
Should Cartel Laws Be Criminalised?

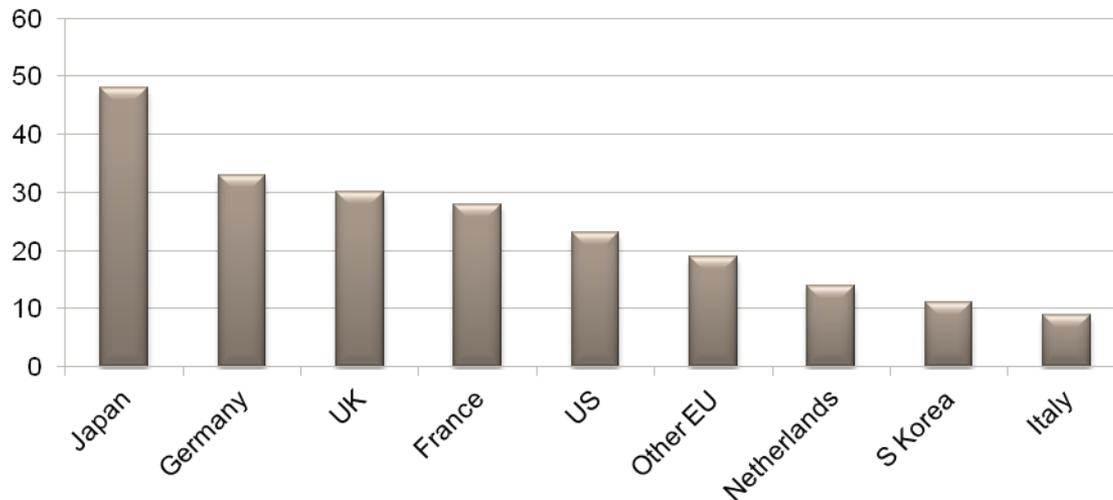
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Why all jurisdictions should punish cartels

- ✦ By any estimate, harm to global economy is likely to be in the billions (\$).
- ✦ Developing and emerging economies are disproportionately harmed.

International Cartel Members by
Country (EU Cases)



Background

- ✦ **Administrative Approach to Cartel Enforcement:** Corporate Fines only. Firms vicariously liable for actions of employees. (e.g. EU and most other competition jurisdictions)
- ✦ **Criminal Approach to Cartel Enforcement:** Firms and Individuals punished with criminal penalties. (E.g. USA, Canada, and now Australia).
- ✦ **Private Enforcement** – encouraged under both systems, but weak outside of North America.

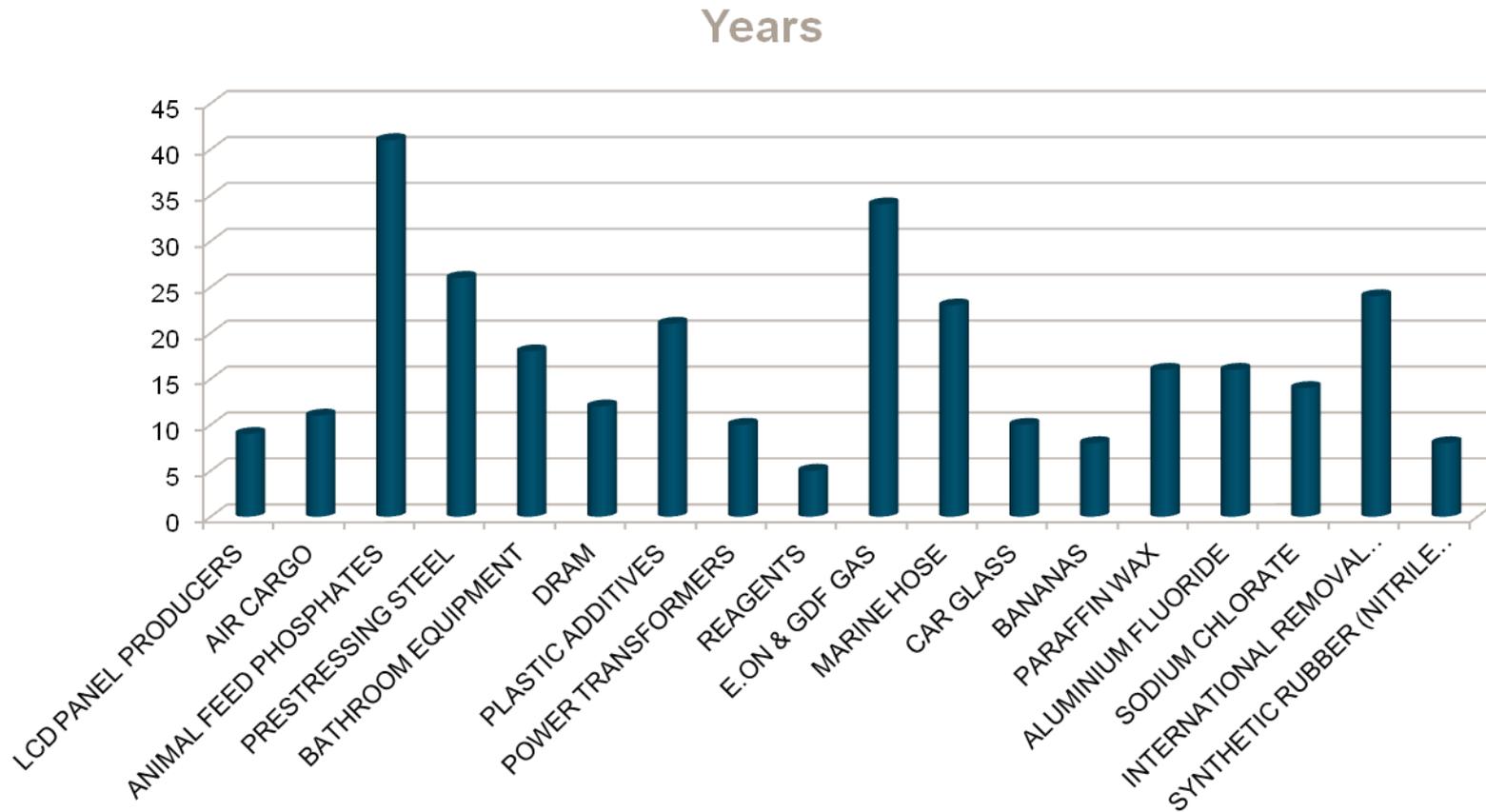
The UK's Approach to Cartels

- ✦ **Administrative Fines against the firm:** up to 10% of annual worldwide turnover. (Competition Act 1998)
- ✦ **Criminal Offence against individuals only:** up to 5 years imprisonment and / or unlimited fine. (Enterprise Act 2002)
- ✦ **Director Disqualification:** Up to 15 years (Enterprise Act 2002).
- ✦ **Private Enforcement** Currently under Review (increased standing before Competition Appeal Tribunal and 'Opt-out' collective actions).
- ✦ *European Commission investigates cases which have an appreciable effect on trade between member states (essentially, the International cartel cases).*

Why should Cartel Laws be Criminalised?

- ✦ Morality and Harm: price fixing tantamount to theft?
- ✦ Fines of the level that would 'optimally' deter would bankrupt many firms.
- ✦ Deterrent fines would need to be in excess of 100% of turnover (even given modest estimates about overcharges and probability of detection).
- ✦ Actual fines in EU closer to 2-3% of turnover.
- ✦ Fines punish the wrong people and come too late

Time between start of cartel and when fine was imposed (EU 2008-2010).



Empirical Evidence (OFT 2007 Study)

- ✦ Businessmen ranked factors which motivated compliance:
 1. *Criminal Penalties*
 2. *Disqualification of Directors*
 3. *Adverse Publicity*
 4. *Fines*
 5. *Private Damages Actions*

- ✦ Competition Lawyers put Fines in second place.

The UK's Experience of Criminalisation

- ✦ **Under UK offence, prosecution must prove 'dishonesty'**
- ✦ ...that what was done was doing was dishonest by the standards of 'reasonable and honest people'.
- ✦ ...and that the defendant knew what he was doing was dishonest by those standards.
- ✦ Taken from theft / fraud. Designed to signal seriousness of cartel conduct to public and business community.
- ✦ **Trial of 4 British Airways executives collapsed in 2010. No successful prosecutions in 9 years! Why?**

Definition of Offence and Public Attitudes

- ✦ Inclusion of dishonesty meant juries would be asked to make a contemporary moral judgement.
- ✦ CCP Survey (2007) found that:
 - ✦ 73% of Britons felt price fixing was harmful.
 - ✦ 60% felt it was dishonest.
 - ✦ 11% felt those responsible should be imprisoned.
- ✦ British Airways promoted an executive while he was pending trial
- ✦ Cartel fines played down in annual reports.
- ✦ Firms settling while publically denying wrongdoing.

Why are attitudes weak?

- ✦ Poor information dissemination / media coverage.
- ✦ Remote nature of cartel harm / symptom of free markets?
- ✦ Contradictory behaviour of government (e.g. In setting up a cartel or in relation to trade).



Definition of Offence and Public Attitudes

- ✦ Main problem in UK was definition of the offence. Under reforms, dishonesty will be removed from offence. It will become intention to fix prices unless done openly.
- ✦ Public attitudes are nevertheless important to decision to criminalise: determine likelihood of convictions and legitimacy of offence.

Difficulties in prosecuting criminal case

- ✦ OFT's inexperience as criminal prosecutor.
- ✦ Leniency and overreliance on revealing firm in building its BA case.
- ✦ Pre trial challenges.
- ✦ Cost and time involved in a full trial (BA case cost over £1m)
- ✦ Lack of US procedural short-cuts.
 - ✦ Ease of securing indictment through Grand Jury
 - ✦ Use of Plea Bargain to expedite enforcement

So is criminalisation a good idea?

- ✦ Sanctions against individuals are necessary, but should complement and not replace fines against firms.
- ✦ Criminalisation should follow a period of advocacy work.
- ✦ Some of the problems experienced in the UK stem from having two parallel procedures (administrative / criminal).
- ✦ Alternative punishments against individuals could be contemplated (e.g. Director disqualification), but nothing quite has the deterrent effect of gaol.
- ✦ Some jurisdictions (e.g. Germany) have only criminalised bid-rigging cases, where infringement and harm are easier to demonstrate. Modern US criminal enforcement also started here.