cases prosecuted is an improper measure of s. 188’s impact, given it was intended to act as a deterrent more than a punishment, however it seems a more compelling perspective that

s. 188 is simply failing to have major impact. Indeed, prior to s. 188's implementation, high-level commentators envisaged between six and ten major cases a year being prosecuted.

Moreover, the single successful case of Marine Hoses (2008) was in due to guilty pleas (rather than a guilty verdict) resultant from the work of the US Department of Justice, whilst Galvanized Steel Tanks (2016) also only materialised following guilty pleas, and British Airways (2010) is widely perceived as having suffered from an embarrassing collapse due to basic errors, resulting in what O'Loughlin describes as 'the nadir of eight years of embarrassment for the OFT'. It subsequently seems undeniable that s. 188 is defective in some manner, whether it be its theoretical underpinnings, structural construction or, as this paper submits, both.

Theoretical Failings

A strong argument can be made that any criminal cartel offence is doomed by its very nature as anti-competitive behaviour, whilst undoubtedly harmful, does not lie within the ambit of the criminal law. Whilst there is no exhaustively defined and objectively agreed upon approach to determining what should or should not be a criminal action, it is generally true that criminal actions bear multiple common characteristics, and a general definition can be applied, as espoused by the noted scholar Glanville Williams. As will be seen, this definition cannot be easily applied to cartel behaviour.

Indeed, as is frequently posited by those who consider the boundaries of the criminal and civil spheres, the two ought be viewed as distinct entities, rather than as existing on a single scale. Indeed, Robinson notes that no legal system, regardless of political system, economic development, or stage in historical development, has made the error of failing to distinguish the criminal and civil legal systems.

Whilst there are a myriad of reasons for this, a core one lies in the fact that the criminal sanctions are associated with signalling 'moral condemnation', unlike civil penalties. Thus, the criminal system is distinguishable from criminal law in providing 'a communicative function' which aids in 'separating and labelling' immoral behaviour. Notably, whilst the question of the relationship between morality and the law has occupied jurisprudential attention for centuries, epitomised in the thought-provoking debate between the positivist Hart and the natural lawyer Devlin J, such a question is beyond the scope of this paper. Thus, whilst all criminal behaviour is generally viewed as immoral, cartel behaviour does not have this same connotation. As lamented by O'Loughlin, there has been little effort to construct an effective 'enforcement culture' around the potentially severe impacts of anti-competitive behaviour. Indeed, this is evidenced by empirical evidence from Stephan who notes that a very low percentage of the British population equate cartel behaviour with economic theft, with a sizable portion believing that there were multiple situations and exceptions in which cartel behaviour would be acceptable, for instance if it assisted in avoiding mass unemployment. Even on the question of whether cartel behaviour such as price-fixing was dishonest, as per the Ghosh test, only 63% of Britons surveyed felt it was, whereas it can be reasonably presumed that other common crimes such as fraud, and theft, would likely be much more widely perceived as dishonest. Whilst issues with public understanding is a frequent problem in relation to white collar and complex financial crime, it appears to be particularly present in regards to cartel behaviour.

Subsequently, whilst many commentators applaud the reform to s. 188, effective from 2014, which removed the 'dishonesty' component of the offence, which had been 'routinely criticised' by commentators from the outset, it is ultimately unsurprising that this has not resulted in a sizable increase in charges and prosecutions. Indeed, the Competition Management Authority's efforts to 'scapegoat' this aspect of the defence have been deemed relatively unpersuasive, although it is commonly viewed that this component was perhaps s. 188's greatest substantive flaw. As Danagher cogently asserts however, the mere removal of this requirement from the face of the offence does not alter that 'the CMA's ability to convince a jury that a cartelist has acted dishonestly is paramount to the cartel offence's future success' as the average reasonable person would be unwilling to impose criminal sanctions on a person they view as having committed no major moral wrong, regardless of judicial direction.

Further, a common objective of the criminal law is to act as a means of responding to socially undesirable behaviour by punishing it, providing reprisal and endeavouring to re-educate. In contrast, the notion of deterrence as a primary motivation for criminalisation has been criticised, as evidence shows it a mistaken assumption that there is a direct negative correlation the occurrence of crime and the related penalty. Nonetheless, it is widely known that s. 188 is primarily intended to be a deterrent.

Structural Failings

Stemming from s. 188's dubious theoretical grounding, and alongside accusations that it is a misuse of the criminal law, lies its greatest structural error – namely that it operates uncomfortably alongside its civil counterpart. For instance, whilst the criminal law necessarily focuses on individuals and the civil law on organisations, in a competition law context, the justification for this difference is unclear.

Moreover, whilst the the Competition Management Authority, is responsible for overseeing both the civil and criminal competition approaches, they have shown sizable greater skill at the former, as shown by the fact that they were able to obtain a successful civil prosecution in British Airways (2010), whilst being widely criticised for their attempted criminal prosecution. Alongside the fact that the Competition Management Authority has more experience in the civil arena, it is evident that criminal inquiries and trials suffer from being more expensive and time-intensive, as well as being more uncertain in the courtroom, resulting in the very feasible possibility that the Competition Management Authority is simply avoiding bringing concurrent criminal cases, possibly viewing it as a poor use of limited resources and a potential source of embarrassment. Alongside the practical implications of this, this then raises doubts as to whether s. 188 is being equally and uniformly applied: a central tenet of both the rule of law generally and of the criminal law in particular.

Furthermore, whilst the criminal law is typically associated with moral opprobrium, as aforementioned, the a charge under s. 188 can be lessened or forgiven in the UK via a civil leniency programme. The awkwardness of s. 188 running alongside a leniency programme is aggravated by the fact that the latter are widely perceived as not only effective, but integral to a successful cartel regulation approach. This is as cartel behaviour is difficult to expose, and thus unless an involved party makes a report, the behaviour often goes undetected. Indeed, an authoritative economic inquiry in 1991 estimated that only approximately 16% of cartels were ever discovered; whilst a slightly outdated figure, and one that came primarily from a survey of American competition, it remains highly indicative of the difficulties faced by any competition regulation authority. Nonetheless, 'public opinion is divided as to whether leniency programmes are justifiable', a matter exacerbated by the criminalisation of cartel behaviour as it results in the wholly reasonable question of why, if such behaviour truly merits punishment by the criminal law, can one receive exemption in exchange for information and co-operation? Moreover, as leniency programmes typically give the immunity reward for the first guilty party that comes forward and indicates their conspirators, a significant public perception issue seems likely to arise as 'some guilty parties… go unpunished' and ' sanction on others [is allowed] to be substantially reduced'.

Conclusion

In conclusion, whilst it is clear that cartels are extensively difficult to properly regulate, it is an inappropriate assumption that any difficulties in applying a civil

detection and regulation programme will be improved via the supplementation of a criminal offence. Moreover, whilst anti-competitive behaviour as a form of economic theft can undoubtedly be tremendously harmful to the economy, and thus the consumer, this does not alter that society in general fails to assign the necessary moral condemnation and social stigma to cartel behaviour to merit the use of the criminal law. This structural issue is deepened by the fact that even were such opprobrium to develop, greater attention would then be focused on why leniency programmes are justifiable, despite that they have proven to be more successful than the criminal offence per se. However, s. 188 suffers from more than simple construction issues, cartel behaviour is simply and essentially unsuited to the ambit of criminal regulation, making it highly likely that no amount of reform or redesign will render it an effective regulation mechanism. It is subsequently prescribed that the Competition Management Authority's efforts would be significantly better utilised in improving the civil scheme and abandoning the unworkable s. 188.

Words: 2028

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