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

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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.

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[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

[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

[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

[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

[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

[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

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[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

[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

[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

[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.