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Letting the Punishment Fit the Crime: Sentencing in Cartel Cases in Ireland

Paul K. Gorecki*

Cartels – agreements between competitors to fix prices, allocate customers, and/or limit output – harm consumers. Cartel members raise their profits by, in effect, imposing a small, but nonetheless illegal, per unit ‘tax’ on consumers. Combating cartels requires not only detection and prosecution, but also the imposition of proportionate sentences.

In Ireland a judge has a wide degree of discretion in sentencing in cartel cases. There are no minimum statutory sentences, only maximum. These have increased overtime. For example, an individual on indictment could be sentenced to a maximum of two years in jail under 1996 competition legislation, but by 2012 the maximum had risen to 10 years. The legislation does not provide guidance which might fetter the Court. There are no sentencing guidelines for cartel offences as exist in, for example, the United States and European Union.

How then does the Court determine the sentence in a cartel case? The obvious place to look is the Court’s judgment. However, despite 33 convictions of individuals and firms involved in cartels in home heating oil, Ford cars, and Citroen motor vehicles, there is only one publicly available judgment, *Director of Public Prosecutions v Patrick Duffy and Duffy Motors (DPP v Duffy)* plus the transcript of the sentencing in *DPP v Hegarty*.

Judges often rely on earlier cases for guidance in a current case. In *DPP v Duffy* the Court relies on an English judgment, *R. v Whittle, Alison and Brammar (R. v Whittle)*, for guidance as to the correct approach to sentencing. At first glance this seems a sensible approach, since *R v Whittle* is a criminal cartel case. However, the Court in *R v Whittle* states that it is *not* to be relied upon as providing a set of sentencing guidelines. Whittle and his co-defendants had already entered into plea agreements with the US antitrust authorities and the issue was whether or not the English Court would impose higher prison sentences than those already agreed.

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Nevertheless, in *R v Whittle* reference is made to six plainly relevant factors that should be taken into account in sentencing in a cartel case: the gravity and nature of the offences; the duration of the offences; the degree of culpability of the defendant in *implementing* the cartel agreement; the degree of culpability of the defendant in *enforcing* the cartel agreement; whether the defendant's conduct was contrary to any Company Compliance Manual; and, mitigating factors such as whether or not the defendant had been compelled to participate in the cartel. The Court in *DPP v Duffy* does not go through these six factors and then link the assessment of each factor in a systematic manner to the sentence. This is not to deny that each of the factors, bar one, is discussed and that the Court provides a detailed examination of the defendant's arguments in mitigation.

There are several benchmarks that could be used to determine the appropriate sentence. Here we confine our attention to benchmarks in relation to *Duffy Motors*, the firm that was convicted.¹

- At a minimum, it could be argued, any fine imposed on a firm convicted for participating in a cartel should equal the gains from the cartel activity i.e. raising prices to consumers.² Such an approach is consistent with the Irish Supreme Court's view that the "entire aim and object of competition law is consumer welfare." We assume that the cartel to which *Duffy Motors* belonged was able to raise the price of Citroen motor vehicles in Leinster by 10 per cent for the duration of the cartel.
- An alternative approach to setting the benchmark is to consider the gravity of the offence and any mitigating factors in relation to the statutory maximum. The Court in *DPP v Duffy* characterised the breach of competition law as serious and was not impressed with the mitigating arguments of the defendants. This suggests a sentence towards the upper end of the maximum

¹ In the *DPP v Duffy Motors* both an individual and a firm were convicted and sentenced.

² If account of the fact the probability of being caught and successfully prosecuted is less than one, then the fine would be greater than the additional profits generated by the cartel.

under the legislation relevant for *R v Duffy*: 10 per cent of sales or €3.81 million, whichever was the greater.

Using these benchmarks, it is clear from Table 1 that the €50,000 fine actually imposed on Duffy Motors by the Court was small compared to the benchmarks in the legislation (1.3 or 5.4 per cent) and an approximation of the additional profits garnered by Duffy Motors (1.1 per cent).

TABLE 1

Benchmarking Fines, DPP v Duffy, Duffy Motors(Newbridge) Ltd t/a P. G. Duffy and Sons	
Benchmark	€50,000 fine as per cent of benchmark
10 per cent of sales of Duffy Motors in the year prior to conviction or €927,000	5.4 per cent
€3.81 million	1.3 per cent
Cartel overcharge or €4.64 million	1.1 per cent

One reason for the small fine was that two other members of the Citroen cartel had already been convicted and sentenced prior to Duffy Motors. The Court felt, on grounds of horizontal equity, it had to impose comparable fines on Duffy Motors. Two points can be made in this regard. First, neither of the earlier judgements was in the public domain so it was not possible for the Court in Duffy Motors to determine on what basis these earlier fines were imposed and their relevance, if any, to the sentencing of Duffy Motors. Second, although horizontal equity may have merited a fine of €50,000, this does not take away from the point that the Court could have developed what the correct fine should have been, since the Court was clearly minded, had it been able to do so, to impose a higher sentence than €50,000.

Of course, it is easy to criticise the lack of sentencing guidelines that emanate from the Duffy judgment. Developing such guidelines is likely to be neither easy nor straightforward. There is a tension between too much predictability and too much fettering of the discretion of the Courts. Just as too much judicial discretion without the need to carefully reason why a particular sentence is imposed can lead to sloppy thinking, injustice, and lack of accountability, equally an excessively prescriptive set of guidelines can lead to injustice. The challenge is to get the balance between the two extremes correct, so that the sentencing guidelines or methodology provides a reasonably acceptable framework within which sentences are determined while at the same leaving the Court sufficient flexibility to reflect the facts of the case.

The Court in the *DPP v Duffy* drew on – although it is not clear it applied – the not altogether relevant precedent of *R v Whittle*. Instead the Court could have drawn upon US guidance in determining the appropriate sentence. US cartel law is much more similar to Irish than either that of the UK or the EU. US sentencing guidance in cartel cases are set out in the *Federal Sentencing Guidelines Manual* (the Sentencing Guidelines). These are evidence based and incorporate the factors mentioned in *R v Whittle* as being relevant to sentencing. The application of the Sentencing Guidelines provides a methodology that determines, given the facts of the case, a *range* of fines and/or imprisonment. However, at the same time the Sentencing Guidelines do not remove judicial discretion, since they are advisory and the Court can go outside the range suggested by the Sentencing Guidelines, provided that the reasons are carefully set out by the Court.

In sum, Courts in Ireland have wide discretion in imposing sentences in cartel cases. The sentences imposed by the Courts are – based on *DPP v Duffy Motors* – far too low, resulting in serious under enforcement. Consumers pay the cost in terms of higher prices, while cartelists reap the benefits as individuals in terms of higher executive pay, as owners in terms of higher share prices and higher dividends. There needs to be greater transparency both in terms of publication of Court judgments, but also for those judgments, perhaps assisted by sentencing guidelines, setting out the methodology that underpins the sentence imposed. That way we would know whether or not the punishment fits the crime.

Paul K. Gorecki and Sarah Maxwell, “Sentencing in Criminal Cartel Cases in Ireland: the Duffy Judgment.” *European Competition Law Journal*, Vol. 34, Issue 5, 2013, pp. 239-248.

Paul K. Gorecki and Sarah Maxwell, *The US and Ireland Approach to Sentencing in Cartel Cases: the Citroen Cartel*, ESRI Working Paper 447, 2013, Dublin: ESRI. http://www.esri.ie/publications/latest_working_papers/view/index.xml?id=3697