

CARTEL RECIDIVISTS

Christopher Harding and Alun Gibbs

A striking aspect of the regulation of business cartels is the proportion of repeat offenders (recidivists) within the list of companies and businesses who are detected (and then usually found guilty and penalised) in prohibited cartel activity. Although the pattern of repeat offending is complicated by the limited life span of some corporate actors and the tendency in some economic sectors towards frequent consolidation, merger and take-over, thus confusing the identity of some market actors, the record of legal enforcement does suggest a long-term resilience and commitment to such illegal behaviour on the part of some companies. In some cases there is an apparently enduring history of breach and enforcement spanning several decades, sometimes coupled with a parallel record of involvement in other areas of regulatory investigation and infringement. This impressive indication of long-term and determined recidivism raises some important questions within the agenda of research into cartel regulation.

1. The reality of recidivism. The evidence of repeat offending is largely drawn from the record of formal proceedings brought by competition authorities. In some respects this is a real enough and reliable record of delinquency in that it undoubtedly attests to well-established serious breaches of competition law on the part of certain actors. But both the definition of recidivism and the way that the record has been constructed require further exploration. First, it may be asked what counts as recidivism in this context, in terms of the quantity of offending behaviour (counts of infringements), its frequency, and how it may be spread over sectors of economic activity. Secondly, it may be asked how strategies and patterns of investigation and enforcement affect the outcome of cases, which then provide the official statistics of detection and established infringement. For instance, is there a tendency on the part of enforcement agencies to focus attention on particular economic sectors, or is there a domino effect, whereby evidence in relation to one cartel leads easily to evidence of involvement in another, so confining enforcers' attention and resources to familiar actors and familiar markets ?

2. Lessons regarding the effectiveness of enforcement. A notable rate of recidivism would of course suggest a limited effectiveness of enforcement. In particular, it may indicate the poor deterrent impact of the rules against cartels, and of the strategies and sanctions associated with the enforcement of such rules. Therefore, probing the apparent pattern of repeat offending is an important part of the assessment of the effectiveness and achievement of the effort of regulation in this context.

3. The significance of market and economic context. It is also important to relate patterns of recidivism to the market context. To what extent does repeat offending occur within particular markets and economic sectors ? Is there a significant relation between market forces and circumstances and the impulse towards cartelisation ? Do certain types of market for some reasons inculcate a culture of delinquent cartel conduct ?

4. Lessons regarding the criminology of cartels. An investigation of apparently recidivist companies and the identification of their internal and external traits of corporate behaviour may enable a better understanding of the formation (and hence of the legal control) of business cartels. The sample of recidivist cartelists may be examined in terms of their internal corporate structures and cultures. The sample may also be analysed in terms of external conduct and performance : both behaviour in the context of other fields of regulation, and the degree of economic success over a longer period of time. Such an enquiry concerns, in short, the questions of whether delinquency pays – or how much it pays – in the regulated market place.

Summary of main research questions

1. The concept of cartel recidivism and its sources.
2. Constructing a rigorous definition of recidivism within this context for research purposes.
3. The impact of enforcement strategies on the construction of a recidivist profile.
4. The implications for policies of deterrence and the effectiveness of the enforcement effort.
5. Recidivism and market context : the role of economic factors and forces.
6. The criminology of cartel recidivism : internal and external aspects of cartel behaviour.

METHODOLOGICAL ISSUES

A The concept of the cartel offender

The legal definition of infractions of anti-cartel rules across jurisdictions :

- (a) global scope of the exercise
- (b) different legal definitions
- (c) classification of legal control (criminal, administrative)
- (d) application to corporate and human actors
- (e) need for a comparatively equivalent generic description (e.g. OECD formulation of 'hard core cartel' ?)

It is necessary to have a consistent and clearly indicated basis for counting offenders, and in relation to the issue of repeat offending, what counts as a single offence or infraction : it is suggested that this should be the participation by a single (corporate/human ?) actor in a particular (market related) cartel.

Separate data sets for corporate and human offenders ? The latter may be more difficult to trace.

Plus information on the duration of cartels.

B The concept of recidivism or repeat offending

Who ? The identity of the actor – is this stable over time (the problem of corporate restructuring) ?

What ? The nature of the anti-competitive activity and the market context - the same type of restriction, in the same market ?

How many ? Rate ? The number and frequency of established or proven violations.

Where ? The geographical extent, and jurisdictions covered. There is also a temporal issue, in that jurisdictions have and continue to enact prohibitions at different historical points.

C Survey of official policy and academic literature on the deterrent effect of sanctions in this context. Theory and discussion of the prevention of recidivism.

D Construction of the datasets : (1) the sample

(1) Sources

(a) Official investigations and prosecutions :

Established violations
Alleged unproven violations.

(b) Other sources :

Anecdotal, biographical, literary and journalistic evidence
Academic / non-academic studies.

(2) Assessing the representative character of the sample of officially pursued cases

The impact of prosecutorial selection (linked cartels, evidence chains, transparency of markets).

(3) Addressing the dark figure

Likely extent and market sites of the dark figure
Methods of deducing the dark figure from known violations
Other sources.

(4) The problem of corporate identity and its continuity in time and space (the problem of identifying the same offender for purposes of calculating repetition)

Parent and subsidiary companies within corporate groups
Restructured companies
The location of delinquent ethos within corporate structures.

E Construction of the datasets : (2) the sanctions

(1) A typology of sanctions and other impacts

Classification of sanctions :
Criminal / administrative
Financial penalties / other penalties and measures

Application : corporate or individual actors.

(2) *Quantification of sanctions*

How much ?

How many times in relation to 'single' offenders ?

(3) *Impressionistic evaluation of the impact of sanctions*

By cartelists

By enforcement agencies

Access to such material ?

F Corporate and human actors as recidivists

Distribution of sanctions between the two categories

Underlying policy on this issue

Evidence of dialogue between corporate and individual actors regarding the impact of and reaction to sanctions.

G Measurement of recidivism

(1) The proportion of repeat offending within the sample.

(2) The relation of financial penalties, damage to reputation and other impacts of sanctions to the estimated illegal economic gain arising from the violation.

(3) Perceptions of likely discovery and successful prosecution, and the prediction of gains from appeals.

(4) The impact of legal or other advice.