

ANTITRUST AND
COMPETITION LAW

Cartels, Markets and Crime

A Normative Justification for the
Criminalisation of Economic Collusion

BRUCE WARDHAUGH

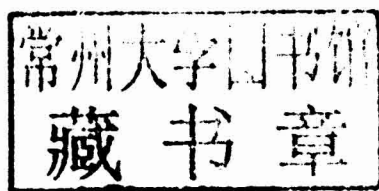


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CARTELS, MARKETS AND CRIME

This study of the normative justification for the use of criminal sanctions as a means of cartel control goes beyond the historical and economic viewpoints by adding a normative evaluation of anti-cartel regimes and analysing cartel control in the USA, Europe and the UK. The analysis is unique in seeking to establish why, in a liberal society, criminal sanctions should apply to individuals who participate in this sort of activity. Although cartels have been rhetorically likened to theft and fraud, there are significant differences. Notwithstanding these differences, *Cartels, Markets and Crime* presents an argument for the criminalisation of economic collusion, and, with this argument in mind, analyses the regimes of the US, EU and UK and considers the possibility of global convergence.

BRUCE WARDHAUGH is a lecturer at the School of Law, Queen's University Belfast, where his research interests include competition law and WTO law.

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To Jen and Jay

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PREFACE

At the time that this work went to the publisher (January 2013), the Enterprise and Regulatory Reform Bill (part of which was intended to reform the UK's competition regime) was still subject to Parliamentary consideration. The Bill was expected to receive Royal Assent in the spring of 2013. Accordingly, the discussion of reforms to the UK regime reflects the provisional nature of this legislation.

This work refers to the Articles of the various European Treaties in the way they are numbered in the Treaties. This should present no confusion to those familiar with the topic. It has also relied upon Commission Decisions (and other European materials) in authentic languages, when there is no authentic English version. I have consulted French, German and Dutch versions, though citing the French text. Unless otherwise attributed, all translations are mine.

When a work which has been reprinted over time (e.g. Locke's *Second Treatise*) is cited, citations to chapters and sections are provided, avoiding page numbers. This facilitates users of other editions to find the relevant passage. The exception to this is Mill's *On Liberty* where an authoritative text exists, and to which I refer.

The terms 'antitrust law' and 'competition law' are used interchangeably, though strictly speaking the former is American terminology. This allows for a bit of variation in my vocabulary.

All web references were verified on 30 January 2013.

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Many people have assisted me in the production of this work. Parts of this work have appeared in print previously. In particular, some of the Introduction and Chapter 1 appear as part of my article 'A Normative Approach to the Criminalisation of Cartel Activity' in *Legal Studies* (2012), and part of Chapter 3 appeared as 'Closing the Deterrence Gap: Individual Liability, the Cartel Offence and the BIS Consultation' in *The Competition Law Journal* (2011).

Prior to publication, I presented versions of the *Legal Studies* article at the Socio-Legal Studies Annual Meeting in Brighton in 2011 and the Society of Legal Scholars Meeting in Cambridge, also in 2011. Part of Chapter 2 was presented at the Socio-Legal Studies Association Annual Meeting in Leicester in 2012 and at the 2012 Society of Legal Scholars meeting in Bristol. Parts of Chapter 4 were presented at the University of East Anglia/Centre for Competition Policy Conference in June of 2012. I wish to thank all who commented on these papers (including anonymous reviewers), and in particular Jonathan Galloway, Andreas Stephen, Angus MacCulloch, Bill Kovacic, Christopher Brown and Morten Hviid. The usual disclaimers apply.

I would also like to thank my wife, Jennifer, who assisted in checking references and proof reading. Of course, all errors are mine alone.

My greatest debt is to my family, Jennifer and Jason, who tolerated my work and endured my absence from them (physically, mentally and at times spiritually) during the writing of this book. I doubt I would have accomplished this task without their support, for which I thank them.

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