

# Imprisonment, An Effective Deterrence Against Cartel Activity?

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## Abstract

**With the development of global capital markets, the huge benefits of cartel activity are increasingly attractive to capitalists. In order to stifle this activity and imprison price-setters, there are increasing calls for the use of criminal law to regulate cartel activity. Understanding the relationship between criminal law measures and the fight against cartels is important for economic and social stability and the development of the legal system.**

## Keywords

**Cartel; Imprisonment; Crime.**

## 1. Introduction

According to Article 101 of the Treaty on the Functioning of the European Union (TFEU), cartel activity often consists of monopolies that disrupt certain markets. An increasing number of countries have criminalised cartel behaviour in the past century. United States antitrust legislation penalised monopoly offences for the first time in 1890. In addition to Japan (1992), Ireland (1993), Russia (1996), Germany (1997), the United Kingdom (2002), Brazil (2003), Australia (2009), Mexico (2011), the Philippines (2015) and New Zealand (2019), 43 other countries have criminalized cartels in recent years. As a result, strong cartels are needed.) This suggests that criminalizing strong cartel behaviour can be considered a trend in global competition and criminal law. Except for the United States, few countries have imposed criminal penalties on cartel organisers in the form of imprisonment despite the increased enforcement of relevant legislation.

According to some experts, governments should sentence those who violate Article 101 to prison to deter cartel activity more effectively. Legal strategies like this are undoubtedly irresistible to governments. As a criminal punishment, imprisonment entails a deprivation of liberty that is irreversible and compensatory. However, it is too absolute. Furthermore, not all cartel activities are necessarily cartel crimes as defined in Article 101(1). Consequently, this paper will examine whether all cartel activities are punishable by long prison sentences before the death penalty. Additionally, it will assess how criminal law can be integrated into the punishment of cartel activity, depending on its characteristics.

## 2. Cartel and Crime

Despite growing cartel criminalization across several countries, few jurisdictions have imprisoned individuals associated with cartels other than the United States. For example, in the United Kingdom, only two criminal prosecutions have been successful so far, even though cartel offences have been treated as crimes under United Kingdom legislation for more than a decade. About the EU, its judiciary cannot imprison any individual; therefore, the responsibility for choosing imprisonment as a way to punish and deter cartel activity lies with the member states. However, most governments will treat cartel behaviour as a civil dispute and choose to impose only administrative penalties, rather than criminal measures against individuals involved in cartel activities. As noted above, relying solely on corporate fines to stop cartel activity is largely

considered inefficient or ineffective, especially when the fines imposed on companies are disproportionate to the actual harm caused to competitors or customers in the market. As a result, many continue to advocate for governments to punish cartel activity with harsher criminal penalties, such as the imprisonment of key individuals. Many experts believe that this would have a greater deterrent effect on businesses, society, the public and all industry stakeholders, thereby reducing the recurrence of these crimes.

However, this view only considers the harmfulness of cartel offences or, arguably, only the most serious harmful consequences that they may entail. It must be acknowledged that not all cartel activities are so harmful and that some cartel activities are not strictly prohibited. For example, as mentioned above, Article 101(3) of the TFEU defines some exceptions to the penalties for cartel activity. Furthermore, in the United Kingdom, until 1 April 2014, with the implementation of section 47 of the Enterprise and Regulatory Reform Act 2013, cartels were subject to very limited restrictions and only "dishonesty" was severely punished. However, the categorisation of such a subjective moral concept as a crime has led to much controversy in English law. In particular, under Article 7 of the European Convention on Human Rights, criminal offences must be predetermined in terms of specific certainty and stability of criminal law. Thus, the uncertainty of what is classified as dishonesty in English criminal law conflicts with the ECHR. At the same time, this provision, unlike Article 101(1), leads to an overly broad and vague interpretation of the law. It would therefore be unreasonable to assume that the English courts would, or even should, a rule that all persons deemed liable for a breach of Article 101 should go to prison. After the new law came into force in 2014, the controversial dishonesty was removed as the UK sought to reform its legislation on cartel penalties following a significant public debate in the UK. As a result, section 47 of the Antitrust Act, as currently implemented, does not include dishonesty but provides several "exceptions" to cartel offences and three additional defences. Although the deletion of the uncertainty provision makes the law appear tougher, the criminal sanctions for cartel activity are not as strong as they could be. The fact that the three exceptions are taken into account in the conviction means that not all persons liable for a breach of Article 101 in UK law will be imprisoned. It is not directly possible to equate cartel activity with criminal activity and certain conditions need to be met for it to be considered a crime

### 3. Cartels and Criminal Law

There is no doubt that imprisonment is considered a criminal sanction in almost all countries. In other words, those who support the use of weapons for incarceration also mean agreeing to the use of criminal law as a means of stopping cartel activity. Before analysing whether criminal law can effectively stifle cartel activity, it is necessary to analyse the difference between imprisonment in criminal law and civil law or administrative penalties. It is also important to take into account the characteristics of criminal law itself.

#### 3.1. Distinction

The distinction between criminal law and civil law includes the difference between whether the subject of initiation is a private person or a state institution in the case of wrongful or infringing activities. Most importantly, there are differences in terms of the burden of proof, which is more stringent in criminal proceedings than in civil proceedings. A prime example of this discrepancy can be seen in the context of the Simpson murder case, where Simpson was acquitted but was still forced to pay a large civil fine due to faulty evidence presented in court. It can be seen that there is a more rigorous approach to criminal proceedings by the state or the law. Therefore, if criminal measures are used against cartel activities, they will be subject to stricter standards and procedures than previous civil and administrative measures.

### 3.2. Characteristics of Criminal Law

Criminal law should be used as a society's last resort because of its inherently complementary and pervasive nature. Criminal law should only be used to resolve conflicts when other means are not successful.

The deterrent effect of criminal law and related penalties is further divided into ex-ante deterrence, which concerns persons who have not yet committed a crime, and ex-post deterrence, which concerns the possibility of persons who have already committed a crime not committing it after the completion of their sentence. The effectiveness of criminal law in deterring potential criminal activity is also the reason why some argue that cartels should be addressed through criminal measures rather than civil or administrative penalties. Financial penalties do not arouse the moral values of those who are tempted by the huge potential benefits of cartel activity. Instead, the deterrent effect of criminal law is maintained in two ways. The first is to hold criminals accountable. Criminal law is usually in place before a crime is committed. Therefore, no penalty can be imposed without a corresponding law, and people can only be convicted and punished for acts that are clearly defined as crimes by law. Therefore, criminal measures such as imprisonment can only be imposed on cartel leaders if a country's law already defines cartel activity as a crime. Such measures have the advantage of clarifying which economic activities are criminalised under the law, to inform all members of society about the nature and risks of certain activities. Ideally, this would encourage them to avoid engaging in criminal behaviour. Proponents of the inclusion of cartels in criminal law argue that this would have a stronger deterrent effect and exert some educational power over people. Another aspect of maintaining deterrence is to prevent the abuse of criminal law, which weakens its deterrent effect, there must be strict limits on what constitutes an offence for a cartel, and it needs to be clear what will be defined as an offence and what similar conduct is not. Otherwise, the public will perceive the law as untrustworthy and its deterrent effect will be reduced.

### 3.3. Which Cartels Would Be Considered Offences?

The answer to this question requires a return to TFEU 101 once again. The conditions for restricting competition under Article 101(1) can be divided into two categories. The first category includes purposeful restrictions, where the parties to the agreement have an express purpose to restrict competition, while the second category is effective restrictions, where the parties to the agreement do not have an express purpose to restrict competition but do so as a consequence of their combination.

The standard of proof for purposive restraints needs to satisfy the test of significance, i.e. the restriction of competitiveness according to the criteria established in *Franz Völk v S.P.R.L. Ets J. Vervaecke*, which is usually carried out concerning the market position of the parties to the agreement and the degree of harm caused by the restraint of competition. Generally speaking, the smaller the market shares of the parties to the agreement, the lower the risk. As a result, the need for the EU to impose restrictions or fines is reduced. Conversely, the EU understands market restrictions to be primarily based on the effects of rules of reason. Therefore, if no evidence of intentional restriction is found, the agreement as a whole, including pro-competitive and anti-competitive elements, is analysed to determine whether it has a restrictive effect on competition in the market.

Reference is made to the EU's determination of the degree of harm of a cartel in terms of both effect and purpose, and the same reference can be made when discussing which cartel activities are punishable under criminal law, although the criteria need to be stricter. A cartel that constitutes an offence should be more serious in terms of harm than that set out in 101(1). In particular, the imposition of criminal measures such as imprisonment on a natural person is irreparable, as it undermines the right to fundamental human freedoms. Therefore, by the

principle of proportionality, in most cases existing civil or administrative penalties will be sufficient to deter less extensive and less harmful cartel activities without the use of criminal law.

#### 4. Conclusion

Contrary to common sense, imprisonment as a severe criminal measure can be a good way to combat cartel activity. However, this does not mean that it is unconditional and unrestricted, and that imprisonment should only be imposed if the statutory conditions are met for greater social harm. Otherwise, it can cause irreparable damage to a country's social stability and justice system. At the same time, in contrast to violent crime, the harm caused by economic crime is often not immediate. The application of criminal measures to economic crime should therefore be a "last resort".

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