REPORT EXAMINING THE DESIRABILITY OF INTRODUCING CRIMINAL SANCTIONS FOR CARTEL ACTIVITY

Submitted to the Finnish Competition and Consumer Authority

Dr Peter Whelan
Associate Professor in Law
University of Leeds

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CHAPTER 1: INTRODUCTION

[1.1] This report has been produced in order to advise the Finnish Competition and Consumer Authority ('FCCA') on the desirability of imposing criminal sanctions (custodial sentences) upon individuals found to have engaged in cartel activity.

Cartel Activity

[1.2] In order to achieve its overall aim, this report first of all requires a working definition of 'cartel activity'. Unfortunately, despite its wide usage, the word 'cartel' lacks a precise definition and can in fact be used to encapsulate an agreement, a practice which forms the subject matter of an agreement, or a form of organisation to implement an agreement (Harding (2004: 278)). Fortunately, the OECD has provided a working definition of 'cartel activity' that is useful for present purposes (OECD (1998: [2(a)])). This definition is employed in this report. Accordingly, for the purpose of this report 'cartel activity' is defined as the making or implementing of an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.

[1.3] The OECD definition of cartel activity has a number of advantages. It provides 'clarity and simplicity, while covering what are agreed to be the principal categories of anti-competitive strategy' and also links 'the agreement of anti-competitive purpose with its material realisation' (Harding (2004: 279)). In addition, it also limits the definition of cartel activity to agreements, concerted practices or arrangements that are horizontal in nature. This ensures that vertical agreements etc. are excluded from the definition of cartel activity. This is important as vertical agreements etc. often display efficiency-enhancing properties.

[1.4] Cartel activity has a number of destructive effects for customers, consumers, the competitive process and ultimately the economy. These destructive effects are very unlikely to be offset by efficiencies due to the cartel. Cartels reduce competition on a given market and have the potential to reduce or eliminate the gains which such competition secures. More specifically,

cartels involve a transfer of wealth from the consumer to the producer, effectively reducing the consumer surplus; this transfer manifests itself in increased prices and a reduction in output. Allocative inefficiency also results; scarce economic resources are therefore not being employed to their potential. Higher prices may also be charged by non-violating cartel members due to the higher cartel prices. In addition, non-price effects on quality, choice and innovation may arise from the reduction in competition.

[1.5] Cartel activity should be prohibited by jurisdictions intent on securing the maximum benefits from the free market. Cartel activity is prohibited under EU law by virtue of Article 101(1) TFEU. The EU Member States also have their own national laws containing prohibitions on cartel activity.

[1.6] Given the potential destructive nature of cartel activity, adequate sanctions should be in place to secure effective *deterrence* of such activity. The need to deter cartel activity has been readily acknowledged by the EU institutions (see, e.g., European Commission (2013: 7)) as well as the EU Courts (see, e.g.: Case 41/69, *ACF Chemiefarma v. Commission* [1970] ECR 661, [173]; Joined Cases 100/80 to 103/80, *Musique Diffusion Française and others v. Commission* [1983] ECR 1825, [106]; Case T-329/01, *Archer Daniels Midland v. Commission* [2006] ECR II-3255, [141]; and Case C-289/04 P, *Showa Denko v. Commission* [2006] ECR I-5859, [16]).

Cartel Enforcement and the Use of Criminal Sanctions

[1.7] At EU level the EU cartel rules are enforced by the European Commission, which can only impose administrative fines upon undertakings (Council of the European Union (2003: Article 23(5)). Traditionally, within the EU, national enforcement of national/EU cartel law has avoided the employment of criminal sanctions. In fact, the enforcement of cartel law in Europe has 'been of a predominantly administrative character, and when penalties have been imposed these have, in legal terms, commonly been of an administrative or civil nature' (Harding (2006: 181), relying upon Gerber (2001)).

[1.8] Notwithstanding this European tradition, over the last decade or so there has been increasing debate within Europe concerning the necessity and appropriateness of imposing

custodial sentences on individuals who have engaged in cartel activity. This debate has been fostered in particular by the Competition Committee of the OECD and by the Antitrust Division of the US Department of Justice ('DoJ'). While the OECD has not adopted a formal position on the issue of whether its members should impose individual criminal punishment for cartel activity, its work (*viz.*, recommendations, reports and best practice roundtables) evidently recognises that such punishment can be useful in the fight against such anticompetitive conduct (Reindl, (2006: 111)). In particular, its 'Second Cartel Report' advised its Member States to consider: (a) introducing and imposing antitrust sanctions against natural persons; and (b) introducing criminal sanctions in cartel cases in jurisdictions where it would be consistent with social and legal norms (OECD (2003a: 46)). The DoJ, for its part, has publicly espoused a consistent message concerning its role of enforcing Section 1 of the Sherman Act 1890; for it, 'the most effective deterrent for hard core cartel activity, such as price fixing, bid rigging, and allocation agreements, is stiff prison sentences' (Barnett (2009: 2)). A relatively large body of (academic) literature on cartel criminalisation has been created over the last ten years which analyses these claims. It seems that the claims of the OECD and the DoJ have some force in practice: in recent years, 'countries in virtually every region of the world' have criminalised cartel activity (Shaffer and Nesbitt (2011)).

[1.09] Some European jurisdictions have also followed the lead of the US in creating criminal cartel sanctions. Examples include Ireland, the United Kingdom, Estonia, and, most recently, Denmark. Criminal sanctions for bid-rigging (which is a particular category of cartel activity) also exist in Austria and in Germany. Other countries (such as Sweden, for example) have considered introducing criminal cartel sanctions but have ultimately decided against such a course of action.

Specific Objectives and Overall Aim of the Report

[1.10] The author understands that, due to specific commitments in the Programme of Prime Minister Jyrki Katainen's Government, the FCCA has organised a national project which will consider the desirability of criminalising cartels under Finnish law. The author intends to contribute to this project with the present report.

[1.11] More specifically, the report has four discrete objectives. The first objective is to examine in detail the theoretical justifications for the use of criminal cartel sanctions. This examination will provide potential rationalisations for the existence of criminal cartel sanctions. The focus of the analysis will be on two particular justificatory theories of criminal punishment: economic deterrence theory; and retribution theory. The second objective of the report is to provide detail on some of the significant problematic issues that have been encountered in criminalised cartel regimes and what solutions could be adopted to overcome such issues. A particular problematic issue that will be examined is how to define the criminal cartel offence in such a way that does not 'chill' legitimate commercial behaviour. The third objective of the report is to consider the impact of cartel criminalisation on civil/administrative enforcement (in particular the operation of a civil/administrative leniency policy) as well as any potential solution to the negative impact identified. The fourth and final objective of the report is to articulate the main pros and cons of cartel criminalisation for a criminalised cartel regime. This objective is intrinsically linked to the others objectives: the advantages and disadvantages of criminalisation can be linked to the extent to which it achieves its purpose(s), to how difficult it would be in practice to achieve such a purpose/purposes, and to any positive/negative impact on the administrative competition regime. By considering these pros and cons, one can come to a firm conclusion on whether the criminalisation of cartel activity should be pursued by the authorities.

[1.12] By achieving the above-noted objectives, the author will achieve his overall aim in writing this report: advising the FCCA on the desirability of imposing criminal sanctions (custodial sentences) upon individuals found to have engaged in cartel activity. Ultimately, the author submits that criminal cartel sanctions should be introduced in Finland, provided that a number of practical measures are put in place by the authorities.

[1.13] The layout of this report is as follows. Chapter 2 considers the theoretical justifications for cartel criminalisation. It focuses on two justificatory theories (deterrence and retribution) and examines whether these theories can be relied upon to justify criminal cartel sanctions. This is a fundamental issue in the debate and thus it requires extensive treatment in this report. Chapter 3 focuses on the important practical issues that need to be addressed if cartel criminalisation is to be effective in practice in achieving its underlying objectives. In particular it analyses: how to define a criminal cartel offence so that Regulation 1/2003 does not create difficulties in its

enforcement; how to define a criminal cartel offence so that legitimate economic behaviour is not within its scope; how to ensure public and political support exists for the criminalised regime; whether to include a novel enforcement mechanism to support the criminalised regime (namely, a formalised system of plea-bargaining); and how to protect the due process rights of the accused when administrative cartel sanctions exist alongside criminal cartel sanctions. Chapter 4 considers the impact of cartel criminalisation on the operation of a civil/administrative leniency policy and the potential solutions to any negative impact identified. Chapter 5 builds upon the analyses in the chapters which precede it and presents a balanced account of the major pros and cons of a policy of cartel criminalisation. Finally, Chapter 6 presents a number of recommendations to the FCCA concerning the criminalisation of cartel activity within Finland.

CHAPTER 2: THE JUSTIFICATIONS FOR CARTEL CRIMINALISATION

[2.1] There are at least four different theoretical justifications for criminal punishment: deterrence, retribution, incapacitation and rehabilitation (see, e.g., Ashworth (2004: 65 *et seq.*)). Each one of these justifications is conceptually distinct and pursues a specific aim. Deterrence seeks to prevent future activity, either in a general (public-focused) or specific (individual-focused) sense. Retribution posits that individuals should face a criminal charge due to the fact that they have committed a moral wrong. Rehabilitation attempts to treat an individual engaging in unlawful behaviour in order to prevent habitual reoffending. Incapacitation refers to the prevention of activity through the direct deprivation of the ability or capacity to engage in such activity. For the purpose of this report, however, only the punishment theories of deterrence and retribution will be examined as potential rationales for antitrust criminalisation.

[2.2] The reasons for this are as follows. First, both deterrence and retribution are already established aims of EU antitrust enforcement. For example, according to the General Court, 'both the deterrent effect and the punitive effect [i.e, the retributive effect] of the fine are reasons why the Commission should be able to impose a fine': Case T-329/01, *Archer Daniels Midland v. Commission* [2006] ECR II-3255, [141]. Second, the detailed literature on antitrust criminalisation focuses almost exclusively on the criminal punishment theories of deterrence and retribution. This is consistent with the general approach to corporate punishment found in the literature (see, e.g., Fisse (1983)). Third, *a priori*, the criminal punishment theories of incapacitation and rehabilitation represent unsuitable justifications for the creation of an antitrust regime that imposes custodial sentences on cartelists. 'Incapacitation through incarceration' is inappropriate as we do not wish to put cartelists (who, their cartel activity notwithstanding, are usually productive, law-abiding members of society) behind bars *merely* to prevent them from being physically able to cartelise again in future. If one wished physically to prevent a given individual from engaging in cartel activity, one could use other, far less severe/costly methods, such as court orders preventing an individual from being involved in the management of a business. For its part, the concept of 'rehabilitation through incarceration' — with its focus on those recividivist individuals who, after being punished, are, by their very nature, still incapable of adhering to the law — is of limited relevance when one is considering the punishment of

rational and educated corporate decision-makers who are capable, one assumes, of learning from their mistakes (Baker and Reeves (1977: 619)).

[2.3] While not without their issues, the theories of deterrence and retribution can be used as potential justifications for the employment of criminal sanctions (imprisonment) to enforce cartel law (see: Whelan (2007); and Whelan (2013a)). Two caveats should be noted, however. The first is that, as with any criminal punishment theory, these theories can and have been criticised as providing imperfect solutions to the justification of criminal punishment. In short, there is no one, accepted justificatory theory for criminal punishment that is above criticism. The second is that, in order for deterrence and/or retribution to be achieved with cartel criminalisation it is not sufficient for the legislator to merely add criminal sanctions to the available (administrative) sanctions for cartel activity. As will become apparent, further action is required from the legislator. Strategies must be adopted, encompassing, *inter alia*, decisions regarding the definition of the criminal cartel offence, additional practical enforcement measures and the protection of the integrity of the administrative competition regime.

Deterrence

[2.4] At its most basic, deterrence theory holds that punishment can only be justified if it leads to the prevention or reduction of future crime (Walker (1980: 26)). Deterrence is thus consequentialist; 'it looks to the preventive consequences of sentences': Ashworth (2005: 75). It views punishment as a method of maximising utility, to be employed only when the disutility of its imposition is less than the utility to society secured by its deterrent effect. The economic variant of deterrence theory is employed for present purposes; it places 'societal wealth' at the centre of the analysis of utility (Becker (1968)). This variant of deterrence theory is based on the assumption that individuals/corporate entities are rational economic actors who act in their own interest in order to maximise their own welfare (Veljanovski (2006: 49 *et seq.*)). Accordingly, a rational actor can be deterred from conduct if the cost of that conduct is great than its benefit. The economic variant of deterrence theory attempts to achieve economic efficiency in order to maximise societal welfare. Efficiency is obtained, and welfare maximised, where the marginal benefit of punishment of punishment is equal to its marginal cost (Cooter and Ulen (2004: 25 *et seq.*)).

[2.5] There are two different models that can be relied upon to implement a policy of economic deterrence: the 'unlawful gains' model; and the 'harm to others' model (Yeung (1999: 447-449)). 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 were 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 which, while harmful and not costless, nonetheless exhibits potential benefits for society. Under 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.

[2.6] Those who argue in favour of cartel criminalisation almost invariably employ the theory of economic deterrence to justify their stance (see, e.g.: Baker (2001); Calkins (2007); Calvani (2004); Ginsburg and Wright (2010); Werden and Simon (1987); and Wils (2006)). The essential argument is that the key to an effective antitrust enforcement policy that ensures deterrence is the existence of the non-indemnifiable individual sanction of imprisonment. As observed by the OECD, '[a]s agents of corporations commit violations of competition law, it makes sense to prevent them from engaging in unlawful conduct by threatening them directly with sanctions and to impose such sanctions if they violate the law' (OECD (2003b: 2)): hence the rationale for a personal sanction. To avoid indemnification by the corporation, however, the personal sanction is coupled with the use of the criminal law — thereby introducing the (non-indemnifiable) threat of imprisonment — and accordingly becomes 'the most meaningful deterrent to antitrust violations' (Liman (1977: 630-631)) and a forceful method of sending 'a message to other business executives about the risks and penalties for this kind of behaviour' (Bauer (2004: 307)).

[2.7] In order to understand fully the specifics of the deterrence-based cartel criminalisation argument, one needs to consider the counterfactual. A sensible way of doing this is to consider the effectiveness of a competition regime in deterring cartel activity when that regime only employs administrative fines on undertakings (i.e. entities engaged in an economic activity, regardless of the legal status of the entity and the way in which it they are financed: Case C-41/90, *Höfner and Elser v. Macrotron* [1991] ECR I-1979, [21]). One can then compare the ability of the administrative regime to achieve deterrence with a regime that employs criminal cartel sanctions (i.e. custodial sentences), in the process demonstrating the attractiveness of cartel criminalisation for the purposes of securing deterrence.

[2.8] To consider the administrative regime's effectiveness in achieving deterrence of cartel activity, one must first evaluate the size of an administrative fine that ensures deterrence of cartel activity (under the assumptions of economic deterrence theory). Before doing so, however, one must decide whether to employ the 'unlawful gains' model or the 'harm to others' model. This report will rely upon the 'unlawful gains' model. This approach is generally consistent with the academic literature on antitrust criminalisation (see, e.g.: Calvani (2004); Werden (2009); and Wils (2006)). There are two merits to this approach. First, the 'harm to others' variant relies upon the assumption that cartels are capable of being efficient, something that is extremely unlikely to be the case. Second, calculation of the relevant variables should be easier as the 'deadweight loss' is not considered. That said, such a choice does not materially affect the argument presented below that financial cartel sanctions (i.e., fines) alone are ineffective in achieving deterrence.

[2.9] An administrative fine that is effective in achieving deterrence would be at least equal to the gain obtained by cartel activity discounted by the rate of detection and prosecution. To construct an optimally-deterrent cartel fine, one can rely upon the available empirical evidence concerning: the overcharge due to the cartel activity; the duration of cartel activity; and the probability of detection and prosecution.

[2.10] In 2002, Wils employed the unlawful gains model of economic deterrence theory and argued that the fine required to ensure effective deterrence is, at its absolute minimum, equal to at least 150% of the firm's annual turnover in the product market affected by the violation (Wils

(2002: 199 *et seq*)). In 2005, he re-examined this figure, and although he varied the data involved in his calculation, the size of the optimal fine did not change (Wils (2005)). In Wils's original (2002) 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 the then available empirical economic evidence. The size of the mark up was estimated at 10% by relying upon the road-building cartel cases of the 1980s and the subsequent use of this figure in the US Sentencing Guidelines. Since this only represented the gain if price elasticity of demand was zero, adjustments were required to be made; the gain was thus set at a significantly lower level of 5%. The literature available at that time suggested an average cartel lifespan of over six years. Wils decided to be conservative and employ the figure of 5 years. Finally, the rate of detection took its inspiration 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 between 13 to 17% (Bryant and Eckhard (1991)). Wils's (2005) recalculation, however, acknowledged that the original rate of detection and prosecution had presumably increased since 1988, due to the operation of leniency policies; this rate was therefore increased from 1/6 to 1/3. As a result of studies by the OECD (2002b) and Connor (2004), Wils also increased the figure taken for the cartel overcharge from 10% to 20%. By multiplying the mark up (discounted to take account of price elasticity) by the duration (5 years) and dividing it by the probability of being caught and prosecuted, one arrives (once more) at an optimal fine of 150% of annual turnover. Calvani (2004) agrees with the estimation offered by Wils, as do others (such as: Clarke and Bagaric (2003); and Vogelaar (2008)). Werden goes even further, however; he argues that the optimal cartel fine should be in the region of 200% of the annual turnover (Werden (2009: 29)).

[2.11] Wil's calculation of the optimal fine is very important for advocates of cartel criminalisation for reasons of deterrence. In particular, it highlights the significant problems in achieving an effective deterrent with only administrative fines (i.e. financial sanctions). Before examining these problems, one should note two things. The first is that the figures used are conservative estimates (see Connor and Lande (2012)). For example, a detailed study by Connor and Lande (2005), involving analysis of over 600 cases of cartel activity, argues that in Europe average overcharges were in the 28% to 54% range; only 20% is assumed by Wils in his most recent calculation. Further, Connor and Lande (2005) also estimate the average lifespan of

cartels to be 7 to 8 years, whereas Wils decided to use the figure of 5 years. In fact, another study, this time focusing on fifty-six recent international cartels, found the average duration of an international cartel to be 6.6 years; and the median mark up was estimated at 27% (Bolotova and Connor (2008)). In 2011 Combe and Monnier (2011) published their study which analysed 64 cartel decisions adopted by the Commission between 1975 and 2009. The average duration of cartels in their sample was 7 years, with a median of 5.6 years. Most recently, Smuda (2014), using a sample of 191 overcharge estimates and several parametric and semiparametric estimation procedures, found that the mean and median overcharge rates are 20.70% and 18.37% of the selling price and that the average cartel duration is 8.35 years. As regards the rate of detection, a 2008 study (Combe *et al.* (2008)) estimated a detection rate of 12.9-13.3% in any given year in the EU during the period 1969-2007, which is a rate considerably lower than the 20% chosen by Wils. If any of these studies are representative, fines far in excess of 150% of annual turnover would be required to ensure effective deterrence. The second thing that one should note is that 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. The minimum effective fine will be even higher than 150% of annual turnover when such interest payments are taken into account.

[2.12] The main problem with the optimally-deterrent fine is that, for practical reasons, it usually cannot be imposed on the undertaking: an optimal fine of the magnitude discussed above (i.e., 150% of annual turnover) 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 optimal fine. Second, as there is an appreciable time lapse between the occurrence of the cartel and the 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. Indeed, according to Werden and Simon (1987) there is empirical evidence to demonstrate that unions capture most of the monopoly profits earned by US manufacturing firms. It is no surprise, then, that the literature has offered an estimate of 18% as the percentage of firms convicted of price fixing that would have had sufficient resources to pay an optimal fine (see Craycraft *et al*. (1997), whose study was based on a sample of 386 convicted firms between 1955 and 1993). This figure would have been even lower had the study not

omitted all defendants for which financial data could not be found (Werden (2009: 30, Footnote 67)). 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 assets to sales ratios would have the ability to pay (Werden and Simon (1987: 929)). Further, the effects of bankruptcy go beyond those required for optimal 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. Calvani (2006) notes that forcing a company into liquidation would not be a politically acceptable move; for him it is 'very doubtful whether any parliament would have the stomach for what is the equivalent of corporate capital punishment for price-fixers'. Bankruptcy would also result in further concentration of the market (Schoneveld (2003: 448-449)). If one cares about the level of competition in a market, this is something to be avoided.

[2.13] An additional notable problem that exists when a jurisdiction relies solely upon administrative cartel fines on undertakings to deter cartel activity is the lack of individual financial responsibility. Admittedly, some have argued that fining undertakings rather individuals is sufficient in that the undertaking involved usually possesses effective means to prevent its employees from acting against its interests (Posner (1976: 226)). More recently, other scholars have disagreed (see, e.g.: Beaton-Wells and Fisse (2011), 295-307; and Polinsky and Shavell (1993)). It is argued that 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. 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 (Wils (2002: 208)). It may also be the case that the employee is aware that she will have left the firm by the time the infraction is discovered (Calkins (1997)). The firm could also be management controlled and fines may only represent a minor financial burden for each of the individual shareholders (Blair (1985)). Furthermore, firms may have incentives not to take disciplinary actions against its employees: 'a disciplinary programme may be disruptive, embarrassing for those exercising managerial control, encouraging for whistleblowers, or hazardous in civil litigation against the corporation or its officers' (Beaton-Wells and Fisse (2011: 299)). These (persuasive) points may ensure that

employees are not sufficiently deterred from behaving according to their own interests when they are in conflict with those of their employer.

[2.14] One could respond to the above (deterrence-related) criticisms of administrative (undertaking-focused) fines by suggesting that administrative enforcement should also encompass administrative fines on individuals. However, while such an approach would deal with the issue of individual financial responsibility, it would not deal with the problem of inability to pay an optimally-deterrent fine. It is true that the optimally-deterrent fine is constructed on the basis of the undertaking's gains (rather than the gains to the individual cartelist). It is also true that the (direct) gain to the individual cartelist would not be as large as the gain due to the undertaking: it is the undertaking that benefits from the increased prices in the market, not the individual cartelist who works for it. (Admittedly the individual may receive indirect benefits from cartel activity, such as bonuses and prestige at work.) One could therefore argue: (a) that an optimally-deterrent administrative fine concerning an individual would not be as large as that concerning an undertaking; and (b) that the inability to pay a fine of 150% of annual turnover could be circumvented by imposing (lower) optimally-deterrent fines on individuals). The point however is that when the administrative fines imposed upon undertakings are sub-optimal the undertaking has the incentive to engage in cartel activity and, if employees are deterred from cartel activity through the threat of individual fines (which will necessarily be lower than the optimal-deterrent fine facing an undertaking), that undertaking will simply pay any employees administrative fines up to the point where cartel activity becomes unprofitable (i.e. up to the optimally-deterrent (undertaking-focused) fine - which cannot actually be paid by the undertaking without causing significant, undesirable social effects). What is needed (in addition to administrative fines upon undertakings), then, is a non-indemnifiable punishment upon the individual cartelist. This is where criminal sanctions (custodial sentences) have a role to play.

[2.15] The threat of imprisonment overcomes the central weakness of an administrative sanction imposed upon an individual: its susceptibility to indemnification by the company (which benefits from the cartel activity). Since cartelists are unlikely to accept payment to go to prison for their firm, 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. As stated by Chemtob (2000: 19), 'criminal

enforcement has the potential to improve deterrence markedly by introducing non-monetary costs into the equation'. This increase in deterrent effect may be particularly noticeable among the professional classes or those who have 'invested' a great deal in their reputation (Katyal (1997: 2416)). This argument is supported to a degree by empirical evidence: according to the available data (which, admittedly, is only relevant up until 2003), never has an individual accused of cartel activity in the US offered to go to jail in lieu of paying a fine (OECD (2003b: 100)).

[2.16] In addition, by actually imposing custodial sanctions for cartel activity the authorities express how seriously they consider such behaviour and in so doing — it is argued — deter potential cartelists (Baker and Reeves (1977: 625)). As Posner (1985: 1215) indicates, criminal sanctions 'are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it', hence their condemnatory nature. For corporate individuals, with their particular sensitivity to public censure and deprivation of liberty, the threat of imprisonment would not go unnoticed (Furse and Nash (2004: 140)). One should understand here that the 'average white collar criminal fears the shame of a prison term more than a fine, which is not so shameful' (Posner (2000: 89)). She also presumably fears the stigma associated with a criminal conviction more than any embarrassment caused by an adverse decision of a civil court (see Comino (2006: 438)). Furthermore, prison sentences carry a stronger message than (administrative) fines as they are more newsworthy and are more noted by other business people; they therefore arguably reduce ignorance about the law and, according to some, enhance deterrence (see: Liman (1977: 631-632); Lynch (1997: 47); and Werden and Simon (1987: 943)).

[2.17] Even if one accepts that custodial sentences are capable of deterring cartelists more effectively than administrative fines (whether they are imposed on individuals or undertakings), it does not follow that criminalisation of cartel activity should occur. The reason for this is that the introduction and maintenance of criminal cartel sanctions involves considerable costs. These costs must be considered if one is pursuing an objective of achieving economic deterrence of cartel activity. These costs are often overlooked in the literature advocating cartel criminalisation (see however: Reindl (2006); and Whelan (2007)). Specifically, one must be able to demonstrate that the criminalisation of cartel activity generates more benefits than costs. (Or more accurately, that criminal cartel sanctions are capable of being imposed where their marginal cost is equal to

their marginal benefit.) This is not an easy task to do. In fact, it is one of the most difficult challenges facing those who advocate the employment of criminal cartel sanctions for reasons of deterrence.

[2.18] The problem is that one does not have accurate measurements of the exact costs and benefits of criminal antitrust sanctions. According to the OECD (2003a: 7):

> [a]necdotal evidence exists that criminal sanctions against individuals can have deterrent effects. There is, however, no systematic empirical evidence available to prove such effects, and to assess whether the marginal benefit of introducing sanctions against individuals (in the form of less harm from cartel activity) exceeds the additional costs that in particular a system of criminal sanctions entails (including the costs of prosecution as well as of administering a prison system). There appears to be agreement that it would be virtually impossible to generate the relevant data.

The point to be made here is that cartels, by their very nature, are secret and therefore it is difficult, if not impossible, to determine the exact number of cartels in operation at any given time. A fall in the number of cartels detected in a given regime does not mean that fewer cartels are in existence than previously. Likewise an increase in the number of cartels detected does not mean that more cartels are in existence than previously. This is unfortunate: (a) it is impossible to compare the number of cartels in existence prior to criminalisation in a given jurisdiction to the number of cartels post-criminalisation; (b) it is impossible to compare the number of cartels in existence prior to decriminalisation in a given jurisdiction to the number of cartels post-decriminalisation; and (c) it is impossible to compare the number of cartels in existence when a jurisdiction is contemplating criminalising/decriminalising cartel activity to the number of cartels that exist once a decision is made about the existence of criminal cartel sanctions. (In fact, to this author's knowledge, no systematic empirical analysis of this issue has been conducted in those (EU) countries which have criminalised, decriminalised, or contemplated criminalising or decriminalising cartel activity.) Consequently, there is an inherent weakness in the pro-criminalisation argument based on economic deterrence theory: it lacks firm empirical evidence to back up its theoretical claims.

[2.19] Notwithstanding the above, the UK authorities in particular have attempted to create (limited) empirical evidence concerning the impact of criminal sanctions regarding competition law compliance (see Furse (2012: 36-38)). In doing so, they replied upon surveys conducted with business people and/or lawyers. In a 2007 report (OFT (2007)), the threat of *criminal* penalties were ranked as the number one sanction by both businesses and lawyers in terms of their importance in deterring competition law infringements. A later survey (OFT (2010)), which focused on large businesses with compliance programmes in place and involved 22 interviews found that criminal sanctions were helpful in 'encouraging individuals to focus on competition law compliance'. In fact, a majority of respondents were concerned about the existence of criminal cartel sanctions in the UK:

> [m]ost respondents also said that they and individuals within their organisations were concerned about the implications of personal sanctions such as criminal penalties…. Most respondents said that discussions of personal sanctions was a helpful way to get the attention of individuals in the business when discussing competition law compliance (OFT (2010: [4.17])).

A 2011 report (OFT (2011)) involved analysis of responses from 809 firms and found that the three most important factors in achieving deterrence of competition violations were reputational damage to the company, criminal sanctions for individual cartelists and fines on the company. Admittedly the robustness of the methodologies of these types of empirical studies can be questioned (see, e.g., Furse (2012: 36)).

[2.20] Despite the inherent vulnerability of the deterrence-based pro-criminalisation argument due to secret nature of cartel activity, there are relatively robust theoretical arguments supporting the assertion that criminal cartel sanctions are at least *capable* of generating more benefits than costs.

[2.21] First, the imposition of administrative fines also involves costs; any reduction in the use of an administrative 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 fewer

(administrative) fines would thereby be recovered, nothing is preventing the criminal regime from also employing this particular 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, such fines could even be increased to cover some of the costs of the criminal regime.

[2.22] Second, the benefits of criminal sanctions in terms of reductions in cartel activity could well be substantial. According to some commentators, imprisonment is a very effective measure that delivers a considerable degree of deterrence. The US is often put forward as the example in chief, with its enormous success in deterring cartelists through criminal sanctions, as evidenced by, *inter alia*, the reluctance of global cartelists to embrace the US market and the success of its criminal immunity programme (see, e.g.: Wils (2006: 83); and Calvani and Calvani (2011: 193)). Any increased powers of investigation due to criminalisation also presumably improve the rate of discovery of (secret) cartels and thus help to add to the beneficial effect (see Markham (2012: 124)). As (international) cartel activity involves significant harm to society estimated at billions of dollars annually (OECD (2002b: 90)), even the prevention/termination of only a few major (potential/actual) cartels would be likely to 'save' exorbitant amounts of societal wealth.

[2.23] Third, useful methods of increasing the benefits and reducing the costs of criminal enforcement exist. For a start, one can ensure that the custodial sentence is only as long as necessary to achieve its deterrent effect. The desire of cartelists to avoid the unpleasantness of prison is often reported. They, like other white collar criminals, may well be 'unprepared for the emotional and physical trauma of prison': Szockyj (1998-1999: 490). If true, relatively short sentences may be sufficient for optimal deterrence and incarceration costs can be kept to a minimum, as can the cost of keeping usually productive business people out of the economy. In addition, 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. The successful use of plea-bargaining and individual criminal immunity programmes has some potential to reduce significantly the costs of investigation, prosecution and incarceration. Plea-bargaining leads to guilty pleas and, *inter alia*, reductions in the costs of both the resultant trials and incarcerations. Leniency/immunity, 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 (Wils (2007)). Another relevant technique would be the imposition of cost orders upon the convicted cartelist. This particular technique has been introduced in Ireland in order to reduce the public costs of criminal cartel enforcement (Whelan (2013b)). Section 2(h) of the Competition (Amendment) Act 2012 provides that when a person is convicted of a (criminal) offence under the Competition Act 2002, the court shall order the offender to pay to the relevant authority the costs incurred concerning the investigation, detection, and prosecution of the offence, 'unless the court is satisfied that there are special and substantial reasons for not so doing'. An example of a special and substantial reason for not imposing such orders in a given case could be the desire to ensure that the punishment meted out to the convicted cartelist is not disproportionate to her actions.

[2.24] Taken together, all of the arguments presented above construct a strong case for the use of criminal sanctions (custodial sentences) to achieve the deterrence of cartel activity. This is not to say, however, that both economic deterrence theory in general and its specific application to cartel activity do not display inherent limitations. It should also be clear that there are a number of disadvantages to the use of criminal cartel sanctions. The limitations of economic deterrence theory and these other disadvantages should be evaluated before any decision is made by a jurisdiction contemplating the criminalisation of cartel activity. As the aim of this chapter is merely to articulate the theoretical justifications for cartel criminalisation, these issues are considered in Chapter 5 of this report.

Retribution

[2.25] An alternative justificatory theory for criminal cartel sanctions is the theory of retribution. In essence, theories of retribution hold that punishment ought to be justified not by reference to its ability to prevent future crime but rather because human beings are responsible for their actions and must thus receive what they deserves when they have made what society deems are wrong choices (Packer (1968: 37)). 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 (Galligan (1981: 144)).

[2.26] To investigate whether a retribution-based case for cartel criminalisation can be made out it is essential that one establish the extent to which cartel activity displays negative moral content. Moral content can be determined by considering, *inter alia*, the social harmfulness of her conduct and whether her conduct is 'morally wrongful' (in the sense that it violates prevailing norms in society): Green (2006). If cartel activity has negative moral qualities this will also be useful for those who advocate introducing criminal cartel sanctions for reasons of deterrence: it helps to ensure that they do not run into claims of over-criminalisation (see Whelan (2013a)).

[2.27] It is not really disputed that cartel activity has the potential to cause serious social harmfulness. Social harm in this context can be defined generally as the 'negation, endangering, or destruction of an individual, group or state interest which was deemed socially valuable' (Dressler (2001: § 9.10[B])), where an interest refers to something in which one has a stake (Green (1997: 1549)). Cartels reduce competition on a given market and have the potential to reduce or eliminate the gains which such competition secures (Breit and Elzinga (1989: 12); OECD (2003a); OECD (2002a); OECD (1998)). From a welfare perspective, a successful cartel (particularly if it involves all market participants) 'leads to the same market outcome as a monopoly and therefore causes similar types and degrees of allocative, productive, and dynamic inefficiencies': Hüschelrath (2010: 523). The specific effects of cartel activity are detailed above at [1.4]. In short, cartel activity strikes 'a killer blow at the heart of healthy economic activity': Kroes (2006). In other words, cartel activity has a negative impact upon a socially valuable interest, *viz.* the successful operation of a free market.

[2.28] What is more controversial is the claim that cartel activity inevitably involves morally wrongful conduct. One can argue, however, that cartel activity can amount to morally wrongful conduct in that it violates one or more of the moral norms against stealing, deception or cheating (see Whelan (2013a)).

[2.29] Stealing can be defined as an intentional and fundamental violation of another's rights of ownership in something that is capable of being bought or sold (Green (2006: 89-91)). The argument that cartel activity amounts to stealing is based on the claim that the thing capable of being bought or sold is the cartel overcharge and that consumers (not the cartelists) have the right

of ownership in the overcharge. The claims that the overcharge is something that is capable of being bought or sold is sound: the money represented by the cartel overcharge can be used to buy goods or services. The claim that the consumer has a right to this overcharge is more difficult to substantiate. One could argue that, irrespective of their legal rights, consumers are entitled to a competitive price for the goods/services on the market; that, for example, due to the endorsement of free market economics by the majority of European citizens, consumers have a right to a competitive market. If so, their 'right' to the overcharge could be established. It is difficult, however, to pinpoint exactly how and when such a right is created, hence the room for disagreement. It might be best in these circumstances to consider the role of the law. The rules of EU competition law, for example, may be interpreted as providing consumers with the right to the overcharge; this would arguably be the case if these rules establish a consumer welfare standard concerning the assessment of potential anticompetitive conduct. For some, a consumer welfare standard has already been established under EU law (see, e.g.: Malinauskaite (2007); and Cases T-213/01 and T-214/01, *Österreichische Postsparkasse AG v. Commission* and *Bank für Arbeit und Wirtshaft AG v. Commission* [2006] ECR II-1601, [115]). According to the (then) Commissioner for Competition, 'consumer welfare is now well established as the standard the Commission applies when assessing … infringements of the Treaty rules on cartels': Kroes (2005). Admittedly, however, the legality of such an approach can be questioned following the judgment of the Court of Justice in *GlaxoSmithKline* (Joined Cases C-501/06 P etc., *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291), and debate concerning the appropriate welfare standard in EU competition law continues. The essential point here is that the debate on whether cartel activity can be interpreted as a form of stealing cannot be divorced from the debate on the appropriate standard to be adopted in antitrust cases (i.e., consumer welfare or total welfare).

[2.30] If consumers are indeed deemed to have a right in the overcharge, one would still need to prove two further things to demonstrate that cartel activity can be likened to stealing: that cartel activity involves a fundamental violation of that right; and that the cartelist intends to violate fundamentally the rights of consumers. A fundamental violation is easy to prove: the cartelist (or more accurately her firm) will keep the overcharge and therefore substantially interfere with the victim's ability to use or possess her property. In fact, if the cartel is successful and the cartelised product is purchased, the victim would be completely incapable of exercising her rights of

ownership in the overcharge. One should be aware that a fundamental violation will not be present where the cartel agreement in question is formed but not implemented: by creating a cartel agreement, the cartelists will only have agreed to violate the rights of its customers; to actually violate them they must put the cartel into practice. Consequently, if the criminal cartel offence is necessarily to capture conduct which amounts to a violation of the moral norm against stealing, its scope should not extend beyond the implementation of a cartel to the mere agreement to implement a cartel.

[2.31] It is difficult to come to a definitive conclusion on whether cartel activity inevitably involves a cartelist's intentionally violating the rights of consumers in the overcharge. The reason for this is that there is a scarcity of robust empirical evidence on the motivations of cartelists (for a general overview of the existing evidence, see Parker (2011)). However, if one assumes that a cartelist is rational in her behavior then it is possible to argue that a cartelist intends to violate the rights of consumers in the overcharge. A rational cartelist can be deterred from engaging in a given conduct if the cost to her of such conduct is greater than its benefit, and the existence of a cartel implies that, if rationality is indeed present as assumed, engaging in cartel activity results in a net gain to the cartelist (or more accurately to her company). Following this line of argument, as cartels exist in practice, they must therefore be perceived as profitable to the relevant cartelists. But how exactly are they profitable? They are profitable because the cartelist obtains all or part of the overcharge (for her company). The desired objective of maximising profit (i.e., rationality) therefore manifests itself in a direct intention to obtain all or part of the overcharge. In other words if rational choice theory holds the mere existence of cartels dictates that cartelists intend to obtain the overcharge: the overcharge is a *means* of obtaining profit maximisation. But for this to be the case, the assumption of rationality must be a realistic assumption in practice. To the extent that it is not, the above argument is weakened.

[2.32] Accordingly, there is an argument that cartel activity is similar in nature to a violation of the norm against stealing. For this to be so, however, one must grant rights to the overcharge in consumers (through, for example, pursuing a consumer welfare approach to antitrust law) and one must define cartel activity to exclude the mere entering into a cartel agreement (i.e. the concept of cartel activity must only extend to the implementation of a cartel agreement). In addition, in the absence of solid empirical data, one is forced to rely upon theoretical arguments

about the intentions of cartelists and accept the assumption that cartelists are rational in their behaviour.

[2.33] Deception occurs where (i) a message is communicated, with (ii) an intent to cause a person to believe something that is untrue and (iii) a person is thereby caused to believe something that is not true (see: Adler (1997: 437); and Green (2006: 76)). When the cartelist *expressly states* to her customer that she *has* colluded with her competitors, it is clear that there will be no deception: the cartelist is merely telling the truth and elements (ii) and (iii) of deception will not be present. This might sound obvious but it can influence the definition of a criminal cartel offence: to line the criminal cartel offence up with the moral norm against deception one would be advised to 'carve out' from the offence the publication of cartel agreements prior to their implementation (see Section 47 of the Enterprise and Regulatory Reform Act 2013 (UK)). When the cartelist *expressly states* that she *has not* engaged in cartel activity it is relatively easy to argue that her actions amount to deception (unless of course she has forgotten about the cartel activity and therefore does not intend to mislead). Lies about the existence of cartels by the cartelists are unlikely to occur in practice, however: cases where cartelists provide statements such as 'no need to worry, our prices have not been determined by collusion' will be rare. A possible exception may be where official statements concerning the absence of collusion when preparing tenders are provided to secure government procurement contracts. This occurs in Germany, where bids responding to public calls for tender, or to calls for tender addressed to at least two entities, 'contain either an express or at least an implied representation that the bids are not rigged': Wagner-von Papp (2011: 165). The difficult scenario concerning cartel activity and its possible link with deception is when the cartelists *say nothing* about the cartel to their customers. That scenario is the one that exists most often in the real world.

[2.34] When cartelists *remain silent* about their cartel a more complicated analysis concerning deception is presented: the message here is more subtle, in that it does not *expressly* comment on the absence or otherwise of cartel activity; and the mechanism through which the message occasions a false belief is less robust. The message communicated by a cartelist when active in a market is that her (cartelised) goods/services are available for sale. This message is a literal truth: the goods are indeed for sale. This is not a problem though, as literally true statements are

capable of being deceptive (see Adler (1997)). What is required is that the message communicated leads to a false belief. The false belief is that cartel activity has not occurred; it is created due to an *assumption* made by third parties as a result of the communication of the original message. The assumption is that the cartelist is lawfully engaged in normal competition with her competitors. In short, by placing her (cartelised) product on the market and by keeping the cartel secret, the cartelist implies that she has not actually cartelised. This point has been argued by Lever and Pike (2005: 95), who posit that:

> in many situations today third parties who deal with undertakings that are in fact parties to cartel agreements will proceed on the *assumption* that they are dealing with undertakings that are lawfully engaged in normal competition with each other; and the cartelists will know that that is so and will, in effect, act in a dishonest … manner, if the existence of the cartel is kept secret.

The weakness in this argument is that there is no empirical evidence to support the claim that customers assume that their suppliers/retailers do not engage in cartel activity. However, this may not be problematic if: (a) consumers know that cartel activity is unlawful; and (b) if those consumers assume that, *in the absence of contrary evidence*, sellers/retailers respect the law. The assumption about sellers'/retailers' respecting the law could be conceptualised as the popular (rather than the legal) manifestation of the principle of the presumption of innocence, a principle that is likely to exist in the minds of rational, educated people.

[2.35] The final element that needs to be investigated when cartelists remain silent is whether by remaining silent they actually *intend* to mislead their customers. While an intention to mislead may well be inferred from the conduct of cartelists in those (detected) cartels involving sophisticated methods of concealment, the same issues of empirical assessment of the cartelist's direct intention are nonetheless present in this context as with the moral norm against stealing: the intentions of cartelists have not been determined definitively on the basis of empirical evidence. Likewise, to fill the empirical gap, one can also link the relevant intention (*viz.*, an intention to mislead) to a direct intention which is supported by robust theoretical arguments concerning cartel activity (an intention to make profit). Misleading the customer about the existence of the cartel (by remaining silent) helps to protect the reputation of the firm and to keep

the existence of the cartel secret (thereby protecting the firm from a fine). Causing a false belief through silence may therefore represent a *means* of achieving profit, itself a likely desired end of cartel activity for the majority of cartelists, and hence represents a direct intention in its own right. If accepted, this line of argument facilitates the claim that cartel activity can amount to deception.

[2.36] There is an additional limitation about the argument that cartel activity amounts to deception. The scenario where cartelists remain silent about their cartel activity requires the customer to have a *false* belief that a product's price is its competitive price merely through the offering of that product by the cartelist. Again for the belief to be false, the product in question must *in fact* be overpriced due to collusion. To link a criminal cartel offence to the violation of a moral norm against deception, then, one must therefore ensure that its *actus reus* does not include the mere conclusion of a cartel agreement: it should be confined to the implementation of a cartel agreement (as only then will the product actually be overpriced).

[2.37] To accept that cartel activity inevitably involves deception one must accept a number of assumptions, as detailed above. In addition, in order for any criminal cartel offence to encompass a violation of the moral norm against deception, one must ensure that such a cartel offence: (a) does not apply to a situation where the existence of the cartel was made public prior to its implementation; and (b) does not extend to the mere conclusion of a cartel agreement but only encompasses the actual implementation of a cartel agreement.

[2.38] Cheating occurs where a natural or legal person has: (i) violated a fair, legitimate and fairly enforced rule, with (ii) the intent to 'obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship': Green (2006: 76). Cartel activity can arguably be interpreted as a form of cheating. The 'rule' is represented by the prohibition on price-fixing, output restriction, market-sharing and bid-rigging ('the cartel prohibition') in Article 101 TFEU and/or national equivalents. The criteria of legitimacy and even-handedness are institution-specific. It is assumed that the relevant authorities are indeed legitimate and that their enforcement of the cartel prohibition would be even-handed. Concerning fairness, what is in question here is whether the *existence* of the rule itself is inherently unfair. The existence of the rule is not unfair. First, the restriction upon the freedom of action of the potential cartelist is very

narrow in scope. While the rule prohibits cartelists from agreeing to fix prices, restrict output, divide markets or bid-rig (i.e., from cooperating on business decisions), it does not prohibit them from cooperating on business functions, such as research or distribution. Market actors, then, are not prohibited from engaging in cooperative ventures in which their activities are integrated in a manner reasonably expected to generate efficiencies (see Werden (1998: 712-715)). Second, the power to prevent cooperation on business decisions is not absolute: if market actors are determined to cooperate with their competitors on business decisions, then, provided that the relevant merger control rules are not violated, they may formally merge their respective firms with those of their competitors. Third, if in the unlikely event that the cartel activity leads to efficiencies, the cartelist may be granted an exemption (or may benefit from an exception) from the operation of the cartel prohibition. Whether this is the case will depend upon how the actual cartel offence is drafted. One could, for example, expressly provide for an (automatic) Article 101(3) TFEU-type exception from criminal liability for those (very rare) cartel agreements that possibly generate net gains for consumer welfare (see, eg, the Irish Competition Act 2002, Section 6(4)). Such an exception would prevent the punishment of a cartelist for engaging in utility-enhancing activity. Fourth, violation of the cartel prohibition rarely occurs through ignorance of the law and the activity involved is relatively easy to comprehend (see Whelan (2012a)). Unlawfulness is therefore understood by business people. Finally, given the harm caused and the very low probability of an increase in consumer welfare, it is not unreasonable to introduce and maintain the cartel prohibition. For these reasons, the first limb in the definition of cheating is relatively unproblematic.

[2.39] The ‘unfair advantage’ at issue with cartel activity can be exercised by the cartelist over not only her competitors and customers, but also the final consumers. She exercises it over her *competitors* who have not engaged in cartel activity: the advantage is the avoidance of the type of self-restraint which is exercised by the non-cartelist competitor in deciding not to enter into a cartel, a self-restraint that is exercised to ensure that the market functions correctly and to the benefit of all. The same advantage would exist regarding the *customer* of a cartelist who is also a firm operating on a market, provided that she did not cartelise the upstream or downstream market: she would be exercising a self-restraint in not violating the rule. The advantage exercised over the *final customers* would be the avoidance of the self-restraint necessary to adhere to the rule prohibiting cartel activity – a self-restraint which can be interpreted as the *quid pro quo* for

the final consumers' adherence to a different market-based rule, which they are capable of breaching (such as not submitting a vexatious complaint to the antitrust authorities).

[2.40] The final issue to be discussed is the intention of the cartelist. Even though one should note the same caveat as with stealing and deception (*viz.*, that there is a scarcity of empirical evidence on the intentions of cartelists), the issue of intention is less difficult with cheating that with the other moral norms. Whatever the ultimate objective of a given episode of cartel activity, one thing is clear: exercising one's freedom to engage in that cartel activity is a prerequisite to the achievement of its ultimate objective. To put it another way, one can only obtain the objective (whatever it may be) *through cartel activity* by first breaking the rule prohibiting cartel activity. Consequently, violating the cartel prohibition (i.e., entering into and/or implementing a cartel) will inevitably be the *means* towards the achievement of any objective of cartel activity (eg, profit maximisation, protecting the firm from competition, fitting in at work etc.). A direct intention to achieve one's objectives through cartel activity implies a direct intention to engage in cartel activity. This finding is particularly interesting as the direct intention is not confined to situations where the cartel activity is implemented; by contrast, it covers situations where the cartelist has merely entered into a cartel agreement. This is because: (i) the existence of a cartel agreement itself is a necessary prerequisite to the implementation of a cartel (and is therefore one of the means towards the achievement of any objective of cartel activity); and (ii) the mere entering into a cartel agreement violates Article 101(1) TFEU and/or its national equivalents. As a result, a criminal cartel offence which is aimed at capturing conduct which violates the moral norm against cheating could indeed include an *actus reus* which extends beyond implementation to the initial conclusion of a cartel agreement.

[2.41] Given all of the above, and subject to the caveats noted, there is a case that cartel activity displays immoral qualities and therefore could be an appropriate candidate for criminalisation should retribution theory be chosen as the underlying theoretical justification. This is not to say, however, that both retribution theory in general and its specific application to cartel activity do not display inherent limitations. It should also be clear that there are a number of disadvantages to the use of criminal cartel sanctions. The limitations of retribution theory and these other disadvantages should be evaluated before any decision is made by a jurisdiction contemplating the criminalisation of cartel activity. As the aim of this chapter is merely to articulate the

theoretical justifications for cartel criminalisation, these issues are considered in Chapter 5 of this report.

CHAPTER 3: THE IMPORTANT (DIFFICULT) PRACTICAL ISSUES OF CARTEL CRIMINALISATION

[3.1] It is not enough for those jurisdictions contemplating the introduction of criminal cartel sanctions merely to identify the theoretical justifications for criminal cartel sanctions. To understand fully the complexities of criminal cartel sanctions (and therefore to have a solid knowledge base upon which to decide whether criminal cartel sanctions should be pursued in a given jurisdiction) one should also consider the difficult practical issues that arise when cartel criminalisation is pursued as a cartel law enforcement strategy. In fact, there are a number of difficult practical issues in this context. They include: how to define a criminal cartel offence so that Regulation 1/2003 does not create difficulties in its enforcement; how to define a criminal cartel offence so that legitimate economic behaviour is not within its scope; how to ensure public and political support for the criminalised regime; whether to include a novel enforcement mechanism to support the criminalised regime (namely, a formalised system of plea-bargaining); and how to protect the due process rights of the accused when administrative cartel sanctions exist alongside criminal cartel sanctions.

The Issue of Regulation 1/2003

[3.2] The potential impact of Regulation 1/2003 on the design and operation of a national cartel offence needs to be articulated (see Whelan (2014: Chapter 8)). This is an issue which is unique to the EU Member States. It is also a very important one. Other (non-EU) jurisdictions clearly have the option of designing their criminal cartel offences from 'basic principles', but such an option may be restricted in practice in the EU Member States if Regulation 1/2003 applies to the enforcement of the national criminal cartel law. The extent to which Regulation 1/2003 impacts upon the definition of the national cartel offence clearly needs to be understood by those who wish to ensure that the national cartel offence achieves its objectives in practice: the definition of the offence in question is crucial to the effectiveness of cartel criminalisation. In addition to this, there may be additional good reasons not related to the definition of the offence why one might wish to ensure that Regulation 1/2003 does not apply to the enforcement of the national cartel offence (see Whelan (2012b: 598-599)). If so, conscientious legislators should know what is required in drafting the offence to avoid the operation of Regulation 1/2003.

[3.3] There is an argument that Regulation 1/2003 can influence the definition of a national criminal cartel offence. More specifically, and assuming that Regulation 1/2003 applies to a national criminal cartel offence in the first place, it is arguable that Article 3(1) and Article 3(2) thereof can influence the definition of a national criminal cartel offence, if only in those circumstances where there is an effect on trade between Member States due to the cartel in question. The argument runs as follows. If there is an effect on trade between Member States due to the cartel which forms the substance of the criminal prosecution then the national authority enforcing the cartel offence must also apply Article 101 TFEU: Article 3(1). In doing so, the national authority cannot allow for the application of the national cartel offence to result in a stricter prohibition of the cartel than would occur under Article 101 TFEU: Article 3(2). If the (criminal) cartel in question would not have violated the prohibition in Article 101(1) TFEU, would have fulfilled the criteria of Article 101(3) TFEU or would have been covered by a block exemption then it could not form the subject matter for the national criminal sanction.

[3.4] This particular argument, if accepted, is problematic for national criminal cartel enforcement for a number of reasons. First, it makes the concept of 'effect on trade' relevant in a criminal trial. If EU competition law would be less strict in terms of prohibiting the cartel than the national cartel offence it would be in the interests of the defendant to argue that her cartel had an actual or potential effect on trade in the hope that the criminal judge would apply the 'convergence rule' in Article 3(2) in her favour. In fact, given how broadly this concept is defined, it is not unlikely that a defendant would try to rely upon it to secure a more lenient treatment in the criminal courts. This should be avoided. Indeed, the undesirability of having the effect on trade criterion analysed in a court of law was one of the reasons why the parallel application for national and EU competition law is allowed and why the Commission's original legislative proposal for exclusive application of Article 101 TFEU to agreements etc. having an effect on trade was not followed (see De Smijter and Kjølbye (2007: 98)). Second, it opens the way for economic arguments to be made in the context of a criminal trial, something that the legislator may have been keen to avoid in drafting the criminal cartel offence in such a way that it does not require a finding of a violation of Article 101 TFEU. In particular it brings in the Article 101(3) 'defence' through the backdoor (if it is not expressly contained in the national criminal cartel offence) and (on the assumption that the national criminal cartel offence does not contain a *de minimis* requirement) also provides additional scope for a defendant to argue that

the cartel in question would not have had an appreciable effect on competition, as only agreements etc. with an appreciable effect on competition are prohibited under Article 101(1) TFEU. The problem here is that forcing criminal courts to undertake complex economic analyses not only 'runs counter to our notions of the relative institutional competence of criminal courts as compared with a specialized administrative agency' (Warner and Trebilcock (1992-1993: 690)), but also injects a degree of inconsistency into the law, as it 'leaves open the possibility of inconsistent findings between criminal and civil proceedings arising as a result of differences in economic judgement between a lay jury [and, it is submitted, a non-specialised panel of criminal judges] and a specialist "civil" tribunal': Pickford (2002: 43). Finally, by allowing Regulation 1/2003 to dictate the content of the cartel offence (in particular, by requiring it to provide a defence in the form of Article 101(3) TFEU) the criminalised jurisdiction may be restricted in its ability to generate a moral norm against cartel activity in the hope that cartelists will internalise the norm, thereby reducing the cost of criminal cartel enforcement. When a defence along the lines of Article 101(3) TFEU is provided it may well foster an (arguably already existing) perception among EU citizens that competition law enforcement (including its criminal variant) is about 'satisfying somewhat technical and arcane regulations rather than about preventing conspiracies that cost EU consumers large amounts of money': Massey (2004: 32). In short, the existence of Article 101(3) TFEU as a defence in a criminal cartel regime communicates the message that the criminality of cartel activity (in particular its moral wrongfulness) is ambiguous.

[3.5] The operation (in addition to the content) of a national criminal cartel offence can also arguably be influenced by Regulation 1/2003. There are at least two ways in which this can occur: by virtue of Article 11(6); and by virtue of Article 35 of Regulation 1/2003. Article 11(6) of Regulation 1/2003 contains the European Commission's power to withdraw a case from the national competition authorities. The provision stipulates that the 'initiation by the Commission of proceedings for the adoption of a decision under Chapter III [of Regulation 1/2003] shall relieve the competition authorities of the Member States of their competence to apply' Articles 101 and 102 TFEU. If Regulation 1/2003 applies to the enforcement of a national cartel offence then Article 11(6) of the Regulation has the potential to influence the operation of that national offence. Specifically the Commission, in theory at least, would hold the power to relieve the

prosecuting authority of its competence to lead a criminal cartel prosecution in front of a criminal court, in effect bringing the national criminal proceedings to an end.

[3.6] Article 35(1) of Regulation 1/2003 provides that the 'Member States shall designate the competition authority or authorities responsible for the application of [Articles 101 and 102 TFEU] in such a way the provisions of [Regulation 1/2003] are effectively complied with'. The argument here is that if the criminal courts are not in fact designated as competition authorities for the purposes of Regulation 1/2003, and EU competition law must be applied if the national cartel offence is being enforced (due to the existence of an effect on trade), then those criminal courts will not have the jurisdiction to apply EU competition law and therefore will not have the jurisdiction to apply the national cartel offence. This type of argument was presented by counsel in the criminal prosecution in the UK of BA executives accused of fixing fuel surcharges on long haul flights contrary to Section 188 of the Enterprise Act 2002 (*IB v. The Queen* [2009] EWCA Crim 2575, [19]). It relies upon the assumption that only those national competition authorities and/or national courts designated as competition authorities for the purpose of Regulation 1/2003 have the competence to enforce the provisions of EU competition law. The Court of Appeal in the *IB* case rejected the defendants' argument that the Crown Court did not have the jurisdiction to rule on whether the UK Cartel Offence was committed due to the fact that the Crown Court had not been designated as a competition authority for the purposes of Regulation 1/2003. In so ruling, the Court of Appeal noted that there was nothing in the Regulation itself which states that only a designated competition authority has the competence to enforce EU competition law and that it 'makes excellent sense' for the directly-effective Regulation to enable the Member States to enforce the EU competition law rules without the need for domestic legislation. While this appears to be a sensible approach to the issue, it is obviously not the end of the matter for European antitrust criminalisation. Only a ruling from the Court of Justice in a preliminary reference request would put this question to rest once and for all.

[3.7] As noted above, the impact of Regulation 1/2003 can only be felt if that Regulation actually applies to the enforcement of the national criminal cartel offence in the first place. The question as to when Regulation 1/2003 will apply to the enforcement of a national criminal cartel offence has not been determined by the EU Courts. At present there appears to be two distinct 'schools of thought' on this issue. According to the first school, Recital 8 of the Regulation is central to an

understanding of when Regulation 1/2003 will apply. This Recital stipulates in its relevant part that Regulation 1/2003 'does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced'. Some (e.g., OFT (2004: [4.21]-[4.22])) have interpreted this Recital as meaning that Regulation 1/2003 will not apply to the enforcement of a national criminal cartel offence except when the national criminal offence is also imposed upon undertakings, as then – and only then – will criminal sanctions be the means whereby competition rules applying to undertakings are enforced. This type of interpretation of the applicability of Regulation 1/2003 in this context would clearly not be acceptable to those who wish to see the Commission have the power to influence the operation of competition policy in the Member States (even when it is dictated towards individuals as such rather than undertakings). Indeed in a 2004 letter addressed to the Director General of the Swedish Competition Authority, the then Director General of DG Competition set out the Commission's thinking on the applicability of Regulation 1/2003 to a proposed Swedish national cartel offence and in the process expressly disavowed this interpretation, noting that it 'fail[s] to find any support for such conclusion in the Regulation': European Commission (2005: 3). The other school of thought, by contrast, argues that Recital 8 merely specifies what flows from Article 3(3) of Regulation 1/2003: 'namely that Article 3(1) and (2) of this Regulation do not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by [Articles 101 and 102 TFEU]' (Wils (2006: 74)). What this school of thought in effect proposes is that one should interpret the relevant sentence in Recital 8 to mean nothing more than that the national criminal cartel offence must have the same predominant objective as Articles 101 and 102 TFEU for Regulation 1/2003 to apply to it. If such an interpretation were followed it would be difficult to ensure that the enforcement of the national criminal cartel offence would not provide scope for the (negative) influence of Regulation 1/2003: the offence would need to be constructed in such a manner that one can plausibly argue that the offence pursues a predominant objective that is different to the objective of the EU competition law rules.

[3.8] In order to avoid any negative impact of Regulation 1/2003 one has two choices in the drafting process. First, one can rely upon the argument that Regulation 1/2003 only applies to the enforcement of the national cartel offence if that offence can also be committed by undertakings.

Accordingly, by ensuring that the national criminal cartel offence can only be committed by individuals, one can avoid the application of Regulation 1/2003. Second, if one were swayed by Wils's interpretation of the legal situation, one could create a criminal cartel offence that does not pursue the same predominant objective as the EU competition law rules (which could be deemed to be as broad as the protection of competition on the market, for example). One possible way of 'engineering' a different predominant objective for the criminal cartel offence to that involving the protection of competition one the market would be to create the cartel offence on the basis of an explicit moral concept (Whelan (2012b: 599-600)). One could, for example, create a criminal cartel offence that necessarily captures the moral wrongfulness of cartel activity by creating an express link between cartel activity and the violation of one or more of the norms against stealing, deceiving and cheating. For example, before imposing criminal cartel sanctions, one could require proof that the cartelist intended to mislead customers, therefore ensuring that punishing cartel activity is about punishing deception (and not about protecting the competitiveness of the market). Admittedly, such an approach, while operationalising the justificatory theory of retribution more fully, could easily run counter to the achievement of deterrence: additional definitional elements present *additional* hurdles for antitrust enforcers, and *ceteris paribus*, a given amount of resources will most likely produce fewer successful prosecutions if a criminal cartel offence requires proof of additional definitional elements. Moreover, the 'engineering' process may not work in practice: depending on the rules of legal interpretation in existence in a given jurisdiction, its judicial authorities may look beyond the exact definition in the cartel offence to green and white papers, consultation documents, responses to consultation documents, legislative debates, draft legislation etc., all of which may reveal that a predominant purpose to the introduction of a criminal cartel offence is in fact to prevent anticompetitive conduct in order to protect the functioning of markets.

[3.9] The above two choices may seem unsatisfactory to some, particularly if they are concerned about the potential negative impact of Regulation 1/2003 on the enforcement of the national criminal cartel offence and are concerned about the lack of guidance from the EU Courts as to when Regulation 1/2003 may apply to the enforcement of national criminal cartel offences. If so, they can take some comfort in the following: an additional strategy can be employed to avoid the negative impact of Regulation 1/2003. Specifically, one could ensure through enforcement policy that the cartels that the authority prosecutes are always local in nature and do not have an

effect on trade. This would ensure autonomy in practice for the criminalised jurisdiction over the content and the operation of the criminal cartel offence: the existence of Regulation 1/2003 only becomes problematic when the cartel being prosecuted has an effect on trade. It is arguable that Ireland has pursued this policy to date in its criminal cartel enforcement activities (see: Massey and Cooke (2011: 128); and Furse (2012: 187)). Unfortunately, such a strategy would also bring with it a number of problems concerning the achievement of the underlying criminal enforcement objectives. For a start, if business executives are aware of such an enforcement policy then they will be incentivised to engage in cartel activity on a large scale (which ensures an obvious effect on trade) as they will know that criminal sanctions will not be pursued against them. This clearly reduces the deterrent effect of the law. Such a policy would also cause problems with the achievement of retribution as the most serious cartels (i.e., those with an effect on trade and, therefore, presumably with the highest degrees of social harmfulness) would not be subjected to criminal punishment, unlike the less serious, localised cartels. Such an enforcement policy would clearly not be ideal.

[3.10] Before moving on to the issue of avoiding the criminalisation of legitimate economic behaviour, one should note here a particular issue regarding Regulation 1/2003 and the concept of European cartel criminalisation: that some commentators believe that the information exchange regime created by (Article 12 of) Regulation 1/2003 is problematic when criminal cartel sanctions exist in some EU Member States and administrative sanctions exist in other Member States. In fact, it has been argued that the *mere co-existence* of criminal and administrative sanctions within the EU inevitably places a major obstacle in the way of information exchange within the ECN. For Perrin (2006: 555), in particular, Article 12(3) of Regulation 1/2003 results in 'a considerable fracture in the supposedly unified EU Network into two distinct networks whose *fault-line* is based on the decision of Member States to impose custodial [antitrust] sanctions'. He believes that EU jurisdictions imposing custodial sanctions for antitrust offences 'will find themselves *excluded* from the larger EU Network and demoted to the smaller EU Network of like-minded Member States'. The present author respectfully disagrees with this particular argument, for two reasons. First, the Article 12(3) prohibition on the use of exchanged information to secure custodial sanctions in the receiving state only extends to the use by the *receiving* Member State of such information *in evidence*. Indeed, Member States may legally send information to other Member States (who impose custodial sanctions) in

order to facilitate the latter in *its investigation* of a violation of Article 101 TFEU. Furthermore, the receiving Member States (who impose custodial sanctions) are legally entitled to use such information to detect and to obtain proof of — rather than to use as evidence of — a violation. Second, there is no formal or informal punishment mechanism which can be used against those Member States without criminal antitrust sanctions who transfer information to Member States with criminal sanctions where the latter then decide to use that information in evidence to secure custodial sentences. In other words, there is no negative 'fallout' for the sending Member State. Rather, all that Article 12(3) of Regulation 1/2003 does is ensure that the receiving Member State will be restrained in its employment of the information: it does not ensure that such information will not be exchanged in the first place. If information is used in a manner which is inconsistent with Article 12(3) of Regulation 1/2003, it is the receiving Member State – not the sending Member State – which will be at fault, as such. Given these two facts, it is not exactly clear why the mere exchange of information through the ECN will result in the creation of a two-tier entity. Incidentally, and to this author unsurprisingly, the Commission's report into the functioning of Regulation 1/2003 (see: European Commission (2009a); and European Commission (2009b)) did not contain any support for Perrin's argument about the creation of a two-tier ECN.

Avoiding the Criminalisation of Legitimate Economic Behaviour

[3.11] The legislature which is responsible for drafting a given national criminal cartel law is required to make a decision about how to deal with 'acceptable' (i.e., legitimate and/or efficiency-enhancing) cartel activity. If the OECD definition of cartel activity noted in Chapter 1 were to be used to construct a national criminal cartel offence it is likely that the resulting offence would be too broadly drawn (Pickford (2002: 36)). One of the reasons for this is that some types of cartels may generate efficiencies that ultimately benefit consumers and that can only be created through the cartel activity or agreement in question. While this is a rare occurrence, the fact of the matter is that civil competition regimes often provide for the legal possibility of an exemption or exception for cartel activity that provides net benefits to society. This is the case with Article 101 TFEU, for example. If one reads the 1998 OECD Recommendation in full, one can see that there is in fact express recognition that 'acceptable' cartel activity may exist:

> the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws (OECD (1998: [2(b)])).

The challenge for the drafters of a criminal cartel offence is how to ensure that 'acceptable' cartel activity is carved out of the criminal offence without making the offence unworkable in practice.

[3.12] There are at least two ways in which what might be deemed to be 'acceptable' cartel activity is regulated by the EU competition law rules. The first involves the employment of the doctrine of 'commercial ancillarity'; the second involves the application of the exception criteria in Article 101(3) TFEU.

[3.13] There are a number of judgments from the EU Courts that demonstrate that 'it is possible to argue successfully that restrictions which are necessary to enable the parties to an agreement to achieve a legitimate commercial purpose fall outside Article 101(1) TFEU': Whish and Bailey (2012: 129). This alone has the potential to influence how one might approach drafting a national criminal cartel offence, particularly if one is concerned about the issue of so-called 'acceptable' cartel activity. The 'commercial ancillarity' case of *Remia BV and Verenidge Bedrijven and Nutricia v. Commission* (Case 42/84, [1985] ECR 2545), for example, demonstrates that use of the OECD's definition of cartel activity (in OECD (1998: [2(a)])) to create a national cartel offence ensures that 'acceptable' cartel activity under the EU competition rules can actually fall within the scope of that criminal cartel offence. In that particular case, the Court of Justice, in ruling on a non-compete clause in an agreement for the sale of a business, held that while such a non-compete clause could be within the scope of Article 101(1) TFEU – and, if so, void – it would fall outside of Article 101(1) TFEU if it is 'necessary for the transfer' of the business concerned and if its 'duration and scope' is 'strictly limited to that purpose'. An agreement of a (potential) competitor not to compete in a given market could plausibly be understood as an agreement to reduce capacity (as one competitor will not be supplying a market) or as an

agreement to divide markets (in this case with one undertaking completely conceding a market to another). In other words, a non-compete clause could fall within the prohibited activity in the definition of cartel activity contained in Paragraph 2(a) of the OECD's Recommendation.

[3.14] Article 101(3) TFEU is the provision of EU competition law that provides an exception to the prohibition in Article 101(1) TFEU for those agreements etc. that meet its four criteria, all of which must be fulfilled: Cases 43/82 and 63/82, *VBVB and VVVB v. Commission* [1984] ECR 19, [61]. The burden of proving that the exception criteria are fulfilled lies upon the undertaking or undertakings seeking to defend the agreement etc.: Regulation 1/2003, Article 2. It is clear from the case of *Matra Hachette SA v. Commission* (Case T-17/93, [1994] ECR II-595) that no type of anticompetitive agreement is excluded as a matter of law from the application of Article 101(3) TFEU, and therefore there is no legal rule that would prevent an undertaking seeking to rely upon an agreement etc. from arguing that the criteria in Article 101(3) TFEU are fulfilled concerning that agreement etc.

[3.15] Both of these techniques of dealing with 'acceptable' cartel activity bring problems in the context of European cartel criminalisation. The reason for this is that they inherently involve some form of economic assessment. As noted above, forcing criminal courts to undertake complex economic analyses not only 'runs counter to our notions of the relative institutional competence of criminal courts as compared with a specialized administrative agency' (Warner and Trebilcock (1992-1993: 690)), but also injects a degree of inconsistency into the law, as it 'leaves open the possibility of inconsistent findings between criminal and civil proceedings arising as a result of differences in economic judgement between a lay jury [and, it is submitted, a non-specialised panel of criminal judges] and a specialist "civil" tribunal': Pickford (2002: 43). An ideal solution to this issue would involve the 'carve out' of 'acceptable' cartel activity from the criminal cartel offence in a manner that does not depend upon the decision-maker in a criminal trial undertaking economic analyses.

[3.16] One method of 'carving out' so-called 'acceptable' cartel activity from the criminal cartel offence would be the creation of a 'white list' of agreements. This approach would ensure that certain agreements (specified by type rather than by their economic effects) would not fall within the scope of the criminal cartel offence. The UK Department of Business, Innovation and Skills

proposed this approach as a potential option in the reform of the UK Cartel Offence in their March 2011 Consultation Document (BIS (2011)). In doing so, it noted that such an approach had been adopted in Australia and Canada and that it would be capable of generating the following advantages. First, it would 'limit the offence by making clear that it does not apply to certain kinds of arrangements in respect of which it may be easiest to argue that they have countervailing beneficial effects that outweigh any detriment to competition': BIS (2011: [6.35]). Second, it 'would also provide added business certainty by excluding the commonest forms of potentially beneficial arrangements from the scope of the offence': BIS (2011: [6.36]). In its final report on the consultation, BIS reported that the majority of respondents did not favour the creation of a 'white list' of agreements: BIS (2012). The reasons provided are compelling. The respondents were worried that such an approach 'might result in an offence that was narrower than it need be, that it could give rise to interpretational difficulties, and that it would risk not adequately differentiating the offence from the civil antitrust prohibitions': BIS (2012: [7.13]). In addition, they believed that it 'would run contrary to the current approach of EU legislators, who no longer favour the use of white lists because they create uncertainty for business when agreements do not exactly meet their criteria': BIS (2012: [71.4]). Finally, some respondents also opined that 'if there was a white list of types of agreement carved out from the offence, this may well lead to more economic argument in criminal trials, rather than less': BIS (2012: [7.14]). It is submitted that a better approach to this issue needs to be identified.

[3.17] The BIS consultation identified another approach that, it is submitted, resolves the issue at hand in a reasonable manner. The BIS Consultation Document (BIS (2011)) also proposed as a possible reform of the UK Cartel Offence the 'carve out' of agreements made openly. This was later refined in the final report as the 'carve out' of those agreements which 'the parties have agreed to publish in a suitable format before they are implemented, so that customers and others are aware of them': BIS (2012: 66). This approach was advocated by BIS and appears in Section 47 of the Enterprise and Regulatory Reform Act 2013. Accordingly, the following are circumstances in which (from April 2014) the UK Cartel Offence will not be committed:

> (a) in a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, customers

would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected,

(b) in the case of bid-rigging arrangements, the person requesting bids would be given relevant information about them at or before the time when a bid is made, or

(c) in any case, relevant information about the arrangements would be published, before the arrangements are implemented, in the manner specified at the time of the making of the agreement in an order made by the Secretary of State.

[3.18] This type of approach is not unique to the UK. In fact, something very similar was proposed in Canada in order to resolve problems with its criminal cartel offence: Warner and Trebilcock (1992-1993). To this author, there is no obvious reason why such an approach could not be adopted in jurisdictions belonging to different legal families (e.g., in a jurisdiction belonging to the civil tradition). In fact, it is submitted that such an approach should be adopted by those jurisdictions which are serious about using criminal cartel sanctions to enforce cartel prohibitions without 'chilling' legitimate economic conduct: Whelan (2012b). A criminal cartel offence that prohibits price-fixing, output restrictions, market sharing and bid-rigging while allowing for a 'carve out' of agreements made openly would not require a decision-maker to assess the economic effects of an agreement to find that the offence has been committed. However it also provides scope for the operation of the 'commercial ancillarity' doctrine as well as for the operation of Article 101(3) TFEU. In short, it can *indirectly* provide immunity from criminal sanctions for those who conclude agreements that would benefit from an exception under Article 101(3) TFEU and for those who believe that the doctrine of 'commercial ancillarity' would be fulfilled under the EU competition law rules. If cartelists genuinely believe that their cartel agreement would benefit from an exception (as it would fulfil the criteria of Article 101(3) TFEU) or that it would fulfil the criteria specified by the Court of Justice in implementing the 'commercial ancillarity' doctrine, all they have to do to avoid criminal sanctions is to publish publicly the agreement prior to its implementation or to notify the competition authority of its existence prior to implementation. Accordingly, no economic evidence needs to be presented to a jury for an Article 101(3)-type exception to be operationalised or for the 'commercial ancillarity' doctrine to be applied. What is necessary is that *before coming to any agreement* the cartelists analyse the agreement contemplated and make

their decision (based on legal advice if necessary) whether those methods of dealing with 'acceptable' cartel activity would be applicable to it under (civil) EU competition law. If so, and they wish to conclude and to implement the agreement, they should publish the agreement (prior to implementation) and avoid criminal sanctions. If they are correct in their analyses about ancillarity or Article 101(3) TFEU the undertakings for whom they work will also avoid administrative sanctions, such as fines.

[3.19] Critics might say that cartelists will 'short circuit' the criminal antitrust regime by routinely making public all of their cartel agreements, thereby nullifying the deterrent effect of the criminal cartel sanctions. This is unlikely as presumably the cartelist wishes to see the cartel actually work in practice (and not receive fines and/or the negative publicity that would presumably follow). If so, they would be reluctant to bring the cartel to the attention of those who enforce the administrative cartel prohibitions. However, if (in the very unlikely case that) cartelists do decide to make their (clearly unlawful) agreement public merely to avoid criminal sanctions, the following positive effect would register: the veil of secrecy surrounding the cartel would be pierced, thereby increasing the rate of detection of unlawful cartels for the purposes of the enforcement of Article 101 TFEU or a national equivalent (and with it the deterrent effect of the administrative offence). This increase in the rate of detection (if it were to occur) would undermine the need for criminal sanctions to deter cartel activity in the first place (as the optimal fine would be reduced significantly). Hence the 'short circuiting' if it were to occur (which, again, is unlikely anyway) would not be overly problematic – at least when deterrence is the underlying objective of the criminal cartel sanctions. In addition, if such 'short circuiting' were to occur its impact on the achievement of retribution is not as powerful as one might first imagine. In particular, the carve out of agreements made openly is in fact required in order to ensure consistency between cartel activity subjected to criminal sanctions and the violation of the moral norm against deception.

Ensuring Public and Political Support

[3.20] Sufficient support for the objectives of the criminal antitrust regime is required from all stakeholders, including the judiciary, antitrust prosecutors and the public at large: 'achieving broad community support is critical' to the success of a policy of cartel criminalisation: King

(2010: 1). In the absence of such support, one risks the provision of insufficient resources for antitrust enforcement efforts and/or nullification of the law.

[3.21] To secure the required support, one must engage in educative efforts. As noted by the OECD (2002b: 5), 'improving public knowledge about the nature of [cartel activity] and the harm that it causes would bolster popular support for more effective action against it'. More specifically, 'regulators have to be able to develop an effective outreach programme to the media, political class, and public to explain why price-fixing is so damaging and why heavy penalties are required': Riley (2007: 2). So, to secure support for the criminal antitrust regime, one must therefore demonstrate to all of the stakeholders that a policy of criminalisation has merit: one must explain the theoretical justifications for criminalisation. Such educative efforts could be conducted through workshops, public awareness campaigns, news releases, television interviews and media publicity (OECD (2005: 18-20)). They could even involve the introduction of novel aspects to the national educational curricula. The reporting of criminal antitrust cases is also very important (Wagner-von Papp (2011)), as is the actual securing of prosecutions (Fingleton *et al.* (2007)).

[3.22] Whatever form such educative efforts take, they will be limited as a result of the nature of cartel activity. The nature of cartel activity is challenging in three respects: (i) the harm is often 'diluted' across many different victims; (ii) the individual (as opposed to the aggregate) loss may be minimal; and (iii) the identity of the victims may be difficult to determine. These combined features of cartel activity may restrict the impact of the educative efforts required when implementing a policy of cartel criminalisation. When cartel activity is perceived as a 'victimless crime', it can be very difficult to get the attention of the general public concerning this conduct, particularly if the media are also disinterested. Added to this is the fact that cartelists may attempt to convince the public that their conduct, as an economic activity, was aimed at the achievement of social objectives, such as the protection of employment. The words of an Australian cartelist are illustrative of this problem:

> [t]he key reason for us to enter into [cartel] arrangements was not to make profits, but for survival and to retain jobs. … I put the interest of the business and the

> employees above my own personal risk. I thought I was acting in the national interest (Parker *et al.* (2004: 47)).

Moreover, it is possible that any desired tendency towards reproach may be assuaged by an admiration for economic and business success; in fact, '[t]he affluent and elite context of business crime and cartel activity may even add a kind of glamour to the public perception of the subject': Harding (2006: 199). It is certainly clear that cartel activity is not as worrying to citizens as crimes such as murder, rape or burglary (Stephan (2011)). Cartels, as a manifestation of corporate wrongdoing, 'simply do not yet give rise to the personal horror that we equate with so many other criminal acts against people and property': Castle and Writer (2002: 23). Consequently, newspaper editors may hesitate to provide decent coverage of criminal cartel trials.

[3.23] To overcome any potential limitations due to the nature of cartel activity, the authorities must act carefully and sensibly in their educative efforts. In particular, they need to be clever in their prioritisation strategies regarding antitrust prosecutions. For Stephan (2011), there are two key elements to this: (a) an initial focus on public procurement involving bid-rigging; and (b) an initial focus on cartels selling to final consumers. For him:

> [p]ublic procurement cases involving bid-rigging provide a useful way of side-stepping the victim hurdle faced in most cartel cases. As tax payers, every reader and viewer automatically becomes a victim paying artificially inflated prices. The direct victims — especially schools, hospitals and the military — are also more likely to capture the popular imagination and spark public outrage. ... Cartels selling to final consumers are also likely to be more newsworthy; members of the public can immediately identify the products, the companies involved and can even determine whether they are potential victims.

Sufficient support for this type of strategy can be found in the US antitrust cases involving bid-rigging in the supply of milk to school children and in the supply of equipment to the military, cases which helped to foster current US public support for criminal antitrust punishment. This strategy also appears to have been adopted in Germany, where the specific offence of bid-rigging

has been created (see Section 298 of the German Criminal Code). Indeed, as some have acknowledged, there is a very good reason to start the process of antitrust criminalisation with an offence focused on bid-rigging: 'in the case of public procurement, the tax-payers' money and usually large stakes are involved': Wagner-von Papp (2011: 180). Obtaining public money through rigged bids is an activity that is easily regarded by society as 'contemptible' (see Kovacic (2006: 52)).

[3.24] The imposition of practically mandatory harsh penalties, including imprisonment, has also been interpreted as a factor leading to support in the US for criminal antitrust sanctions (Baker (2009: 160)). For Joshua (2003: 640), for example, by identifying

> the conduct as meriting imprisonment, the [US] legislators altered the previously deeply-engrained view of many judges that the defendants appearing before them were not criminals but the type of person they would meet at the country club or charity fundraiser. [Footnote omitted.] With the judges having no choice but to hand down jail terms, public, legal and business circles came more readily to regard the conduct in question as unalloyed criminality.

Such an approach could be adopted within a European jurisdiction that wishes to criminalise cartel activity. One needs to be careful here, however. For a start, judges may not take too kindly to efforts designed to restrict their freedom to act in the context of sentencing. In addition, if the penalties imposed are very high from the outset, and sufficient education has not been provided, one risks engendering some of the disadvantages associated with 'over-criminalisation'. If such an option is decided upon, it is preferable therefore to increase the penalties slowly but surely; this would at least allow for acceptance of the necessity of criminal cartel sanctions to develop within society. If mandatory sentencing guidelines are deemed to be too radical a solution however, a jurisdiction could consider the use of *non-binding* sentencing guidelines, as such guidelines may be capable of performing a 'signaling effect' towards the judiciary in order to persuade them to overcome their hesitancy to impose custodial sentences upon convicted cartelists.

Contemplating the Issue of Plea-Bargaining

[3.25] The successful use of plea-bargaining has some potential to reduce significantly the costs of investigation, prosecution and incarceration involved in a criminal cartel regime. Indeed, plea-bargaining leads to guilty pleas and, *inter alia*, reductions in the costs of both the resultant trials and incarcerations (Victor (2004: 88-89)). Jurisdictions contemplating introducing criminal cartel sanctions should therefore give some thought as to whether they should also introduce a (limited) system of plea-bargaining. However, the use of plea-bargaining is not without its own problems in practice (for the literature on this, see Stephan (2008: 39-40)). These need to be understood if a jurisdiction is to decide whether to introduce a system of plea-bargaining to complement the existence of criminal cartel sanctions.

[3.26] Although it can be understood as 'a prompt, efficient and simple manner' of disposing of criminal cases (Kathuria (2007: 60)), the use of plea-bargaining may be a relatively alien concept to a given jurisdiction. In many EU Member States (particularly the civil jurisdictions) there is no formal system of plea-bargaining, unlike the United States where plea-bargaining is seen as 'virtually indispensable' within its justice system (Vamos (2009: 621)). In fact, it appears that over 90% of criminal cases are resolved in the US through the use of plea-bargains (see, e.g., Gazal-Ayal (2006: 2311)). While US successes in criminal antitrust enforcement may be due in part to the ability of US enforcers to rely upon the system of plea-bargaining, that does not necessarily mean such a system should be created in the European regimes that wish to criminalise cartel activity: it would be naïve in the extreme to assume that (apparent) US successes in anti-cartel enforcement can be achieved in Europe by the mere transposition of their enforcement mechanisms and techniques (see, e.g., Beaton-Wells and Ezrachi (2011: 20)).

[3.26] Plea-bargaining also introduces the risk of undermining the procedural guarantees for the defendant, not to mention the risk of placing pressure on innocent people to plead guilty (Lawrence *et al.* (2008: 26)). As noted by Wils (2008b: 20), if the 'reward' for pleading guilty were

> so large that a 'flagrant disproportion' would exist been the two alternatives facing the defendant, it might be argued that the pressure to [accept the plea-bargain] would be compelling.

Such pressure would clearly be inconsistent with European human rights law (see, e.g.: *Deweer v. Belgium* (1980) 2 EHRR 439; OECD (2008: 39); and Ashworth and Redmayne (2010: 312-316)).

[3.27] In addition, the existence of plea-bargaining can undermine efforts to underline the criminality of cartel activity and create support for the existence of criminal sanctions, as a 'full, well-publicised' criminal trial 'with undiscounted penalties (including a prison term) may help to bring into sharper focus the inherent criminality and egregious nature of cartel conduct': Gamble (2011: 452).

[3.28] In any case, for plea-bargaining to work effectively, it is vitally important that the antitrust enforcement regime be transparent with regard to the severity of the sanctions facing those who violate the cartel prohibition: in the absence of transparency, potential plea-bargainers will be deterred from making guilty pleas (Riley (2007: 3)). By contrast, if plea-bargaining is combined with other features of the legal regime that are to the detriment of the accused (e.g., 'deliberately unbalanced procedural devices, psychological zealotry of enforcement officials and disproportionate penalties'), it may result in 'far more negotiated pleas than would be warranted on the merits' (Jacobs (2007: 50 and 45, respectively)).

Protecting the Due Process Rights of the Accused (when Criminal Sanctions Exist Alongside Administrative Sanctions)

[3.29] When a jurisdiction imposes criminal cartel sanctions alongside civil/administrative cartel sanctions, it must take extra care not to violate the due process rights of the accused individual in the criminal enforcement proceeding. In this context a potentially problematic issue can be identified: the (unlawful) use of administrative powers to collect evidence for a parallel criminal investigation (assuming it has the power to conduct a criminal antitrust proceeding). This issue arises because the substance of due process rights may not be exactly equivalent as regards both criminal and administrative regimes (see Whelan (2011)). Assume that an antitrust authority is conducting an administrative investigation against an undertaking using its administrative powers. During that administrative proceeding, the antitrust authority uncovers evidence

implicating a particular individual cartelist. The antitrust authority then decides to commence a criminal proceeding against that individual. If the due process rights protected under the administrative proceeding are not as robust as those to be respected under a criminal proceeding, the evidence collected using the administrative powers could not be used in a criminal court without violating due process. Of course, if evidence is collected to a criminal standard and is then used in an administrative proceeding, there should be no human rights-based objection: the strictest of legal guarantees will have been observed and potential prejudice will be absent.

[3.30] To avoid this particular issue, one should not present evidence in a criminal court if it is gathered only to the administrative standard. Criminal antitrust proceedings should respect the rights of the accused to a criminal standard *at all stages* of the investigation and prosecution. This is not to say, however, that parallel (criminal and administrative) investigations *by the same authority* cannot be conducted. In fact, such parallel enforcement actions can be successfully conducted if mechanisms exist to avoid the relevant due process-related issue (see Whelan (2013c)).

[3.31] The first required mechanism is a system which ensures from the outset that the administrative investigative team is functionally and materially separate from the criminal investigative team. Under this system, each investigative team acquires evidence according to its powers and respects the appropriate level of due process rights (administrative or criminal). What is to be avoided here is the 'fusion' of the investigations (i.e., the treatment of the administrative and criminal investigations as one single investigation), not their parallel advancement (by separate teams within the antitrust enforcement agency).

[3.32] A second mechanism should exist to ensure that this division of enforcement teams remains solid throughout both investigations. If different teams within the one authority are pursuing respectively administrative and criminal investigations, 'Chinese walls' must be established between these teams. In particular, if information or evidence is to move from one investigative team to another, then it should first pass through a screening process involving lawyers who are not part of either investigative team. These lawyers should be qualified to appreciate whether in passing on the relevant information or evidence and allowing it to be used by others, due process will be undermined. Where this is likely, the information or evidence in

question should not be passed on. Legislation (and/or soft law) could also be adopted to provide clarity to antitrust enforcers on legitimate information exchange. Such legislation could detail, for example, the circumstances in which information passed from the administrative team to the criminal team can be legitimately relied upon in court (see, e.g., Section 30A of the Competition Act 1998 (UK)).

[3.33] Finally, to ensure efficiency in enforcement, a formalised decision-making process should be initiated which will determine whether an administrative or criminal proceeding (or both) should be followed for a given cartel. If it is unclear initially which type of proceeding should be initiated, evidence should be collected to the criminal standard. It is only when it becomes clear that an administrative proceeding should also be initiated (or should take the place of the criminal investigation) that the administrative standards should be deemed relevant. By creating a formal structure (composed of experienced investigators and/or prosecutors) which determines whether an investigation should be criminal or administrative (or both), one can ensure that due process is not violated, while limiting the amount of resources spent on unnecessary investigative efforts. It can also help to avoid situations where evidence is initially collected using administrative powers but which then must be reacquired using criminal powers.

CHAPTER 4: CARTEL CRIMINALISATION AND ITS IMPACT UPON CIVIL/ADMINISTRATIVE LENIENCY

[4.1] All EU countries with the exception of Malta operate leniency policies in order to ensure the effective enforcement of their (and the EU) cartel rules. The European Commission also operates a leniency policy. Increasingly, leniency is seen as an 'essential' element of an effective anti-cartel enforcement programme, particularly given the inherently secret nature of cartels (see, e.g.: Leslie (2004); OECD (2001); and Riley (2002)). To take the European Commission as an example, it believes that

> it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices (European Commission (2006: [3])).

The idea here is that one can destabilise a (secret) cartel by providing incentives for whistle-blowing by the cartelists themselves, thereby creating a 'race to the regulator'. These incentives include either a reduction in the potential cartel fine and/or immunity from the imposition of a fine or from prosecution. In exchange for immunity or reductions in fines, cartelists will typically admit their involvement in a cartel, terminate involvement in the cartel (unless such a move would 'tip off' the other cartelists), keep their leniency/immunity arrangement confidential, and cooperate with the antitrust authority by, for example, providing it with evidence to secure fines against the other parties. Due to their internal dynamics, cartels are inherently vulnerable to such an enforcement strategy (Harding and Joshua (2010: 229)).

[4.2] Leniency is seen as being superior to other forms of information gathering (e.g., monitoring markets, relying upon third party information, or using direct force or compulsion against the cartelists), for a number of reasons. Specifically, it can be used to obtain all kinds of information (and not just the physical variety), it reduces search costs, and it does not suffer from the

reliability problems of other methods of collection (Wils (2007)). For Kaplow and Shavell (1994: 584-585), self-reporting programmes (such as leniency/immunity programmes) have two distinct advantages for society: they save enforcement costs and eliminate risk-bearing costs. Leniency/immunity programmes also incentivise cartelists to preserve evidence of cartel activity as such evidence has an 'economic and strategic value' if whistleblowing is later deemed to be a viable option for the cartelist (Harding and Joshua (2010: 254)). Importantly, leniency/immunity does not raise self-incrimination issues, as, according to the ECtHR, '[p]ersons are always free to incriminate themselves if in doing so they are exercising their own will': Concurring Opinion of Judge Walsh in *Saunders v. UK* (1997) 23 EHRR 313 (see also Case C-73/02 P, *ThyssenKrupp Acciai speciali Terni SpA v. Commission* [2005] ECR II-6773, [50]).

[4.3] Given this context, it is imperative that the introduction of criminal cartel sanctions does not undermine the operation of (civil/administrative) leniency policies. There are arguments in the literature that the introduction of criminal cartel sanctions can have a negative effect on the operation of civil/administrative leniency (see, e.g.: Billiet (2009: 18); Carmeliet (2011-2012: 479); McFadden (2011: 15); and Schroeder and Heinz (2006: 162-163)). There are at least two reasons as to why criminal cartel sanctions can impact negatively on civil/administrative leniency applications. First, companies (or, more accurately, the relevant decision-making units within companies) applying for administrative leniency may actually care about what happens to their employees. They may not wish to apply for administrative leniency if, by doing so, they would expose their employees to potential jail. This type of problem was recognised in the UK when it criminalised (dishonest) cartel activity in June 2003. According to the (then) Deputy Director of the Office of Fair Trading's Cartels Group,

> it was recognised from the outset that if undertakings thought that by applying to the OFT for immunity they would be exposing their employees and directors to the risk of criminal prosecution, this would have a serious chilling effect on the OFT's immunity policy and, therefore, on its ability to uncover cartels (Blake (2008: 14)).

Second, individuals within a firm which is contemplating applying for leniency may fear for their own exposure to criminal cartel sanctions (Joshua (2002: 236)). This fear impacts upon an

individual's preparedness to cooperate with a leniency application or to pursue such an application on behalf of the firm. Undertakings may well need the cooperation of its employees who have engaged in cartel activity in order to be certain that they can provide the necessary documentation and information to secure the benefit of the leniency policy (Arp and Swaak (2002: 64)). Such cooperation would surely not be provided if the employees were to risk being exposed to criminal liability.

[4.4] It is submitted that cartel criminalisation can occur without an inevitable negative impact on the operation of a jurisdiction's leniency policy. The reason for this is that mechanisms can be found that will resolve the above-identified fears of undertakings (and their employees). Admittedly, the legal frameworks that exist in a given jurisdiction can affect the extent to which such mechanisms are effective in practice in that jurisdiction, as will become apparent below.

[4.5] The primary mechanism that can be used to resolve the issue of conflict between criminal cartel sanctions and the successful operation of an administrative leniency policy involves the operation a *criminal* immunity programme in the criminalised regime. This particular mechanism has been put in place in many criminalised cartel regimes, including, for example, the US, Canada, Australia, Ireland, and the UK. As with its administrative counterpart, there are of course many different ways of designing a criminal immunity policy. However, the central feature of such a programme would generally be the granting of automatic criminal immunity for the first individual to self-report, admit guilt and cooperate with the authorities, if by doing so that individual would enable the authorities to take forward a credible (administrative/criminal) investigation. If the individual is not the first to report, or if an investigation is already in progress when the applicant reports, the criminal immunity policy could provide for a discretionary immunity from prosecution. In such a case, additional requirements could be imposed such as the requirement that the applicant provide significant value to the investigation. Alternatively, the authorities may wish to create a rapid 'race to the regulator' and therefore may choose to design a criminal immunity policy that only applies to those who have 'won' the race outright. (In such situations, the existence of a system of plea-bargaining could provide scope for a reduction in sentence for those who fall outside of the criminal immunity programme, but who wish to cooperate with the authorities.) However the immunity programme is designed, it is imperative that transparency surrounding its operation exists (see Spratling (1999)).

[4.6] One should also understand that the existence of criminal immunity in a criminalised cartel regime may bring with it additional advantages regarding the detection of cartels: the use of immunity in a criminal regime arguably leads to the discovery of more evidence than would occur in the administrative context (Neyrinck (2009: 24)). The reason for this should be clear. When only administrative (corporate) sanctions are available, individuals working for a company that has cartelised a market may not be motivated to provide useful information to the antitrust authorities. Indeed, the absence of personal criminal sanctions ensures that the 'involved individuals have little incentive to work hard to recall awkward facts about meetings and understandings', hoping instead for an unpleasant situation to blow over (Baker (2001: 709)). By contrast, when the individual personally faces not only a hefty fine but also possible time in a prison cell, there will be an obvious incentive both to come forward quickly in order to secure immunity and to ensure that whatever information is provided is as robust as possible. Under a criminal regime, then, there will tend to be witnesses 'who, with the proper incentives, might be persuaded to come forward with additional evidence ... if they can secure a better deal for themselves': Lawrence *et al.* (2008: 23). Criminal sanctions (with criminal immunity) can be used, in other words, to create a conflict between corporate and private interests. This conflict will not only produce effects in terms of *individual* immunity applications; the number of *corporate* leniency applications is also likely to rise: '[u]ndertakings understand that if they don't make a leniency application, then for fear of personal fines and a jail sentence one or more of their executives will make an individual leniency application': Riley (2010: 205). This 'basic reality' may explain why there was a reported increase in leniency/immunity applications in Australia following that particular jurisdiction's adoption of a criminal cartel law in 2009 (see Ministry of Economic Development (2010: [23])). Some commentators believe that the impact of criminalisation upon the operation of (administrative) leniency is so positive that it provides an instrumental justification for the very existence of criminal cartel sanctions; accordingly 'criminal punishment against managers is sought not as an instrument to penalize these individuals for a fault committed, but as a strong incentive to whistle-blow regarding an involvement of their companies in a cartel': Lewisch (2006: 302).

[4.7] The secondary mechanism involves the limited linking of administrative leniency with criminal immunity (assuming that criminal immunity is accepted as a policy within the

criminalised regime). Indeed, in order to ensure that applications for administrative leniency are not 'chilled' by the existence of criminal cartel sanctions, one must not only create a criminal immunity policy in the criminalised jurisdiction but, ideally, also ensure that criminal immunity automatically extends to the (cooperating) employees of those undertakings that have successfully applied for 'full' administrative leniency. An important point that needs to be made about the linking of criminal immunity to administrative leniency is that the linkage should not be 'complete': the criminal immunity policy should also be capable of *standing apart* from the administrative leniency policy. In order to secure the additional advantages of criminal immunity noted above, a criminal immunity policy needs to ensure that a conflict can exist between an undertaking and its employees. If the criminal immunity policy is only allowed to come into effect when administrative leniency has been applied for by the undertaking, these advantages would not be secured. To be clear, there must be a possibility for individuals to seek and obtain criminal immunity without having to involve cooperation of the undertaking. This may sound like an obvious point, but it was overlooked in Greece when criminal cartel sanctions were introduced in that jurisdiction in 2009, a fact which contributed to their ineffectiveness (see Brisimi and Ioannidou (2011: 174)).

[4.8] The use of a criminal immunity policy is not without its own problems. The first drawback of criminal immunity concerns the extent to which the investigating antitrust authorities can actually *guarantee* immunity for applicants. If a system is not in place whereby applicants fulfilling the requirements of the criminal immunity policy are *guaranteed* full immunity, then such applicants may be very hesitant to come forward with their evidence (Frese (2006: 201)). The absence of a system whereby a guarantee of immunity can be granted (provided the necessary criteria are fulfilled) has the potential not only to impact upon the effectiveness of the criminal regime, but it may also undermine the operation of any parallel administrative regime (see: Kelly (2010: 329-330); and Lavoie (2012: 152). This point was not initially appreciated by the UK authorities. For example, in the 2001 'White Paper' that proposed the introduction of criminal cartel sanctions in the UK, it was recommended that the OFT would only have a *discretion* not to prosecute those cartelists who self-reported a cartel (DTI (2001: [7.50])). This proposal was (rightly) criticised at the time on the basis that it would 'do nothing to encourage wrongdoers to come forward. Only a guarantee of non-prosecution will do so': Smith (2001: 292). Failure to deal effectively with this issue can result in a 'paradox', as 'strengthening the

sanction system might make it harder to detect cartels': Norgen (2007: 56). Unfortunately, it is well recognised that there are 'inherent difficulties in "guaranteeing" absolute immunity from prosecution': Guy (2006: 251). In particular, a system guaranteeing (conditional) immunity in this context may be difficult to put in place when the investigating antitrust authority (i.e., the body receiving the immunity application) is not the body which will be making the final prosecutorial decision. Institutional traditions or politics will be relevant here: it is not unlikely in such a situation that the prosecuting authority will be reluctant to delegate its prosecutorial discretion to the investigating body and to bind itself to the latter's decisions. Wils (2008a: 144) proposes two potential solutions to this problem. Either one can impose the criminal immunity policy of the investigating authority upon the prosecuting authority by virtue of a higher legislative act, or one could ensure that the prosecuting authority is involved in the introduction and application of the policy. The first proposed solution is obviously the most coercive: it requires the prosecuting authority to respect the decision of the investigating body; however, it requires legislative action and risks alienating the prosecuting authority. The second proposed solution is less likely to cause friction between the two relevant entities; however, it still requires the consent of the prosecuting authority, a consent that may be difficult to obtain for political reasons. A further solution would be for the prosecuting authority to agree to accord 'serious weight' to recommendations for immunity that are proposed by the investigating body. Although not without its own problems concerning certainty and transparency, this final proposed solution may provide a 'workable level of comfort' that will relieve the concerns of potential immunity applicants (Young *et al.* (2009)). It may act as a middle ground between the other two proposed solutions. Whichever solution is chosen, however, it is imperative that the different authorities possess 'a shared philosophy about the seriousness of cartel conduct, shared priorities toward prosecuting cartel activity and open and constant communication': ICN (2009: [3.12]).

[4.9] The second major drawback of the solution of criminal immunity is that, given its application to breaches of criminal (cartel) law as opposed to administrative (cartel) law, the criminal immunity policy may conflict with the principle of mandatory prosecution, which exists in some EU Member States, including Finland (see Zingales (2008: 14)). In essence, this principle holds that if sufficient evidence exists concerning the commission of a criminal offence, then the public authorities must take enforcement action; no discretion can therefore be exercised over the prosecutorial decision. This principle appears to exclude the possibility of

criminal immunity: the authorities cannot promise to ignore the crimes of those who have decided to whistle-blow. This argument has been made in relation to Sweden, for example (see: Swedish Competition Authority (2006); and Holm (2006)). Germany also has this particular issue (see Vollmer (2006: 259)).

[4.10] In Sweden the apparent unavailability of criminal immunity persuaded the authorities not to pursue a policy of cartel criminalisation lest it impact negatively upon the success of its administrative leniency policy. For the Swedish Competition Authority, with cartel criminalisation, the

> effectiveness of the leniency programme applied by the [Swedish] Competition Authority would be in danger since there is no crown witness system and prosecutors in Sweden are obligated to prosecute crimes. There is no discretion for prosecutors in this regard. If the Competition Authority cannot guarantee leniency [for criminal offences], the system does not give incentive for companies or individuals to come forward. Therefore we came to the conclusion that a dual or parallel system would damage rather than improve the possibilities to effectively intervene against cartels. Although sanctions would be amplified this would be countered by a loss in detection which would make enforcement and deterrence less effective (Swedish Competition Authority (2006)).

It is submitted that this argument is founded upon the assumption that the principle of mandatory prosecution cannot be circumvented, an assumption that is not entirely supportable.

[4.11] As noted by Wils (2008a: 143-144), four points need to be remembered here: (i) the principle only prohibits immunity from prosecution, not immunity from the imposition of criminal punishment arising due to prosecution; (ii) depending upon the specifics of the legal regime, the principle can often be displaced by legislation; (iii) the Council of Europe has been actively encouraging its members to introduce and/or expand the principle of discretionary prosecution; and (iv) the main objective motivating the principle (i.e., equal treatment) can still be achieved if transparency is a feature of the criminal immunity policy. Furthermore, in jurisdictions where the principle exists there are often ‘various and extensive’ exceptions to the

requirement of mandatory prosecution (Wagner-von Papp (2011: 176)). Consequently, the issue is not overly problematic: the principle of mandatory prosecution does not in fact completely tie the hands of the authorities; rather, it merely: (a) dictates that, in the absence of further legislative action, criminal leniency should be provided instead of criminal immunity; or (b) requires legislative action in order to provide a legitimate base for a policy that allows for immunity from prosecution. For undertakings that care about their employees, approach (b) is preferable to approach (a). The reason for this is that approach (a), unlike (b), requires an individual to stand trial and the mere fact that an individual is subjected to a criminal process (even if the outcome is a conviction with no punishment) is likely to have significant negative effects on an individual's life: the 'harm that indictment brings to the individual may be irremediable even by subsequent dismissal or acquittal': Chadwell (1955: 1139). It is submitted that approach (b) should be adopted by those jurisdictions with the principle of mandatory prosecution that wish to introduce cartel sanctions but do not wish to impair their administrative leniency policies.

CHAPTER 5: PROS AND CONS OF CARTEL CRIMINALISATION

Main Pros of Cartel Criminalisation

Specific to Deterrence Theory

[5.1] Deterrence theories find their primary advantage as justificatory theories for criminal punishment 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 upon theoretically quantifiable variables and thus represent a more 'scientific' method of resolving questions related to the criminalisation of a given behavior than other theories of criminal punishment. Fortunately, there are numerous studies (involving calculation of, e.g., cartel overcharges and duration of cartels) which can be relied upon to construct an argument as to why criminal sanctions are necessary to ensure deterrence of cartel activity.

[5.2] There is a compelling, relatively solid argument that criminal punishment is capable of deterring cartel activity more effectively than fines. This argument is presented in Chapter 2 above. The points that should be made here are that: (a) custodial sentences punish those most responsible for cartel activity (i.e. the individuals who engage in it, rather than the shareholders of a company, who may be unaware of the cartel activity); (b) criminal punishment overcomes the problems associated with the imposition of optimal fines (e.g., the inability of firms to pay and the engendering of social costs if they are imposed on firms); (c) custodial sentences are essentially an non-idemnifiable sanction upon business executives; and (d) custodial sentences represent a forceful method of sending a message to other business executives about the risks and penalties involved in engaging in cartel activity.

[5.3] Economic deterrence theory can be used to argue that there are no equally effective alternatives to the introduction and maintenance of the threat of imprisonment so as to deter cartel activity. Private enforcement and director disqualification orders, for example, suffer from critical defects which undermine their efforts to rectify the identified (deterrence-based) deficiencies with fines, defects which are not present with the non-indemnifiable individual sanction of imprisonment.

[5.4] It was argued in Chapter 2 above (using economic deterrence theory) that the imposition of an optimal fine would be likely to lead to the liquidation of the infringing company, that this is to be avoided, and that any sanction which depends solely upon *financial impact* for its effectiveness will not ensure optimal deterrence, as the corresponding optimal financial penalty cannot be imposed in practice. According to this argument, penalties which 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 (see Wils (2006: 87)). Consequently, 'the deterrent effect of private actions is limited by the same factors that apply to high fines imposed as a result of public enforcement actions': OECD (2011: 15). Following this line of argument, private enforcement is not an effective alternative to imprisonment.

[5.5] 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 and/or to encourage their firm to comply with competition law — director disqualification orders do not rectify the identified (deterrence-based) weaknesses of fines as effectively as imprisonment. 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 upon how close the director is to retirement; and suitable indemnification by the company may still be possible (Wils (2006: 86)). Second, they are unlikely to be very effective in jurisdictions where relatively small companies, in particular family-owned businesses, are the norm. A disqualified director in such a jurisdiction 'might still exercise control through having a family member act in their stead, thus limiting the deterrent effect of such measures': Massey (2012: 163). Third, 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 (Wils (2006: 86)). This line of argument is consistent with recent developments in *R v. Whittle and others* [2008] EWCA Crim 2560, a criminal case that resulted in the imposition of terms of imprisonment and of director disqualification orders on three UK nationals. As noted by MacCulloch (2010: 291), the appeal in that case indicated a clear desire on the part of the appellants to minimise the pain of jail, but did not include an attempt to reduce the length of the director disqualifications; for him that choice suggests that director

disqualification orders 'constitute a much less effective deterrent; perhaps because imprisonment would effectively end a career, or it may be that [director disqualification orders] are not, in reality, a significant hindrance to future earnings'. 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.

[5.6] Economic deterrence assumes rationality on behalf of the entities which are subject to the criminal law. One can certainly question the accuracy of such an assumption, as scholars (particularly behavioural economists) have done. The point to be made here, however, is that the assumption of rationality in the context of cartel activity is less problematic than it is in other contexts. Although rationality may not be an accurate assumption for a number of (traditional) crimes — which may be committed in response to situational factors — 'it is legitimate for white-collar crimes, as executives have the time and resources to consider logically their decision to offend': Boberg (2010: 88). Some (e.g., Nelson and Winter (1982)) have argued that the more competitive the environment, the likelier it is that actors act rationally: non-rational (i.e., non-profit-maximising) firms (and their employees) will eventually be driven out of the market. At least in a business context, then, where the environment can generally be considered to be competitive, the concern with rationality may therefore be subject to overstatement. So even if one concedes that the criticism of unreality may have value when analysing, for example, the existence of crimes of passion or impulse, it loses its potency somewhat when applied to economic offences which are committed after long periods of deliberation by educated, intelligent and otherwise morally-functional persons.

Specific to Retribution Theory

[5.7] Theories of retribution finds their primary advantage as justificatory theories for criminal punishment in the fact that under these theories 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 deterrence-based 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 (Kant (1785: 429)).

[5.8] Some argue that applying the criminal law to morally-neutral/-ambiguous conduct is not only unjust but is also counterproductive, in that by unfairly labelling offenders as criminals, the moral authority of the criminal law is undermined, resulting as a consequence in a weakening of its deterrent value (Green (1997: 1536)). Packer (1968: 359) contends that applying the criminal sanction to morally-neutral conduct 'decriminalises' the criminal law and can result in nullification or, more subtly, a changing of people's attitudes towards the meaning of criminality. The criminal law, then, should be concerned solely with conduct which unequivocally attracts the moral opprobrium of society (Richardson *et al.* (1982: 14-15)). In the absence of such a restraint, the criminal law may begin to lose its legitimacy. If the criminalisation of cartel activity is justified (in part at least) by reference to retribution theory, this goes some way to responding to any criticism that cartel criminalisation would be a form of 'over-criminalisation' and thus a contributing factor to the problems noted directly above.

[5.9] The strength of a retribution-based cartel criminalisation argument depends upon the acceptance by society of the value of the free market. It is submitted here that while individuals may find unbridled capitalism objectionable, they nonetheless support the concept of the free market. This claim is supported by numerous, relatively rigorous surveys. The 'Pew Global Attitudes Project' — a project which presents a series of worldwide public-opinion surveys on various important issues — is a case in point. In its 2003 survey (Pew Global Attitudes Project (2003: 103)) it was found that majorities in 33 of 44 countries surveyed believed that people are better off if they live in a jurisdiction with a free-market economy. Countries with a relatively high majority included Italy (71%), Germany (69%) and the United Kingdom (66%). Some of these figures have not changed much in the last 10 years. In a 2012 survey, for example, (see http://www.pewglobal.org/database/indicator/18/survey/all/) Germany still registered 98% (and even registered 73% in 2010) and the UK's percentage stood at 61% (down from a high of 71% in 2007). Admittedly, Italy's percentage has moved down considerably in the last number of years and in 2013 stood at 50%, but it is submitted that the figure is still a high one. If these types of surveys are to be believed, there is a clear advantage of justifying criminal cartel sanctions in Europe on the basis of the demonstration that cartels violate the socially valuable mechanism of the free market: citizens clearly accept the social interest at issue.

Additional Advantages

[5.10] The use of criminal sanctions can help to 'pierce the veil of secrecy' surrounding cartel activity (provided they are accompanied by a criminal immunity programme). If criminal sanctions (plus a criminal immunity programme) are in place for cartel activity then individuals who have engaged in cartel activity are more likely to come forward with information about the cartel (provided that they can get immunity) than they would have been if only administrative sanctions existed. If criminal sanctions (plus a criminal immunity programme) are in place for cartel activity then undertakings will also be encouraged to apply for administrative leniency as there will be an additional aspect of the 'race to the regulator'.

[5.11] The use of criminal sanctions can also bring with it additional criminal powers of investigation, powers that cannot be used in administrative investigations. This phenomenon is observable in Germany, for example (see generally Vollmer (2006: 259)). Indeed, although the administrative investigative powers of the Bundeskartellamt are robust, they do not allow for the antitrust authority to intercept telecommunications (see Sections 46(2) and 46(3) of the Administrative Offences Act). By contrast, such a power can be exercised when the criminal offence of bid-rigging is being investigated (see Sections 100a(1) and 100a(2)(1)(r) of the Criminal Procedure Code). The increased powers of investigation that may be provided by criminalisation (such as powers of covert surveillance or wire-tapping) could supply essential information that would not have been available under an administrative procedure (Danagher (2012: 522-533)), thereby improving the rate of discovery of (secret) cartels and compensating for any potential reduction in evidence caused by any strengthening of rights in favour of the accused that might occur due to criminalisation (Whelan (2011)).

Main Cons of Cartel Criminalisation

Specific to Deterrence Theory

[5.12] By relying upon 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, as a result, one cannot adequately predict how people will act in given situations.

[5.13] While economic deterrence theory can be used 'scientifically' to set the quantum of criminal punishment, its application in a real world scenario, where the variables may not be determined accurately, can prove difficult, if not impossible. The relevant variables in setting a deterrent fine (which is relied upon to argue in favour of criminal cartel sanctions) include: the cartel overcharge; the price-elasticity of demand; the duration of a cartel; and the rate of detection and prosecution). Two points can be made about the use of these variables in the deterrence-based criminalisation argument advanced in Chapter 2 in order to demonstrate its vulnerability regarding the input of empirical data. First, the figure inputted into the 'gain' calculation for the optimal fine is not exactly an average measure of the actual gains attributable to cartel activity (i.e., the average profit one can expect to make by engaging in such activity), but rather an average measure of a *proxy* for such gains. The proxy used is half of the cartel mark-up, i.e. half of the difference between the cartelised price and the competitive price. In setting the size of the deterrent fine by using this proxy a price elasticity of demand ('PED') of 0.5 is assumed. The point here is that this estimation of the PED may not be accurate for quite a number of different product markets. Indeed, the exact size of the PED varies between products and depends upon a number of different factors, including market definition, the nature of the product itself, the availability of substitutes, etc (Mankiw (2008: 90-91)). In other words, a 'one size fits all' approach may be questionable here. Additionally, and more importantly, as it is based solely upon the overcharge (discounted to take into account the 'law of demand'), the proxy does not take into account the costs of organising and monitoring the cartel, costs that will need to be covered by any increase in revenue occasioned as a result of the overcharge if the cartelist is to receive a gain for engaging in cartel activity. Second, due to the fact that cartel activity is inherently secret, any attempt to estimate the rate of discovery and prosecution of cartel activity will remain open to question.

[5.14] An additional disadvantage associated with economic deterrence theory is that one does not have accurate measurements of the exact costs and benefits of criminal antitrust sanctions. Cartels, by their very nature, are secret and therefore it is difficult, if not impossible, to determine the exact number of cartels in operation at any given time. Consequently one cannot be certain

than in imposing criminal cartel sanctions one is acting efficiently: one cannot be certain that the marginal benefit of imposing criminal cartel sanctions is equal to the margin cost.

Specific to Retribution Theory

[5.15] The retribution-based argument in favour of criminal cartel sanctions is vulnerable due to the fact that the intentions of cartelists have not been definitively established in the empirical literature. Particular intentions must be established in order to demonstrate that cartel activity involves violation of one or more of the norms against stealing, deception or cheating. In the absence of definitive empirical evidence, to argue that cartel activity inevitably involves morally wrongful behaviour (due to the fact that it inevitably violates such norms) requires one to assume that rationality exists on behalf of cartelists: such rationality, if present, enables one to construct solid arguments that the required intentions of cartelists are present. The retribution-based criminalisation argument is therefore limited due to: (a) the absence of definite evidence regarding the intentions of cartelists; or (b) due to the fact that rationality may not always exist in the context of cartel activity.

[5.16] The retribution-based criminalisation argument relies upon identification of the social harmfulness of cartel activity. The nature of this social harmfulness is problematic in three respects: (i) the harm is often 'diluted' across many different victims; (ii) the individual (as opposed to the aggregate) loss may be minimal; and (iii) the identity of the victims may be difficult to determine. In particular, these problematic aspects of cartel activity may negatively affect people's perception of the importance of dedicating adequate resources to criminal anti-cartel enforcement; likewise, educative efforts concerning the (im)morality of cartel activity may be more challenging than would have otherwise been the case.

Additional Disadvantages

[5.17] A successful policy of cartel criminalisation requires the existence of a dedicated prosecutor which understands the necessity of taking criminal enforcement action against cartelists. This requirement can be particularly difficult to fulfil when the prosecutor is not a body that focuses mainly, if not solely, on antitrust offences, such as an antitrust authority would

be for example. As Tavares de Araujo (2010: 76) notes, 'it is quite natural for an antitrust authority to set anti-cartel enforcement as a top priority, but not as natural for criminal authorities that usually are involved with the investigation of other serious crimes to do the same'. This negative effect has in fact manifested itself in criminalised cartel regimes where general prosecutors were responsible for criminal cartel enforcement. One of the reasons for the failure of criminal antitrust enforcement in Austria (a failure that would lead to eventual decriminalisation, with the exception of bid-rigging), for example, was the fact that the efforts of the relevant prosecutors were completely insufficient, due mainly to a general disinterest in criminal cartel enforcement and a realisation that taking such cases involves the accumulation of human capital that, given the low number of criminal cartel cases, would not be of much use in future (Lewisch (2006: 297)). Likewise, in the Netherlands, when cartel activity was a criminal offence, public prosecutors 'did not seem to show much interest in the enforcement of competition rules': Kalbfleisch (2006: 313). All that is required for a criminal cartel case to get pushed down even further in the pile in the public prosecutor's office is a serious violent crime, like a murder or a rape (see Fingleton (2003: 309)). General prosecutors — at least initially — may also feel ill-equipped to take on cartel cases due to their unfamiliarity with competition law issues and therefore may be more cautious in bringing cases. This type of hesitancy was also one of the reasons for the failure of cartel criminalisation in the Netherlands (Kalbfleisch (2006: 313)).

[5.18] Depending on the legal specifics of the jurisdiction at issue, the use of criminal cartel sanctions may require stronger human rights guarantees for the accused than those required when administrative sanctions are imposed (see Whelan (2011)). For example, the standard of proof may be higher and/or the right against self-incrimination may be more robust. If so, this would be a distinct disadvantage of criminal cartel sanctions: a 'strengthening of rights' has the potential to create additional burdens for prosecutors and to make it more difficult for them to acquire evidence of criminality. (Admittedly however, any increases in leniency applications and the possible benefits of criminal investigative powers both reduce the problematic nature of this limitation of criminal cartel sanctions: Whelan (2011).)

[5.19] The criminalisation of cartel activity brings with it particular disadvantages regarding the need for international cooperation (if international cartels are to form the basis of a criminal

prosecution) and the possible lack of desire of other (non-criminalised) jurisdictions to provide such cooperation when the incarceration of individuals remains a possible outcome of enforcement proceedings. If cartelists and evidence relating to the cartel are located abroad (i.e., outside of the criminalised jurisdiction) such individuals and evidence will be beyond the reach of the criminalised jurisdiction unless the jurisdiction within which they are located also has in place criminal cartel sanctions. Indeed, extradition and the use of mutual legal assistance treaties will almost invariably be unavailable in the context of cartel enforcement when the requested state does not have criminal cartel sanctions on its legislative books. (Naturally, this particular weakness of criminal cartel sanctions loses its power as more and more jurisdictions introduce criminal cartel sanctions.)

Summary of Pros and Cons of Criminal Cartel Sanctions	
Pros	**Cons**
Specific to deterrence theory: • It represents a more 'scientific' method of resolving questions related to the criminalisation of a given behavior. • There is a compelling, relatively solid argument that criminal punishment is capable of deterring cartel activity more effectively than fines. • (According to economic deterrence theory) there are no equally effective alternatives to the introduction and maintenance of imprisonment so as to deter cartel activity. • The assumption of rationality in the context of cartel activity is less problematic than it is in other contexts. Specific to retribution theory: • Individuals are treated as moral agents responsible for their own choices. • The use of retribution theory to justify criminal cartel sanctions avoids problems with 'over-	Specific to deterrence theory: • The assumption of rationality may not be realistic in practice. • Determining the necessary variables in practice can be difficult (e.g., overcharges), if not impossible (e.g., the rate of detection and prosecution of cartels). • One cannot be certain that the marginal benefit of imposing criminal cartel sanctions is equal to the margin cost Specific to retribution theory: • The intentions of cartelists have not been definitively established in the empirical literature. • As with deterrence theory, rationality is assumed (in order to take the place of empirical evidence regarding the

criminalisation'. • Citizens value the free market and so may appreciate a justification for criminal cartel sanctions that is based on the demonstration that cartels violate the socially valuable mechanism of the free market. <u>Additional advantages</u>: • Criminal sanctions can lead to the discovery of more cartels if criminal immunity is established. • Criminal sanctions can improve administrative leniency policies if criminal immunity is established. • Criminalisation may allow for the provision of criminal powers of investigation.	intentions of cartelists). • The social harmfulness of cartel activity may not be obvious to citizens due to the nature of cartel activity. <u>Additional disadvantages</u>: • Cartel criminalisation has failed in the past in some EU countries due to the absence of a dedicated prosecutor. • Human rights guarantees may be more burdensome with criminal cartel sanctions than with administrative sanctions. • Prosecuting international cartels effectively often requires international cooperation, something which may not be provided if the requested jurisdiction is opposed to cartel criminalisation.

CHAPTER 6: RECOMMENDATIONS

[6.1] The author believes that, on balance, a **solid (albeit imperfect) case** for the introduction and maintenance of criminal cartel sanctions (in the more developed and mature competition law regimes within the EU) can be made out. In particular, the author has confidence that in that context criminal sanctions can help to secure deterrence of cartel activity in a given jurisdiction, provided certain practical-focused measures are adopted.

[6.2] The author would recommend the **adoption of criminal cartel sanctions** in Finland. The main basis for this recommendation is that such sanctions can help to secure the deterrence of cartel activity in Finland, a jurisdiction with a relatively developed and mature competition regime and culture. In adopting this position the author would underline the following points in particular which are specific to Finland:

(a) The argument advanced in Chapter 2 that an administrative regime alone (with only fines imposed on undertakings) cannot secure optimal deterrence of cartel activity is immediately relevant to the Finnish regime: currently the Finnish regime does not impose punishment on individuals and imposes cartel fines only on undertakings.

(b) Given the size of the calculated optimal cartel fines, it is likely that current cartel fines in Finland are sub-optimal. Admittedly, this argument assumes that the input data for the optimal fine (e.g., the duration of cartels which affect trade between Member States and the overcharges implemented in cartels which affect trade between Member States) are relevant to Finland. The author sees no reason why such input data would not be relevant to Finland: cartel activity is an international phenomenon which displays common characteristics across jurisdictions.

(c) Furthermore, given the size of the calculated optimal cartel fines, it is not recommended that current cartel fines in Finland be brought up to the optimal level, even if the cap on fines found in Section 13 of the Competition Act (No. 948/2011) were to be removed through legislative action. Sup-optimal cartel deterrence in Finland can arguably be rectified through criminal cartel sanctions, as demonstrated in Chapter 2 of this report.

[6.3] It is undeniable that **the timing of the introduction of criminal sanctions** needs to be correct in order to secure considerable support for the criminalisation project. According to Fingleton *et al*. (2007: 22),

> cartels should only be criminalised once an agency has an established track record in civil enforcement, merger control and, where possible, in market studies and a sustained flow of outputs in each area. In this way, the agency is more likely to have a sufficient base of experienced and skilled staff to enable it to take on costly criminal investigative work.

A general competition culture also needs to be in place prior to criminalisation, and any attempt to introduce criminal sanctions without the existence of that competition culture will surely be perceived as 'premature', particularly by industry lobbies. What is important is that the measures in a civil competition regime 'should be given time to prove their worth before a decision is taken on criminalisation' (Blair and Conway (2002: 54). It is submitted that the civil competition regime in Finland **meets this criterion**.

[6.4] If a decision to criminalise cartel activity is taken by the Finnish authorities, it must be understood that a number of important practical measures need to be adopted in order to secure the effective operation of the national criminal cartel offence. These measures are detailed in the paragraphs that follow.

[6.5] To provide some cover from the claim that Regulation 1/2003 applies to the enforcement of any national cartel offence, the Finnish legislature should only introduce criminal cartel sanctions for **individuals and not for undertakings** (firms, corporate bodies etc.). Administrative fines should continue to be imposed upon undertakings that have engaged in cartel activity; such sanctions help to ensure that firms are not incentivised to encourage cartel activity among their employees.

[6.6] To ensure that a criminal court does not need to undertake complex economic analyses, the national criminal cartel offence should not contain an exception along the line of Article 101(3) TFEU or contain a 'white list' of approved agreements (even if they are defined by type rather

than by their economic effects). It is clear, however, that Finnish competition law, like EU competition law, does not have a per se approach to cartel activity. For example, in a similar manner to the operation of Article 101(3) TFEU concerning the EU cartel prohibition, Section 6 of the Competition Act (No. 948/2011) provides an exception to the cartel prohibition contained in Section 5 of that particular Act. This fact should influence the drafting of the criminal cartel offence by the Finnish legislature. Specifically, to avoid the 'chilling' of legitimate cartel behaviour (e.g., cartel behaviour that produces efficiencies for consumers) the legislation creating the national criminal cartel offence should **expressly provide** that the criminal cartel offence would **not be committed** where: (a) the agreement is published by the parties in a suitable format prior to its implementation; or (b) the FCCA is informed about the agreement by the parties prior to its implementation. Such an approach would operationalise in practice the specifics of Section 6 of the Competition Act (No. 98/2011) without requiring the criminal court to conduct complex economic assessments.

[6.7] To avoid issues with 'over-criminalisation' (such as a reduction in the level of respect for the criminal law, changes in the meaning of criminality and nullification) the Finnish authorities would be advised to ensure that the definition of cartel activity in the criminal cartel offence **captures significant moral wrongfulness**. Linking cartel activity with the violation of moral norms against stealing, deception or cheating is an effective way of doing this, particular given that such norms are likely to have been accepted across Finland. That said, it is not advisable to link completely cartel activity to the violation of such norms (i.e. to require each of the elements in each norm to be proved): by doing so, they would place additional burdens in front of the prosecutors, to the detriment of deterrence. Instead, a 'rough fit' with these norms can be created by: (a) carving out agreements made openly, as per [6.6] above; and (b) ensuring that the criminal cartel offence only extends to cartel agreements that are implemented (rather than merely created). To ensure deterrence of the entering into cartel agreements (as opposed to the implementation of those agreements) the relevant lawmakers could ensure that the mere creation of a cartel agreement would be covered by the law of attempts.

[6.8] Securing public support for the criminal cartel regime is crucial to its success. Prior to criminalisation, the relevant authorities in Finland should try to secure support for the criminal antitrust regime by **demonstrating to all of the stakeholders** that a policy of criminalisation has

merit. These educative efforts could be conducted through workshops, public awareness campaigns, news releases, television interviews and/or media publicity. An absence of such support would be detrimental to any criminalized cartel regime in Europe. To foster further such support, a coherent **prioritisation strategy** should also be developed regarding the enforcement of the criminal cartel offence. Two key elements that should be considered are: (a) an initial focus on public procurement involving bid-rigging; and (b) an initial focus on cartels selling to final consumers. These elements would ensure that the criminal regime would initially focus on the types of cartels that Finnish citizens are likely to find most objectionable.

[6.9] To overcome any judicial hesitancy regarding the imposition of custodial sentences for cartel activity, the relevant authorities in Finland would be advised to consider the possibility of introducing mandatory **sentencing guidelines** for criminal cartel cases. If such a step were deemed to be too radical, the authorities would be advised to consider the introduction of **non-binding** sentencing guidelines for such cases, as these guidelines have potential to produce a 'signalling' effect from the legislature to the judiciary regarding the need for custodial sentences for cartelists.

[6.10] The importance of the Finnish administrative immunity/leniency regime for cartels which is enshrined in Sections 13 to 17 of the Competition Act (No. 948/2011) is clear (see Hiltunen and Nieminen (2013: 106)). If cartel criminalisation is to be successful in Finland, it is imperative that criminal cartel sanctions do not threaten the workability of the Finnish administrative immunity/leniency regime. There are two mechanisms that should be employed in order to protect the Finnish administrative immunity/leniency regime. First, the Finnish authorities should put into place a ***criminal* immunity programme**. This would work best if it only provided guaranteed immunity to those individual cartelists who are first to report the existence of their cartel to the FCCA and cooperate with the FCCA in order to secure convictions against their co-cartelists. Second, there should be **a link** between the **corporate leniency programme** and the criminal leniency programme: those undertakings that manage to secure full administrative leniency should also be able to secure automatic criminal immunity for their cooperating employees. The **principle of mandatory prosecution**, while an issue, would not be insurmountable: if **legislative action** is required in order to circumvent the principle for criminal cartel law enforcement, then such action should be taken.

[6.11] Robust **powers of criminal investigation** should be provided to the relevant investigator of violations of the criminal cartel offence. These powers could include (within strict limits defined by law) the ability to run human intelligence sources, the ability to conduct covert surveillance (including wire-tapping) and the ability to arrest and detain suspects for questioning. These powers have potential to overcome the additional evidentiary burdens imposed upon prosecutors due to the criminal nature of the punishment.

[6.12] To avoid the problems experienced in Austria and the Netherlands it is necessary to ensure that **the prosecutor** (whichever entity that may be) is **dedicated** to the enforcement of the criminal cartel offence. Sufficient funding for its enforcement should of course be provided, something that will be easier to secure once political support for the existence of criminal cartel sanctions has been fostered.

[6.13] If the FCCA is to assume responsibility for the investigation of the criminal cartel offence then it is imperative that its **criminal enforcement role is not undermined by its (current) administrative enforcement role**. To ensure adherence to the relevant human rights standards, the following should be the norm in the investigating agency:

> (a) a system should exist which ensures from the outset that the administrative investigative team is functionally and materially separate from the criminal investigative team;
> (b) if different teams within the one authority are pursuing respectively administrative and criminal investigations, 'Chinese walls' must be established between these teams;
> (c) to ensure efficiency in enforcement, a formalised decision-making process should be initiated very early in the investigation which will determine whether an administrative or criminal proceeding (or both) should be followed for a given cartel.

[6.14] Director disqualification orders are not as effectiveness in ensuring deterrence of cartel activity as custodial sentences. They should not be seen as an alternative to criminal sanctions. However, given their obvious merits in contributing towards the enforcement of cartel law they

should be part of the cartel enforcement landscape in Finland: they can be used to complement custodial sentences.

[6.15] To ensure that the costs of introducing and maintaining a criminal cartel regime are not too burdensome the Finnish authorities would be advised to consider **methods of reducing those costs** in practice. The author does not necessarily advocate the introduction of a system of **plea-bargaining** in Finland: the question whether to introduce such a system is a highly complex one that is beyond the scope of this report. That said, the author recognises that such a system has some potential to reduce the costs involved in the operation of a criminal cartel regime. The author would therefore advocate that the Finnish authorities consider in detail the issue as to whether the utilisation of a formal system of plea-bargaining in the context of criminal cartel enforcement is warranted. In addition, it would be advisable for the Finnish authorities to allow for the **imposition of cost orders** on convicted cartelists, as such orders can clearly help to reduce the cost of running a criminal cartel regime in practice.

[6.16] Finally, it should be further noted here that the benefits of introducing and maintaining personal criminal sanctions for cartel activity may only be visible in the long term, that is, a considerable time after the outlay of the additional costs involved in setting up such a regime. Accordingly, the Finnish authorities should be aware that 'introducing a criminal enforcement regime should be seen as a long-term, front-end loaded investment' (Reindl (2006: 115)) which may require a wide range of criminal prosecutions to 'give birth to a new culture' (Fingleton *et al.* (2007: 23)).

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