Sanctioning hard core cartel infringements in EU Competition Law: towards a more compliance-driven approach

Aaron Khan, Cardiff Law School
Overview

• Why should a system of enforcement be more compliance-driven?

• Does criminalisation ensure that organisations take compliance seriously?

• Proposals to ensure that enforcement systems are more compliance-driven
Unpacking the objectives of cartel enforcement

• Cartel enforcement seeks to achieve two objectives: punishment and deterrence

• It is often assumed that sufficiently severe punishment will ensure appropriate levels of deterrence

• However, this assumption may not work in practice: there is a risk that individualisation of liability will increase the "rogue employee" narrative and will not force organisations to take compliance seriously
Achieving deterrence

• In order to achieve deterrence, competition authorities should use enforcement mechanisms that ensure norms prohibiting cartel conduct are internalised

• This requires a more comprehensive understanding of the causes of cartels
Cartels and Corporate Governance

• Individual disregard for the law can be shaped by three factors:
  – Incentive structures (or remuneration packages)
  – Corporate culture
  – Individual moral beliefs

• Corporate culture and remuneration structures are determined by a company's senior management rather than shareholders, as modern corporations suffer from a separation of ownership and control
Executive Compensation

• Executive compensation is often poorly designed, uses superficial profit-based targets and rarely provides for punishment if an individual engages in activity that causes the company harm.

• Therefore, they can be seen as a possible cause of cartels as they may create an indirect incentive to engage in cartel conduct without fear of consequences.
Corporate Culture and Groupthink

• The problem created by poorly-designed remuneration systems is furthered by cultural defects within corporations

• Corporate management often exhibits "groupthink" tendencies: when working in pressured situations, groups' decisions become strongly influenced by a "culture"

• This culture often goes unchallenged by others due to the risk of being perceived as an outsider, and a lack of diversity on corporate boards
Corporate Culture and Groupthink (II)

• Therefore, if a member of management introduces the idea that cartels could maximise profits, this can lead to a culture of infringement which is fed down from senior management.

• Such a culture can also spread across sectors (Connor, 2010).
Does criminalisation ensure deterrence?

• In theory, criminalisation is extremely well placed to punish individual offenders

• In practice it has not worked well - criminal penalties introduced by Member States remain remarkably under-enforced
  – Beaton-Wells & Parker (2013): the empirical basis for the deterrent effect of criminal sanctions is "thin"
Reasons for under-enforcement of criminal sanctions

• Lack of social consensus on treating cartelists as criminals

• Limited scope of application - only suitable for those directly involved in a cartel

• Evidentiary difficulties in proving direct involvement

• Resource implications - competition authorities will be selective in the cases pursued to trial and will only prosecute where the likelihood of success is high
Criminal sanctions and the corporate governance causes of cartels

• It is further doubted whether criminal sanctions will ensure organisations take compliance seriously

• They do not target the parties that could have prevented infringements from taking place

• Therefore, competition authorities should seek to use other means of enforcement that are more directly compliance-driven
Towards a compliance-driven approach: three suggestions

• Fostering a comprehensive dialogue on what constitutes a robust and effective compliance programme in order to distribute best practices

• Requiring an effective compliance programme as part of a settlement

• Using a plurality of criminal and civil sanctions (including director disqualification)
A plurality of sanctions

• Corporate fines remain essential to a system of enforcement: they create an important incentive for shareholders to ask difficult questions of management and reduce the separation of ownership and control; they also ensure that the organisation as a whole is punished for an infringement

• Individual sanctions will strengthen the moral imperative to overcome groupthink, challenge illegal behaviour and shape the corporate culture into one that takes compliance seriously
Director disqualification

• A director would be prohibited from participating in the formation or management of a company if he/she was found to be involved in an infringement (including encouraging such conduct), or failed to take preventative action where they knew, or ought to have known, that it was taking place.

• Advantages: less resource intensive, very effective at combatting the underlying causes of an infringement, more public and political support.
A plurality of sanctions will allow competition authorities to use the most appropriate sanction depending on factors such as:

- The nature of the infringement
- The evidence available
- The role of the individual and the corporation
Concluding points

- In order to effectively tackle cartels, systems of enforcement must become more compliance-driven by seeking to ensure deterrence and combatting the underlying corporate governance causes of an infringement.

- Three suggestions:
  - Fostering a more comprehensive dialogue on compliance programmes in order to formulate best practices
  - Requiring compliance programmes as part of a settlement
  - Using a plurality of individual and corporate sanctions (including director disqualification)
Concluding points (II)

• Using a plurality of sanctions would reduce the mounting pressure on criminal sanctions, which could be reserved for the most serious cases.

• The expectation of criminal sanctions is currently too high - they cannot be an all-encompassing solution the cartel problem in Europe.