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Editorial - Developing Criminal Cartel Law: Dealing with the Growing Pains

*Alan Riley**

The Ninth CLaSF workshop was devoted to the subject of Cartels, Leniency and Criminalisation. The extensive and illuminating debate at the Workshop brought out the extent to which jurisdictions across the world are grappling with the development of modern cartel law. While it has been clear almost since the Sherman Act came into force that price-fixing, in the trenchant words of Justice Scalia in *Trinko*, is the 'supreme evil of antitrust'[1] for most of the period since 1890 cartels have not disturbed the development of competition law. This is because, until very recently, as cartels operated in secret they were not caught and as a result very few were prosecuted. For most competition law specialists, cartels were a serious but marginal feature of the competition landscape. In addition, modern economics suggested that, as the optimal strategy for all cartelists was to cheat, most cartels would rapidly fall apart. As a consequence, it was thought that in fact price-fixing, although technically serious, was, in practice, not much of a problem.

The development, in August 1993, by the Antitrust Division of the US Department of Justice of an effective Corporate Leniency Programme for cartels proved a significant number of regulators and economists wrong. The US CLP has been responsible for 'busting' over 40 cartels, with fines amounting to more than $2 billion and the jailing of dozens of executives for participation in price-fixing. It would appear that local, regional and global markets are riddled with cartels; some of them of very long duration. The success of the US CLP did not go unnoticed; the European Commission is now on the third version of its, almost US style, leniency programme. 24 of the 27 EU Member States have also adopted a leniency programme. The EU Leniency Programme, in particular, has been very successful with 167 incoming leniency applications in just over three years and over 50 cartels now under investigation. The success of the US, and EU, in combating cartels has encouraged a 'leniency infection' amongst regulators across the planet. Leniency programmes can now be found on the websites of antitrust regulators from Brazil to South Korea.

As the debate ensued at the Workshop, it became clear that developing a leniency programme is the only the start of the process of putting in place an effective enforcement policy against cartels. One of the major issues that regulators have to tackle is their own understanding of the importance of price-fixing. As the US CLP and the European Commission leniency programme have both established that there are

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[1] *Verizon Communications Inc v Law Offices of Curtis and Trinko, LLP* (2004) 540 US 3, 8.

large numbers of cartels of significant duration affecting any economy, and given that price-fixing is the most serious form of antitrust offence, regulators have to re-assess their enforcement priorities. This means, for instance, shifting resources from other areas of work to focus on cartel enforcement, and reviewing existing procedures to see if they are able to cope with the contentious nature of civil administrative cases dealing with price-fixing. On a broader canvas, regulators have to be able to develop an effective outreach programme to the media, political class, and public to explain why price-fixing is so damaging and why heavy penalties are required.

This process has only just started in many states and within the European Union. It is true that the European Commission, for instance, has established a Cartel Directorate and reviewed its fining policy to focus on cartels. However, there is still an enormous amount that needs to be done for DG Competition to take full account of the leniency inspired 'cartel revolution'. It is open to question whether a Cartel Directorate consisting of only approximately 60 staff is really sufficient for the Commission to tackle the 50 cartels now on its books. Equally, there are some particularly tough procedural questions that need answering. One major issue, given the potentially enormous fines that can be imposed on companies for price-fixing and the significant reputational damage that can flow from such fines, is: can the Commission continue to both prosecute and then make a finding that price-fixing has occurred without that issue being argued before an independent judge?

Another major procedural issue discussed at the Workshop was the question of plea bargaining. DG Competition is now in many ways the victim of its own success; leniency applicants are flowing through the door of its Rue Joseph II offices, and as a result the small Cartel Directorate is overwhelmed with work. In part this is clearly due to the large number of cases arriving and the size of the Directorate; however, the existing heavyweight procedural system does not help. In order to deal with one cartel DG Comp officials once they have, received the leniency application, undertaken unannounced inspections, issued Article 18 decisions, required further information, and negotiated with the other cartel members over information received in view of a fine reduction, then have to launch an additional major procedural process. A detailed Statement of Objections is required to be issued; which may easily run to 100 pages plus annexed documents. Time for an extensive reply has to be given, and that reply has to be considered. Thereafter the defendants can ask for an Oral Hearing at which all issues involved in the case, involving significant Commission staffing, will be heard. Thereafter a detailed draft prohibition decision will have to be drafted and put before a meeting of the National Competition Authorities Advisory Committee. Penultimately the draft decision goes to the Commissioner for signing off, before its approval by the College of Commissioners before publication.

There is a very strong argument for saying that, given a leniency application plus unannounced inspections will give DG Competition virtually overwhelming evidence of the existence and operation of the cartel, it must be possible to introduce some form of fast track procedure. One idea that the Commission are considering is the introduction of a plea bargain procedure where defendants admit guilt and the

Commission are thereafter able to adopt a short form decision. This idea clearly has its very positive aspects; however, for such a procedure to work the Commission will also need to deal with several other questions. One issue already referred to is the need for an independent judge in the Commission's administrative procedure. It is difficult to see how the Commission can accept what are effectively 'guilty pleas' without first having the plea authorised by an independent judicial figure. The Commission will also have to consider introducing a much more transparent regime in respect of the level of fines that can be imposed for fear that potential plea-bargainers will be deterred from making guilty pleas because they will be unsure as to the level of fine which they would otherwise pay if they contested the Commission's prohibition decision.

The three papers in this issue of the *Competition Law Review* focus upon one particular aspect of the cartel revolution: the trend toward harsher sanctions and criminalisation in particular. As regulatory, political and media elites, along with the public, have begun to appreciate the number of cartels in operation and the damage that they do to the economy there has been a much greater willingness to consider criminalisation. Peter Whelan, in his article 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law', makes clear that simply fining undertakings apparently large sums of money is questionable; at least terms of deterrence. Whelan first provides a framework for discussing the intellectual rationale for criminal sanction and then goes on to apply those rationales to participation in a price-fixing cartel. He points out the difficulties of imposing a fine commensurate with the likely levels of gain, and the likelihood of detection. Relying on US data a fine would have to be imposed of approximately 150% of turnover. Interestingly recent data on European cartels suggest that European cartels were longer lasting and were more profitable than the cartels analysed in the US data, suggesting that to be effective any recovery would have to be significantly above 150% of turnover.

The paper makes a strong case for the argument that the focus on imposing 'heavy' corporate fines for price-fixing under EC competition law is misplaced. Fines which would provide an effective deterrent of 150% turnover are wholly unrealistic. If such fines were imposed many cartelists would simply go out of business. As Whelan points out, competition policy would in effect inflict significant damage on communities and employees who are entirely innocent of participation in price-fixing. In addition, from a pure competition policy perspective, if firms began to exit the market in significant numbers because of price-fixing fines, the end result would be a much more heavily concentrated market in respect of the few remaining firms in the market place; which would have greater ability to raise prices. A very convincing argument is then made that personal sanctions, preferably including imprisonment, are likely to significantly increase the willingness of corporate executives to avoid price-fixing.

In the second paper in this issue of the review by Mary Elizabeth Curtis and John McNally, 'The Classic Cartel-Hatchback Sentence', the authors discuss the growing pains of criminal antitrust in Ireland. In a fascinating article Curtis & McNally discuss

the successful price-fixing prosecution in *DPP v Manning.*[2] One of the major points made in the article is that Manning was the classic cartel operator, a respected retired executive whose job it was to ensure that no-one cheated on the cartel agreement. He was able to develop what Leslie, in his seminal paper 'Trust, Distrust, and Antitrust',[3] referred to as 'trust factors' to overcome the incentive to cheat - a real issue in a multi-member cartel. He ran the operation, built trust amongst members that the cartel would be operated fairly, hired mystery shoppers to check everyone was respecting the pricing arrangements and operated a penalty-bond system for those who infringed the pricing regime. Furthermore, a competition law consultant was hired at around the time the new criminal antitrust regime came into force in 2002 to examine the pricing regime. This consultant was not given the full information on the operation of the pricing system and gave what amounted to a largely clean bill of health.

Despite the central role of Manning, the hiring of a consultant to give the impression all was well with the pricing regime, and the fact that since the last major cartel case, *Connaught Oil*,[4] Parliament had enacted tougher criminal antitrust legislation, the judicial consequences were modest. The sentence handed down, a one year suspended sentence and a €30,000 personal fine, only represented a very minor increase on the sentence handed down in *Connaught Oil*. In that case the defendant received a fine of €15,000 and a six month suspended sentence. This is despite the fact that the 2002 Competition Act increased the maximum fine to €4 million and up to five years in jail.

There is a real whiff in *Manning* of the first modern criminal antitrust cases in the US; the *Lysine Cartel* where Federal Judges found it difficult to jail individuals. As the Judges pointed out in *Manning* and *Lysine* the defendants were of previous good character and would not reoffend. But as the authors say, 'should previous good character be disregarded in such cases? If most perpetrators have unblemished records, the fact that this may be regarded as a mitigating factor can only further perpetuate the running of cartels and work against deterrence'.

Despite Parliamentary support for tougher prosecution there still seems to be a judicial and prosecutorial reluctance in Ireland, despite the fact that criminal antitrust legislation has been on the statute book since 1996, to deploy criminal law weaponry effectively. No cases have yet been taken on indictment; instead personal fines and suspended sentences are preferred as a compliance strategy.

At least in Ireland there is a criminal antitrust statute on the books which is being applied. Brent Fisse, in his paper, 'The Australian Cartel Criminalisation Proposals: An Overview and Critique', makes clear that in Australia that all that has been provided so far is a detailed press release from the Federal Treasurer. A number of interesting observations are made on the proposals; most notably in respect of the reliance on

2 *DPP v Manning* (2007) Central Criminal Court 9th February not yet reported.

3 CR Leslie, 'Trust, Distrust, and Antitrust' (2004) 82(3) Texas LRev 517-680

4 *Connaught Oil* known as *DPP v Michael Flanagan* (2005) not yet reported, but details of the case are available from the Irish Competition Authority's website.

dishonesty as an element in the offence. The appearance of dishonesty as part of the offence raises serious questions as to the overall effectiveness of the legislation in holding price-fixers, and in particular major corporations, to account. For as Fisse states:

> 'the requirement for dishonesty of 'knowledge that the conduct was dishonest according to the standards of ordinary people' is a subjective test that will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of mistake of law and self-preferring subjectivised beliefs about the morality of conduct'.

This view was borne out by the experience of the mock Criminal Antitrust Trial in July 2003, at the Regulatory Policy Institute's annual conference at Oxford University, which revealed the extent to which the subjective belief of dishonesty made it very difficult to obtain a conviction. In that case the facts involved a falling market and attempts by competitors to argue that the reason for undertaking the price-fixing was to protect jobs and keep the business running. While that argument would not have been given house room by a regulator the jury acquitted.

The paper also makes an interesting point in comparison with the UK Enterprise Act that criminal liability under the Australian proposals is not limited to individuals but also applies to corporations. Fisse makes an important, an often neglected point, when he says that:

> 'The argument that corporate criminal liability is unnecessary because the only penalty that can be imposed on a corporation is a monetary penalty of the kind already imposed in civil or administrative proceedings is unpersuasive. It fails to take account of the importance of the stigma flowing from the conviction of a company for an offence. It also fails to take consider the possibility of developing punitive non-monetary forms of sanction against corporations'

Despite the detailed press release in February 2005 there has been no draft legislation, despite further promises from the Federal Government. Hopefully the forthcoming Federal Elections in November will provide an opportunity to develop draft legislation and provide a basis for the new administration to tackle some of Professor Fisse's concerns.

At first sight these three papers suggest the development of criminal antitrust law is very problematic and difficult, if not impossible, to establish outside the United States. A more optimistic view is that what these three papers suggest is that we are experiencing the growing pains through which most of the developed world will establish effective criminal antitrust regimes. One major reason to be optimistic is that the driver of change, leniency applications, shows no sign of slowing up. In fact recently it has accelerated. The number of US grand jury investigations into international cartels has increased from an average of 50 grand juries per year to 130; in

part as a result of 'de-trebling' to single damages for leniency applicants.[5] Leniency will mean more cartel prosecutions being carried out in Europe and Australia as well as the United States. As long as leniency in the US and Europe continues to generate large numbers of cases the pressure to increase sanctions and create effective criminalisation regimes will continue.

5 Masoudi, 'Cartel Enforcement in the United States' (2007) Budapest Cartel Conference 1.

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A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law

*Peter Whelan**

This article formulates a principled criminalisation framework in order to argue for the necessity of criminal sanctions as punishment under EC cartel law. It examines the traditional rationales of criminal punishment, demonstrating their relative merits and demerits. The theoretical usefulness of an economic model of analysis concerning the employment of criminal antitrust sanctions is highlighted in the process. The examined theories are then used to establish a 'model of criminalisation', which consists of a number of principles to be adhered to, and a set of (limiting) criteria to be considered, when deciding whether to criminalise certain (cartel) behaviour. This principled criminalisation framework is then employed to argue that a personal criminal sanction for cartel activity is necessary if one genuinely wishes to enforce the law in this area. More specifically, it is argued, first, that the current use of non-criminal sanctions within the EC concerning such arrangements leads to ineffective law enforcement of an activity that causes serious harm to consumers and the economy; and, second, that this deficiency should be rectified through the use of criminal punishment as reinforcement for other less controversial antitrust law enforcement tools, such as fines, director disqualifications, and private enforcement actions.

1. INTRODUCTION

The process of modernising the enforcement of EC competition law, epitomised by the entry into force of Regulation 1/2003, has engendered numerous strategic debates on the various methods of enforcing the EC cartel law rules. One particular debate has emerged that only five years ago or more would have been considered too futuristic, namely, the debate on whether the enforcement of these rules should be enhanced through the use of individual criminal sanctions. This article engages with this particular debate by setting out a principled argument for the use of personal criminal sanctions as punishment for infringement of the EC cartel law rules.

This article's central argument involves a two-step methodology. First, in Part 2, a principled criminalisation framework, which should be employed when contemplating the criminalisation of cartel activity, is developed. The criminalisation framework is then utilised, in Part 3, to demonstrate that current ineffective law enforcement of cartel activity should be rectified through the use of criminal punishment as

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reinforcement for other less controversial antitrust law enforcement tools, such as fines, director disqualifications, and private enforcement actions.

It is argued that by employing the principled framework for criminalisation in the context of cartel activity one achieves a morally acceptable, yet effective, approach to the creation and maintenance of criminal sanctions for what is, in the final analysis, undesirable and objectionable behaviour.

2. A Principled Framework for Criminalisation

This part examines the traditional rationales of criminal punishment theory in order to establish a 'model of criminalisation' which should be employed when contemplating the criminalisation of cartel activity.

2.1 Rationales for Criminal Punishment

Two general theories are traditionally put forward as rationales for the existence of criminal punishment: 'just deserts' and 'deterrence'.[1]

2.1.1 Just Deserts

At their most basic, theories of just deserts hold that punishment ought to be justified not by reference to its ability to prevent future crime but rather because man is responsible for his actions and must therefore receive what he deserves when he has made what society deems are wrong choices.[2] Such theories employ an approach to punishment that is backwards-looking to the offence, rather than forward-looking to the offender or to the consequential effects of punishment on the rest of society; they are centred on the concept of retribution for offences against the moral code.[3] Just deserts theories view punishment as a justification in itself for a wrong that has been committed; they argue for the imposition of punishment irrespective of its impact on future crime levels. For retributionists it is the nature of the prohibited act, and not the consequences of punishment, that matters.[4]

Most modern retribution theorists attempt to distance themselves from the 'strong form' retributive arguments which claim that just deserts theories not only offer society a justification for the imposition of punishment but also impose an obligation

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1 Some have argued that there are five justifications: retribution, deterrence, incapacitation, rehabilitation, and restoration/reparation, e.g. Ashworth, *Sentencing and Criminal Justice*, Cambridge University Press, Cambridge, 2005, at 65 et seq. Rehabilitation is unlikely to be useful for cartelists and will not be considered here. Restoration will only be considered as an alternative to criminalisation. Incapacitation could be engulfed by a broad definition of 'deterrence', encompassing, e.g., director disqualification.

2 Packer, *The Limits of the Criminal Sanction*, Oxford University Press, Oxford, 1968, at 37.

3 Galligan, 'The Return to Retribution in Penal Theory', in Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, Butterworths, London, 1981, at 144.

4 See Duff and Garland, 'Introduction: Thinking About Punishment', in Duff and Garland (eds), *A Reader on Punishment*, Oxford University Press, Oxford, 1994, at 4.

concerning its use.[5] These theorists attempt to move beyond the intuitive assertion that 'those who have done wrong should be punished' and incorporate social justifications into their retribution models.[6] Two variants of the modern approach are particularly noteworthy; they relate to 'unfair advantage' and to the 'communicative function' of the criminal law.

Fairness and Social Balance

For some, punishment restores the social balance by neutralising an unfair advantage secured by a non-compliant citizen in his breach of the law.[7] By exercising his own freedom of choice and acting against the defined common interest, an offender effectively gains an unfair advantage over those who restrain themselves;[8] punishment seeks to restore the 'distributively just balance' of advantages between the offender and the law-abiding so that no one in society should have been disadvantaged.[9] As Galligan explains, this unfair advantage may reflect itself in gains in goods, welfare or position.[10] But these gains are not what is significant; what matters is the gain inherent in 'indulging one's will, exercising one's freedoms beyond the restrictions imposed by law'.[11]

Punishment as Communication

A variant of retribution theory that appeals more to the intuitive feelings towards punishment finds itself in the arguments of those who espouse a communicative function of punishment.[12] Von Hirsch, for example, argues that punishment has a communicative element, in that it conveys to society the inherent wrongness of an act and the appropriateness of a resultant legal sanction; treating an offender as a wrongdoer, and by consequence conveying blame, is central to the idea of punishment.[13] For him, this account has the advantage of comprehensibility, in that

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[5] See Yeung, *Securing Compliance - A Principled Approach*, Hart Publishing, Oxford, 2002, at 72-73. There are however 'modern' retributionists that advocate an obligation in this context; see Moore, 'The Moral Worth of Retribution', in Ashworth and von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2000, at 150.

[6] Galligan, op cit, n 3, at 153-54.

[7] See Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980, especially at 262-64; and Finnis, 'Meaning and Ambiguity in Punishment (and Penology)' (1972) 10 Osgoode Hall Law Journal 1. See also von Hirsch, *Censure and Sanctions*, Clarendon Press, Oxford, 1993, at 7 et seq.

[8] Finnis (1980), ibid, at 263. See also Morris, 'Persons and Punishment' (1968) 52 Monist 473, at 474.

[9] Finnis (1980), ibid.

[10] Galligan, op cit, n 3, at 155.

[11] Finnis (1980), op cit, n 7, at 265.

[12] These include Feinberg, Matravers and von Hirsch.

[13] Von Hirsch (1993), op cit, n 7, at 9. See also: von Hirsch, 'Proportionate Sentences: A Desert Perspective', in Ashworth and von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2000, at 170.

blaming is something we engage in everyday, and is easier to link to the principle of proportionality than the unfair advantage theory.[14]

Proportionality

Since according to just deserts theories punishment has as its sole purpose deserved suffering, it follows that it should only be imposed to the extent that the offender is responsible for his behaviour.[15] The concept of 'just deserts', then, acts not only as a justification for punishment, but, through the operation of the proportionality principle,[16] also dictates the severity of any punishment imposed; both punishment per se and its severity must be justified according to what one deserves. Punishment, however, is not only dictated by the degree of culpability of a person: the gravity of the harm also affects the seriousness of an offence, and thus the severity of punishment.[17]

Although the existence of the proportionality principle in just deserts theory is not disputed, there are a number of conceptual disagreements regarding its implementation. For example, some see the principle as a defining, central concept in the determination of the severity of punishment,[18] while others see it simply as a limiting principle which should be used as a guide to ensure that punishment is neither too lenient nor too severe.[19] Indeed even its ability to as act as a precise guideline in any given situation has been questioned.[20]

2.1.2 Deterrence

Deterrence theory finds its roots in the classic utilitarian argument that suffering is a pain that should be avoided and that, as a result, punishment, itself a form of suffering, could not be justified unless a specific social benefit or utility can be derived from its imposition.[21] At its most basic, this theory holds that punishment can only be justified if it leads to the prevention or reduction of future crime.[22] Deterrence is thus

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[14] Ibid.

[15] See Packer, op cit, n 2, at 140.

[16] Two types of proportionality can be distinguished: ordinal proportionality dictates that persons convicted of offences of like gravity should receive punishments of a like severity; cardinal proportionality refers to the relationship between the gravity of the offence and the severity of punishment. See von Hirsch (1993), op cit, n 7, at 18-19; and Easton and Piper, *Sentencing and Punishment: The Quest for Justice*, Oxford University Press, Oxford, 2005, at 63-65.

[17] See Galligan, op cit, n 3, at 164.

[18] See e.g. von Hirsch (1993), op cit, n 7, at 15.

[19] See Morris, 'Desert as a Limiting Principle', in Ashworth and von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2000, at 181-83; and Easton and Piper, op cit, n 16, at 64.

[20] See Finnis (1980), op cit, n 7, at 264.

[21] See Beccaria, *On Crimes and Punishment*, 1995, first published in English in 1767, at 31; Bentham, *Introduction to the Principle of Morals and Legislation*, 1996, first published in 1789, at footnote 158; Bentham, 'The Principles of Penal Law', in Bowring (ed), *The Works of Jeremy Bentham*, Thoemmes Continuum, 1997, at 165-66; and Easton and Piper, op cit, n 16, at 104.

[22] Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice*, Barnes & Noble, Totowa, New Jersey, 1980, at 26.

consequentialist; 'it looks to the preventive consequences of sentences'.[23] Unlike retribution, deterrence does not attempt to reward those who make the right moral choices and punish those who do not. Rather, it sees punishment as a method of maximising utility, to be employed only when the disutility of imposition is less than the utility to society secured by its deterrent effect.

An Economic Variant

A relatively recent development in the debate on deterrence was the introduction of economics as a method of analysing the deterrent effect of a given law. The chief proponent of this approach was Becker, who placed the maximisation of wealth, as opposed to the more nebulous concept of 'happiness' advocated by the classic utilitarians, at the centre of any evaluation of deterrent effects.[24] Two central concepts in this theory concern 'rationality' and 'economic efficiency'.

Rationality: Economic deterrence theory is based on the fundamental assumption that individuals/undertakings are rational economic actors who act in their own interest in order to maximise their own welfare.[25] Accordingly, a rational actor can be deterred from engaging in a given conduct if the cost to him of such conduct is greater than its benefit. By ensuring that the 'price paid' by the offender is greater than he is willing to pay, one can disincentivise the potential offender and thereby reduce the incidence of unwanted behaviour.

Efficiency: Economic deterrence theory attempts to achieve economic (allocative) efficiency in order to maximise the total welfare of society.[26] Conduct is seen as efficient, and therefore should be encouraged, if its welfare benefits to society are greater than its costs (including the cost of law enforcement); by contrast, inefficient conduct, where costs outweigh benefits, should be prohibited. Economists will usually look to the margins in order to determine the efficient amount of crime enforcement.[27]

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[23] Ashworth (2005), op cit, n 1, at 75. There are two variants of deterrence: special and general. Special deterrence relates to the act of preventing the offender himself from reoffending; general deterrence refers to the preventive effect of punishment on the wider public. This distinction is important as (empirical) criticism of deterrence theory often rests on the special variant: Packer, op cit, n 2, at 39. Special deterrence is rarely used as the primary rationale of sentencing policy; general deterrence is therefore more significant: Ashworth (2005), op cit, n 1, at 75; Wechsler, 'The Challenge of a Moral Penal Code' (1952) 65 The Harvard Law Review 1097, at 1105. Nevertheless, special deterrence may also be achieved along with general deterrence: Baker and Reeves, 'The Paper Label Sentences: Critique' (1977) 86 Yale Law Journal 619, at 619.

[24] Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169. Posner highlights this difference between economic analysis of law and utilitarianism; for him 'wealth' is defined as the 'value in dollars or dollar equivalents … of everything in society': Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 Journal of Legal Studies 103, at 129.

[25] Cooter and Ulen, *Law and Economics*, Pearson Addison Wesley, USA, 2004, at 455 et seq. On this see Veljanovski, *The Economics of Law*, Institute of Economic Affairs, London, 2006, at 49 et seq.

[26] Allocative efficiency is achieved when it is impossible to advantage one person in an economy without disadvantaging someone else.

[27] See Block and Sidak, 'The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Every Now and Then?' (1980) 68 Georgetown Law Journal 1131, at 1131; Posner, *Antitrust Law: An Economic Perspective*, University of

Efficiency is obtained, and welfare maximised, where the marginal benefit of punishment is equal to its marginal cost.[28]

Harm versus Gain

Unlawful conduct may involve both benefits and costs for society, especially in the regulatory context; the economic models are cognisant of this fact.

The model of *unlawful gain* applies to behaviour that is never beneficial to society, or for which the costs always outweigh the benefits. It holds that for a given punishment to have (efficient) deterrent effect it must be set at a level at least equal to the gain of the offender. If this was not so the offender would not be deterred and inefficiency would result. This model does not foresee any problem with over-deterrence, as no potential benefits are lost through the elimination of the relevant behaviour.

By contrast, the *harm to others* model applies to conduct that, while harmful and not costless, nonetheless exhibits potential benefits for society. For this model only inefficient conduct should be deterred; efficient (albeit unlawful) conduct that provides net gains to society should not, as it is welfare-enhancing. Punishment is set at a level that equals the societal harm caused by the conduct in question, and not the gain of the offender, effectively internalising the external cost and ensuring that the entity engaging in the behaviour suffers its detriment and not society. By so doing the model avoids over-deterring, and thus penalising, efficient behaviour.

When calculating an optimal cartel fine, I will focus on the gain to the offender and not the harm to others.[29] There are three reasons for this. First, the economic harm variant relies upon the assumption that cartels are capable of being efficient, something that is extremely unlikely to be the case.[30] Second, calculation of the relevant variables should be easier as the deadweight loss is not considered.[31] Finally, the condemnation effect of criminal sanctions is likely to arouse less hostility when applied to conduct that is perceived as having no redeemable (i.e. efficient) features. It is conceded that this choice reflects a personal interpretation of the purpose of the cartel law rules, namely, the achievement of maximum consumer, as opposed to producer or indeed total, welfare.[32] Nonetheless, it is submitted that such a choice, while consistent with current

Chicago Press, Chicago, 1976, at 221-222; and Breit and Elzinga, *The Antitrust Penalties*, Yale University Press, 1976, at 7-16.

[28] On this see Cooter and Ulen, op cit, n 25, at 25 et seq.

[29] Cf. Becker, op cit, n 24; Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 University of Chicago Law Review 652; and Connor and Lande, 'How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines' (2005) 80 Tulane Law Review 513, at 516.

[30] On efficiency see Landes, ibid, at 653 et seq. Cf. Werden and Simon, 'Why Price Fixers Should Go to Prison' (Winter 1987) The Antitrust Bulletin 917, at 932 ('efficient hard-core price-fixing is no more likely than efficient child molestation').

[31] See Landes, op cit, n 29, and Breit and Elzinga, *Antitrust Penalty Reform: An Economic Analysis*, Washington: The American Enterprise Institute for Public Policy Research, 1986 at 11-12.

[32] On this see, e.g., Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) World Competition 183, at 191-193.

European practice,[33] does not materially affect the argument presented that non-financial cartel sanctions alone are ineffective.[34]

Adjustments

The following assumptions have been made in relation to the above two economic models of deterrence:[35]

(a) that the cost of detection and prosecution is zero;
(b) that the probability of detection and prosecution is one;
(c) that all rational actors are risk neutral; and
(d) that no legal errors occur.

Since these assumptions are not entirely realistic, certain adjustments should be considered.

Costs: Enforcement costs will be treated differently depending on which deterrence model is adopted.[36] With the 'harm to others' variant, costs are considered as part of the harm caused to society and are therefore internalised. With the 'unlawful gain' model, enforcement costs will be used to determine whether intervention is warranted or not.

Probability of detection and prosecution: Since not all offences will be detected, the expected cost of any future unlawful action will always be lower than the actual penalty imposed on apprehended offenders; it will be determined by multiplying the actual penalty by the probability of getting caught.[37] In other to deter effectively under both models, the actual penalty should be raised by dividing it by the probability of getting caught. The severity of an effective penalty and the rate of detection, therefore, have an inverse relationship.[38]

Risk neutrality: Risk-averse offenders will be deterred by a lower penalty than the one contemplated under either economic model.[39] Risk seekers, conversely, will only be deterred by higher penalties.[40] The penalty should be adjusted accordingly if either of these situations is the case.[41]

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[33] See, e.g., OECD, 'Remedies and Sanctions in Abuse of Dominance Cases', DAF/COMP(2006)19, 15 May 2007. See also, European Commission, *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003*, Brussels, (2006/C 210/02).

[34] That is, fines calculated under either of the models are of such a quantum to justify the analysis contained in Part 3 of this article.

[35] The assumption that all actors act rationally has already been considered.

[36] Yeung, op cit, n 5, at 67.

[37] Cooter and Ulen, op cit, n 25, at 456-457.

[38] Block and Sidak, op cit, n 27, at 1132.

[39] Cooter and Ulen, op cit, n 25, at 50-51.

[40] Ibid at 52.

[41] It has been suggested that public corporations are risk neutral: Posner, *Antitrust Law: An Economic Perspective*, University of Chicago Press, Chicago, 1976, at 269.

Legal error: Errors that allow guilty people to go free are simply reductions in the level of detection; they thus ensure a higher penalty.[42] Random erroneous convictions affect the deterrent penalty as follows: it falls if one is swayed by considerations of fairness, but rises if deterrence is the sole aim.[43] Non-random erroneous convictions chill (beneficial) behaviour at the borderline of criminality and thus should lead to a lower penalty.[44]

2.2 Comparative Analysis of the Rationales

This section analyses the effectiveness of both rationales in providing a suitable justification for criminalising unwanted behaviour in order to provide a stable base upon which the criminalisation framework can be constructed.

2.2.1 Principal Strength of Each Rationale

Theories of just deserts have as their principal strength the fact that individuals are treated as moral agents responsible for their own choices. Holding at their centre the acknowledgment of the moral worth of the individual, these theories, unlike their deterrent counterparts, cannot be criticised as falling foul of the Kantian admonition that individuals should be treated as an end in themselves, not as a means towards an end.[45]

Deterrence theories find their primary advantage in their ability to set a specific quantum for an effective penalty. Such theories, it can be argued, employ a non-arbitrary, principled approach based on theoretically quantifiable variables and thus represent a more 'scientific' method of resolving questions related to the criminalisation of a given behaviour.[46]

2.2.2 Moral Considerations

Retributionists can claim that they, at least, do not violate the liberal requirement of respect for individual autonomy and the separateness of persons; they hold that man is a moral agent responsible for his actions and should only be punished to the extent that he is morally responsible for his behaviour. Such theories are not immune, however, from criticism in relation to their approach to moral reprobation. The main criticism relates to their inability to justify *criminal* sanctions for unwanted behaviour, in contrast to simple condemnation or social avoidance: while just deserts theories may well justify moral reprobation for a given behaviour, they alone do not explain exactly why such reprobation should translate into penal hard treatment.

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[42] Werden and Simon, op cit, n 30, at 921.

[43] Ibid.

[44] Ibid. See also Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Col. Law Review 1193, at 1206.

[45] See Kant, *Foundations of the Metaphysics of Morals*, translated by Beck, Liberal Arts Press, New York, at 429.

[46] Cf. Beyleveld, 'Deterrence Research and Deterrence Policies', in Ashworth and von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2000, at 76.

This objection is so compelling that it has led some retributionists to acknowledge the (secondary) role of forward-looking punishment in their theories.[47] For von Hirsch, for example, moral censure in and of itself is not sufficient to justify penal hard treatment; it should be 'supplemented' by a 'prudential disincentive'.[48] People are assumed to be moral agents capable of understanding the reprobative function of the law, but as they are human, and thus weak, they may fall foul of temptation and break the law. The penal sanction therefore acts a supplementary preventative measure to reinforce the moral censure it embodies.[49]

The failure of deterrence-based theories to account for why excessive punishment, or, more worryingly, the punishment of the innocent, should not be allowed remains one of their principal weaknesses. Indeed, on their face such theories are by their nature capable of rendering invalid the liberal prescription that punishment be limited to those morally responsible for their actions, and only to the extent of such moral responsibility; they have difficulty in finding a satisfactory explanation for the constraints imposed by the responsibility principle.[50] That said, certain 'costly constraints', such as the requirement of *mens rea*, are often placed on the use of deterrence theories by those who advocate them that usually attempt to achieve one of two different aims.[51] Either they are used to achieve the general purpose of crime prevention, an aim that is fulfilled *inter alia* through ensuring that respect for the law exists;[52] or, alternatively, one places the deterrence model within a system of independent values, each of which, while not justifying punishment, nonetheless acts as a limiting influence on its imposition.[53] The latter approach is preferable in that it can regard justice (and thus the responsibility principle) as a value in itself that must be respected even if its effect on utility is negative; the former approach, while accepting that constraints may be necessary in some circumstances in order to maximise utility, ultimately fails to explain adequately why the responsibility principle should be adhered to if its imposition leads to net utility losses.[54]

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[47] Both Duff's and Finnis's accounts of retribution theory, for example, hold that it may be necessary to employ forward-looking concerns. See Yeung, op cit, n 5, at 75-76; Duff, 'Punishment, Communication and Community', in Matravers (eds), *Punishment and Legal Theory*, Hart Publishing, Oxford, 1999, at 52; and Finnis (1980), op cit, n 7, at 262-64.

[48] Von Hirsch (1993), op. cit., at 13.

[49] Ibid.

[50] Ibid at 152.

[51] Ibid at 147. Another aim could be efficiency in law enforcement: one could argue that as a matter of practicality it would be extremely difficult to design an efficient punishment regime without limiting the imposition of criminal sanctions to those responsible: Rawls, 'Two Concepts of Rules', in Foot (ed), *Theories of Ethics*, Oxford University Press, London, 1967, at 144 et seq.

[52] Respect for the law would be undermined by putting innocent people in prison; this reduces the value reinforcement effect of the law, and may ultimately increase crime levels. It should thus be avoided; hence the use of restraints. See Packer, op. cit., at 65.

[53] Ibid at 65-66.

[54] The latter approach is not without its problems though. See Galligan, op cit, n 3. It may be tempting to use a 'definitional stop' here and argue that if hard treatment is imposed on an innocent person, then it is not

2.2.3 Practical Implementation

Unlike economic deterrence, just deserts models are not theoretically capable of providing an exact penalty for a given offence.[55] While the proportionality principle can act as a limiting or defining element in the determination of punishment, it cannot produce scientifically verifiable answers to the question of its severity. Indeed, not only are there disagreements about whether the principle should act as a guide or as a central concept in such an evaluation,[56] the severity of punishment to be imposed once a particular approach is agreed upon is also disputed. This is due to two reasons: (i) the difficulty in comparing unlike crimes in order to set the scale of ordinal proportionality;[57] and (ii) the difficulty in setting an anchor of punishment, i.e. cardinal proportionality, for any given crime, as, in particular, the perceived gravity of an offence is often a social construct.[58] Any attempt to use just deserts theory and its concepts of ordinal and cardinal proportionality[59] to set an adequate severity of punishment is therefore likely to be a relatively subjective exercise, and one prone to controversy.[60]

While modern deterrence theories are, by contrast, theoretically capable of producing an exact quantum of punishment required for deterrence to occur, they can nonetheless be criticised on the basis of the practicalities encountered in their implementation.

First, the theoretically quantifiable variables themselves may not be so easy to calculate in practice. Therefore, while economic theory can indeed be used to set the quantum of punishment, its application in a real world scenario, where the variables may not be determined accurately, can prove to be difficult, if not impossible. Such problems, however, may be less restrictive when economic crimes are concerned. With price fixing, for example, economists have indeed made concerted efforts to determine an average mark-up, time period and probability of detection.[61]

Second, strict adherence to the dictates of economic deterrence theory would lead, in certain circumstances, to the generation of counter-intuitive outcomes which on their face appear to violate (popular) community values of fairness or morality. Three

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actually 'punishment'; see Benn, 'An Approach to the Problems of Punishment' 33 Philosophy 325, at 332. According to Hart, however, no account of punishment can afford to dismiss this issue with a definition: Hart, *Punishment and Responsibility*, Clarendon Press, Oxford, 1968, at 6.

55 See Walker, 'Modern Retributivism', in Ashworth and von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy*, Hart Publishing, Oxford, 2000, at 156-157.

56 See above.

57 See Hart, op cit, n 54, at 162-163.

58 This is acknowledged by von Hirsch: von Hirsch (1993), op cit, n 7, at 19.

59 Von Hirsch accepts, however, that the amount of punishment dictated by cardinal proportionality itself is limited and that as a result trivial crimes should not result in severe punishment such as imprisonment: von Hirsch (1993), op cit, n 7, at 19.

60 See Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57(2) Modern Law Review 228, at 231.

61 See below.

scenarios are conceivable: (i) imposing extremely high penalties and low levels of enforcement for minor offences (so that overall costs will be reduced) in order to reach a given level of deterrence; (ii) the imposition of increasingly lower penalties on those who continually break the law (as recidivism increases the rate of detection for those offenders);[62] and (iii) ignoring the effects of an offence when setting the quantum of punishment according to the gain of the offender.[63] The above scenarios can be avoided, however, if one takes an instrumentalist view of the law, and calculates its deterrent effect by reference to *inter alia* the level of respect it generates.[64] Nevertheless, such an approach would not prevent these scenarios from taking place if, following their occurrence, overall utility would be higher.

Third, by relying on the assumption that potential offenders act rationally when deciding to break the law, deterrence theories are open to the criticism that they do not adequately reflect reality. Detractors could argue that rationality is not a dominant feature of the human condition, that many factors influence how people order their behaviour, and that, consequently, one cannot adequately predict how people will act in given situations.[65] While this sort of criticism may indeed have value when analysing the existence of crimes of passion, it loses its potency somewhat when applied to economic offences that are committed after long periods of deliberation by educated, intelligent and otherwise morally functional persons.[66] An economic approach to sanctions in the antitrust context is more attractive than in others as executives are no doubt likelier to undertake a cost-benefit analysis of their (market) behaviour - especially concerning its economic impact on the firm they work for - than, let's say, the ordinary citizen unconnected in a direct way with the dynamics of business. Further, some have argued

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62 In practice this would require that increased focus be placed on those who have broken the law. However, this is not usually the case with cartelists: comments of Wouter Wils during a lecture at King's College, London, 15 February 2007, in response to questions from the author.

63 This would be a particularly sensitive issue when the gain to the offender is significantly lower than the injury to the victim. This particular concern may not be very pressing for antitrust law where victims often find themselves among thousands of others, and where the gain to the offender is usually higher than the loss experienced by each individual victim.

64 One finds a similar argument in Packer, op cit, n 2, at 65.

65 See e.g. Bromberg, *Crime and the Mind: A Psychiatric Analysis of Crime and Punishment*, Macmillan Company, New York, 1965, and Zilboorg, *The Psychology of the Criminal Act and Punishment*, Harcourt, Brace & Co., New York (who both argue that man is governed by unconscious impulses and does not have systematic regard to the rational principle of maximising one's welfare). Cf. Posner, *Economic Analysis of Law*, Little, Brown and Co, Boston, 1992, at 224 (a better test of the theory than the realism of its assumptions is its predictive power; and the available empirical evidence vindicates the effectiveness of the predictive power of the economic approach to the criminal law). See also Pyle, *The Economics of Crime and Law Enforcement*, Macmillan, London, 1983, at Chapter 3-4 (summarising the literature on empirical evidence); Packer, op cit, n 2, at 41; and New Zealand Ministry of Commerce, 'Penalties, Remedies and Court Processes under the Commerce Act 1986', discussion document, Wellington, January 1998, available online at the following website: http://www.med.govt.nz/templates/Page____9120.aspx, at 12.

66 See Baker and Reeves, op cit, n 23, at 620; Renfrew, 'Two Concepts of Rules' (1977) 86 Yale Law Journal 590, at 593-594; and Lynch, 'The Role of Criminal Law in Policing Criminal Misconduct' (1997) 60(3) Law and Contemporary Problems 23, at 45.

that the more competitive the environment, the likelier it is that actors act rationally.[67] At least in a business context, where the environment can generally be considered to be competitive,[68] the concern with rationality may therefore be subject to overstatement.

2.3 Towards a Principled Framework for Effective Criminalisation

This section builds upon the above analysis in order to develop a principled framework for effective criminalisation.

2.3.1 A Compromise Model and its Resultant Principles

Neither retributionist nor deterrence-based theories are capable of providing a complete account of the use of criminal punishment. While one theory, by discouraging/preventing others from breaking the law, attempts to ensure efficiency and minimise the social cost of crime, the other seeks to uphold the principle of personal autonomy and impose punishment only on those morally responsible for their actions. Both theoretical approaches have their advantages, and neither should be discounted simply because one favours the use of one over the other. A morally acceptable account of punishment, and, importantly, one that seeks to avoid over-simplification, demands the realisation that different theories of justification are relevant at different points of our inquiry into whether punishment is appropriate in a given situation.[69]

Some commentators see the primary aim of the criminal law as being in its preventative potential; for them, the law acts to discourage the public from engaging in unwanted social behaviour.[70] The criminal law is seen in terms of its singular ability to prevent, by anticipated punishment, the commission of antisocial conduct; deterrence should therefore be the chief justification for the *existence* of a crime. Use of deterrence as the chief justification for punishment is a good starting point for antitrust law, especially given the perceived lack of moral impropriety among the public concerning cartels. Indeed, such an approach relieves one of the burden of establishing by necessity the moral offensiveness of such activity. Whatsmore, economic deterrence theory is particularly helpful as it offers specific (theoretical) guidance on the size of an optimal fine, and can therefore be used to argue later that fines per se are an ineffective deterrent. Further, one of the fundamental underlying principles of this approach, viz. that the offender behave rationally, is more easily acceptable with breaches of the antirust law rules than with other more passion-induced offences.

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[67] Nelson and Winter, *An Evolutionary Theory of Economic Change*, Harvard University Press, Cambridge, Massachusetts, 1982.

[68] It should be remembered that even if the product market is not competitive, the job market for managers can be expected to be fairly competitive so that rational, profit maximising managers are selected: New Zealand Ministry of Commerce, op cit, n 65, at 12.

[69] Hart, op cit, n 54, at 3.

[70] Ibid at 6; and Packer, op cit, n 2, at 16.

Justifying the existence of criminal punishment for a particular offence, however, is not the only issue encountered in our inquiry into whether punishment is appropriate; we must also account for: (i) why punishment should be imposed on a *particular individual*; and (ii) what the *severity* of that punishment should be. This is where retributionist theories and their resultant principles have a role to play. Deterrence-based theories, if brought to their logical conclusions, can lead to situations that either run counter to popular beliefs on fairness, or violate fundamental principles such as respect for individual autonomy. Society is often founded on a plurality of values and principles; the pursuit of deterrence through the criminal law should be conditioned accordingly. Indeed, crime prevention does not hold itself out as the sole value in society - it does not exist in a vacuum. As Packer states, deterrence theories have 'to be qualified by other social purposes, prominent among which are the enhancement of freedom and the doing of justice'.[71] Their potential adverse results would be avoided by upholding values such as autonomy, fairness, and respect for human rights as values per se, values which cannot be overruled even if the net effect on utility levels would be positive. These particular liberal ideals find their practical application in traditional retribution-based concepts such as the principles of 'responsibility' and 'proportionality'. Even if one has chosen deterrence as a founding justification for the *existence* of punishment, these principles can, and indeed should, still influence its *distribution* in a given situation. In a hybrid, compromise-driven criminalisation framework, retribution theories therefore have a limiting role to play in the justification of punishment: they set an outer limit on the severity of punishment by virtue of the proportionality principle, and prohibit punishment of the innocent through the responsibility principle.

The above approach, namely using deterrence theory to justify the existence of a crime and using retributionist theory to set an outer limit on liability and severity, is open to at least two criticisms: (i) that it fails to value man's inherent moral worth by refusing to consider the concept of retribution when justifying the existence of an offence; and (ii) that the exact link between deterrence and retribution is not established or clear.[72] Consequently, Galligan believes that the introduction of just deserts at the sentencing stage makes most sense if the general aim includes some concern to punish wrong doing.[73] For these reasons and others, and despite the fact that it is not essential to the framework as developed, I will offer comments on the moral quality of cartel activity.

In summary then, by adhering to the above framework one effectively ensures a criminal cartel law that respects, inter alia, the following important principles:

- That the criminal law should be an efficient mechanism for maximising social welfare ('principle of efficiency');
- That an offender should only be punished for conduct for which he is responsible ('principle of responsibility);

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[71] Packer, op cit, n 3 at 16. See also Hart, op cit, 54, at 21-24, and 177-185.

[72] Yeung, op cit, n 5, at 88.

[73] Galligan, op cit, n 3, at 151.

- That an offender should receive no more punishment for an offence than that which is proportionate to and commensurate with the gravity and seriousness of the offence itself ('principle of proportionality');
- That no person should be treated simply as a means towards an end but as an end in himself ('principle of autonomy'); and
- That any punishment that is imposed should be imposed in a manner that is just and fair ('principles of fairness and justice').

2.3.2 A Final Set of Criteria

A number of (limiting) criteria should be considered before arguing for the criminalisation of a given conduct so as to avoid the creation of a criminal law that is unnecessary, ineffective, overly costly or simply inappropriate.

Sufficiency of harm: Mill argued in the 1800s that the criminal law should only be concerned with behaviour that harmed others. Many have argued over what constitutes 'harm to others' and indeed whether the criminal law should also cover conduct that does not manifest any such effects. These disagreements have not, however, detracted to a sufficient degree from the argument that the criminal law, although perhaps capable of covering many different (harmful/unharmful) types of behaviour, should at the very least include those that produce a seriously harmful effect on others. As a coercive and expensive measure, the criminal law should be reserved for that which really matters; seriously harmful behaviour would indeed be included within this notion. A strong argument for criminalising a given behaviour would therefore at the outset attempt to demonstrate the harmfulness of its effects.

Moral quality: Although not all criminal offences involve moral wrongs, the more negative that conduct is perceived in terms of its moral qualities - at the least by a significant number of the population - the more likely it will be appreciated as undesirable conduct requiring criminal sanctions.[74] Criminalisation of so-called 'acceptable' behaviour - although capable of influencing views on questions of harmfulness/seriousness[75] - could, by contrast, result in a negative outcome, such as nullification or a change of attitudes towards the nature and fairness of the criminal law.[76] So, although when following the above framework the immorality of a given conduct is not necessarily a prerequisite for the justification of the existence of a criminal sanction, it is a weighty consideration nonetheless. What is important is whether the population, *once they are made aware of the character of the offence*,[77] will consider it to be something that is inherently wrong.

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[74] See e.g. Packer, op cit, n 2, at 262.

[75] See e.g. Ball and Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation' (1964) 17 Stanford Law Review 197, at 217.

[76] Flynn, 'Criminal Sanctions under State and Federal Antitrust Law' (1967) 45 Texas Law Review 1301, at 1320.

[77] Criminalisation may need, for example, to be preceded by considerable competition advocacy and education.

Comprehensibility: It is axiomatic that for a proposed offence to be effective it must be enforceable in practice.[78] In order to be enforceable, the offence as defined in the criminal law, as well as the broad type of conduct underlying it, should be (or at least be capable of being made) understandable, both to those subject to the law and to those responsible for its enforcement. Comprehensibility is also required if the offence is to be capable of being considered a wrong by a sufficient proportion of the population.

Lack of effective alternative: The criminal law is costly and resource intensive, and often involves moral condemnation, especially when custodial sentences are imposed; conduct should therefore only be criminalised as a last resort, when all other reasonable legal and non-legal remedies are incapable of delivering effective enforcement. Accordingly, before opting for criminalisation one must investigate if the mischief in question could be dealt with under existing legislation or using other remedies.

Political will: For an effective criminal law to be passed and enforced a sufficient political dedication to the criminalisation project should exist - or at least be capable of being created without disproportionate costs - among citizens, law enforcers and the legislature. This political will is linked to the conduct's moral quality: the more negative the moral quality of the act, presumably the stronger the political will to criminalise. Nonetheless, *realpolitik* may also be relevant. It is important therefore to identify at the outset those non-ideological factors which have the potential to undermine/create the political will to criminalise.

3. CRIMINALISATION OF EC CARTEL LAW INFRINGEMENTS

This part argues that current ineffective law enforcement of cartel activity should be rectified through the (principled) use of criminal punishment as reinforcement for other less controversial antitrust law enforcement tools, such as fines, director disqualifications, and private enforcement actions.

3.1 Current EC Enforcement Approach

Current European enforcement in this area takes three different forms in order to achieve its objectives: administrative, civil/private and criminal.

3.1.1 Administrative Fines

The EC cartel rules are enforced by both the European Commission ('the Commission') and the national competition authorities ('NCAs') of the Member States.[79]

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[78] On this see Walker, *Crime and Criminology: A Critical Introduction*, Oxford University Press, Oxford, 1987, at 145 et seq.

[79] See Article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1 ('Regulation 1/2003'). Nonetheless, only the fining practice of the Commission is examined as this provides sufficient context for the criticism concerning dependence on monetary sanctions.

The Commission imposes administrative fines on undertakings that negligently or intentionally violate the European cartel rules.[80] Subject to certain limits, it enjoys a wide discretion when imposing these fines.[81] Regard must be had, however, as to the gravity and duration of the violation.[82] Further, the Commission cannot impose a fine exceeding 10% of the undertaking's total turnover in the preceding business year.[83] According to the current guidelines, the Commission will use a two-step procedure when calculating its fines: (i) it sets a basic amount for each undertaking; and (ii) it adjusts this amount upwards/downwards depending on the particular circumstances of the case.[84]

In setting the basic amount the Commission considers the pre-tax value of the undertaking's sales of goods/services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA; it will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.[85] As a general rule, the proportion of the value of sales taken into account will not exceed 30%.[86] When deciding on this proportion, the Commission takes into account a number of factors, including the nature and geographic scope of the infringement, the combined market share of all the undertakings concerned, and whether the infringement has been implemented.[87] Cartel activity will, as a matter of policy, be heavily fined; for it the proportion of the value of sales will generally be on the higher end of the scale.[88] The relevant proportion is then multiplied by the number of years of participation in the violation.[89] To this figure is added an 'entry fee' of 15 to 20% of the value of sales.[90] This final figure represents the basic amount of the fine.

Aggravating and mitigating circumstances can increase or reduce the fine respectively. Aggravating circumstances include: re-offending after a Commission- or NCA-imposed fine;[91] refusal to cooperate; and acting as a ringleader.[92] Mitigating circumstances include: termination on Commission intervention (but not for secret infringements); negligent infringement; avoidance of implementation; cooperation outside the scope of

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[80] Ibid, Chapter VI, especially Article 23(2)(a).

[81] See *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425, paragraph 172.

[82] Article 23(3) of Regulation 1/2003.

[83] Ibid, Article 23(2). With an association of undertakings, the upper limit is equal to 10% of the sum of the total turnover of each member active on the affected market: ibid.

[84] See European Commission, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, Brussels, OJ 2006, C210/02, at paragraphs 9, 10 and 11.

[85] Ibid, at paragraphs 13 and 17.

[86] Ibid, at paragraph 21.

[87] Ibid, at paragraph 22.

[88] Ibid, at paragraph 23.

[89] Ibid, at paragraph 24.

[90] Ibid, at paragraph 25.

[91] The basic amount increases by 100% for each infringements: ibid, at paragraph 28.

[92] Ibid.

the leniency procedures; and encouragement of the infringing behaviour by public authorities.[93] In the interests of deterrence, the Commission may impose higher fines on those undertakings that have a particularly high turnover beyond the relevant value of sales.[94] The Commission may also increase the fine when the unlawful gains are difficult to gauge.[95]

A symbolic fine may be imposed in appropriate cases.[96] Further, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context, where inability relates to a situation that would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.[97] Finally, in the interests of deterrence, and subject to the legal limit, the above methodology may be departed from in a particular case.[98]

3.1.2 Private Enforcement

Victims of anti-competitive conduct can avail of the national civil courts to secure, amongst other things,[99] compensatory damages for their losses.[100] Unlike its US counterpart,[101] European cartel law does not presently depend to any significant degree on private litigants for its enforcement function and is therefore mostly enforced by competition agencies, subject to review by the courts.[102] Indeed, the recent *Ashurst Report* found that private enforcement of EC cartel law is currently in a state of 'total underdevelopment'.[103] The 2005-2006 consultation on damages actions represents an

93 Ibid, at paragraph 29.

94 Ibid, at paragraph 30.

95 Ibid, at paragraph 31.

96 Ibid, at paragraph 36.

97 Ibid, at paragraph 35.

98 Ibid, at paragraph 37.

99 Such as interim measures or declaratory relief.

100 See Case C-453/99, *Courage v Crehan* [2001] ECR I-6297; and Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619.

101 See Ginsberg, 'Comparing Antitrust Enforcement in the US and the EU' [2005] 1(3) Journal of Competition Law and Economics 427; and Rosochowicz, 'Deterrence and the Relationship between Public and Private Enforcement of Competition Law', IBA, EU Private Litigation Working Group, 17 February 2005, at 6 et seq.

102 By August 2004 there had only been 28 European damages awards: Ashurst, Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, report, Brussels, 31 April 2004, at 1. My analysis will thus focus on administrative fines. Private enforcement is, however, considered as an alternative to criminalisation.

103 Ibid.

attempt to rectify this situation;[104] the outcome of that process, to be encapsulated in a future Commission White Paper, is eagerly awaited.[105]

3.1.3 Criminal Sanctions

Criminal sanctions are not currently imposed at EC level. They are available, however, in a small minority of Member States.[106]

3.2 Failure of the Current Approach

Current European cartel enforcement efforts are deficient in three respects, viz. lack of individual sanctions, imposition of inadequate fines, and failure to condemn cartel behaviour.

3.2.1 Lack of Individual Sanctions

The Commission only imposes sanctions on undertakings, not their constitutive individuals. Some have argued that such an approach is sufficient in that the undertaking involved usually possesses effective means to prevent its employees from acting against its interests.[107] Other more recent scholars have disagreed.[108] For them, the ability of a firm to discipline its employees is limited to the impact of dismissal (itself undermined by the existence of alternative employment prospects) as well as the value of the personal assets of the employee in question.[109] This is especially so when the alternative to an (uncertain) dismissal for engaging in price-fixing is poor performance at work and certain adverse consequences, including dismissal.[110] It may also be the case that the employee is aware that he will have left the firm by the time the infraction is discovered.[111] The firm could also be management controlled and fines may only represent a minor financial burden for each of the individual shareholders.[112] Such facts ensure that employees are not sufficiently deterred from behaving according to their own interests when they are in conflict with those of their employer. Further, by not holding an individual responsible for his unlawful actions one reduces somewhat

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[104] European Commission, Green Paper - Damages Actions for Breach of the EC Antitrust Rules, Brussels, 19 December 2005, COM(2005) 672 final; and European Commission, Commission Staff Working Paper - Annex to the Green Paper - Damages Actions for Breach of the EC Antitrust Rules, Brussels, 19 December 2005, COM(2005) 672 final.

[105] See http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html.

[106] See generally, Cahill (ed), *The Modernisation of EU Competition Law Enforcement in the EU: FIDE 2004 National Reports*, Cambridge University Press, Cambridge, 2004.

[107] See Posner (1976), op cit, n 41 at 226.

[108] See e.g. Polinsky and Shavell, 'Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?' (1993) 13 International Review of Law and Economics 239.

[109] Ibid.

[110] Ibid. Wils, *Optimal Enforcement of EC Antitrust Law: A Study in Law and Economics*, Kluwer Law International, London, 2002, at 208.

[111] See Calkins, 'Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties' (1997) 60 Law and Contemporary Problems 127, at 142.

[112] See Blair, 'A Suggestion for Improved Antitrust Enforcement' (Summer 1985) The Antitrust Bulletin 433.

the moral force of the cartel law rules, thereby undermining deterrence efforts. Finally, overuse of corporate, as opposed to individual, sanctions may result in lower internal corporate enforcement efforts, as undertakings become more anxious about unfavourable cartel investigations resulting from the possible publicity derived from the punishment of their staff.[113] Current EC enforcement efforts that only focus on undertakings therefore need to be seriously reconsidered.

3.2.2 Inadequate Fines

The economic deterrence approach can be used to evaluate the size of fines that deter effectively, regardless of whether they are criminal or administrative. As above, the cartel fine should be set at least equal to the unlawful gain secured by the cartelist. It has been estimated by Wils that the fine required to ensure effective deterrence is, at its absolute minimum, equal to at least 150% of the annual turnover in the products affected by the violation.[114] In his calculation the size of the gain (at half the mark up) was set at 5%, the average cartel length at 5 years, and the probability of detection at 1/6. All of these figures were determined using US studies. The size of the mark up was estimated at 10% by relying on the road-bidding cases of the 1980s and the subsequent use of this figure in the US Sentencing Guidelines.[115] Since this only represents the gain if price elasticity was zero, adjustments were required to be made; the gain was thus set at a significantly lower level of 5%.[116] A six year plus average lifespan of a cartel has been established in the literature.[117] Finally, the rate of detection is taken from the only comprehensive study on the issue by Bryant and Eckard, involving a statistical birth and death model on a sample of 184 price-fixing cases for the period 1961 and 1988 to establish the rate at 13-17%.[118] By multiplying the mark up by the duration and dividing it by the probability of being caught and prosecuted one arrives at an effective fine of 150% of annual turnover. This is a crucial calculation and has a number of implications for EC cartel enforcement.

[113] See Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 Journal of Legal Studies 833.

[114] See Wils (2002), op cit, n 110, at 199 et seq; Calvani (2004a), 'Enforcement of Cartel Law in Ireland', in Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute*, Juris Publishing Inc., New York, 1999; and Calvani (2004b), 'Competition Penalties and Damages in a Cartel Context: Criminalisation and the Case for Custodial Sentences', Paper, Irish Centre for European Law, 13 December 2004.

[115] US Sentencing Commission, Federal Sentencing Guidelines Manual, Washington, 1999, paragraph 2R1.1, at 231. See also Gallo, Dau-Schmidt, Craycraft and Parker, 'Criminal Penalties under the Sherman Act: A Study of Law and Economics' (1994) 16 Research in Law and Economics 25, at 58; and Froeb, Koyah and Werden, 'What is the Effect of Bid Rigging on Prices?' (1993) 42 Economic Letters 419.

[116] See Wils (2002), op cit, n 110, at 200.

[117] Werden and Simon, op cit, n 30, at 925; Connor, 'Private International Cartels: Effectiveness, Welfare and Anti-cartel Enforcement', Staff Paper #03-12, Department of Agricultural Economics, Purdue University, 5 November 2003.

[118] Bryand and Eckhart, 'Price-Fixing: The Probablity of Getting Caught' [1991] Review of Economics and Statistics 531.

First, if we restate Wils's effective fine as 30% of annual turnover in the affected product for each year of the violation, we can see that, leaving aside Regulation 1/2003 and other concerns, the 2006 Commission Notice on fines is theoretically capable of reaching this figure, at least at the intersection where the maximum fine under the Notice reaches the absolute minimum fine required to deter. However, fines would not always reach such a quantum despite the Commission's insistence on the higher end for hard-core cartels; it presumably represents an extreme stick in the antitrust enforcement armoury. It is too early to say if this is the case or whether cartel fines will indeed routinely be imposed at the maximum;[119] but two consequences of the wording of the Notice may indicate future developments. First, the fine will only 'generally' be imposed at the higher end of the scale; it does not automatically occur. Second, the actual words used, 'the higher end of the scale', do not state categorically that the 30% figure will be used; indeed, 20% could be seen as falling within this category. The point is this: anything less than 30% risks being considered an acceptable 'licence fee' that can be more than recouped by breaking the law.

Second, the figures used are very conservative estimates based on US studies; no comprehensive European studies existed at that time, a fact acknowledged by Wils himself.[120] Two points can be made here. First, given the extensive criminal powers of investigation in the US, and their relative scarcity in Europe, it is very likely that a 16% rate of detection is overestimated in a European context. The existence of successful European leniency programmes, however, may reduce this apparent discrepancy somewhat. Second, a detailed new study involving analysis of over 600 cases of cartel activity, found that in Europe average overcharges were in the 28% to 54% range, and not the 10% previously assumed.[121] Further, the authors also estimate the average lifespan of cartels to be 7 to 8 years.[122] If this study is to be believed, fines far in excess of 150% of annual turnover would be required to ensure effective deterrence; current Commission fining practice would, accordingly, be even more deficient.

Third, fines are often paid years after the gain from the cartel has been obtained; a reasonable rate of interest should consequently be assumed if one does not wish to underestimate the required fine.[123] It is axiomatic then that the minimum effective fine will be even higher than 150% of annual turnover when such interest payments are taken into account.

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[119] This would be extremely unlikely due to other factors such as inability to pay.

[120] Indeed Wils has already revisited his 150% calculation. However, although the data involved in the calculation may have been varied (viz., a higher rate of detection and a higher cartel mark-up) the final figure remains unchanged: Wils, 'Is Criminalization of EU Competition Law the Answer?' (2006) 28(2) World Competition 17, at 138 et seq.

[121] Connor and Lande, 'How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines' (2005) 80 Tulane Law Review 513.

[122] Ibid.

[123] See Lande, 'Are Antitrust "Treble" Damages Really Single Damages?' (1993) 54 Ohio State Law Journal 115, at 130-34; Connor and Lande, op cit, n 121, at 518.

Fourth, it should be noted that if one were to use the 'harm to others' model - and not the unlawful gain variant - to set the level of the fine, the figure of 150% of annual turnover would be even higher, as the fine should include not only the wealth transfer but also the deadweight loss.[124] However, although indeed higher, the fine would not be a minimum requirement; rather, it would represent the exact payment necessary in order to ensure optimal deterrence.[125]

Fifth, a major obstacle to the imposition of effective fines remains the legal limitation contained in Regulation 1/2003. By capping the maximum fine at 10% of total annual global turnover the EC institutions have attempted to ensure that fines are not 'disproportionate in relation to the size of the undertaking'.[126] Presumably the authorities are concerned with the size of the undertaking as they do not wish to impose a fine that cannot be paid. They have placed, in any case, a considerable restraint on their ability to impose fines of the quantum dictated by the theory of economic deterrence. As pointed out by Wils himself, fines of that size are very likely to exceed regularly the 10% ceiling; they will exceed it in all cases except those where the violation concerns less than one fifteenth of the products sold by the undertaking.[127] EC cartel fines, then, will, more often than not, be below their optimal level.

3.2.3 Lack of Adequate Condemnation

According to the ECJ, the fines administered by the Commission manifest both retributionist and deterrent aims.[128] Despite this claim, it is submitted that fines fail to reflect an adequate level of condemnation of cartel activity, whether it be condemnation per se or condemnation for deterrent objectives. There are at least three reasons for this conclusion. First, only the undertaking is subject to an administrative fine; its employees, i.e. those ultimately responsible for the active implementation of the cartel scheme, are not held accountable before the authorities. Actual condemnation, then, occurs at one level removed from the natural persons involved in the cartel. It is believed that the undertaking will discipline its own employees; a form of official condemnation by proxy is therefore assumed to exist. However, as explained above, the ability of the undertaking to discipline its agents is not without serious drawbacks. Even with this ability, it is not guaranteed that firms will actually discipline those involved, especially considering that the employees' actions may have been motivated by the interests of their firm, and that the expected gain from the unlawful activity for the undertaking may well have been in excess of the actual fine imposed. This argument is consistent with a survey of legal opinion conducted in the mid-1980s that revealed that

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[124] On cartel harm see below.

[125] This is so as the 'harm to others' model permits efficiency arguments, and is in reality a mechanism that forces the potential cartelist to compare his cost saving (from the cartel) with the deadweight loss triangle: Breit and Elzinga (1986), op cit, n 31, at 11; Landes, op cit, n 29, at 656.

[126] Joined Cases 100-103/80, *Musique Diffusion Française* [1983] ECR 1825, paragraph 109.

[127] Wils (2002), op cit, n 110, at 202-203.

[128] Case 41/69, *ACF Chemiefarma* [1970] ECR 661, paragraph 173; see also European Commission, *Thirteenth Report on Competition Policy*, Brussels, 1983, at paragraph 62.

one of the significant reasons for cartel activity included the fact that subordinates did not believe that company management actually wanted to respect the law.[129] Second, as seen above, current fines imposed by the Commission are in the vast majority of cases merely a 'licence fee' that must be paid in order to access the (more extensive) gains acquired from cartel activity. Pricing of the unlawful activity at such a low level undermines the expression of any resultant condemnation: it sends out a signal that society does not disapprove of such behaviour as highly as it does. Third, by refusing to use criminal sanctions for cartel activity, the authorities invite the criticism that they do not seek the same level of condemnation for cartel activity as they do for other (comparably harmful) white-collar crimes such as conspiracy to defraud or embezzlement.

3.2 The Criminalisation Framework Applied

This section employs the criminalisation framework developed above[130] in order to argue that efficient cartel law enforcement requires the use of criminal sanctions, including imprisonment.

3.2.1 First Step: Why Cartels Warrant Consideration for Criminal Punishment

A strong argument for criminalising a given behaviour would at the outset establish the seriousness of the harm it engenders. This sub-section demonstrates that cartel harm is indeed sufficient for criminalisation purposes. Observations on the moral quality of cartels will also be offered.

Sufficiency of Harm

Cartel formation, involving, for example, price-fixing, output restriction, market allocation, or bid-rigging, is an extremely harmful and damaging activity that has a number of obviously destructive effects for customers, consumers, the competitive process and the economy.[131] For some it is a sophisticated form of theft involving the deceitful acquisition of wealth that rightly belongs to the consumer.[132] What is certain, however, is that cartel activity reduces competition on a given market and has the potential to reduce or eliminate the gains that such competition secures.[133] More specifically, cartels usually have the following consequences. First, they involve a transfer of wealth from the consumer to the producer, effectively reducing the

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129 Feinberg, 'The Enforcement and Effects of European Competition Policy: Results of a Survey of Legal Opinion' (1985) 23 Journal of Common Market Studies 373, at 380.

130 A summary of the framework is set out in an annex below.

131 Klein, 'Luncheon Address', International Anti-Cartel Enforcement Conference, Washington DC, 30 September 1999.

132 Bloom, 'Key Challenges in Public Enforcement', speech, British Institute of International and Comparative Law, London, 17 May 2002, for instance.

133 See OECD, *Second Report on Effective Action Against Hard Core Cartels*, OECD Competition Committee, 2003; OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Competition Committee, 2002; and OECD, *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, adopted by the Council at its 921st Session on 25 March 1998.

consumer surplus; this transfer manifests itself in increased prices and a reduction in output.[134] Second, allocative inefficiency results, as evidenced by the presence of the deadweight loss welfare triangle; scarce economic resources are therefore not being employed to their potential.[135] Third, higher prices may be charged by non-violating cartel members due to the higher cartel prices.[136] Fourth, non-price effects (on quality, choice and innovation) may arise from the reduction in competition.[137] According to the OECD, although accurate quantification of the exact harm from cartels is not currently possible, there is no doubt that it is very large, amounting to the equivalent of many billions of US dollars annually.[138] It is submitted therefore that cartel activity involves sufficient harm to be considered for criminalisation.

Observations on their Moral Quality

According to the criminalisation framework, immoral behaviour per se is not required to meet the initial threshold of deterrence of harmful conduct. While founded at its base on deterrence principles, this framework employs moral concepts in delimiting the severity of punishment; concerns about a morally neutral criminal law are thereby reduced. Nevertheless, if cartels were indeed perceived as wrongs, retributionist criticism of this deterrence base would be undermined - at least concerning its practical application to cartels - as would any potential for nullification by juries and/or law enforcement officials. The following brief observations on their moral quality are therefore provided:

i) Although cartel activity is traditionally considered to be *malum prohibitum* and not *mala in se*,[139] it aims to undermine and destroy a fundamental economic and political philosophy of Western democracies, i.e. free market capitalism, and thus arguably violates prevailing mores, at least concerning this philosophy.[140]

ii) For various complex reasons the words 'cartel activity' do not usually arouse dramatic responses in people; this does not necessarily mean that the public would not wish to prevent such behaviour (by criminal punishment) if they were made aware of the following: that the damage caused is extensive; that damage is certain; that economic theory is robust on this damage; that cartels are created secretly and for the benefit of the cartelists alone; that no benefits for society result; that market prices are usually assumed by consumers to be competitive; that cartelists take

[134] See Landes (1983), op cit, n 29.

[135] See Katz and Rosen, *Microeconomics*, 3rd Edition, McGraw-Hill, Boston, 1998, at 114. Deadweight loss has been calculated at half the size of the wealth transfer: Easterbrook, 'Detrebling Antitrust Damages' (1985) 28 Journal of Law and Economics 445, at 455.

[136] Connor and Lande, op cit, n 29, at 518.

[137] Ibid.

[138] OECD (2002), op cit, n 133, at 90.

[139] Newman, 'White Collar Crime' (1958) 23 Law and Contemporary Problems 735, at 738-739.

[140] See Flynn, 'Criminal Sanctions under State and Federal Antitrust Law' (1967) 45 Texas Law Review 1301, at 1315 et seq. This is not to say that moral turpitude is involved: ibid.

advantage of this belief of consumers, as well as their perceived inability to prevent or terminate such activity; that violation of cartel law rarely occurs through ignorance of the law; that the activity involved is relatively easy to comprehend; that fines alone do not deter effectively; and that no reasonable argument can be made for abolishing the unlawfulness of such behaviour. None of this is to say that the wide scale comprehension of such facts (if they could be established) would create a new moral conception, but rather that already existing moral conceptions (of say 'conventional' crimes like theft or embezzlement) could possibly embrace cartel activity.

iii) The fact that consumers may be unaware of the effects of cartels - or indeed that violence has not occurred - does not necessarily preclude a finding of significant moral impropriety.[141]

iv) If moral turpitude could not be established, the criminal law could still be applied to cartels given the gravity of the harm occasioned, provided that its deterrent effects were considerable.[142]

3.2.2 Second Step: Demonstration of Deterrent Effect

The next step in the criminalisation framework relates to the use of deterrence theory to establish the need for a personal criminal sanction. According to this theory both individual and corporate criminal punishment, including, where appropriate, custodial sentences, should be available to secure efficient deterrence of cartel activity.

Individual and Corporate Punishment

It was detailed above how EC cartel enforcement is not an effective deterrent as it is concerned solely with undertakings and not individuals. Problems included the inability of firms to effectively discipline employees, the existence of perverse incentives directly occasioned by excessive use of corporate sanctions, and a deficiency in individual condemnation. The use of personal criminal punishment avoids these problems: the state can discipline cartelists through coercive measures, including imprisonment; perverse incentives are avoided as those actually responsible for cartels will be held accountable; and criminal sanctions involve by definition a significant degree of moral condemnation. Further, individuals may be compelled by a normative (moral) commitment to obey the law that is not felt by undertakings.[143] None of this is to say, however, that corporate sanctions are not required; in fact, such sanctions are also necessary under deterrence theory. If this were not so, firms would have the incentive to encourage cartel activity among their employees, to reduce or eliminate any monitoring activities and/or to deal lightly with any employee transgressions. Other

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[141] Green, 'Moral Ambiguity in White Collar Criminal Law' (2004) 18 Notre Dame Journal of Law, Ethics and Public Policy 501, argues that such factors (with others) are, however, indicative of 'moral ambiguity'.

[142] See Flynn, op cit, n 76, at 1320.

[143] Stone, 'Sentencing the Corporation' (1991) 71 Boston University Law Review 383, at 389.

reasons for including corporate sanctions include economies in enforcement costs[144] and the increased potential for plea bargaining.[145]

Threat of Custodial Sentences

It was detailed above how EC cartel enforcement practice is deficient in that fines are usually lower than their effective level, due to, amongst other things, the legal limitation of Regulation 1/2003. It is tempting to reply that fines should be increased and that this limitation should be removed. But this approach would not solve the fundamental problems associated with antitrust fines. Indeed, one of the main reasons why criminal, as opposed to administrative, individual sanctions should be imposed for cartel activity is that imprisonment - a reserve of the criminal process - helps, *inter alia*, to overcome the significant problems associated with optimally deterrent fines, in particular inability to pay, difficulty with individual (financial) responsibility, and proportional justice.[146] Such punishment also negatives the criticism that current cartel enforcement lacks adequate condemnation of offenders.

Inability to pay: An optimal fine of the magnitude discussed above would in most cases exceed the undertaking's ability to pay. First, the fine imposed is significantly higher than the gain derived from cartel activity as one must take account of the fact that rates of detection are never 100%. The firm, then, will not actually have received payment from the cartel of the magnitude of the actual fine. Second, as there is an appreciable time lapse between the occurrence of the cartel and imposition of the fine, it is highly likely that any profits gained would already have been paid out in taxes, dividends, salaries and/or wages.[147] Indeed, according to Werden and Simon there is sufficient empirical evidence to demonstrate that unions capture most of the monopoly profits earned by US manufacturing firms.[148] It is no surprise, then, that the literature has offered an estimate of 58% as the percentage of firms convicted of price fixing that would have become technically bankrupt if forced to pay an optimal fine.[149] Bankruptcy itself is not an acceptable by-product of the pursuit of optimal fines. Liquidating a firm's assets will rarely generate enough funds to pay an optimal fine; only large, diversified corporations with extremely high asset-to-sales ratios would have the ability to pay.[150] Further, the effects of bankruptcy go beyond those required for optimal

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[144] Coffee, '"No Soul to Damn: No Body to Kick": an Unscandalised Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 387, at 387, note 6.

[145] See Wils (2002), op cit, n 110, at 217-218.

[146] This sub-section thus engages with Lynch's argument that a demonstrable specific need for incarceration is required to ensure the appropriateness of criminal sanctions: Lynch, op cit, n 66, at 31.

[147] Werden and Simon, op cit, n 30, at 928.

[148] Ibid, at 928 citing Karier, 'Unions and Monopoly Profits' (1985) 67 Review of Economics and Statistics 34; and Salinger, 'Tobin's Q, Unionization and the Concentration of Profits Relationship' (1984) 15 Rand Journal of Economics 159.

[149] Craycraft, Craycraft and Gallo, 'Antitrust Sanctions and a Firm's Ability to Pay', (1997) 12 Review of Industrial Organisation 171, whose study was based on a sample of 386 convicted firms between 1955 and 1993.

[150] Werden and Simon, op cit, n 30, at 929.

deterrence; undesirable social costs are imposed on those with interests in the firm who are innocent of cartel activity, such as employees, creditors, customers, suppliers and the taxpayer.[151] Bankruptcy would also result in further concentration of the market.[152] Inability to pay will therefore be used by the authorities to reduce the fine imposed on an undertaking, resulting in a sub-optimal level of deterrence.[153] This deficiency can be effectively rectified through the use of imprisonment, a non-financial penalty without such direct adverse effects on other stake-holders in the convicted company.

Individual (financial) responsibility: Although for reasons of deterrence fines should be imposed on individuals, sole reliance on such measures should be avoided. For one, evaluating the exact size of an optimal fine for individuals, as opposed to firms, would involve a level of analysis for which courts may be ill-equipped.[154] More importantly, the difficulty of preventing firms from indemnifying their employees for any cartel fines helps ensure that the corporate cost/benefit analysis described above (and the resultant 150% of annual turnover as minimum fine) is still applicable, even when it is the firm's employees that are facing the formal financial sanction. Employees act as proxies for their company and, in the absence of non-financial punishment (or an optimal fine that, in all likelihood, results in the firm's liquidation), will be incentivised to enter cartels on their employer's behalf. The threat of imprisonment overcomes both of these shortcomings: as cartelists are unlikely to accept payment to go to prison for their firm,[155] a specific 'cost price' cannot be put into the equation of cost versus benefit in their evaluation of the expected net gain of their activities.

Proportional justice: It is also arguable that the imposition of optimally deterrent fines, unlike imprisonment, risks conflicting with the concept of proportional justice.[156] This is due to the fact that detection rates are relatively low and that consequently deterrent fines are multiple (i.e. at least six) times the size of the unlawful gain obtained.[157] Given the immense harm associated with cartels and the fact that principles of retribution theory are to be adhered to when deciding the severity of the criminal custodial sentence, it is submitted that such concerns are not significant when imprisonment is contemplated.

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[151] Kraakman, 'Corporate Liability Strategies and the Cost of Legal Controls' (1984) 93 Yale Law Journal 857, at 882. However, even fines below the level of inability to pay may involve undesirable side-effects, e.g. increased prices. See Coffee, op cit, n 144, at 401-402; and Wils (2002), op cit, n 30, at 205.

[152] Calvani (2004b), op cit, n 114, at 9.

[153] See European Commission (2006), op cit, n 84, at paragraph 35.

[154] See Calvani (2004b), op cit, n 114, at 10. It is also true that the individual may be unable to pay the optimal fine: ibid.

[155] On this see Liman, 'The Paper Label Sentences: A Critique' (1977) 86 The Yale Law Journal 619, at 630-633.

[156] Wils (2002), op cit, n 30, at 206-207; and Sunstein, Schkade and Kahneman, 'Do People Want Optimal Deterrence?' (2000) 29 Journal of Legal Studies 237.

[157] Cf. Parker, 'Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties', (1989) 26 American Criminal Law Review 513, at 563-566, who argues that by choosing an offence with a lower probability of detection one deserves a higher penalty.

Deterrence through condemnation: Criminal punishment, in particular imprisonment, establishes a noteworthy degree of condemnation for what is significantly harmful and unjustifiable behaviour. By actually imposing custodial sanctions for cartel activity the authorities express how seriously they consider such behaviour and in so doing deter potential cartelists.[158] Prison sentences carry a stronger message than fines as they are more newsworthy and are more noted by other businessmen; they therefore arguably reduce ignorance about the law, and thereby enhance deterrence.[159]

Efficient Deterrence

The 'unlawful gain' model was chosen for analysing cartel sanctions; accordingly: a) the expected value of punishment should be at least equal to the cartelist's unlawful gain; and b) optimal enforcement strategy is determined by the resultant benefits and costs of maintaining such a value. We have seen that fines are incapable of reaching the minimum required, and that criminal law, with its threat of custodial sanctions, is a plausible alternative capable of negativing the unlawful gain and thereby achieving deterrence. Part a) is therefore satisfied. The use of criminal sanctions, however, involves social costs which must be considered if accurate pronouncements on the efficiency of this deterrence are to be made. While thorough analysis of an optimal enforcement strategy is beyond the scope of this article[160] confirmation that such a strategy includes the imposition of personal criminal sanctions is not. One must therefore investigate whether the introduction and maintenance of such sanctions is capable of generating more benefits than costs.[161] It is submitted that, more likely than not, this is actually the case.

First, the imposition of administrative fines also involves costs; any reduction in the use of this regime in favour of increased criminal punishment results in saved expenditure which should be added to the calculation of the benefits of criminal sanctions. Although less administrative fines are thereby recovered, nothing is preventing the criminal regime from employing this sanction; in fact, fines should continue to be imposed, as they have some deterrent abilities and stigmatising effects, and are relatively cheap to administer. Subject to considerations of inability to pay and proportional justice etc., such fines could even be increased to cover some of the costs of the criminal regime.

Second, the benefits of criminal sanctions in terms of reductions in cartel activity are likely to be substantial. Imprisonment is a very effective measure that delivers a considerable degree of deterrence.[162] The US is an example in chief with its enormous

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[158] Baker and Reeves, op cit, n 23, at 625.

[159] Werden and Simon, op cit, n 30, at 943; Liman, op cit, n 155, at 631-32; Lynch, op cit, n 66, at 47.

[160] I do not analyse, for example, how much resources to employ in the fight against cartels.

[161] Or more accurately, if they can be imposed where their marginal cost is equal to their marginal benefit: see Cooter and Ulen, op cit, n 25, at 25 et seq.

[162] See Bauer, 'Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?' (2004) 16 Loyola Consumer Law Review 303, at 307; or Liman, op cit, n 155, at 630-31.

success in deterring cartelists through criminal sanctions, as evidenced by, *inter alia*, reductions in domestic cartel activity, the reluctance of global cartelists to embrace the US market, and the success of its criminal leniency programme.[163] The increased powers of investigation assured by criminalisation also improve the rate of discovery of (secret) cartels, and thus add to the beneficial effect.[164] As we have seen, cartel activity involves significant harm to society estimated at billions of dollars annually. Even the prevention/termination of only a few major (potential/actual) cartels would likely 'save' exorbitant amounts of societal wealth.[165]

Third, useful methods of increasing the benefits and reducing the costs of criminal enforcement exist.

Severity: Since the severity of an effective penalty and the rate of detection have an inverse relationship, to reduce costs and maintain the same expected value of punishment one could raise the severity and reduce enforcement efforts.[166] It may be tempting therefore to impose an exorbitant custodial sentence in only a number of cases; but for reasons of proportionate justice, this should not occur. Nevertheless, one could attempt to reduce costs by actually lowering the penalty. The desire of cartelists to avoid the unpleasantness of prison is often reported.[167] If true, relatively short sentences should be sufficient for optimal deterrence, and incarceration costs can be kept to a minimum.[168]

Prosecution levels: If only the most serious cartels are prosecuted the deterrent message can be sent to the most destructive elements in the economy without incurring unnecessary and frivolous costs.[169] Further, since the penalty of imprisonment is presumably already relatively severe in the eyes of cartelists, detection rates may not need to be as high as those under administrative regimes in order to deter effectively.[170]

Cooperation: The successful operation of both plea-bargaining and corporate and individual criminal leniency programmes has the potential to significantly reduce the

[163] See Calvani (2000a), op cit, n 114, at 6; Kolasky, 'Criminalising Cartel Activity: Lessons for the US Experience', Global Competition Law Centre, Brussels, 29 September 2004, at 11-12; and Bloom, 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy' [2005] 1(1) Competition Policy International 57. See also Wils, 'Is Criminalization of EU Competition Law the Answer?', in Cseres, Schinkel and Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Edward Elgar, 2006, at 83 ('hereafter Wils (2006)').

[164] Such powers have helped secure current US enforcement successes; see Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 The George Washington Law Review 693.

[165] With the Lysine cartel alone, for example, prices rose by 70% in a market worth $500 million annually: Klein, op cit, n 131, at 2.

[166] The cost of legal error will still be active: see Block and Sidak, op cit, n 27.

[167] See eg Liman, op cit, n 155, at 630-31.

[168] Not to mention the cost of keeping usually productive businessmen out of the economy.

[169] See Bloom (2002), op cit, n 132, at 9.

[170] Some level of enforcement is required though to avoid citizens forgetting about the offence: Werden and Simon, op cit, n 30, at 934-35.

costs of investigation, prosecution, and incarceration.[171] Plea-bargaining leads to guilty pleas and, inter alia, reductions in the costs of both the resultant trials and incarcerations.[172] Leniency, in particular, increases the difficulty of creating and maintaining cartels, improves collection of intelligence and evidence at low expense, and reduces considerably the costs of adjudication.[173]

3.2.3 Third Step: Acknowledgement of Principles

Criminalisation of cartel activity should ideally occur without violation of certain fundamental principles, all of which affect the criminalisation process in a number of different ways. With the exception of efficiency, these principles - as employed in the criminalisation framework - do not shape the argument on the existence of criminal liability; rather, they are used to limit that liability and to develop rules concerning, inter alia, the subject and/or severity of criminal sanctions. The responsibility principle would, for example, ensure that only those actually in 'control' of the cartel would be convicted of a criminal offence.[174] Proportionality, on the other hand, will guarantee that the maximum sentence imposed does not exceed an outer limit commensurate with the gravity and the seriousness of cartel activity. The operation of these two principles facilitates the application of the principle of autonomy to cartelists: it ensures that they are not held as mere pawns in the pursuit of the maximisation of consumer welfare. Values such as respect for human rights, fairness, or humanity can also be acknowledged under the criminalisation framework and are thus afforded the possibility of influencing the treatment of cartelists accused of criminal behaviour.[175]

3.2.4 Final Step: Limiting Criteria

The final step in the criminalisation framework is the consideration of the remaining limiting criteria.[176] It is submitted that the criteria do not negative the above argument for criminalisation.

Comprehensibility

Those opposed to criminalisation might argue that the antitrust rules are not clear and that given the severity of imprisonment it would be unfair to impose criminal

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[171] Some also advocate using bounties to ensure cooperation: Kovacic, 'Bounties as Inducements to Identify Cartels', in Marsden, Hutchings and Whelan (eds), *Current Competition Law V*, BIICL, London, 2007.

[172] See Easterbrook, 'Criminal Procedure as a Market System' (1985) 12 Journal of Legal Studies 289. Cf. Garoupa and Stephen, 'Law and Economics of Plea-Bargaining', July 2006, available at SSRN: http://ssrn.com/abstract=917922.

[173] See Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30(1) World Competition 25.

[174] The UK Cartel Offence and its use of 'dishonesty' delimits the scope of criminal liability in this way: see MacCulloch, 'The Cartel Offence and the Criminalisation of United Kingdom Competition Law' [2003] Journal of Business Law 615.

[175] A detailed examination of the operation of these principles and values under the criminalisation project is, however, beyond the scope of this article, concerned as it is with the justification for the existence, as opposed to the distribution, of criminal sanctions.

[176] Two of the criteria have already been considered: sufficiency of harm and moral quality.

sanctions.[177] But this argument should be placed in proper perspective: while relevant to the outer fringes of antitrust activity, it does not necessarily apply to clear-cut violations where little confusion exists concerning unlawfulness.[178] While there are antitrust violations with which the imposition of criminal sanctions would stifle legitimate, welfare-enhancing conduct, cartel activity, as a clear-cut violation, is almost certainly not one of them. If, however, a case did arise involving uncertainty as to unlawfulness, any consequent doubt concerning criminal liability should be resolved through the exercise of prosecutorial discretion: only a civil/administrative case should result.[179] By ensuring that both the definition of an offence and those offences charged are for clear-cut violations only, one responds effectively to the argument that vagueness should negative the criminalisation project.

To avoid nullification it is imperative that both potential jurors and crime enforcement officers understand the prohibited conduct. While competent legislative drafting and educational drives can avoid potential comprehension problems, less complex offences are preferred as they reduce their resultant costs. Cartel activity is not a complex concept to understand, although proving its occurrence can sometimes be difficult: at its base, it involves a relatively straightforward, uncontested economic model; in practice, no (involved) economic arguments are offered as to any efficiencies; and, generally, its effects are direct and observable. Accordingly, the criterion of comprehensibility is fulfilled.

Lack of Effective Alternative

It is submitted that there are no equally effective alternatives to the introduction and maintenance of the threat of imprisonment: private enforcement, director disqualifications, and negative publicity orders suffer from critical defects that undermine their efforts to rectify the identified enforcement deficiencies.

Private enforcement: It was demonstrated above that an optimal fine would likely lead to the liquidation of the infringing company, that this is to be avoided, and that any sanction that depends solely on financial impact for its effectiveness will not ensure optimal deterrence, as the corresponding optimal financial penalty cannot be imposed in practice. Penalties that deter solely through their financial impact are not, therefore, effective alternatives to imprisonment. Unfortunately, private enforcement, as a mechanism of imposing financial liability through damages awards, is such a penalty.[180] This is not to say private enforcement, even with its evident difficulties,[181] should not

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[177] See, e.g., Chadwell, 'Antitrust Administration and Enforcement' (1955) 53 Michigan Law Review 1133.

[178] See Barnett, 'Criminal Enforcement Of Antitrust Laws: The U.S. Model', speech, Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy, New York, 14 September 2006, at 2-3; and Flynn, op cit, n 76, at 1312 et seq.

[179] Ibid, at 1314-1315; Baker and Reeves, op cit, n 23, at 623-624.

[180] See Wils (2006), op cit, n 163, at 87.

[181] Relating to issues such as passing-on, direct and indirect purchasers and calculation of damage; see e.g. http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html; and

be used as a complement to other enforcement efforts, as it may help fulfil secondary antitrust objectives, such as compensating victims and reducing the regulatory burden of the antitrust authorities.[182]

Director disqualification: Although useful to some degree in deterring cartel activity - in that they force directors of companies to think twice about the (financial and non-financial) consequences of their actions - director disqualification orders[183] do not rectify the identified enforcement failures as effectively as individual criminal sanctions. First, serious drawbacks concerning their implementation exist: they cannot be used against non-directors (actively) involved in cartel activity; their deterrent effect depends to a large degree on how close the director is to retirement; and suitable indemnification by the company may still be possible.[184] Second, in principle they are less condemnatory of an individual's behaviour than imprisonment; therefore the deterrent effect of the moral consequences of unlawful activity will not be as strong as is possible.[185] Nonetheless, since with disqualification, punishment is more condemnatory, and indemnification less straightforward, than is the case with fines, it is submitted that these orders should exist as a complementary mechanism for achieving deterrence.[186]

Negative publicity orders: Unfavourable publicity occasioned by discovery of an infringement can lead to financial losses for a company. Presumably the possibility of suffering such publicity stimulates deterrence as it may reduce a firm's profit-maximising potential. Research, however, suggests that adverse publicity orders,[187] such as exist in Australia, deter through their non-financial impacts; executives, apparently, are concerned with 'corporate prestige'.[188] For this reason, negative publicity may be a useful sanction. It is submitted, however, that such orders, while valuable, are inferior to criminal sanctions and are not an effective alternative. First, although concerned with

Baker, 'Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?' (2004) 16(4) Loyola Consumer Law Review 379.

[182] See European Commission, Commission Staff Working Paper - Annex to the Green Paper - Damages Actions for Breach of the EC Antitrust Rules, Brussels, 19 December 2005, COM(2005) 672 final. Cf. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26(3) World Competition 473.

[183] See, e.g., the UK Enterprise Act 2002 where the Office of Fair Trading may secure a Competition Disqualification Order against a company director if his company breaches the competition law rules and a court finds that his behaviour renders him unfit to be concerned in the management of a company.

[184] Wils (2006), op cit, n 163, at 86.

[185] Ibid.

[186] Wils also holds this view: ibid, at 87. Interestingly, some authors do not even consider the usefulness of disqualification in their criminalisation arguments: eg Calvani (2004b), op cit, n 114.

[187] These could be mechanisms that enable a court, in addition to any other sentence imposed, to order that a notice be placed in an appropriate publication (including a company's annual report) within a specified period: see Macrory, *Regulatory Justice: Sanctioning in a Post-Hampton World*, Consultation Document, London, May 2006, at 92 et seq.

[188] Fisse and Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press, Albany, New York, 1983. The effects of such orders on profitability seem to be minimal: ibid.

corporate prestige, executives and the companies they work for also value profit.[189] The research referred to does not establish that the ability of unlawful activity to create profit will by necessity always be trumped by possible effects on reputation, but, rather, that possible negative reputation per se has an ability to deter. But cartel activity, as we know, stimulates profits. The expected cost of apprehension associated with adverse publicity orders - uncertain loss of reputation (with minimal financial effect) - therefore should be balanced against the benefits of cartel activity. It is submitted that the substantial, and almost certain, benefits from cartel activity, the low chances of getting caught, the link between corporate prestige and profit, the pressures to secure shareholder returns felt by executives, not to mention the minimal financial impact of negative publicity orders are sufficient factors to tip the balance in favour of cartel activity. Second, publicity orders, like director disqualification orders, are less effective at deterring through condemnation, as they involve a far less severe form of denunciation, and one focused more on the company than its constitutive individuals. Third, by favouring the use of such a mechanism over criminal sanctions the authorities are still open to the criticism that they do not seek the same level of condemnation for cartel activity as they do for other (comparably harmful) white-collar crimes such as conspiracy to defraud or embezzlement. Fourth, by employing such measures, even if they secure optimal deterrence, one sends out a signal that society does not disapprove of such behaviour as highly as it does; this is avoided with optimal criminal sanctions. Finally, some vital benefits of criminalisation (e.g. a criminal leniency program and increased investigatory powers) would no longer be available; this would be particularly damaging to the fight against cartels, where evidence of unlawful behaviour is often difficult to uncover.[190]

Political Will

Internationally, there has been an apparent growing consensus among antitrust enforcers that cartel activity should be detected and prosecuted.[191] Indeed, competition officials, legislators and governments regularly remind us of their destructive effects, particularly at EC level. It is reasonable, therefore, to assume that enforcement in this area will not be neglected or undermined once criminalisation has occurred. However, for this truly to be the case citizens/jurors and crime enforcement officers must display similar feelings. Given an adequate degree of educational effort and competition

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[189] Corporate prestige, in any case, is not wholly independent of profit. For one, a firm cannot dedicate sufficient resources to maintaining/improving its reputation without first satisfying shareholders with adequate investment returns; if profit is secured through cartel activity more resources will be available to devote to improving a firm's reputation. Also, the mere fact that a firm secures exorbitant profit in itself may generate a desirable reputation.

[190] A civil leniency programme could still be established however, although the authorities would still have less to bargain with (i.e. no threat of imprisonment) and fewer investigatory powers.

[191] Kovacic, op cit, n 171, at 689; ICPAC, Final Report to the Attorney General and Assistant Attorney General for Antitrust, International Competition Policy Advisory Committee to the Assistant Attorney General for Antitrust, Antitrust Division, Washington, 2000, at 164. See also First, 'The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law' (2001) 68 Antitrust Law Journal 711.

advocacy, this is highly likely. First, comprehensibility exists, making the creation of odium towards this offence less difficult. Second, the harm caused is significant; efforts to reduce this harm, once understood, would likely be appreciated. Third, since the end of the Cold War there has been a growing awareness of the benefits of democracy and free market economics; arguably, attempts to undermine this system are increasingly subject to less tolerance. Fourth, criminal sanctions may be perceived as fair by those who identify elements of favouritism in the treatment of 'white-collar' activity as less deserving of criminal punishment. Finally, there appears to be a growing concern among consumers with the perceived 'rip-off' culture of modern living, particularly in Western Europe; feelings of impotence in the face of large corporations could lead to (passive) support for such radical action. Although the required educational and advocacy efforts involve costs, their benefits are substantial, potentially involving increased consumer awareness, improved political will, increased enforcement efforts, increased condemnation (and thus deterrence), not to mention the enormous benefits inherent in a successful criminalisation project.

4. CONCLUSION

Through examination of the relative merits and demerits of the rationales of criminal punishment, a 'model of criminalisation' was established detailing principles to be adhered to and (limiting) criteria to be considered when deciding whether to criminalise antitrust violations. This framework was subsequently employed to argue that a personal criminal sanction for cartel activity is necessary if one genuinely wishes to enforce the law in this area.

Current ineffective law enforcement involving the use of non-criminal sanctions was highlighted; such enforcement involves both a denial of individual punishment and a lack of adequate condemnation, and depends for the most part on the use of fines that due to EC legislation, and more importantly, considerations of proportional justice and inability to pay, are incapable of reaching their optimally effective level. Such considerations, and the fact that individual as well as corporate sanctions are required for effective deterrence, lead one to the conclusion that the threat of individual criminal sanctions, in particular imprisonment, can play a major part in rectifying the enforcement deficiencies, subject, of course, to the limiting effects of retribution principles and the plurality of values regarded by society. Consideration of the limiting criteria does not reduce the force of the argument that the use of criminal punishment as reinforcement for other less controversial antitrust law enforcement tools is necessary to ensure effective deterrence efforts in this area. Nonetheless, substantial competition advocacy may be required in future if negative outcomes are to be avoided.

ANNEX: SUMMARY OF THE CRIMINALISATION FRAMEWORK

A PRINCIPLED FRAMEWORK FOR ANTIRUST CRIMINALISATION	
STEP 1:	Ensure that the offence is significantly serious as to warrant criminal punishment. If possible establish that the prospective offence is inherently wrong (or would be considered so if all of the facts surrounding the violation were known).
STEP 2:	(i) Assess the ability of the criminal law to deter the unwanted behaviour. (ii) If data is available, use an economic deterrence-based approach: For conduct that is always inefficient: (a) Calculate the expected gain from an offence; (b) Set punishment for this offence at least equal to the expected gain divided by the probability of detection and prosecution; and (c) Ensure the marginal benefit of punishment is equal to its marginal cost. For conduct that is not always inefficient: (a) Calculate the cost of the harmful conduct to society; (b) Internalise the cost by punishing the offender up to the amount it represents in harm to society divided by the probability of detection and prosecution; and (c) Include the cost of administering punishment within the internalised harm.
STEP 3:	If (efficient) deterrence is possible, use retributionist theories and their principles to limit the distribution of criminal punishment: (i) Use the responsibility principle to ensure that only those 'responsible' for their actions are punished; and (ii) Use the proportionality principle to set an *outer limit* to the severity of the punishment.
STEP 4:	One should generally not introduce or maintain criminal sanctions, including imprisonment, unless: • the offence as defined in the criminal law, as well as the broad type of conduct underlying it, should be (or at least be capable of being made) understandable, both to those subject to the law and to those responsible for its enforcement; • the mischief could not be dealt with under existing legislation or using other remedies; and • the political will to implement the proposed law exists or is capable of being created without the imposition of disproportionate costs.

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The Classic Cartel - Hatchback Sentence?

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Ireland's national competition legislation, recently strengthened by the Competition Act 2002, provides that breaches of competition law constitute criminal offences and, in the case of cartels, managers and directors of offending firms may be imprisoned or fined if convicted for such behaviour. Ireland is the first Member State in Europe where the courts have interpreted the criminal sanctions provided for in competition legislation. However, the reluctance to imprison white-collar criminals appears to remain in the Irish courts. This article looks at the implementation of criminal sanctions in the *Connaught Oil* and *Manning* Cases. The authors question whether the sentence handed down in *Manning* was unduly lenient in proportion to the more stringent penalties provided for under competition legislation. Finally, we consider whether these cases will set a precedent for such leniency in future cases.

INTRODUCTION

The debate surrounding how white-collar crime[1] should be penalised and discouraged rages on unresolved. Although competition law is adopting a more punitive approach,[2] through the Irish Competition Act 2002[3] (the 2002 Act), reality demonstrates a preference for a compliance strategy over the sanctioning structure; as is evident in the recent case of *DPP v Manning,* heard on the 9th February 2007. This case is the first competition law case to be tried in the Central Criminal Court in Ireland, and relates to a breach of the price-fixing provisions of the most recent competition legislation. Denis Manning was sentenced by Mr Justice Liam McKechnie to a twelve month suspended sentence and ordered to pay a fine of €30,000. The question is whether the sentence handed down was too lenient in the light of the behaviour in question and in respect to the provisions of the 2002 Act. Is 'crime in the suites' still considered less criminal than

* The Authors are both currently undertaking an LLM at the University College Cork. We would like to express our gratitude to Mr Declan Walsh and Dr Shane Kilcommins, both members of the UCC Law Faculty, for their invaluable advice and guidance. We alone are responsible for any errors remaining.

[1] A crime committed by a person of respectability and high social status in the course of his [or her] occupation. Braithwaite J, 'Challenging Just Deserts: Punishing White-Collar Criminals' (1982) 73(2) Journal of Criminal Law and Criminology 723 at p 724.

[2] 'There is evidence that the seeds of a new strand of punitive regulation are to be encountered across government enforcement policy, legislative developments and the enforcement stances being adopted by some regulators…the suggestion is of a change in regulatory style in which the use or threat of criminal or other potentially severe sanctions (e.g. disqualifications) plays a greater role', Baldwin, R, 'The New Punitive Regulation' (2004) 67(3) MLR 352. In relation to the emergence of new punitive approaches to regulatory offences in Ireland, see:, Maher, Imelda, 'The Rule of Law and Agency: The Case of Competition Policy', London School of Economics, International Economics Programme: IEP WP 06/01, March 2006, iep@chathamhouse.org,uk (09/03/2007)

[3] Competition Act No 14 of 2002, available on http://www.irishstatutebook.ie/ZZA14Y2002S8.html (accessed 4 April 2007).

'crime in the streets',[4] or are the new legislative provisions enough to deter the operation of cartels?

FACTS OF THE CASE

The case against Denis Manning involved price fixing in the car industry. The facts of the case were briefly as follows. Mr Manning was appointed as secretary of the Irish Ford Dealers Association (IFDA) in 1994. The offending scheme was, however, in place before his appointment. Previous to this, Mr Manning was a director of Henry Ford & Sons (Ireland) Ltd (Ford). The job as secretary was taken as a part time position following his retirement. The purpose of the IFDA was to act as a representative of car dealers in the course of transactions or disputes with Ford. His former position as a director of Ford provided him with a unique knowledge of and insight into the functions of the IFDA. Another function of the IFDA was to aid dealers in obtaining a workable profit on the sale of their stock. It was this activity that eventually attracted the attention of the Irish Competition Authority (the Authority).

The scheme was labelled a 'programme for profitability' and involved the distribution of guide prices to the fifty-three members of the Association. The breach of competition law occurred however when the Association operated a system of enforcement for these guidelines. The effect of this enforcement was to prevent a party to the scheme from breaching the agreement and undercutting the other dealers. In effect a glass floor was put in place to prevent more generous discounting while giving the illusion of competition. All members of the association lodged a bond of €1,250 (£1,000) with the Association as security for fines levied as a result of any breaches. Only Kelleher's of Macroom, Cork, did not participate in the cartel and were stated as the only firm to 'emerge with dignity from this sad affair'.[5] If the scheme was breached, a penalty of €635 (£500) per car was levied. Different charges were added to each car for delivery or, for example, metallic paint (which was already accounted for in the factory price). The I.F.D.A. then engaged mystery shoppers to ensure that the scheme was being complied with. Following the enactment of the 2002 Act, which was intended to give the existing competition legislation more bite, the IFDA engaged a competition consultant, Mr Myles O'Reilly, to report on the scheme. Mr O'Reilly was not informed of all the facts nor did the IFDA interact with him after he had provided the first draft of the report, which was expressly limited in effect for three months. This exercise demonstrates two things. The first, as noted by McKechnie J, was to give the illusion that the IFDA had acted on expert advice - an illusion of the believed legality of the scheme to match the illusion of competition. This can be construed as an exercise of window dressing to feign conformity with the compliance culture. This supposed advice seeking exercise was nurtured as one of a salvo of mitigating factors put forward by the defence. The second was that the IFDA accepted the possibility of the scheme falling foul of the new penalties. The preliminary advice given by Mr O'Reilly was that

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[4] Braithwaite, J, 'What's Wrong with the Sociology of Punishment?' (2003) 7(1) *Theoretical Criminology* 5.

[5] As per Justice McKechnie, *DPP v Manning*, 9th February 2007.

while issuing pricing guidelines was legal, their enforcement was not and that the bonds should be repaid. The bonds were repaid following this preliminary advice, but outstanding penalties were still deducted. These deductions could be viewed as further enforcement of the pricing guidelines, despite the 2002 Act having come into force. The defence that could be raised was that this is a contractual obligation of the agreement. This argument is disputable; however, as such contracts were in fact illegal since the Irish Competition Act 1991.[6] Despite repayment of the bonds, the agreement was still policed by the mystery shopper surveys.

THE ROLE OF DENIS MANNING

Denis Manning pleaded guilty to the charge of aiding and abetting a scheme to fix prices on the 26th January 2007. The main thrust of his defence was that he was a mere conduit for the Association and was following the orders of the executive. Even his Senior Counsel Mr Tom Creed noted the Nuremberg nature of his defence. However it is difficult to believe that Mr Manning was merely following orders. He had an intimate knowledge of the trade, enabling him to act as an 'honest broker'[7] between the members of the cartel. This point was alluded to by the defence's single witness Mr Myles O'Reilly who mentioned the need for an honest broker to enable agreements such as these to last without breaking up due to cheating by members. This was a strong indication of Mr Manning's pivotal role. Mr Manning, as secretary, was also a signatory on the Association's bank account and thus would have signed the cheques refunding the bonds, including those refunds with penalties deducted. Finally, he co-ordinated the discipline system by arranging the mystery shoppers, corresponding with those found to be in breach and collecting any penalties imposed. He retained meticulous records and ran the scheme very effectively. It was also suggested that the collective advertising fund was another method used to monitor the agreement.

When the scheme was eventually revealed, Mr Manning was initially cooperative, although this was said to be, '"reactive" cooperation, as every minutiae of the scheme had to be discovered by the Authority before Mr Manning aided the investigation'.[8] Mr Ray Leonard, former Divisional Manager of the Authority, was the prosecution's main witness. He stated that without the delaying tactics employed by Mr Manning, the investigation which lasted two and a half years, and required the majority of the Authority's resources, would have been shortened by approximately eighteen months.

THE SENTENCING HEARING

During the hearing, the prosecution's main witness, the leading investigator Mr Leonard, intimated his personal opinion that the car industry consists of a collection of

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6 Section 4, Competition Act No 24 of 1991 available on http://www.irishstatutebook.ie/ZZA24Y1991.html (accessed 4 April 2007).

7 Mr Myles O'Reilly, Competition Adviser, *DPP v Manning*, 9th February 2007.

8 Mr Ray Leonard, Competition Authority, *DPP v Manning*, 9th February 2007.

cartels competing against each other.[9] Although not fact, this opinion, which has a professional stance, serves to suggest that the car industry is not being sufficiently policed, that competition in the industry is significantly affected, and that only a small percentage are benefiting from such anti-competitive schemes. This opinion was followed by defence counsel, emphasising that Mr Manning had not personally benefited from the scheme. Figures presented by Mr Leonard asserted that Mr Manning earned a salary of up to €100,000 per annum including his pension. Only €9,000 of this figure was reputed to have been wages from the IFDA. Much time was spent labouring this point as the defence counsel argued that this proved Mr Manning had not gained extensively for his personal involvement in the cartel. This is not to say, however, that he had not been paid in kind for his commitment to the scheme. Besides there are some who argue that this lack of personal benefit should further strengthen the rationale for punishing the individual. Braithwaite states:

> Individuals acting on behalf of the corporation, in contrast, are not benefiting personally, and therefore are more deterrable. Hence in such instances the utilitarian analysis recommends the punishment of the individual rather than the corporation.[10]

During the cross-examination of Mr Leonard, the defence emphasised the fact that members of the cartel frequently attempted to breach the profitability programme, and also that Mr Manning had co-operated throughout the investigation. The object of this exercise was to obtain the mitigating effect of an early guilty plea and co-operation. In response to the former assertion, Mr Leonard mentioned that the investigation could have been short-circuited by up to eighteen months, thus saving the State a considerable amount of money and resources, if Mr Manning had been more candid. In effect, Manning had been caught red-handed and had no other option than to co-operate. Thus these *de facto* reactions should have no mitigating effect. In reply to the suggestion that the cartel was frequently infringed by the IFDA members, Mr Leonard confirmed that the agreement was, in fact, honoured more in the breach than in the application, but that this was in effect more lucrative for IFDA who would benefit from fines imposed on non-compliant dealers.

The second prosecution witness to take the podium offered valuable details of a previous cartel conviction concerning the *Connaught Oil* case[11] (Home Heating Oil case). This evidence would be significant in Mr Justice McKechnie's decision, due to the similarity of its facts to the *Manning* case. The accused in this case, Mr JP Lambe, was

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9 Ibid.

10 Braithwaite J, 'Challenging Just Deserts: Punishing White-Collar Criminals' (1982) 73(2) *The Journal of Criminal Law and Criminology* 723, at p 727.

11 *DPP v Michael Flanagan, Con Muldoon, Muldoon Oil, James Kearney, All Star Oil, Kevin Hester, Corrib Oil, Mór Oil, Alan Kearney, Sweeney Oil, Gort Oil, Pat Hegarty, Cloonan Oil, Ruby Oil, Matt Geraghty, Declan Geraghty, Fenmac Oil & Transport, Michael McMahon, Tom Connolly, Eugene Dalton Snr., JP Lambe, Sean Hester, Hi-Way Oil, Kevin Cunniffe.* Available on The Competition Authority's website: http://www.tca.ie/EnforcingCompetitionLaw/CriminalCourtCases/HomeHeatingOil.aspx (11/02/2007)

charged and pleaded guilty to aiding and abetting a price-fixing cartel in the Home Heating Oil industry. He was sentenced to six months imprisonment, suspended for twelve months, and fined €15,000.[12] If the precedent set in *Connaught Oil* was what settled Mr Justice McKechnie's opinion, the *Manning* judgement appears just proportionately marginally more punitive than the *Connaught Oil* threshold, and yet could be considered more lenient, in light of the legislative guidelines of the 2002 Act which allows for 'fines up to €4 million and up to 5 years imprisonment' for breaches of its provisions.[13]

An important fact should be noted at this point. In *Connaught Oil* the charges related to the period between 1st January 2001 to 11th February 2002.[14] This means that the sentence was handed down in light of the penalties provided for under the 1991 Act as the 2002 Act is dated 10th April 2002.[15] It would seem therefore that perhaps McKechnie J erred in considering *Connaught Oil* as a sentencing precedent. To put the sentence in context, Lambe received a six month[16] suspended sentence out of a possible two years imprisonment (25%) while Manning received a twelve month suspended sentence out of a possible five years imprisonment (20%). Both men were of similar age and both were considered as the facilitator of the cartel. However despite Manning having a longer involvement in the operation of a cartel, he received a more lenient sentence. The same can more or less be said of the fines imposed, in Lambe's case €15,000 out of a possible €3,810,000 (£3,000,000) while Manning was fined €30,000 out of a possible €4,000,000. The sentence does not appear to reflect the increased teeth provided for in the 2002 Act.

During cross-examination, Mr Myles O'Reilly, the defence's single witness, gave an account of how he was instructed by the IFDA to prepare a report on the scheme and that no further correspondence was entered into with him once a draft report had been provided to the Association. One may surmise that this draft report was for the benefit of the Association's files. In the course of his evidence, Mr O'Reilly stated how cartels are liable to breaking up because members attempt to cheat on the agreement. He stated that the use of an 'honest broker'[17] helped to ensure the continuation of the scheme. He also asserted that larger cartels with more than eight members were hard to police and on the whole were unsuccessful. This assertion, however, was quickly dismissed by McKechnie J who highlighted the longevity of the scheme in question.[18]

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12 Gorecki, PK and McFadden, D, 'Criminal Cartels in Ireland' [2006] 11 ECLR 631 at p 638.

13 Section 8(b)(ii), op cit, n 3.

14 See Gorecki & McFadden, op cit, n 12.

15 2002 Act, op cit, n 3.

16 A possible error should be noted in *DPP v Lambe*, as while a six month prison sentence was handed down, it was subsequently suspended for twelve months. This is in conflict with the principle of suspending sentences which holds that a suspended sentence should be no greater than a term of imprisonment which would have been initially handed down. See below, n 37.

17 Mr Myles O'Reilly, Competition Consultant, *DPP v Manning*, 9th February 2007.

18 As per Justice McKechnie, *DPP v Manning*, 9th February 2007.

This is where Manning's role was crucial in the management and maintenance of the cartel.

Counsel for the defence concluded the case by listing an inventory of the mitigating factors on behalf of his client, seeking the court's leniency due to these factors. These included Mr Manning's co-operation with the Authority's investigation; the fact that he had pleaded guilty and saved the state the financial burden of a trial; Mr Manning's previously unblemished record; his old age of sixty-eight;[19] his recent 'ill-health'; and, his intention to resign from his position as secretary of the IFDA. It was also mentioned that his family were fully grown, with some living outside the jurisdiction, and that if he received a criminal conviction, he would be unable to visit them, mainly those in the United States. The stress that the investigation and conviction had placed on Mr Manning was also underlined. Finally, great emphasis was put on the fact that courts often make examples of those who aid and abet a cartel, while the main players escape without consequence. In this respect, counsel for the defence sought the court's mercy. As Howe so succinctly notes:

> Every man who gets whipped for a sin claims that other men have done more, and been whipped less.[20]

Throughout his judgement McKechnie J firmly rejected the assertion that Mr Manning was merely a 'conduit' following orders from the executive of the Association. He remarked on the shocking sophistication of the scheme. It was a crime against consumers, he noted. He also commented on how a person of unblemished character would suffer from a criminal conviction but said that this did not apply presently. He accounted for his guilty plea, but also noted his mere reactive co-operation with the investigation resulting in a delay in the process. McKechnie J then went on to state that he did not consider Mr Manning's health problems to be of grave concern and, in any case, he was over them at the present time. He concluded by stating that he had good grounds for imposing a custodial sentence of twelve months. However, 'with great reservation',[21] due to the defendant's age and 'ill-health', McKechnie J concluded that he would fine Mr Manning €30,000 and suspend the entirety of the 12 month sentence. Mr Manning then took the stand and swore to enter into a bond for five years.

COMMENT

Initially it should be noted that agreements to fix prices and thus distort competition are expressly prohibited under section 4 of the 1991 Act,[22] therefore, there can be no assertion that competition law is in its 'infancy', as was claimed by an industry spokesperson.[23] This agreement was illegal for the entirety of its operation under Mr

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[19] It should be noted that it was the defence counsel who emphasised the elderly status of the defendant.

[20] Howe, EW, (1853 – 1937) *Country Town Sayings*, Croom Helm, London, 1911, p 54.

[21] As per Justice McKechnie, *DPP v Manning*, 9th February 2007.

[22] 1991 Act, op cit, n 6.

[23] Flannery, P, from Pragmatica, The Matt Cooper Show, 12th February 2007 at 5.30pm.

Manning's stewardship. The 2002 Act merely added teeth to the enforcement of competition law. Price fixing is also specifically provided for under section four of the 1991 Act with more or less identical wording. Yet, it was this Act that prompted IFDA to seek an independent review of their practices; albeit half heartedly. Could it possibly have been a protective measure in light of the fact that the penalties were increased to a maximum of four million Euros or five years imprisonment or both? Employing a consultant to draft an opinion and then neglecting to curb its anti-competitive behaviour was labelled 'obnoxious' and a 'false front' by McKechnie J who seemed incredulous at the IFDA's hypocrisy and under-handedness. The whole point of giving the provisions teeth was so that they could act as a more effective deterrent. Will the sentence handed down to Mr Manning set a good precedence for deterrence? Massey notes that there is a difficulty in solely fining individuals engaged in anti-competitive behaviour because, 'the employer may reimburse them, thus negating the deterrent effect'.[24] It is for this reason that harsher sanctioning of white-collar criminals is becoming more favourable as a deterrent and combative tool, since, 'an individual cannot pass the sentence onto their company'.[25] He also notes that passing fines back to the company is sometimes seen as the 'cost of doing business'.[26]

The mitigating factors accepted by Mr Justice McKechnie are also cause for concern. The judge noted how he did not consider Mr Manning's ill-health to be serious enough to take on board, and yet recognised it as a reason not to imprison him. He also rejected the defence that Mr Manning was only following orders, and accepted evidence that he played a crucial role in the cartel's organisation and operation. He did, however, note his age. In relation to white-collar crime cases, almost all of the accused are, 'of previous good character and unblemished record'. Once caught, they will generally not re-offend. Therefore, should previous good character be disregarded in such cases? If most perpetrators have unblemished records, the fact that this may be regarded as a mitigating factor can only further perpetuate the running of cartels and work against deterrence.

Perhaps this sentence was only lenient as the charge was that of aiding and abetting, and perhaps the trials of other members of the IFDA cartel will result in harsher penalties for those involved.

White-Collar Crime and its Victims

Vigorous competition on an open internal market provides the best guarantee that companies will increase their productivity and innovative potential. Competition law enforcement is therefore key in maintaining a healthy and lucrative economy while ensuring abundant choice for the consumer. Yet, despite the governance of EU[27] and

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[24] Massey, P, 'Criminal Sanctions for Competition Law: A Review of Irish Experience' (2004) 1(1) CompLRev 23, 31.

[25] Ibid.

[26] Ibid.

[27] Articles 81 and 82 EC Treaty; Regulation 1/2003/EC; Regulation 2790/1999/EC, etc.

national legislation[28] in the area, there is still much concern that 'white collar crime'[29] is not being sufficiently targeted and penalised.

The operation of a cartel is an extremely serious crime as it can significantly and adversely affect those most vulnerable - the consumer and the competitor - since, without legislative provisions for civil action/private enforcement[30] on a national or European level, such parties have little recourse to the law. This is because individuals hold no investigatory powers (such as those held by the European Commission or the national competition authorities) and thus, attaining evidence to prove they were defrauded by the defendant is a major obstacle. It is for this reason that the general public rely on the work of the national competition authorities to take action against the supposed perpetrator of the cartel, and for this reason also that calls for tougher sanctions for white-collar crime have become more regular - from all sections of the community.

In the Dáil[31] Debates on the 2002 Act in February of that year, Mr Rabbitte (Labour Party) noted the appropriateness of tougher penalties on 'hard core cases', such as, 'blatant cartels, which involve price-fixing - including agreements on margins, price increases or maximum discounts, bid rigging, market sharing'. He continued that:

> the assessment of such practices is clear and unambiguous. There is no evidence that they have any beneficial effects, in fact, quite the opposite - they reduce efficiency and clearly harm consumers because, effectively, they are a rip-off.[32]

Mr Perry (Fine Gael), in the same Debate, called for sanctions:

> ensuring [that] consumers get the best value, best choice and are empowered to make decisions about the choice of goods and services they wish to use. If consumers do not have a competitive choice, there is greater possibility that they will suffer poor service, pay higher prices and obtain inferior goods.[33]

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28 Section 4 and 5 of the Competition Act 1991 are mirrored in Articles 81 and 82 of the EC Treaty; Competition Act 2002; Competition Amendment Act 2006.

29 White-collar crime is often seen as less dangerous and less criminal than traditional crime, because there is no victim. This is a fallacy, however, as the 'victim' may in fact be society at large. Not targeting white-collar crime indicates an imbalance in the criminal justice system which tends to focus its resources on crime related to social deprivation. Note: in 2002, 35,000 Irish individuals were found to have been holding bogus non-resident accounts, enabling them to evade normal tax rates. This operation defrauded the State of enormous sums of money. The victim? The ordinary taxpayer. Kilcommins, S, O'Donnell, I, O'Sullivan, E, Vaughan, B, *Crime, Punishment and the Search for Order in Ireland*, 2004, Institute of Public Administration, p 131. Also note: Timmer, DA and Eitzen, DS, 'Crime in the Streets and Crime in the Suites: Perspectives on Crime and Criminal Justice' (1990) 18(2) Teaching Sociology 252-253.

30 For details of the European Commission Green Paper on Private Enforcement, see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0672:EN:NOT (22/07/07).

31 The Dáil is the Irish Parliament.

32 Dáil Debates Official Report, 28/02/2002, available on http://www.gov.ie/debates-02/28feb/sect3.htm, pp 1-9 (accessed 4 April 2007).

33 Ibid, pp 10-17.

The only way that consumers are protected from such harm, however, is to target the root of the problem: greed and the opportunity to satisfy it by cleverly evading the law. Massey advocates that, 'the people behind cartels are not petty crooks'[34] and he notes O'Dea TD (Fianna Fáil) stating that:

> most people are appalled at the notion of somebody being robbed on the street and will support custodial sentences for criminals who steal just a few pounds in this direct physical manner. However, pulling a stroke and stealing millions by shuffling bits of papers and crunching numbers is regarded as, somehow, not quite criminal.[35]

CONCLUSION

According to Gorecki and McFadden, the first successful criminal cartel trial in the EU before both a judge and jury took place in Ireland in February and March 2006. This was the *Home Heating Oil* case already mentioned, and it resulted in the convictions of 15 people with only one (JP Lambe) being given a six month suspended prison sentence.[36] This was the first step, hence, in Europe towards a more punitive sanctioning of white-collar crime. Being the first case, of a similar nature, to be tried after the *Home Heating Oil* case; as well as being the first case tried under the Irish Competition Act 2002; *DPP v Manning* warrants close analysis, and it gives us the opportunity to consider the perception of white-collar crime in contemporary society.

Corporate offences, until recently, were thought to be exempt from the criminal law because 'a corporation', it was said, 'did not have a will of its own and could not therefore form the *mens rea* required for an offence'.[37] It is now accepted, however, that since individuals manage corporations, they can form the *mens rea* to commit an offence, and thus be accountable for criminal behaviour. Little concrete action has followed this belief in Ireland, however, and even though corporate criminal responsibility is widely accepted today, hesitation to convict and imprison corporate offenders still exists (unlike in the US where the perpetrators of anticompetitive behaviour from ENRON and Sotheby's were imprisoned). This is reflected in the fact that although criminal penalties have existed since 1996 in Ireland, there have only been a small number of summary prosecutions, i.e. prosecutions in the District Court where the penalties are relatively low.[38] No competition cases taken to the Irish courts have led to indictment. This is an indication of the compliance strategy.[39] What is meant by this is that courts tend historically to fine or give suspended sentences as sanction for

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[34] Massey, P, 'Criminal Sanctions for Competition Law: A Review of Irish Experience' (2004) 1(1) CompLRev 23, 32.

[35] O'Dea TD, 'White Collar Criminals Are Getting Clean Away', *Sunday Independent*, 12 April 1998.

[36] See Gorecki & McFadden, op cit, n 12, p 632.

[37] O'Malley, T, *Sentencing Law and Practice*, Dublin, Round Hall Sweet & Maxwell, 2006, p 411.

[38] See Massey, op cit, n 24, p 27.

[39] In relation to this, note: Gray, GC 'The Regulation of Corporate Violations: Punishment, Compliance, and the Blurring of Responsibility' (2006) 46 Brit J Criminol 875-892.

white-collar crime. The *Connaught Oil* case is evidence of this, since only one of 15 received a suspended prison sentence. Similarly, the Competition Authority has adopted an Immunity Programme to encourage compliance from organisations engaged in potentially concerted practices. These immunity and leniency programmes,[40] developed initially by the European Commission, serve to indicate that compliance and cooperation are more favoured than imprisonment.

A moral dilemma exists, however, in the case of corporate offenders - should they be imprisoned, and if not, why? One argument not to imprison an individual such as Mr Manning is that the considerable cost of imprisonment is shouldered by the ordinary tax-payer (and hence, the victim of the IFDA cartel), and the other argument is that imprisoning an individual negates the opportunity for society to benefit. Imprisoning a white-collar criminal, however, can set an example for persons holding corporate managerial positions, and thus deter further similar offences being committed. This supports the Massey view that corporations will not be able to do the prison sentence for the individual, although it can pay its fine. This argument suggests that incarceration is more effective for deterrence.

Arguments in relation to the sanctioning of white-collar criminals, such as that by Massey, suggest that the best route to deterrence is through punitive sanctions. The reality is, however, that white-collar criminals do not face the same punishment as the traditional criminal. The question remaining is, in the aftermath of *DPP v Manning*, and *Connaught Oil*, will subsequent competition trials follow a more punitive or compliance strategy? The results of such trials are likely to indicate whether or not we are in fact taking a more punitive approach to white-collar crime. The legislation exists which could allow for such an approach. If this approach is taken in Ireland, will other European member states follow suit? Will this spell the end of impunity for white-collar criminals? We wait in anticipation.

[40] See Gorecki & McFadden, op cit, n 12, p 635.

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The Australian Cartel Criminalisation Proposals: An Overview and Critique

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The Australian Treasurer issued a press release on 2 February 2005 outlining proposals for the criminalisation of serious cartel conduct. The proposals depart from the Enterprise Act model in many ways but have some common features including reliance on the concept of dishonesty as an element of the cartel offence. This article is an overview and critique of what the proposals say, or do not say, about: (1) dishonesty as a problematic element of a cartel offence; (2) the requirement of 'an intention to obtain a gain'; (3) the mental element of the cartel offence; (4) the element of agreement for the cartel offence; (5) the $1 million value of affected commerce threshold for prosecution; (6) the principle of corporate criminal responsibility that is to apply to the cartel offence; (7) the defences and exemptions that will apply to the cartel offence; (8) sentencing options and maximum penalties, and the application of proceeds of crime legislation and money-laundering offences; and (9) numerous other questions, including the challenge of defining the cartel offence in terms that can readily be communicated to a jury, the need for a 'one-stop' process for handling applications for immunity from both criminal prosecution and enforcement action for civil penalties, and whether powers of telecommunications interception should be available. Most of these issues are not straight-forward and should have been referred to the Australian Law Reform Commission for full examination and due public consultation. Exposure draft legislation has yet to be provided. Legislation may be introduced in 2008 after the forthcoming Federal election.

THE AUSTRALIAN GOVERNMENT'S PROPOSALS FOR THE CRIMINALISATION OF SERIOUS CARTEL CONDUCT

Proposals for the criminalisation of serious cartel conduct were announced by the Australian Treasurer in a press release on 2 February 2005 (Criminalisation Proposals; Press Release). The cartel offence to be introduced under those proposals will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain, pecuniary or non-pecuniary and for the defendant or another person, from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates (Australian Cartel Offence). The maximum penalties for the Australian Cartel Offence will be a term of imprisonment of five years and a fine of $220,000 for individuals and a fine for corporations that is the greater of $10 million or three times the value of the benefit

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from the cartel, or where the value cannot be determined, 10 per cent of annual group turnover.

The criminalisation of cartel conduct in Australia, as elsewhere, raises many issues of design. Key issues of design were not resolved by the Dawson Committee *Review of the Competition Provisions of the Trade Practices Act* in January 2003 and, remarkably, the task of completion of the review of the criminalisation of cartel conduct was remitted to the Government.[1] The Government announced on 3 October 2003 that a Working Party on Penalties for Cartel Behaviour (Working Party) would consider outstanding issues before the end of 2003.[2] The Working Party's recommendations and report have not been published (they are currently the subject of a freedom of information application).[3] The Treasury papers for the 2006 Commonwealth Budget said that the criminal cartel provisions were to be introduced to Parliament in the 2006 winter sittings.[4] However, they have yet to be introduced into Parliament and the Government has not released an exposure draft Bill. Legislation may be introduced later this year or in 2008 after the forthcoming Federal election.

Although the Criminalisation Proposals have been influenced by the cartel offence provisions in the Enterprise Act 2002 (UK), they do not follow the Enterprise Act model in various significant ways.

The Criminalisation Proposals disappoint. Many questions surround the Proposals, largely because there has been no detailed public review of the issues by a law reform agency.

DISHONESTY AS AN ELEMENT OF THE AUSTRALIAN CARTEL OFFENCE

Under the Criminalisation Proposals, the Australian Cartel Offence would be defined partly in terms of the element of dishonesty. This reflects the dishonesty-based cartel offence under the Enterprise Act.

I have argued in a recent paper at some length that the concept of dishonesty is problematic and unnecessary as an element of the Australian Cartel Offence,[5] for these main reasons:

(1) the Criminalisation Proposals fall short of adequately reflecting the elusive notion of 'serious cartel conduct' largely because the requirement of an 'intention to

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1 As criticised in Fisse B, 'The Dawson Review: Enforcement and Penalties' (2003) 9(1) UNSW Law Journal Forum 54 ('The Committee has failed to perform one of its most obvious and important tasks').

2 Treasurer, Press Release, 3 October 2003. See also Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) 10 Deakin LR 141 at 146.

3 By B Fisse and Lexpert Publications Pty Limited. This application is now the subject of an application by those parties for review by the Administrative Appeals Tribunal; copies of the application and other documents are available at http://www.brentfisse.com.

4 Budget Paper No 2 Part 2- Expense Measures – Treasury (2006).

5 'The Cartel Offence: Dishonesty?' (2007) 35 Australian Business Law Review 235.

dishonestly obtain a gain' is not a touchstone of serious harm or serious culpability;[6]

(2) the idea of making dishonesty an element of a cartel offence reflects the approach taken by the Enterprise Act 2002, but the explanatory materials on dishonesty as element of the Enterprise Act cartel offence are seriously flawed and incapable of withstanding critical scrutiny;[7]

(3) the 'standards of ordinary people' limb of the element of dishonesty is an undefined and undefinable populist notion the practical application of which will create real difficulties for judges and juries as well as for people in business and their advisers;[8]

(4) the requirement for dishonesty of 'knowledge that the conduct was dishonest according to the standards of ordinary people' is a subjective test that will allow large and sophisticated corporations to deny liability and quite possibly obtain an acquittal on the basis of mistake of law and self-preferring subjectivised beliefs about the morality of their conduct;[9] and

(5) the element of dishonesty is unnecessary given that there are several possible alternative ways of limiting a cartel offence to serious cartel conduct, including:[10]

  (a) requiring, as a jurisdictional element of the cartel offence and as a guideline for the exercise of prosecutorial discretion, that the specific line of commerce affected by the cartel is likely to represent a minimum percentage (say 20%) or more of the value of sales by all competitors who competed in that specific line of commerce in the relevant geographic market during the period when that specific line of commerce was affected by the cartel or a specified period linked to the time of the alleged offence;

  (b) requiring, as the core mental element for the offence, a common intention: (i) to fix prices or restrict supply; and (ii) to increase bargaining power at the expense of those with whom the cartel deals; and

  (c) narrowing the definition of price fixing, restricting output, bid rigging or market sharing (as by excluding the fixing of a maximum price and indirect price fixing in a downstream market).

The Enterprise Act is the only legislative model in the world to rely on dishonesty as a definitional element of a cartel offence.[11] No explanation is given in the Criminalisation

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6 Ibid, at 241-244.

7 Ibid, at 250-253.

8 Ibid, at 257-261.

9 Ibid, at 261-266.

10 Ibid, at 266-277.

11 For example, dishonesty is not required under the definition of cartel offences in the USA, Canada, Japan, Korea, France, Germany, or Ireland. The concept of dishonesty is not mentioned in OECD, *Fighting Hard-*

Proposals for following the UK model instead of, for example, the established model of section 1 of the Sherman Act (US). Instead, the Proposals seek to justify reliance on dishonesty in three short paragraphs each of which makes question-begging claims. For example, it is claimed that 'dishonesty goes to the heart of serious cartel conduct' and that 'dishonesty appropriately captures the genuinely criminal nature of serious cartel conduct'.

Andreas Stephan's recent study by of public attitudes toward price fixing in the UK[12] confirms that difficulty is likely to arise in persuading juries beyond a reasonable doubt that price fixing and other cartel conduct is dishonest:

> Approximately 6 in every 10 Britons (63%) believe price-fixing is dishonest, whereas two in every ten (21%) believe it is not dishonest. This figure is lower than one would expect given that the overwhelming majority of respondents do recognise that price-fixing is wrong …
>
> Only 7% of respondents felt that price-fixing is comparable to theft. 8% felt it was comparable to fraud. A strong majority clearly had trouble relating it to any other illegal act with which they were familiar.[13]

There is no reason to believe that there is any consensus in Australia that price fixing and other cartel conduct is dishonest. Moreover, it is inevitable that defence counsel will mine and exploit latent ambivalence on the part of jurors. Defence counsel will focus on examples (including export cartels and shipping conferences) where cartel conduct is lawful. They will also construct explanations or justifications for the conduct alleged that are calculated to cancel out any prior simplistic images of theft, fraud or extortion.[14]

INTENTION TO OBTAIN A GAIN AS AN ELEMENT OF THE AUSTRALIAN CARTEL OFFENCE

The Australian Cartel Offence would require not only dishonesty but also an intention to obtain a gain. The reasons for this particular departure from the Enterprise Act model are not explained in the Criminalisation Proposals.[15]

At first sight, the requirement of an intention to obtain a gain seems almost trivial given that the gain intended by a defendant may be miniscule and yet still amount to a 'gain'. However, Philip Williams has raised the interesting possibility that, in the context of

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Core Cartels (2002), nor by the ICN Working Group on Cartels in *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties* (2005).

[12] Stephan A, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain* (CCP Working Paper 07-12, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=993407.

[13] Ibid, at 16-17. See also MacCulloch A, 'Honesty, Morality and the Cartel Offence' (2007) 28 European Competition Law Review 353.

[14] See Fisse (2007) ABLR 235 at 263-265.

[15] The offence of acting with intent dishonestly to obtain a gain from a Commonwealth entity under section 135 of the Criminal Code (Cth) appears to have been a model.

price fixing, the wording of the Press Release – 'intention to obtain a gain from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates' - may usefully limit the scope of the Australian Cartel Offence. This wording 'may mean that the gain by a selling cartel must be at the expense of those to whom they sell and that the gain by a buying cartel must be made at the expense of those from whom they buy'.[16] If so, then in effect there must be an intention to increase bargaining power at the expense of those with whom the cartel deals. Williams has pointed out, requiring such an intention will exclude liability in four situations where there is no case for imposing liability for price fixing.

Collaborative Agreements Entered Into to Create Value

A requirement of proof that the agreement among competitors entered into the agreement did so with the intention of increasing their bargaining power at the expense of those with whom they deal would seem to avoid catching agreements that were entered into to create value: it will only catch agreements that were entered into to increase bargaining power at the expense of those with whom the competitors deal.[17]

Agreements with No Sustained Effect on Price Levels

A requirement of proof that the agreement among competitors entered into the agreement did so with the intention of increasing their bargaining power at the expense of those with whom they deal would avoid liability where, as in *Chicago Board of Trade v United States*[18] and *Radio 2UE Sydney Pty Ltd,*[19] there is no intention to affect price levels; '[t]his inoffensive class of agreements would not be caught by the new cartel offence'.[20]

Agreements among Members of a Network that Competes Against another Network

The members of a network (eg a national football code; a credit card network) that competes against another network may agree with each other about pricing and non-pricing issues within their particular network but will not necessarily have any intention to increase their bargaining power:

> In cases where networks compete against each other, price-fixing agreements among members of networks are likely to be driven by concerns to prevent free-riding or to redistribute funds among members – so that incentives confronting members of the network are compatible. That is, the pricing agreements are unlikely to be found to be intended to obtain a gain from the persons with whom

[16] Philip Williams, commentary on my paper 'The Proposed Australian Cartel Offence: The Problematic and Unnecessary Element of Dishonesty' at the Centre for Regulation and Market Analysis 4th Annual Trade Practices Workshop, Barossa Valley Resort, Oct 2006, at 3-4.

[17] Philip Williams, commentary on my CRMA Workshop paper, at 4.

[18] 246 US 231 (1918).

[19] (1982) 62 FLR 437, (1983) 68 FLR 70.

[20] Ibid, at 3-4.

> members of the network deal. Rather, they are intended to enable the network better to compete against rival networks – when such competition is ultimately to the benefit of those with whom the networks deal.[21]

Agreements between Negotiating Partners to Engage in Joint Negotiations

Williams points to situations where there are large numbers of buyers and sellers who all agree to a joint negotiation, as in *Re VFF Chicken Meat Growers' Boycott Authorisation*[22] and in joint negotiations for IP rights. As he has explained, in this type of situation there is unlikely to be an intention to obtain a gain at the expense of any other party in the joint negotiation where none of the parties are opposed to the negotiation.[23]

An intention to make a gain at the expense of a buyer may also be absent in other situations, including that where competing sellers fix a maximum price.[24]

Arguably, the limitation elucidated by Williams should also apply to the civil per se prohibition against price fixing under section 45 of the Trade Practices Act 1974 (Cth). If so, an intention to increase bargaining power and thereby gain at the expense of a buyer or seller would not be a definitional element that would distinguish criminal from civil liability.[25]

THE MENTAL ELEMENT OF THE AUSTRALIAN CARTEL OFFENCE IN RELATION TO PRICE FIXING, RESTRICTING OUTPUT, DIVIDING MARKETS OR RIGGING BIDS

The Criminalisation Proposals do not specify what mental element will be required in relation to the element of price fixing, restricting output, dividing markets or rigging bids. By contrast, section 188(1) and (2) of the Enterprise Act require an intention on the part of each and every accused to achieve the price fixing, bid rigging or other particular form of cartel conduct alleged.

The Criminalisation Proposals are brief and do not make it clear whether intention or recklessness is the required mental element in relation to the element of price fixing, restricting output, dividing markets or rigging bids. If intention is required, the Proposals do not indicate if all parties charged must have a common intention to achieve the price fixing or other cartel conduct alleged.

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[21] Ibid, at 5.

[22] [2006] ACompT 2.

[23] Ibid, at 5-6.

[24] See further Easterbrook, 'Maximum Price Fixing' (1981) 48 U Chicago LR 886.

[25] Similarly, the concept of a 'naked restraint' does not distinguish civil from criminal liability under section 1 of the Sherman Act.

Under the Criminal Code (Cth), an offence consists of physical elements and fault elements.[26] A physical element of an offence may be *conduct, a result of conduct* or *a circumstance in which conduct, or a result of conduct, occurs*. The default mental element for conduct (ie the mental element that will apply unless a different mental element is specified in the legislation creating an offence) is intention.[27] The default mental element for a result of conduct is recklessness. The default mental element for circumstances is recklessness. A contract, arrangement or understanding may be characterised as a conduct element (with intention as the default element) rather than as a circumstance (with recklessness as the default element) where the contract, arrangement or understanding is described in terms of conduct (eg arriving at an understanding).[28] The element of price fixing, restricting output, dividing markets or rigging bids is a result of conduct (with recklessness as the default element).

The default mental element of recklessness would be questionable as the mental element in relation to price fixing, restricting output, dividing markets or rigging bids.[29] As defined under the Criminal Code, recklessness with respect to a result requires that: (a) the accused be aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. The degree of risk of which the accused must be aware is low. By contrast, in *US v United States Gypsum Co*, the United States Supreme Court held that the offences under sections 1 and 2 of the Sherman Act required proof of intention or knowledge of the probable consequences (in the case of price fixing, knowledge of the probability that the arrangement would result in the fixing of prices). The knowledge of probability test does not obviously match the aspiration of the Criminalisation Proposals to criminalise cartel conduct that is plainly serious or 'hard-core' and the forthcoming legislation may well require intention rather than knowledge of probability or recklessness.[30]

Assuming that the Australian Cartel Offence will require intention in relation to price fixing, restricting output, dividing markets or rigging bids, will that intention need to be

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[26] See further Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) pp 7-9; Leader-Elliott I, 'Elements of Liability in the Commonwealth Criminal Code' (2002) 26 Crim LJ 28. See generally Odgers S, *Principles of Federal Criminal Law* (2007).

[27] Under s 5.2(3) of the Criminal Code (Cth): 'A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events'.

[28] See *R v Saengsai-Or* (2004) 147 A Crim R 172.

[29] Contrast the submission by the ACCC to the Dawson Committee that the mental element should be recklessness: ACCC, *Submission to the Trade Practices Act Review* (June 2002) at [2.6.3].

[30] But note the rejection of a requirement of intention in *US v United States Gypsum Co* 438 US 422 at 445-446 (1978): 'The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.'

a common intention on the part of all the parties charged as principal offenders?[31] A submission was made to the Dawson Committee by the Law Council of Australia that it should be sufficient for the prosecution to establish intention on the part of only two parties.[32] However, that is not the approach taken under section 188 of the Enterprise Act and there is no compelling reason for watering down the requirement of a common intention under section 188. A common purpose is now required for the civil penalty prohibition against exclusionary provisions under section 45 of the Trade Practices Act.[33] It is difficult to understand why the mental element of the Australian Cartel Offence should be less exacting than the mental element required by the civil penalty provisions that apply to exclusionary arrangements.

The distinction between intention, recklessness and knowledge of probability will not matter in easy cases. However, for cases close to the boundary between criminal and civil liability, the distinction may be critical.

THE ELEMENT OF AGREEMENT IN THE AUSTRALIAN CARTEL OFFENCE

The Criminalisation Proposals refer to the need for a 'contract, arrangement or understanding'. The same concepts are used to define the civil penalty prohibitions against price fixing and exclusionary provisions in section 45 of the Trade Practices Act. Under section 188 of the Enterprise Act 'an agreement' is the corresponding although narrower concept.[34]

The requirement of a contract, arrangement or understanding has been difficult to establish in civil penalty enforcement actions for price fixing and exclusionary arrangements under section 45 of the Trade Practices Act.[35] Recent cases in which the

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31 In *Gerakiteys v The Queen* (1983) 153 CLR 317 the High Court of Australia held that conspiracy at common law requires that all parties to a conspiracy have a mutually shared intention to achieve the object of the conspiracy; see further Fisse B, *Howard's Criminal Law* (5th ed, 1990), 370-375.

32 Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour (12 December 2003), 10-11. That approach is consistent with the mental element of conspiracy under the Criminal Code (Cth), s 11.5.

33 *Carlton & United Breweries (NSW) Pty Ltd v Bond Brewing NSW Ltd* (1987) ATPR [40-820] at [48,880]. Contrast the highly questionable interpretation in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 27 FCR 460 that the purpose of a provision could be anti-competitive where only one of the alleged parties had a subjective anti-competitive purpose; see the criticism in Robertson D, 'The Primacy of Purpose in Competition Law – Pt 1' (2001) 9 CCLJ 4 at [71]-[72]. By contrast, in *Seven Network Limited v News Limited* [2007] FCA 1062 at [2402] ff, Sackville J adopted the interpretation that the relevant purpose must be shared by 'each of the parties responsible for including' the relevant anti-competitive provision in an agreement as distinct from the parties to the alleged agreement. The interpretations adopted in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* and *Seven Network Limited v News Limited* raise the difficulty of determining which parties are to be taken as being 'responsible for including' the relevant anti-competitive provision in an agreement. More fundamentally, they are difficult or impossible to reconcile with the penal nature of the prohibitions under section 45 of the Trade Practices Act and the canon of interpretation that ambiguity in a penal statute is to be resolved in favour of defendants.

34 The offence of conspiracy under the Criminal Code (Cth) s 11.5 is also defined in terms of 'agreement'.

35 See Round D and Hanna L, 'Curbing Collusion in Australia: The Role of Section 45A of the Trade Practices Act' (2005) 29 MULR 270. See also *Bell Atlantic Corp v Twombly*, 550 US _ , 127 S Ct 1955 (2007); and Kovacic

ACCC has failed to prove the existence of an arrangement or understanding have highlighted the difficulty. The enforcement actions in *Apco Service Stations Pty Ltd v ACCC*[36] and *ACCC v Leahy Petroleum Pty Ltd*[37] for price fixing failed partly because of the ruling that communication of prices between competitors did not amount to an arrangement or understanding under section 45 unless there is evidence of a commitment by at least one participant to fix prices following a discussion about a future price increase.[38]

These decisions have been taken by some to suggest that the Australian Cartel Offence is likely to be a dead letter given the difficulty of proving the presence of a commitment beyond a reasonable doubt. That difficulty would be compounded if the presence of commitment must be proven against each of the alleged participants in an arrangement or understanding. This concern is tempered to some extent by the fact that the party making a price fixing overture may be liable for an attempt to enter into a price fixing arrangement.[39]

The Criminalisation Proposals were published early in 2005 before the decision in *Apco Service Stations Pty Ltd v ACCC*. It is unknown whether the forthcoming legislation will redefine an 'arrangement' or an 'understanding' in such a way as to make it unnecessary for commitment, or moral obligation, to be proven where competitors discuss or otherwise communicate with each other about future prices and extend an invitation to fix those prices.[40] If the law is changed in this way, the change is likely to be limited to the civil penalty provisions under section 45 of the Trade Practices Act.

VALUE OF AFFECTED COMMERCE THRESHOLD FOR PROSECUTION OF THE AUSTRALIAN CARTEL OFFENCE

An MOU between the ACCC and the Commonwealth Director of Public Prosecutions (DPP) will be put in place to guide prosecutorial discretion and thereby help to limit the prosecution of the Australian Cartel Offence to serious cases.

The MOU is to include a guideline requiring the ACCC to consider whether or not the value of affected commerce exceeds $1 million.

W, 'The Identification and Proof of Horizontal Agreements under the Antitrust Laws' (1993) (Spring) The Antitrust Bulletin 5.

[36] (2005) ATPR 42-078.

[37] [2007] FCA 794.

[38] See further Guirguis A & Evans C, 'Cartels, Cooperation and Circumstantial Evidence' (June 2007) available at http://www.bdw.com.au.

[39] *TPC v Parkfield Operations Pty Ltd* (1985) 7 CR 534. See further Round D and Hanna L, 'Curbing Collusion in Australia: The Role of Section 45A of the Trade Practices Act' (2005) 29 MULR 270, Section IVA. Compare the curious reasoning in *US v American Airlines, Inc*, 743 F2d 1114 (1984).

[40] See further Black O, *Conceptual Foundations of Antitrust* (2005) chs 4-6; Page W, 'Communication and Concerted Act' (2007) 38 Loyola University Chicago LR 405; Hay G, 'The Meaning of 'Agreement' under the Sherman Act: Thoughts from the 'Facilitating Practices' Experience' (2000) 16 Review of Industrial Organization 113.

This threshold appears to be based partly on the US Sentencing Guidelines under which the value of affected commerce is a significant variable for determining sentences imposed on corporate offenders.[41] One purpose of specifying a percentage of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.

The Press Release states that the value of affected commerce means 'the combined value for all cartel participants of the specific line of commerce affected by the cartel'. This seems consistent with the interpretation of the 'value of affected commerce' sentencing factor under the US Sentencing Guidelines in *United States v Hayter Oil Co*,[42] where the Sixth Circuit Court of Appeals held that:

> the volume of commerce attributable to a particular defendant convicted of price-fixing includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price.[43]

The proposed $1 million value of affected commerce threshold has been criticised on the ground that small cartels may have a severe impact in small geographic markets.[44]

One possible solution would be to limit prosecutions to cases where the specific line of commerce likely to be affected by the cartel represents a minimum percentage (say 20%) or more of the value of sales by all competitors who compete in that specific line of commerce in the relevant geographic market during the period when the specific line of commerce is affected by the cartel or a specified period linked to the time of the alleged offence. In contrast, the proposed threshold of $1 million value of affected commerce is over-inclusive as well as under-inclusive. It may also be noted that the approach suggested would go some distance toward meeting the concern of the Law Council of Australia in its Submission to the Working Party that a monetary threshold may not take account of the multiplier effect of a cartel affecting supply of an essential ingredient or component on very substantial downstream markets.[45]

Corporate Responsibility for the Australian Cartel Offence

The Australian Cartel Offence, unlike the cartel offence under the Enterprise Act, would be subject to corporate and individual responsibility. This is entirely to be

[41] *Federal Sentencing Guidelines Manual* (2004) ch 2. Consider also the definitional requirement in the money laundering offences under the Criminal Code (Cth) ss 400.3(1)(2) and (3) that the value of the relevant money or property be $1 million or more. Curiously, the $1 million value of affected commerce threshold in the Criminalisation Proposals is merely a guide to the exercise of prosecutorial discretion, not a definitional element of the Australian Cartel Offence.

[42] 51 F.3d 1265 (1995).

[43] At 1273.

[44] Clarke, 'Criminal Penalties for Contraventions of Part IV of the Trade Practices Act' (2005) 10 Deakin LR 141 at 162.

[45] Law Council of Australia, Submission to the Working Party on Penalties for Cartel Behaviour, 12 December 2003, 8.

expected because corporate criminal responsibility is well entrenched in Australia and applies across a very broad range of legislation.[46]

To Australian and US eyes, it is odd that the cartel offence under the Enterprise Act does not apply to corporations as well as to individual persons:

- The claim that individual criminal liability is sufficient seems heroic because it fails to take account of the difficulties of investigation and enforcement resources which largely explain the development of corporate criminal liability in the USA, Canada, Australia and many other countries.[47]
- Price fixing and other forms of serious cartel conduct are rarely the product of insular individual choice but typically are related to organisational pressures and failures of organisational control.[48]
- The argument that corporate criminal liability is unnecessary because the only penalty that can be imposed on a corporation is a monetary penalty of the kind already imposed in civil or administrative proceedings is unpersuasive. It fails to take account of the importance of the stigma flowing from the conviction of a company for an offence.[49] It also fails to consider the possibility of developing punitive non-monetary forms of sanctions against corporations. [50]

The approach taken in the Enterprise Act appears to be based on the position that it is desirable to maintain consistency with the civil regime of prohibitions against

[46] See generally Clough J & Mulhern C, *The Prosecution of Corporations* (2002).

[47] See Fisse B & Braithwaite J, *Corporations, Crime and Accountability* (1993) 36-41. See also Harding C, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (2007) 149-150. The explanation given in Office of Fair Trading, *Proposed Criminalisation of Cartels in the UK* (OFT 365, 2001) at 1.19, 2.11 is very brief and does not discuss eg the extensive reliance on corporate criminal liability under US antitrust laws. Nor is the issue of corporate criminal responsibility addressed adequately in eg Cseres KJ, Schinkel MD & Vogelaar FOW (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (2006). On corporate criminal responsibility in the UK, see Wells C, *Corporations and Criminal Responsibility* (2nd ed, 2001).

[48] See Fisse B & Braithwaite J, *Corporations, Crime & Accountability*, 24-31.

[49] See Fisse B & Braithwaite J, *The Impact of Publicity on Corporate Offenders* (1983).

[50] See eg Australian Law Reform Commission, *Principled Regulation* (Report 95, 2002) ch 28; NSW Law Reform Commission, *Sentencing Corporate Offenders* (Report 102, 2003); Gruner R, *Corporate Crime and Sentencing* (1994) ch 12; Fisse B, 'Community Service as a Sanction against Corporations' [1982] Wis L Rev 970; Fisse B, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 S Cal L Rev 1145; Fisse B, 'The Punitive Injunction as a Sanction against Corporations' (unpublished working paper, 1993) http://www.brentfisse.com; Fisse B and Braithwaite J, *Corporations, Crime and Accountability* (1993) 42-43, 82-83; and Garrett B, 'Structural Reform Prosecution' (2007) 93 Va L Rev 853. The analysis in Wils WPJ, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (2002) is far from optimal because it does not discuss possible non-monetary sanctions against corporations or the extensive literature on that subject.

undertakings under EU competition law.[51] However, the non-use of corporate criminal responsibility under the EU model is open to question.[52]

The basis upon which a corporation is to be held responsible for the Australian Cartel Offence is not clear from the Criminalisation Proposals. The main possible options for the attribution of responsibility to corporations are:

(1) vicarious responsibility parallel to vicarious liability under section 84 of the Trade Practices Act;

(2) corporate responsibility under the Criminal Code (Cth) provisions on corporate criminal responsibility;[53]

(3) vicarious responsibility subject to a defence that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct, as under section 44ZZO and section 152EO of the Trade Practices Act.

Approach (1) follows section 84 of the Trade Practices Act, which has given the ACCC a low barrier to clear when seeking to establish liability for civil penalties and remedies. However, vicarious liability is a form of strict liability and is inconsistent with the general principle that criminal responsibility is personal, not vicarious, and requires fault.[54]

Approach (2) follows the Criminal Code (Cth). The general principle of corporate responsibility under the Criminal Code (Cth) seeks to reflect the concept of corporate blameworthiness by requiring fault that is corporate in nature rather than merely fault on the part of 'a directing mind' under the principle in *Tesco Supermarkets Ltd v Nattrass*.[55] The Criminal Code provisions depart from the *Tesco* principle in two main ways:

- The physical elements of an offence are attributable to a corporation on a much broader basis than under the directing mind principle. It is unnecessary to prove that a representative who is directing mind of the corporation engaged in the

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[51] Office of Fair Trading, *Proposed Criminalisation of Cartels in the UK* (OFT 365, 2001) at 1.19, 2.11.

[52] See Harding C & Joshua J, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2003) chs 9-10. The cartel offence in Ireland is subject to corporate as well as individual responsibility: *Competition Act 2002*, s 6; see generally Massey P, 'Criminal Sanctions for Competition Law: A Review of the Irish Experience' (2004) 1 Comp L Rev 23.

[53] Criminal Code (Cth) s 12. See further, Hill J, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' [2004] Jnl of Business Law 1; and, Woolf T, "The Criminal Code Act 1995 (Cth) – Towards a Realist Vision of Corporate Criminal Liability" (1997) 21 Crim LJ 257. Under s 6AA of the Trade Practices Act (Cth) the Criminal Code principles of responsibility are the default principles that apply to offences under the Act.

[54] See further Fisse B, *Howard's Criminal Law* (5th ed, 1990) 604.

[55] [1972] AC 153. On the weaknesses of the *Tesco* principle see Fisse B, *Howard's Criminal Law* (5th ed, 1990) 601-603. Compare the broader concept of attribution of liability adopted by the Privy Council in the civil case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918. The *Meridian* approach is ill-defined and ill-related to the concept of corporate fault; see Clarkson, CMV, 'Kicking Corporate Bodies and Damning their Souls' (1996) 59 MLR 557 at 565-569.

relevant conduct. It is sufficient that the conduct is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority (section 12.2).

- The mental element of an offence is attributable to a corporation on a different basis than under the directing mind principle. Under section 12.3(1), if intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element is attributable to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Section 12.3(2) provides that this corporate fault element can be established by:

  (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

  (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

  (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

  (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

It is unclear whether or not (a) above applies to an ulterior intention. If not, then the requirement of an 'intention dishonestly to obtain a gain' will be attributable to a corporate defendant under the unsatisfactory common law principle in *Tesco Supermarkets Ltd v Nattrass*.

Corporate responsibility on basis (b) above does not apply if the body corporate proves that it 'exercised due diligence to prevent the conduct, or the authorisation or permission'.

The Criminal Code provisions raise a considerable barrier for the prosecution, at least in the context of cartel conduct:

- Rare will be the case where a board gets involved in cartel conduct or fails to have boilerplate precautions in place to thwart attempts to sheet home criminal responsibility.

- The concept of a 'high managerial agent' is ill-defined[56] but goes further than the *Tesco* precept of 'a directing mind'. Even so, cartel offences are often likely to be

[56] Under s 12.3(6) '*high managerial agent* means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy'. Contrast the avoidance of this concept in the statutory model set out in Fisse B, 'The Attribution of Criminal Liability to Corporations' (1991) 13 Sydney Law Review 277.

perpetrated on the front lines of middle management rather than in the much more remote command posts of high managers.

- The concept of a 'corporate culture' does project the animating idea of corporate blameworthiness. However, the concept has yet to be tested and appears to require proof of conditions and attitudes within an organisation that go considerably beyond merely proving that the managers immediately involved in the cartel conduct acted with criminal intent. Moreover, expert sociological evidence would seem relevant to prove or disprove the existence of a corporate culture. Given that usually there are many diverse cultures within a corporation, the concept of some homogenous corporate culture is probably unworkable.[57]

The classic heavy electrical price fixing conspiracies in the USA in the late 1950s and early 1960s[58] lead one to ask: would the prosecutions against GE, Westinghouse and the other larger transformer companies have succeeded if the US DOJ had been required to establish liability under the Criminal Code provisions for corporate criminal responsibility? Considerable difficulty would have been encountered given that the companies assiduously blamed middle management for breaching the antitrust compliance policy that each company had in place. In particular, the companies would have answered, not without some degree of credibility, that no high managerial agent was implicated in the price fixing, and that their antitrust compliance policies and programs indicated that they had exercised due diligence and did not have a corporate culture given to price fixing.

The prosecution would face much less of a hurdle if, as under approach (3), vicarious responsibility is imposed subject to a defence that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct. This is the pragmatic approach adopted in section 44ZZO and section 152EO of the Trade Practices Act and in provisions governing corporate responsibility in numerous Acts of the Commonwealth of Australia.

One feature of this approach is that it focuses on the standard of reasonable precautions and due diligence expected of a corporation engaged in the same kind of commerce – the standard is not based merely the standard of any given individual within the company.[59]

DEFENCES TO AND EXEMPTIONS FROM THE AUSTRALIAN CARTEL OFFENCE

The Criminalisation Proposals state that Australian Cartel Offence will not apply to conduct that is lawful by reason of a defence or exemption under the Trade Practices Act. For example, it is possible to seek an authorisation from the ACCC for conduct that would otherwise amount to price fixing and, if granted, such an authorisation

57 See further Smircich L, 'Concepts of Culture and Organizational Analysis' (1983) 28 Administrative Science Quarterly 339.

58 See Smith RA, *Corporations In Crisis* (1966) chs 5-6.

59 Fisse B, 'The Attribution of Criminal Liability to Corporations' (1991) 13 Sydney Law Review 277 at 292.

would provide an exemption from criminal as well as civil liability.[60] Other exemptions include those for certain export cartels and intellectual property licensing conditions.[61] The main defence is the joint venture defence that became available on 1 January 2007.

By contrast, the cartel offence under the Enterprise Act is not defined in terms of conduct without lawful authority or excuse. The requirement of dishonesty is the avenue whereby accused with an excuse or justification for their conduct may obtain an acquittal.

At a political level, there would be a public outcry from business in Australia if defences and exemptions available in civil penalty cases were not also available in criminal cases. In terms of policy, the Government has not accepted the explanation given for relying on the concept of dishonesty in section 188 of the Enterprise Act instead of allowing an accused to plead an exemption or defence available in civil proceedings.

The Office of Fair Trading Report, *Proposed Criminalisation of Cartels in the UK* (2001) saw dishonesty as a way of preventing accused from arguing in a jury trial that they had not committed a breach of United Kingdom or European Union competition laws because, for example, the conduct was subject to an exemption.[62] That approach lacks credibility:

- The element of dishonesty would not prevent an accused from arguing that conduct in compliance with a civil per se prohibition was not dishonest according to the standards of ordinary people. Here the Report is at odds with the statement in paragraph 7.31 of the DTI White Paper, *A World Class Competition Regime* that: 'A defendant could use as his defence the claim that he honestly believed he was acting in accordance with Art 81 or Ch I.'[63]

- Even in the case of conduct yet to be exempted but which the defendant believed to be likely to become exempted, the element of dishonesty would not prevent an accused from arguing that he or she did not know that the conduct was dishonest according to the standards of ordinary people. Indeed, the subjective limb of the element of dishonesty gives accused much more latitude to deny liability than is the case where liability depends on the legal definition of defences and exemptions. For example, the subjective limb of the *Ghosh*[64] test of dishonesty opens the way for accused to rely, in effect, on ignorance or mistake of law as a defence.

- If, as a matter of policy, it is thought desirable to allow a defence of ignorance or mistake of law, or reliance on official advice or an expert economist's opinion, a fundamental issue to be resolved is whether any such defence should be limited to

[60] Note also that even if an authorisation has not been sought an accused may be able to deny the element of dishonesty on the basis that, if sought, authorisation would be likely to be granted.

[61] Trade Practices Act (Cth) s 51(2)(g), s 51(3).

[62] OFT Report 365, at 2.5, 2.6.

[63] Cm 5233, July 2001.

[64] [1982] 2 All ER 689.

> a cartel offence rather than being made a general defence in the criminal law. If there are to be such defences, general or special, the defences would need to be defined in accordance with standard definitional form and practice for criminal law defences. Additionally, consideration should be given to the possibility of placing a persuasive burden of proof on the accused and limiting any new defences to a belief based on objectively reasonable grounds.

The joint venture defence under sections 76C and 76D of the Trade Practices Act gives competitors a way of structuring their conduct so as to be able to rely on a competition test instead of being exposed to a per se criminal prohibition and the uncertainties of the element of dishonesty in the Australian Cartel Offence. It is a defence to establish that a price fixing or exclusionary provision: (a) is for the purposes of a joint venture; and (b) does not have the purpose, and does not have and is not likely to have the effect, of substantially lessening competition. Sham joint ventures, such as arranged marriages of convenience between competitors who suddenly decide to pitch for a tender as a joint venture, will not provide a defence.[65] However, it will be relatively easy for competitors to create a 'joint venture' that involves sufficient integration and efficiencies to avoid being regarded as a sham.[66] If so, they will be able to invoke a competition test at trial, whether in criminal proceedings or in enforcement actions for civil penalties.

SENTENCING OPTIONS AND MAXIMUM PENALTIES FOR THE AUSTRALIAN CARTEL OFFENCE

The sentencing options and maximum penalties heralded by the Criminalisation Proposals raise numerous policy questions. The maximum jail term of 5 years is lower than that for the Criminal Code offences of obtaining property by deception (section 131.1 – 10 years) and conspiracy to defraud a Commonwealth entity (section 141.1 – 10 years). The general offence under section 135 of acting with intent to dishonestly obtain a gain carries a maximum jail term of 5 years but that offence does not require serious cartel conduct and applies to a wide range of conduct of lesser gravity than serious cartel conduct. The maximum term proposed for the Cartel Offence is also difficult to reconcile with the rhetoric of politicians and others that serious cartel conduct is akin to theft, fraud or extortion.

The maximum fine for individuals is to be $220,000 whereas the maximum civil penalty for price fixing and exclusionary arrangements is now $500,000. This disparity is unexplained and is curious. There is no maximum limit on the fine that can be imposed under section 190 of the Enterprise Act. Few would doubt that the stigma flowing from conviction is high because the offence is subject to the possibility of a jail sentence. However, that consideration does not explain why, in cases where jail is not

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[65] See further Tyson N, 'Joint Venture Regulation under Australian Competition Regulation' (2006) 34 ABLR 211 at 215-216.

[66] See Werden, 'Antitrust Analysis of Joint Ventures' (1998) 66 Antitrust LJ 701.

considered by a court to be an appropriate sentence, the maximum fine should be lower than the maximum civil penalty for the same or very similar conduct.

The maximum jail term of 5 years has implications for the powers of investigation that may be used to investigate serious cartel conduct. One implication is that it will not be possible to obtain a telecommunications interception warrant under the Telecommunications (Interception and Access) Act 1979 which applies only in relation to serious offences (offences carrying a 7 year maximum jail term). However, presumably a surveillance device warrant under section 14 of the Surveillance Devices Act 2004 (Cth) could be obtained for the use of electronic surveillance methods other than telecommunications interception (eg participant monitoring). However, it would be necessary to comply with State and Territorial legislation regulating the use of listening and other surveillance devices; the Criminalisation Proposals do not explain what mechanisms should be adopted in order to achieve compliance. It has not been explained in the Criminalisation Proposals or elsewhere why, unlike the position in the USA, Canada and the UK, the power to intercept telecommunications should not be available.[67] The power to use electronic surveillance should be addressed squarely, as it has been in the UK.[68] Otherwise the ACCC might find itself tempted to gear investigations to more serious offences, such as conspiracy to defraud a Commonwealth entity[69] or money-laundering,[70] which qualify for the use of telecommunications interception.

The criminal sanctions to be available against corporations are: (a) fines that parallel civil penalties; and (b) adverse publicity orders.[71] Non-punitive orders of probation or community service will also be available.[72] There is no sanction comparable in severity of impact to jail. Any direct analogue of jail would be absurd as a corporate sanction given the drastic spillover effects that incapacitation would have on employees, shareholders and the general community.[73] However, there are other possible sanctions that could avoid untoward spillover effects and yet internalise within corporations the unwanted nature of serious cartel conduct in a way that fines are incapable of doing. Various possible combinations of adverse publicity orders, corporate probation and community service orders could be used by a court when sentencing to make the point

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[67] See Racanelli M, 'Bugs in the Boardroom?' (2006) (January) ABA Antitrust Source 1; Canada, Bureau of Competition, Information Bulletin, *Interception of Private Communications and the Competition Act* (1999); Furse M & Nash S, *The Cartel Offence* (2004), 57-60.

[68] See eg OFT, Code of Practice, August 2004, *Covert Surveillance in Cartel Investigations*; OFT, Code of Practice, August 2004, *Covert Human Intelligence Sources in Cartel Investigations*.

[69] Criminal Code (Cth) s 141.1.

[70] Criminal Code (Cth) s 400.3.

[71] Trade Practices Act 1974 (Cth), s 86D.

[72] Trade Practices Act 1974 (Cth), s 86C. See further NSW Law Reform Commission, *Sentencing Corporate Offenders* (Report 102, 2003); Gruner R, *Corporate Crime and Sentencing* (1994), ch 12; Fisse B, 'Community Service as a Sanction against Corporations' [1982] Wis L Rev 970.

[73] See Fisse B, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 S Cal L Rev 1145.

that serious cartel conduct is a serious offence and not merely some kind of activity that needs to be priced and accounted for in the financial statements of a corporation.[74] The Criminalisation Proposals are set out merely in the Press Release and do not deal in any helpful way with the challenge of punishing corporate offenders in ways that fit the new crime.

The Criminalisation Proposals indicate that the Proceeds of Crime Act 2002 (Cth) will apply to the Australian Cartel Offence. However, they do not stay to examine the practical implications of this development. The particular implications in the context of cartel conduct were not examined by the Australian Law Reform Commission in its extensive review of this subject in 1999.[75] The Proceeds of Crime Act provides for far-reaching restraining orders, forfeiture orders and penalty orders. Working out how those provisions will apply in the context of serious cartel conduct is a non-trivial task that may unravel unintended results and unjustified exposures to the risk of double punishment.

Consideration also needs to be given to the implications of the wide array of offences against money laundering in the Criminal Code (Cth). These offences are very widely defined, will often apply to the conduct proscribed by the Australian Cartel Offence, and carry high maximum jail terms. For example, the offence under section 400.3(1) of the Criminal Code proscribes dealing with money or other property where the money or property is believed to be proceeds of crime and the money or property has a value of $1 million or more at the time of the dealing; the maximum jail term for this offence is 25 years. Assume that the Australian Cartel Offence has come into effect. Assume further that ACO and BCO are competitors and bid for two infrastructure projects. The bids are rigged by individuals on the tender so that ACO is likely to win the first project and BCO is likely to win the second. Under the contracts for these projects an initial payment of $2 million is payable upon start of work. This money is derived or realised from the commission of an indictable offence and hence amounts to 'proceeds of crime' as that term is defined in section 400.1. Employees within each company may 'deal with' the $2 million payment in one or more of the ways specified in the definition of this term in section 400.2. They may also have a belief that the $2 million payment they deal with is derived from the commission of an indictable offence. If so, they will commit the offence of dealing in proceeds of crime under section 400.3(1) and be subject to a maximum jail term of 25 years.[76] The Criminalisation Proposals do not indicate what, if any, limitations or prosecutorial guidelines will govern the operation of the money laundering offences in the context of serious cartel conduct.

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[74] Consider, for example, the reaction of BA in the recent fuel surcharges price fixing case - BA had set aside £350 million 'as a provision' for possible fines: Australian Financial Review, 2 August 2007, 16.

[75] Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (Report 87, 1999).

[76] Other money laundering offences may also be relevant including the offence under section 400.3(2) which carries a maximum jail term of 12 years.

OTHER QUESTIONS RAISED BY THE AUSTRALIAN CRIMINALISATION PROPOSALS

The Criminalisation Proposals raise many other questions. To begin with, the title 'cartel offence' is beige and seems comparable to calling theft or fraud 'unlawful acquisition of property'. More apposite and suitably pungent possibilities include 'conspiracy to subvert competition'.[77]

The relevant types of serious cartel conduct need to be defined in terms that can readily be communicated to juries.[78] There is no reason for optimism that this challenge will be met. The definitions of cartel conduct in sections 188 and 189 of the Enterprise Act are prolix. The definitions of price fixing and exclusionary provisions in sections 45, 45A and 4D of the Trade Practices Act defy quick comprehension, even by persons accustomed to Australia's baroque school of trade practices legislative drafting.

There are to be supposedly separate criminal and civil tracks of investigation. The ACCC now relies heavily on the broad powers of investigation under section 155 of the Trade Practices Act and the extent to which the new criminal powers of investigation are narrower than those under section 155 remains unknown. The main potential practical problem is that the decision whether or not to proceed with a criminal rather than civil investigation may depend on information and evidence that criminal powers of investigation may not necessarily provide. Partly for this reason, it is surprising that: (a) the Criminalisation Proposals do not say anything about telecommunications interception or participant monitoring by means of electronic surveillance devices; and (b) the Proposals seem to preclude the use of telecommunications interception to investigate the Australian Cartel Offence.

The Commonwealth Director of Public Prosecutions is to prepare an immunity policy for the Australian Cartel Offence. From the standpoint of offenders, the efficacy of immunity arrangements will much depend on whether or not the ACCC and the DPP will offer a 'one-stop' procedure for the receipt and assessment of applications for immunity from both criminal and civil penalty proceedings. The Criminalisation Proposals do not indicate whether or not there is to be any such one-stop process.

The relationship between criminal and civil proceedings needs to be managed.[79] The Criminalisation Proposals state:

> The existence of parallel civil and criminal provisions for potentially the same conduct could give rise to issues concerning the order in which matters are litigated

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[77] See Fisse (2007) 35 ABLR 235 at 276.

[78] Note the very different meanings that can be given to terms such as 'bid rigging'; see *US v Heffernan*, 43 F3d 1144 (1994).

[79] Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003) 156-157; Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* (Report 95, 2002), ch 11; Australian Law Reform Commission, *Compliance with the Trade Practices Act* (Report 68, 1994) ch 9; Nazzini R, *Concurrent Proceedings in Competition law: Procedure, Evidence and Remedies*, Oxford, OUP, 2004.

> and the appeals process. Therefore, statutory bars will be incorporated in the Trade Practices Act to provide appropriate protection, for example, to stay civil proceedings until criminal proceedings are completed, after which time, if the defendant is convicted, the civil proceedings would be terminated.

This proposal does not deal with the situation where criminal proceedings are brought against employees of a company and where civil penalty proceedings are brought concurrently against the company. Nor does the proposal deal with the question of when civil actions for damages against a company should be stayed because the alleged conduct is also the subject of criminal proceedings.

Will the offence of conspiracy apply to the Australian Cartel Offence? The offence of conspiracy applies to the cartel offence under the Enterprise Act. However, the cartel offence is itself an offence defined in terms of an agreement between parties and is closely akin to a conspiracy.[80] The notion of a conspiracy to commit a conspiracy is infinitely regressive and alien to the common law.

One problem with creating a cartel offence instead of relying on the offence of conspiracy (eg by extending the offence to include a conspiracy to subvert competition) is that desirable limitations on the scope of liability for conspiracy may be passed over. For example, the offence of conspiracy under the Criminal Code (Cth) is subject to a defence of withdrawal.[81] Will withdrawal be a defence to the Australian Cartel Offence?

Large and well-advised companies may have the tactical sense and ability to adapt to the resulting cartel laws in various ways, as by means of mergers, greater use of joint venture arrangements, and proactive steps (eg timely legal advice) calculated to place the company and its employees in a good position to deny that they have acted dishonestly.[82] Query whether small companies will be in anywhere near the same position of strength if and when they take sight of the Australian Cartel Offence and the proceeds of crime and money-laundering destroyers that go with it.

THE PROCESS OF CARTEL CRIMINALISATION IN AUSTRALIA

The process of cartel criminalisation in Australia has been marked by delay, lack of transparency and uncertainty. There is still no detailed publicly available report that addresses the questions raised in the overview and critique above. The refusal of the Government to release the 2004 report of the Working Party is remarkable and increases the suspicion that the report is unconvincing or, if convincing, difficult to

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[80] The offence of conspiracy was not used as basis for the cartel offence under the Enterprise Act because of the perceived difficulty in making price fixing and other forms for serious cartel conduct the object of conspiracy when such conduct was not itself a criminal offence. The logic is superficially attractive but results in the perverse result of creating the offence of conspiracy to commit what is similar to a conspiracy to defraud.

[81] Criminal Code (Cth) s 11.5(5).

[82] See Fisse (2007) 35 ABLR 235 at 263-265.

manage politically.[83] The legislation heralded by the Government over two and a half years ago remains vapourware. This unsatisfactory process stems partly from the failure of the Government initially to entrust the project to the Australian Law Reform Commission, an agency with a strong track record of producing detailed reports, coupled with commitment to public consultation.[84] Another likely explanation is political diffidence about treating cartel conduct as an offence and close identification with business people who would be subject to the application of the offence.[85]

It is to be hoped that an exposure draft bill will be published for comment well before the cartel criminalisation legislation is introduced into Parliament but there is no sign as yet that any such draft will be provided.

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[83] The author has made a freedom of information application for access to the Working Party's report; see n 3 above.

[84] See eg Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* (Report 95, 2002), ch 11; Australian Law Reform Commission, *Compliance with the Trade Practices Act* (Report 68, 1994) ch 9; Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (Report 87, 1999).

[85] For an account of the politics surrounding the Dawson Committee's review of the ACCC's proposals for the criminalisation of cartel conduct, see Brenchley F, *Allan Fels: A Portrait of Power* (2003) ch 12. On the sociological background to the use of the criminal law against restrictive trade practices in Australia, see Hopkins A, *Crime, Law & Business: The Sociological Sources of Australian Monopoly Law* (1978) 116-120.