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Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges

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Reader in Law (Associate Professor), University College London (UCL), Faculty of Laws, London

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ABSTRACT

Suite à l'harmonisation des règles matérielles dans le cadre du règlement (CE) no. 1/2003, la Commission a récemment commencé à se pencher sur la question de l'harmonisation des règles de procédures et de sanctions, alors que le Parlement européen a, en janvier 2016, demandé l'introduction de sanctions contre les personnes physiques. Ce dossier examine l'état actuel des sanctions individuelles dans les États membres, fait état des difficultés institutionnelles posées par ces sanctions individuelles en particulier à l'égard des programmes de clémence, et se penche sur les avantages et inconvénients de l'introduction de sanctions individuelles, en particulier de nature pénale. Ce dossier examine l'expérience de la France, de l'Allemagne, du Royaume-Uni et des États-Unis en matière de sanctions pénales et présente des données empiriques ayant trait aux attitudes du public dans différents États membres et aux États-Unis envers les infractions au droit de la concurrence.

Following the substantive harmonisation in Regulation (EC) no. 1/2003, the Commission has started more recently to focus on procedure and sanctions, and in January 2016, the European Parliament called for penalties against natural persons. This 'On Topic' issue looks at the current state of individual sanctions on the Member State level, examines the institutional challenges these individual sanctions present especially for leniency programmes, and discusses the pros and cons of introducing further individual, in particular criminal sanctions. This 'On Topic' issue examines the experience with criminal sanctions in France, Germany, the United Kingdom and the United States, and presents empirical evidence on public attitudes towards competition law infringements in various Member States and the United States.

Introduction

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1. Article 3 of Regulation (EU) 1/2003 aims at convergence of the substantive competition laws in the Member States of the European Union. To be sure, substantial differences between Member States' laws remain in the areas of unilateral conduct and merger control.¹ Yet in the area of anticompetitive agreements, convergence has made great strides. National procedure and sanctions, however, were largely excluded from the convergence goal of Regulation (EU) 1/2003,² and on the matter of individual sanctions the recitals merely state that “*as regards natural persons, they may be subject to substantially different types of sanctions across the various systems.*”³

* I would like to thank Wouter Wils and Florence Thépot for helpful comments.

1 For a criticism of the unilateral conduct exception to the convergence rule, see recently D. Hildebrand, Article 3 (2) in fine: Time for review, May 2015, *Concurrences Review* No. 2-2015, Art. No. 72323, www.concurrences.com.

2 National procedure and sanctions only appear in the periphery. See Art. 5, 12 Regulation (EU) 1/2003.

3 Recital 16 (in the context of the exchange of information under Art. 12 Regulation (EU) 1/2003).

2. In the course of the review of Regulation 1/2003, the European Commission has now turned its attention to these matters of national procedure and sanctions. In 2013, the then-Director General for Competition remarked that despite some voluntary convergence toward a level playing field, “*bumps remain where procedures and sanctions are concerned*.”⁴ Instead of relying on soft convergence, the Commission considers introducing binding EU law,⁵ dubbed “Regulation 2” by the current Vice-President of the German *Bundeskartellamt*.⁶ In May 2014, Vice-President Almunia announced that he intended “*to set in motion a reflection on how the system has functioned so far and its future development*” before the end of his mandate,⁷ and in July 2014, the Commission published its Communication “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”⁸ with an accompanying Staff Working Document.⁹ One of the focal points of this stock-taking exercise was the issue of individual sanctions, and in particular the impact of the current divergent approaches in the Member States on leniency programmes.¹⁰ The most recent development in this process is the launch of a public consultation that opened in November 2015 and closed in February 2016.¹¹

I. Overview

3. This On Topic issue seeks to contribute in two ways to the discussion. First, it takes stock of the status quo with regard to individual sanctions in the *lex lata* of some of the biggest Member States in the European Union, and the associated challenges. Second, it discusses the pros and cons of increased individual, in particular criminal, sanctions *de lege ferenda*, and the institutional issues that will have to be addressed to fit such individual sanctions into the overall antitrust enforcement scheme in a multi-jurisdictional context and make the enforcement of individual sanctions effective.

4. I am delighted that an outstanding panel of experts has agreed to contribute to this issue.

5. M. David Viros, Chief of Staff and Head of International and European Affairs at the *Autorité de la concurrence* examines criminal enforcement against individuals in France and the interface with administrative enforcement. He highlights some of the challenges, in particular the interaction between criminal enforcement by public prosecutors and leniency programmes administered by the *Autorité*.

6. Professor Daniel Zimmer of the University of Bonn, former Chairman of the German *Monopolkommission* (“Monopolies Commission”), describes the practice of individual administrative fines for antitrust infringements and criminal enforcement against bid rigging in Germany, and engages with the debate in Germany about the criminalisation of hardcore cartels beyond the bid-rigging offence. This debate has recently gained momentum in Germany due to the Monopolies Commission’s recommendations.¹² Professor Zimmer argues in his contribution that more fact-finding is necessary, but that the available evidence indicates that criminalisation may well be necessary to achieve sufficient deterrence, and that criminalisation should be accompanied by a leniency programme for individuals, as well as possibly a whistleblower programme with rewards¹³ or occupational bans for infringers similar to director disqualification orders.

7. Professor Bill Kovacic, Global Professor of Competition Law at George Washington University, Visiting Professor at King’s College London, Non-Executive Director at the Competition and Markets Authority (CMA) in the UK, and former Chairman of the Federal Trade Commission in the United States, provides insights based on the experience in the United States. He cautions that it is not enough to change the law in the books to include a criminal offence, and draws attention to the importance of the gradual building of institutions. He outlines the long process it took for US criminal enforcement to be where it is today. He points out the need to understand the “institutional interdependencies” of different features of the antitrust system, and that tinkering with one aspect, namely introducing criminal sanctions, may have repercussions and unintended consequences in other areas, such as the interpretation of the

4 A. Italianer, The ECN, convergence and enforcement of EU competition law: achievements and challenges (3 October 2013), European Competition Day, Vilnius, http://ec.europa.eu/competition/speeches/text/sp2013_08_en.pdf.

5 Ibid.

6 K. Ost, From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence (2014) 5(3) *Journal of European Competition Law & Policy (JECLAP)* 125–36.

7 J. Almunia, Honing the Instruments of EU Competition Control (15 May 2014), *International Competition Law Forum*, St. Gallen, http://europa.eu/rapid/press-release_SPEECH-14-378_en.htm.

8 Communication from the European Commission to the European Parliament and Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014) 453 final (9 July 2014) (the “Commission’s Ten Years Communication”).

9 Commission Staff Working Document, Enhancing competition enforcement by the Member States’ competition authorities: institutional and procedural issues, SWD(2014) 231 final (9 July 2014) (“Staff Working Document”).

10 See the Commission’s Ten Years Communication, n. 8, §§ 41, 42, 46; Staff Working Document, n. 9, §§ 89–102.

11 http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html

12 Monopolkommission, *Eine Wettbewerbsordnung für die Finanzmärkte*, XX. Hauptgutachten 2012/13 (2014) §§ 118–217, http://monopolkommission.de/images/PDF/HG/HG20/HG_XX_gesamt.pdf with an English summary in §§ 18–28 of http://monopolkommission.de/images/PDF/HG/HG20/HG_XX_Summary.pdf (also see the accompanying press release Monopolkommission, Pressemitteilung, 9 July 2014, <http://tinyurl.com/h94daez>); Monopolkommission, *Strafrechtliche Sanktionen bei Kartellverstößen*, Sondergutachten 72 (2015), http://monopolkommission.de/images/PDF/SG/s72_volltext.pdf; see already Monopolkommission, *Stärkung des Wettbewerbs bei Handel und Dienstleistungen*, XIX. Hauptgutachten 2010/11 (2012) § 479 (calling for research into the question of criminalisation).

13 On whistleblowing rewards see also A. Stephan, Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool? (January 15, 2014), *CCP Working Paper* 14–3, <http://ssrn.com/abstract=2405933>; E. Bueren, Prämien für Whistleblower im Kartellrechtsvollzug (2012) *Zeitschrift für Wettbewerbsrecht* 310–48.

scope of substantive infringements or the evidentiary standards applied. He emphasises the need for transparency, both in the political discussion preceding the introduction of criminal sanctions and in the application of these sanctions. He highlights the importance of patient institution building, in particular for cooperation between competition authorities and prosecuting authorities where they are not one and the same. A further important aspect highlighted by Professor Kovacic is the building of support for criminalisation in the population and judiciary. This last point leads up to the contribution by Professor Andreas Stephan.

8. Professor Andreas Stephan of the Centre for Competition Policy at the University of East Anglia addresses the assumption, made by many in the criminalisation debate, that public opinion in Europe does not consider antitrust infringements as sufficiently worthy of moral condemnation to justify criminal sanctions.¹⁴ The question is an empirical one, and Professor Stephan has addressed it in the way empirical questions should be approached: by looking at the evidence. He reports on large-scale surveys on public attitudes to antitrust infringements in the UK, Germany, Italy, and the US.¹⁵ As Professor Stephan explains, the results of the survey will not settle the debate once and for all: the data are conducive to cherry-picking. Proponents of criminalisation can now point to evidence that in the UK, the US, in Germany a majority of respondents considered price fixing as equally serious as fraud, and as equally or more serious than insider trading; that an overwhelming majority in all jurisdictions considered it more serious than illegally downloading music; and that a strong minority of respondents (some 45%) considered cartels at least as serious as tax evasion. One can also reject the notion that the public attitude to white-collar crime in the US is somehow “unique”; Professor Stephan draws attention to the surprising uniformity of the responses from the US and from the European clusters. Opponents of criminalisation will likely argue that when directly asked whether imprisonment would be an appropriate sanction for price fixers, support in Europe hovers between one quarter and one third of respondents. However, Professor Stephan explains that there may have been a response bias because of uncertainty whether “imprisonment” referred to a prison sentence (that could possibly be suspended) or to actual incarceration (which could be considered excessive in a jurisdiction where most first-time nonviolent offenders only get suspended prison sentences). Indeed, such a response bias appears likely, given that otherwise it would be difficult to explain how a majority in most of the jurisdictions can equate the seriousness of price fixing with fraud, but reject imprisonment as a possible sanction — unless this was understood as a popular vote to decriminalise fraud. With regard to attitudes in the UK, the new survey in combination with an earlier survey conducted in

the UK¹⁶ also allows some longitudinal insight: support for the sanction of imprisonment appears to have tripled in the UK between the first and the second survey.

II. Status quo

9. With regard to the status quo, the experience with criminal enforcement in the United Kingdom and Ireland—often touted as *the* European jurisdictions with criminal enforcement—is limited and fairly well publicised, and I will only briefly mention it below.

10. In contrast, the state of the “law in action” in continental European Member States on individual sanctions is much less transparent.¹⁷ There are at least four reasons for this intransparency regarding individual, and in particular criminal enforcement on the continent. First, there are language barriers: to the extent there is a detailed discussion, the discourse takes mostly place in the local language (French, German, Italian, Spanish, Polish, etc.). International observers usually rely on brief English-language summaries in multi-jurisdictional surveys that may or may not capture accurately the law in action.¹⁸ Secondly, while the competition law community in the UK has predominantly accepted the arguments

16 A. Stephan, Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain (May 1, 2007), (2008) 5(1) *Company Law Review* 123–45, <http://ssrn.com/abstract=993407>.

17 According to the country reports in A. N. Campbell (ed.), *Getting the Deal Through: Cartel Regulation*, 2015, 15th edn, at least the following EU jurisdictions provide for criminal sanctions for cartels (or, where noted, only bid rigging): Austria (bid rigging, see A. Ablasser-Neuhuber and F. Neumayr, *ibid.*, 17, 19); Belgium (B. Lebrun and L. Bersou, *ibid.*, 23, 25: “*Bid rigging is the sole cartel activity which is likely to lead to criminal sanctions*”); the Czech Republic (T. Fiala, *ibid.*, 63, 65); Denmark (since 2013; A. Rung-Hansen, *ibid.*, 69, 71); France (see the contribution by David Viros in this issue); Germany (bid rigging; see below, Professor Zimmer’s contribution in this issue, and Wagner-von Papp, What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany in C. Beaton Wells and A. Ezrachi [eds.], *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford: Hart 2011) 157); Greece (see A. Papadopoulos and L. Lovdahl Gormsen, in Campbell, 104, 107); Hungary (bid rigging; L. Szabó, *ibid.*, 117, 120); Ireland (P. Andrews and D. Collins, *ibid.*, 135, 137–8; for more detail see P. Massey and J. D. Cooke, Competition Offences in Ireland: The Regime and Its Results, in Beaton-Wells and Ezrachi, 105; T. Calvani and K. M. Carl, The Competition Act 2002. Ten Years Later: Lessons from the Irish Experience of Prosecuting Cartels as Criminal Offences, [2013] 1 *Journal of Antitrust Enforcement* 296); Italy (R. Caiazzo and F. Costantini, in Campbell, 150, 154); Poland (bid rigging only, D. Hansberry-Bieguńska and M. Krasnodębska-Tomkiel, *ibid.*, 212, 214); Romania (separate provisions for cartels and bid rigging, M. Rădulescu and V. Iacob, *ibid.*, 227, 229); Slovenia (N. Pipan Nahtigal and T. Lahovnik, *ibid.*, 245, 247–8); UK (for the amended cartel offence, see A. Stephan, The UK Cartel Offence: A Purposive Interpretation [2014] 12 *Criminal Law Review* 879; P. Gilbert, Changes to the UK Cartel Offence—Be Careful What You Wish for [2015] 6 *Journal of European Competition Law & Practice* 192; for the 2002 version, see *idem*, The UK Cartel Offence: Lame Duck or Black Mamba, Centre for Competition Policy [CCP] Working Paper No. 08–19, <http://ssrn.com/abstract=1310683>; J. Joshua, DOA: Can the UK Cartel Offence be Resuscitated, in Beaton-Wells and Ezrachi, 129). This does not even include criminal sanctions for procedural offences, such as in Cyprus, Finland, and Sweden (and in the EFTA Switzerland) considered, but eventually rejected criminalisation. The Netherlands considered re-criminalising cartels, but eventually decided against it (M. J. Frese, *Sanctions in EU Competition Law: Principles and Practice* [Oxford: Hart 2014] 222–4). In the EEA, Norway has also criminal sanctions (T. Sando and A. J. Hageler, in Campbell, 206, 208). To be sure, in many of these jurisdictions the criminal cartel provisions are law in the books without enforcement. Yet even this law in the books may become relevant when it comes to extradition, see below, § 40.

18 See the country surveys in Campbell, n. 17.

14 This is emphasised in particular by opponents of criminalisation. See, e.g., Ost, n. 6, 134; M Dreher ‘Wider die Kriminalisierung des Kartellrechts’ (2011) *Wirtschaft und Wettbewerb* 232, 237.

15 The full survey results are reported in A. Stephan, Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA, *CCP Working Papers* 15–8, <http://tinyurl.com/zlbwnrh>.

for the criminalisation of cartels since the Penrose report and the subsequent introduction of the cartel offence in 2002, enthusiasm for criminal enforcement has generally been muted on the Continent.¹⁹ Even administrative (or quasi-criminal) enforcement against individuals is not uncontroversial.²⁰ This lukewarm response also has an impact on the interest in research of the status quo—competition law experts are generally happy to leave criminal enforcement to criminal law experts, and criminal law experts rarely tend to devote their attention to competition matters. Thirdly, the intransparency is owed to difficulties in accessing information on the sanctions imposed on individuals. Higher privacy standards on the Continent prohibit naming and shaming in the press, and access to criminal or quasi-criminal decisions is restricted. The fourth reason is that in continental jurisdictions, criminal enforcement is usually decentralised: it is public prosecutors with local or regional jurisdiction that investigate and prosecute these cases.

1. Looking at enforcement numbers

11. Let us first look at the enforcement numbers—bearing in mind that numbers indicate activity, not necessarily effectiveness of enforcement.²¹

12. David Viros reports that in France there have been approximately two criminal convictions per year under Article L. 420-6 of the French Commercial Code over the first two decades of the provision's existence.²² While most of these convictions resulted in fines or suspended prison sentences, at least five defendants were actually incarcerated for periods up to one year, starting as early as 1995.²³ To put this into perspective: this actual incarceration took place more than a decade earlier than the suspended prison sentence in the 2006 heating oil cartel

in Ireland, which is widely touted as the “*first successful criminal prosecution of a hard core cartel in the EU*,”²⁴ and “*the first prison sentence in Europe*.”²⁵

13. In Germany (as in a number of other Member States²⁶), “only” bid rigging is a criminal offence (§ 298 of the German Criminal Code).²⁷ Other cartel infringements, including price fixing, market allocation, or output restrictions, are mere administrative offences that may result in administrative fines both for individuals and undertakings. Even with this limited scope of the criminal offence, there were 264 prosecutions, 184 convictions, and 26 suspended prison sentences in the period from 1998 to 2008 (inclusive).²⁸ In his contribution to this issue, Professor Zimmer updates these statistics through to 2012 by adding that in 2009, 19 convictions were reported (three of which were suspended prison sentences, one for six months, one for more than 9 but no more than 12 months, and one for more than one year but no more than two years); in 2010, 17 convictions were reported (one of which was a suspended prison sentence of more than one but no more than two years); in 2011, 20 convictions were reported (seven of which were suspended prison sentences, four of which were for sentences of more than one but no more than two years); and in 2012, 22 convictions were reported (all fines).²⁹ In addition, in 2013, the latest year for which officially reported data are available, 35 convictions were reported, of which five defendants were sentenced to suspended prison sentences.³⁰

In Germany, the highest actual prison sentence to be served being two years and 10 months

14. Altogether, this brings the number of criminal convictions in Germany reported in the official statistics for bid rigging between 1998 to 2013 (inclusive) to 297

19 See Ost, n. 6, 133–4; P. Klockner and K. Ost, Nach der Novelle ist vor der Novelle—Themen einer 8. GWB-Novelle, in Brinker (ed.), *Recht und Wettbewerb, Festschrift Bechtold* (Munich: CH Beck 2006) 229, 240–2; Dreher, n. 14; A. Bräunig Wider die Strafbarkeit von “Hardcore Kartellen” de lege ferenda, (2011) HRRS 425, <https://www.hrr-strafrecht.de/hrr/archiv/11-10/index.php?sz=11>. These repeat and build on the objections that had been raised by competition lawyers in earlier times, when it was mainly criminal lawyers that argued for criminalisation. See, e.g., W. Kartte and A. von Portatius, *Kriminalisierung des Kartellrechts? (1975) Betriebs-Berater* 1169–72; W. Möschel, *Zur Problematik einer Kriminalisierung von Submissionsabsprachen* (Cologne: Carl Heymanns 1980).

20 Ost, n. 6, 134; Klockner and Ost, n. 19, 244 (suggesting that it may be preferable to abolish individual liability and apply administrative procedure to fines imposed on the undertaking, similar to the procedure in the EU Courts; such a procedure would, however, arguably not be consistent with the guarantees in the German Constitution).

21 See W. E. Kovacic, Rating the Competition Agencies: What Constitutes Good Performance, 16 *George Mason Law Review* 903; *idem* and D. A. Hyman, Consume or Invest: What Do/Should Agency Leaders Maximize? (December 19, 2015), forthcoming in *Washington Law Review*, <http://ssrn.com/abstract=2705919>.

22 See David Viros’s contribution below, §§ 13, 14. See also L. Idot, Conference—Criminal and competition laws: Comparative study of antitrust criminal provisions and policies in European Member States, February 2008, *Concurrences Review* No. 1-2008, Art. No. 15196, www.concurrences.com.

23 D. Viros, below, §§ 13, 14. The convictions concerned multiple (antitrust and other) offences, *ibid.*, § 12.

24 P. K. Gorecki and D. McFadden, Criminal Cartels in Ireland: the Heating Oil case (2006) *European Competition Law Review* 631, 640.

25 B. A. Barnett, Criminalization of Cartel Conduct—The Changing Landscape, Adelaide, Australia (3 April 2009), <http://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape>. The Irish Competition and Consumer Protection Commission’s website makes the much more modest claim that these were the first jury convictions for price fixing in Europe, which is probably accurate given the nearly complete absence of juries in continental Europe.

26 E.g., Austria, Hungary, Poland, and apparently Belgium; references in n. 17. As David Viros points out in his contribution, the restrictive conditions of the more general provision Article L. 420-6 will de facto mostly be fulfilled in bid-rigging cases.

27 See D. Zimmer’s contribution below, § 1; F. Wagner-von Papp, What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany, in C. Beaton-Wells and A. Ezrachi (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford: Hart Publishing 2011) 157, 164–82.

28 Wagner-von Papp, n. 27, 166–8 (explaining that these statistics are underreporting actual enforcement), 182 (statistics on prosecutions, convictions and sentences between 1998 and 2008, inclusive).

29 See the contribution by Daniel Zimmer, § 5, and the statistics from Statistisches Bundesamt, Fachserie 10, Reihe 3 for the respective years.

30 Statistisches Bundesamt, Fachserie 10, Reihe 3, 2013 (Wiesbaden 2015) 172. Two of the suspended prison sentences were to six-month prison each, and three were for periods of between 9 and 12 months.

convictions, with 42 suspended prison sentences and the remainder criminal fines. I have pointed out elsewhere that these cases reported in the official statistics systematically under-report the more serious cases.³¹ Because of this bias, the official statistics so far do not report any actual cases of incarceration, so that one has to rely on anecdotal evidence. In 2005 and 2006, two persons were actually incarcerated, the highest actual prison sentence to be served being two years and 10 months.³² In 2015, the German Federal Court of Justice dismissed an appeal of two defendants who had been convicted of bid rigging (concurrently with corruption charges) and sentenced to one-and-a-half years and two years and four months, respectively.³³ At least the latter prison sentence cannot be suspended.³⁴ Whether these three cases are the only ones in which defendants “served time” or whether they are the tip of the iceberg is impossible to say.³⁵

In the beer breweries cartel, 14 individuals were fined a total of approximately €3.6 million

15. In addition to criminal enforcement for bid rigging, German competition authorities have prosecutorial discretion to impose administrative fines on individuals under § 81 of the German Act against Restraints of Competition. For individuals, the statutory maximum fine is €1 million. Again it is difficult to get at reliable statistics about the actual practice of setting the fine: the *Bundeskartellamt*, curiously, chooses not to report systematically the amount of the individual fines imposed. Nevertheless, it is possible to give some indication of the “law in action.” In a case before the German Federal Constitutional Court, the *Bundeskartellamt* submitted that in the period from 1993 to 2010 it had fined 510 individuals and 563 legal persons for competition law infringements—approximately one individual per legal person.³⁶ The average fine per fined individual in that period was reported to be €56,000.³⁷ It should be noted that this average includes not only horizontal

cartel cases, and that the maximum fine was doubled from €500,000 to €1 million in 2005 without retrospective effect, so that most of the fines in the sample will have been based on the lower maximum. There are some indications that in larger cartel cases, typical individual fines are in the order of magnitude of €200,000 to €250,000. For example, in the beer breweries cartel, 14 individuals were fined a total of approximately €3.6 million.³⁸ Even if this amount were uniformly distributed among all these 14 individuals, the fine for each of these 14 individuals would be approximately €257,000. Since a skewed distribution seems more probable, the highest fine is likely to have been higher—possibly substantially higher—than that. Similarly, individual fines of €250,000 and €200,000 were reported in the *Wholesale Paper*³⁹ and *Cement*⁴⁰ cases, respectively. However, the quantification of the fine depends on multiple factors, among others the wealth and income of the person fined.⁴¹ Accordingly, individual fines even in cartel cases can be substantially lower than the previous numbers suggest.⁴²

16. It should be pointed out that in Germany these individual administrative fine appear to be magnitudes higher than the usual individual criminal fines that are imposed in the officially reported bid-rigging cases.⁴³ However, this may be due to the under-inclusivity of the official statistics that arguably exclude the more serious bid-rigging cases; in the *District Heating Pipes* cartel, in addition to the 2-year-10-month prison sentence described above, the court imposed criminal a fine of €100,000 on the main defendant.

17. France and Germany are not alone among the continental jurisdictions in imposing prison sentences. In Austria, for example, courts have imposed not only suspended sentences,⁴⁴ but also prison sentences that were not (entirely) suspended.⁴⁵

31 Wagner-von Papp, n. 27, 166–7.

32 Wagner-von Papp, n. 27, 168–70. The 2005 conviction was mostly for corruption offences and only partly for aiding and abetting bid rigging (sentence of two years and six months; BGH, 22 June 2004, 4 StR 428/03, 49 BGHSt 201), but the 2006 conviction and sentencing to two years and ten months in the *District Heating Pipes* cartel was for bid rigging (under the bid-rigging offence and concurrently aggravated fraud; LG Munich II, 3 May 2006, W5 KLs 567 Js 30966/04, BeckRS 2008, 00736).

33 BGH, 29 April 2015, 1 StR 235/14, BeckRS 2015, 12466.

34 Sentences of more than two years cannot be suspended. § 56(2) of the German Criminal Code (StGB).

35 Ost, n. 6, reports that “at a recent meeting of public prosecutors (...) with a special competence for prosecuting bid-rigging, not one of them could remember any conviction including the imposition of a custodial sanction.” With respect, given that they overlooked the three cases in which I know there to have been custodial sentences (excluding all the suspended sentences), this seems to speak more to the level of intransparency in German law than to the existence or non-existence of further cases. An error-detection mechanism that detects zero out of three known errors does not give great confidence in its reliability.

36 BVerfG, 19 December 2012, 1 BvL 18/11, WuW/E DE-R 3766, §§ 52, 60 – *Verzinsungspflicht*, available at http://www.bverfg.de/entscheidungen/ls20121219_1bv1001811.html (in German).

37 *Ibid.*, § 60.

38 *Bundeskartellamt*, 2 April 2014, Fallbericht Bußgelder gegen Brauereien (Summary Case Report on the decisions of 27 December 2013 and 31 March 2014, Case B10-105/11), http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B10-105-11.pdf?__blob=publicationFile&v=1.

39 BGH, 19 June 2007 – KRB 12/07, NJW 2007, 3792, WuW/E DE-R 2225, § 10 – *Papiergroßhandel* (Wholesale Paper).

40 In the *Cement* case, the individual fine of €200,000 imposed on the individual “Ed. Sch.” was reduced by 5 per cent (€10,000) on appeal because of the long duration of the appeal procedure, BGH, 26 February 2013 – KRB 20/12, WuW/E DE-R 3861, §§ 1, 87–91 – *Grauzement* (Cement).

41 Second sentence of § 17(3) of the Administrative Offences Act (OWiG).

42 E.g., in the *Cement* case, the lowest of the fines for nine individual appellants was only €6,000, BGH, n. 40. In another cartel case, the Higher Regional Court Düsseldorf set a fine of some €40,000 for one of the individuals, OLG Düsseldorf, 29 May 2015, V-2 Kart 1+2/13 (OWi), NRWEntscheidungen. For a discussion of the factors influencing the setting of the individual fines in an information exchange case, see OLG Düsseldorf, 29 October 2012, V-1 Kart 1–6/12 (OWi) §§ 140–96, NRWEntscheidungen – *Silostellgebühren*.

43 See Wagner-von Papp, n. 27, 168 in fn. 75.

44 E.g., OGH, 26 January 2001, 13 Os 34/01, <http://tinyurl.com/h5czaj4>.

45 OGH, 6 October 2004, 13 Os 135/03, <http://tinyurl.com/jypmnvs> (where one defendant, D. I. Dietrich B., was sentenced to a prison sentence of two years, of which 18 months were suspended, resulting in a six-month incarceration).

18. The French and German experience should be considered against the backdrop of the enforcement numbers for the cartel offence in the United Kingdom. A lot of effort went into the drafting of the original cartel offence in s. 188 Enterprise Act 2002, and approximately six to ten prosecutions per year had been expected to result.⁴⁶ Actual enforcement famously lagged behind expectations. There were, first, the three guilty pleas in the Marine Hose cartel, facilitated by the Damocles sword of the US plea bargain, that eventually resulted in prison sentences of 20, 24 and 30 months.⁴⁷ Then there was the Fuel Surcharges cartel prosecution that failed on the first day of trial for procedural reasons.⁴⁸ More recently, one person pleaded guilty in the Galvanised Steel Tank cartel case and was sentenced to a suspended sentence of six months' imprisonment,⁴⁹ while two defendants who did not plead guilty and went to trial were acquitted, because the jury did not find that they acted "dishonestly."⁵⁰ In the meantime, the Enterprise Regulatory Reform Act 2013 ("ERRA 2013") has removed the dishonesty requirement (and replaced it with a range of defences, in particular previous publication or notification to the CMA⁵¹), so that this acquittal need not be indicative for the success of future prosecutions. In Ireland, there have been many more criminal convictions than in the UK, though not as many as in Germany. However, the vast majority ended in relatively low fines and a few suspended sentences.⁵²

2. Institutions

19. So, in terms of mere numbers Germany and France have more criminal enforcement than the UK and Ireland. However, effective deterrence is not a function of enforcement numbers as such. Numbers must not obscure that current criminal competition law enforcement in Germany and France is not always institutionally well embedded in the overall antitrust system, and fails to achieve its deterrent potential.

20. To be sure, both France and Germany have made an attempt to integrate criminal enforcement with competition law enforcement. The *Autorité* can refer cases to the public prosecutor;⁵³ so can the *Bundeskartellamt* (and the competition authorities in the German *Länder*). French courts can ask for the *Autorité's* opinion.⁵⁴ German law has made sure that the competition authorities retain their jurisdiction for dealing with the undertakings even where individuals are criminally prosecuted by public prosecutors,⁵⁵ and that public prosecutors and competition authorities keep each other informed about their investigations under § 298 StGB.⁵⁶

21. Three main failures can, however, be identified in both Germany and France: decentralised enforcement by general prosecutors and criminal courts; the failure to make the most of cooperation between competition authorities and prosecutors or courts; and the failure to provide for automatic immunity for successful leniency applicants. Tax law is generally more effective on all three counts.

Criminal enforcement is largely confined to local or regional prosecutors and courts

22. First, in France and Germany (and many other continental jurisdictions), criminal enforcement is largely confined to local or regional prosecutors and courts. David Viros notes that this decentralised enforcement differs from the treatment of "serious tax or securities fraud which is prosecuted by a national, specialized public prosecutor."⁵⁷ In Germany, the call for such a national specialised public prosecutor for serious economic crimes has been raised for decades. Economic crime is sometimes concentrated in the so-called *Schwerpunktstaatsanwaltschaften*, but these are still relatively decentralised and arguably do not often deal with competition law. This decentralised enforcement by general public prosecutors results in a lack of competition-law specific knowledge and experience, as well as in a lack of publicity: while the *Bundeskartellamt* press releases are invariably picked up by the national press, reports of criminal enforcement is often confined to local court reporting (if there is any coverage at all). For the rest of the world—including potential infringers, whose deterrence is after all the whole point of criminal enforcement—the level of enforcement and sanctions in these jurisdictions remains obscure. Because of the relatively low numbers of criminal competition law cases for each of the decentralised enforcers, the decentralisation arguably also leads to a distortion in the prioritisation of prosecutions. On the one hand, a local prosecutor who

⁴⁶ A. Hammond and R. Penrose, Proposed criminalisation of cartels in the UK (November 2001), Report prepared for the Office of Fair Trading (OFT365)

⁴⁷ *R v. Whittle, Allison and Brammar* [2015] EWCA Crim 2560, [2009] UKCLR 247.

⁴⁸ Office of Fair Trading, Project Condor Board Review, <http://tinyurl.com/hdug9am>.

⁴⁹ Competition and Markets Authority, Director Sentenced to Six Months for Criminal Cartel, Press Release 14 September 2015, <https://www.gov.uk/government/news/director-sentenced-to-6-months-for-criminal-cartel>. In sentencing, the judge indicated that a two-year sentence would generally be an appropriate sanction, but that this was to be reduced because of the substantial cooperation of the defendant.

⁵⁰ Competition and Markets Authority, CMA statement following completion of criminal cartel prosecution, Press Release 24 June 2015, <https://www.gov.uk/government/news/cma-statement-following-completion-of-criminal-cartel-prosecution>.

⁵¹ These new defences present their own problems; see A Stephan, Purposive Interpretation, n. 17; Gilbert, n. 17.

⁵² See the references for Ireland in n. 17, and the information on the Competition and Consumer Protection Commission's website, <http://ccpc.ie/enforcement-mergers-enforcement-mergers-criminal-enforcement-cartels/criminal-court-cases>.

⁵³ Contribution by David Viros below, §§ 23, 24.

⁵⁴ *Ibid.*, §§ 21–22. See also *ibid.*, §§ 15–20 for other interactions of administrative and criminal enforcement in France.

⁵⁵ § 82 GWB.

⁵⁶ RiStBV No. 242, which seems to be honoured more in the breach than in the observance. The *Bundeskartellamt* has invited prosecutors for an exchange of experiences since 2012 (see *Bundeskartellamt*, Press Releases of 10 February 2012, 15 April 2013, and 3 June 2014).

⁵⁷ Contribution by David Viros below, § 12.

gets a small bid-rigging case that is easily provable may prosecute where a centralised prosecutor might prioritise a more harmful infringement even if it is slightly more difficult to prove. On the other hand, a general prosecutor may understandably prioritise cases with more salient harm, such as a confidence trickster that defrauds a few individuals, over cartel cases where the aggregate harm may be magnitudes greater but the victims are less readily identifiable. A specialised prosecuting authority has an incentive to prove its worth by bringing cases, and bringing the right cases. Similarly, it should be considered whether court jurisdiction could be concentrated with courts with competition law experience.

There has up to now been very little involvement of the competition authorities in the actual prosecution

23. Second, the jurisdiction of general public prosecutors would perhaps be much less problematic if competition authorities were actively involved with the criminal proceedings, provided subject-matter expertise, and publicised statistical information. Despite some level of involvement of the competition authorities with criminal cases,⁵⁸ there has up to now been very little involvement of the competition authorities in the actual prosecution in France or Germany. Again it is tax law that shows that things can be different. In Germany, the tax authorities have concurrent jurisdiction with the public prosecutor for investigating criminal tax avoidance.⁵⁹ Even where it is the prosecutor that investigates and prosecutes, the tax authorities have extensive information and participation rights.⁶⁰ The German literature has long asked for a similar degree of involvement for competition authorities in criminal competition cases.⁶¹

Great care has to be taken that these individual sanctions do not interfere with the effectiveness of leniency programmes

24. Third, and most pressingly, the protection of leniency programmes is paramount for the effectiveness of public competition law enforcement. There are excellent reasons, both moral and utilitarian, for increasing the emphasis on individual and criminal sanctions. Great care has to be taken, however, that these individual sanctions do not interfere with the effectiveness of leniency programmes. Where individuals fear they might go to

prison (even if in reality the probability for a cooperating defendant to go to prison in Europe currently tends toward zero), and perhaps even if they fear high pecuniary individual sanctions, they may be deterred from self-reporting their conduct. It is important, therefore, that there is automatic immunity at least for the successful immunity applicant. The importance of guaranteeing automatic immunity from criminal prosecution has been demonstrated by the much greater effectiveness of the 1993 immunity programme in the US compared to the previous programme that had offered discretionary rebates.

25. Unfortunately, neither France nor Germany have provided for automatic immunity for successful leniency applicants in their criminal competition provisions. Viros discusses this issue for France, and notes that the *Autorité* will not refer cases to the public prosecutor where a leniency application has been made. This does not, however, prevent the public prosecutor from initiating an investigation on its own accord. The proposal to introduce an individual leniency programme providing for immunity has not yet been accepted.

26. In Germany, the bid-rigging provision provides for immunity only where the perpetrator prevents the bid from being accepted or has at least expended best efforts to prevent acceptance where the bid is not accepted for other reasons (§ 298[3] StGB). The general leniency provision for helping to uncover a crime (§ 46b StGB) does not apply to crimes without minimum prison sentences, and so does not apply to the bid-rigging provision; even if it did apply, it would only result in a discretionary reduction of the sentence. In the legislative discussion of § 46b StGB, however, the government explained that where the accused was guilty of a crime without a minimum prison sentence, the prosecutor or court were likely to close the case against a perpetrator that contributed substantially to the uncovering of the crime anyway. This is arguably true in practice: especially given the aversion prosecutors and courts have against dealing with complex economic crime, it seems very unlikely indeed that a successful leniency applicant would ever be prosecuted and convicted. However, what counts for the decision to reveal a cartel, especially where risk-averse decision-makers are concerned, is not what actually happens, but the expectation of what might happen. In the absence of an automatic immunity provision, the possibility of criminal prosecution may deter individuals from applying for leniency or contributing to their undertaking's leniency application.

27. Yet again, it is tax law that shows that there are no conceptual obstacles to providing for automatic criminal immunity for perpetrators that self-report.⁶²

28. The recommendations for more effective criminal competition law enforcement, then, would be to establish a dedicated, centralised prosecutor; that the competition authorities should be involved in the investigation

58 Above § 20 (note in particular the possibility in France since 2014 for the judge to involve the *Autorité*).

59 §§ 386, 399 Federal Tax Code (Abgabenordnung [AO]).

60 §§ 402, 403, 406, 407 AO.

61 Wagner-von Papp, n. 27, 175, with further references to, inter alia, J. Biermann, Neubestimmung des deutschen und europäischen Kartellsanktionenrechts (2007) *Zeitschrift für Wettbewerbsrecht* 1, 43; B. Federmann, *Kriminalstrafen im Kartellrecht* (Baden-Baden: Nomos 2006) 518–20. See also R. Raum, § 82a, in H.-J. Bunte (ed.) *Langen/Bunte Kartellrecht Kommentar* Vol. 1 12th edn (Wolters Kluwer 2014) § 3 (noting that § 82a GWB, which allows the court in the administrative fines procedures to permit the competition authority to direct questions to the accused, witnesses and expert witnesses, falls short of § 407 AO, and is, at any rate, inapplicable to criminal prosecutions; considering this to be a legislative mistake that should be corrected).

62 § 371 AO.

and prosecution with full participation rights; that results should be widely publicised (for privacy reasons: usually on an anonymised basis); and that there should be an automatic immunity provision.

29. On these dimensions, the UK has mostly done better than France or Germany. The CMA and SFO have concurrent jurisdiction to prosecute, results are widely publicised, and the no-action letter provides sufficient *ex ante* certainty. The failed *Fuel Surcharges* prosecution demonstrated that perhaps a close involvement of a public prosecutor with expertise on the criminal procedure element of the prosecution may still be desirable. In the US, the Department of Justice's subject-matter expertise and prosecution experience provides for the optimal combination, but one that is arguably not realistically duplicable in Europe in the short or medium term.

30. It is perhaps not a coincidence that tax law provides the template for effective criminal enforcement without impairing the regulatory objectives: here, the state has "skin in the game." *Honi soit qui mal y pense.*

III. Cartel criminalisation

31. The arguments for criminal competition law enforcement beyond the confines of the German bid-rigging offence or the narrow conditions of the French provision in Article L. 420-6 of the French Commercial Code have been discussed for several decades now, and have been systematically introduced into the European debate by Professor Wouter Wils.⁶³ First, deterrence by relying exclusively on fining undertakings will not be effective, not only because these fines cannot be raised to optimal levels due to legal and practical (insolvency) constraints, but also because fines against the principal will not necessarily deter the agent.⁶⁴ Second, where there is automatic immunity for leniency applicants, criminal sanctions provide a strong incentive to be first in reporting

the cartel.⁶⁵ Third, criminal enforcement is a uniquely effective deterrent and sends a strong moral message.⁶⁶ Professor Zimmer, in his contribution below, expands on these arguments, as did the Monopolies Commission in its recent reports.⁶⁷

32. Opponents of criminalisation raise objections that fall into two broad categories. First, they doubt that competition law infringements are sufficiently "immoral" to justify criminal enforcement (the moral argument). Second, they fear that criminal enforcement could endanger the effectiveness of the existing enforcement mechanisms (the utilitarian argument).

Are competition law infringements sufficiently "immoral" to justify criminal enforcement?

33. With regard to the moral argument, opponents of criminalisation generally acknowledge the large social harm that cartels cause, but argue that part of the decision to criminalise behaviour should be whether there is a sufficient recognition in the population that the conduct in question deserves the level of moral opprobrium required to employ criminal law, the remedy of last resort.⁶⁸ They postulate that popular opinion would not support criminalisation.⁶⁹

34. This argument rests on two fragile pillars: that popular recognition of conduct as criminal is a necessary condition for criminalising the conduct, and that popular opinion would not support criminalisation. The argument breaks down if one of the pillars falls.

35. Regarding the first pillar, if one were to reduce criminal law to those prohibitions on which lay persons spontaneously agree in a state of nature, that is, without the guiding posts of what others consider worthy of criminal sanctions, one would end up with a very short list. In many cases, it takes the legislator to take the first step by criminalising conduct to send a signal that certain conduct is considered worthy of condemnation.⁷⁰

36. Regarding the second pillar, I have to admit that my intuition also used to be that popular opinion still does not sufficiently recognise the social harmfulness of cartels.⁷¹ The study on which Professor Stephan reports in this issue is informative in this regard in two ways. First, even

63 W. P. J. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Oxford: Hart Publishing 2008) §§ 544–634; see already W. P. J. Wils, Does the Effective Enforcement of Articles 81 and 82 EC Require not only Fines on Undertakings, but also Individual Penalties, and in particular Imprisonment?, in C. D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford: Hart Publishing 2003) 411–52. Of course similar arguments had been made previously in national discourses, usually with a less economic and more legal approach (in Germany, see, e.g., K. Tiedemann, Kartellrechtsverstöße und Strafrecht [Cologne: Carl Heymanns 1976]; *idem*, Welche strafrechtlichen Mittel empfehlen sich für eine wirksamere Bekämpfung der Wirtschaftskriminalität, in Ständige Deputation des Deutschen Juristentages [ed.], *Verhandlungen des neunundvierzigsten Deutschen Juristentages* Vol. 1 Part C [Munich: C. H. Beck 1972]; see also, though arguing against criminalisation, W. Möschel, *Zur Problematik einer Kriminalisierung von Submissionsabsprachen* [Cologne: Carl Heymanns 1980] with further references) and in particular in the US (e.g., G. J. Werden and M. J. Simon, Why Price-Fixers Should Go to Prison, [1987] 32 *Antitrust Bulletin* 917). However, Wils's contributions have undoubtedly had the effect of focusing the pan-European discussion on the issue.

64 Wils, *Efficiency and Justice*, n. 63, §§ 547–59.

65 Wils, *Efficiency and Justice*, n. 63, §§ 560–5.

66 Wils, *Efficiency and Justice*, n. 63, §§ 566–74.

67 Above n. 12.

68 M. Dreher Wider die Kriminalisierung des Kartellrechts (2011) *Wirtschaft und Wettbewerb* 232, 237.

69 *Ibid.*

70 Baumann and Arzt, Kartellrecht und allgemeines Strafrecht (1970) 134 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 24, 30, 32; Wagner-von Papp, Kriminalisierung von Kartellen (2010) *Wirtschaft und Wettbewerb* 268, 274 (with reference to the first survey in the UK, see n. 16); see also M. Stucke, Morality and Antitrust (2006) *Columbia Business Law Review* 443, 489 et seq; Wils, *Efficiency and Justice*, n. 63, §§ 572–4.

71 Wagner-von Papp, n. 70, 274.

lay people seem to consider price fixing as akin to fraud. Second, about two thirds of the European respondents to the survey expect that when they buy a product or service, the price has been set independently.⁷² This is important both in terms of morality and with regard to positive law. With regard to morality, it supports the argument that price fixing violates the norm against deception.⁷³ With regard to positive law, the reason why price fixing has not been qualified as fraud in Germany, or a conspiracy to defraud in the UK, is that courts found that in the past there was no tacit implied promise that prices are formed independently.⁷⁴ Tacit assumptions today are different from times in which prices in Europe were often subject to price control. Although it would not be desirable to apply the general fraud provisions to competition cases—because the general criminal law institutions for these provisions are not tailored to the requirements of competition law—the very thin doctrinal line between fraud provisions and price fixing (and other hardcore horizontal cartels) should amply demonstrate that from a moral perspective there is hardly any difference, if any at all.⁷⁵

37. David Viros rightly emphasises that criminal sanctions for antitrust infringements are nothing new in Europe, either. He points to Article 419 of the Napoleonic Criminal Code of 1810. Similarly, in Germany one could point to the Prussian royal decree of 14 July 1797,⁷⁶ Article 335 of the Bavarian Criminal Code of 1813, and § 270 of the Prussian Criminal Code of 1851, all of which concerned bid rigging, and were comparable to Article 412 of the Napoleonic Criminal Code of 1810.⁷⁷ It does not appear that these early provisions were vigorously enforced, but they may indicate that the immorality

of anticompetitive conduct is not, as is sometimes claimed, a “US import” that has no support in European culture: the 1797 decree stated in the preamble that the mischief of bid-rigging agreements was their “*immoral and illegal selfishness.*”

38. From a utilitarian perspective, the reasons for criminalisation seem overwhelming—but one has to proceed with great caution in the implementation. Whether criminalisation is desirable depends very much on the institutions in each jurisdiction. Where, for example, it is impossible to allow for criminal immunity, competition law should not be criminalised, lest leniency programmes be undermined. For Germany, at least, this is simply not the case: while constitutional arguments against immunity provisions have often been made, they have not succeeded in the courts, and the immunity from criminal enforcement for criminal tax avoidance in § 371 AO clearly shows that where there is a will, there is a way. In any case, the already existing criminal rules in the Member States (regardless whether they are general, as in France, or limited to bid rigging, as in Germany) already require this particular issue to be resolved. Similar considerations go for the other existing institutional deficiencies noted above.⁷⁸ The European Union should lend a helping hand in “Regulation 2” that would overcome any remaining constitutional concerns in the Member States.

May criminalisation lead to over deterrence?

39. Another argument against criminalisation is that it may lead to overdeterrence. To the extent the cartel offence is narrowly drafted to catch only horizontal hardcore cartels, this is arguably a negligible problem. One could still be apprehensive about some chilling effects on legitimate cooperation. Here, the possibility to exclude criminal liability where the arrangement was notified to the competition authority (along the lines of the revised cartel offence in the UK⁷⁹) should be considered.

40. What is more: arguments against criminalisation largely ignore the international dimension. At least to the extent a cartel affects import commerce into the US (or fulfils the FTAIA conditions), there already is criminal liability for Europeans.⁸⁰ While this criminal liability in the US may have been a footnote in earlier times, today all potential cartelists should better factor the possibility of extradition into their calculation.⁸¹ The case of the Italian alleged member of the Marine Hose cartel that was extradited from Germany to the US signals a new

72 Stephan, n. 1, 9.

73 On this point see P. Whelan, Cartel Criminalization and the Challenge of “Moral Wrongfulness” (2013) 33 *Oxford Journal of Legal Studies* 535, 550–5.

74 For the argument under German law that a positive statement (possibly in standard terms) that there was no price fixing could constitute fraud (§ 263 StGB), and that one could even consider fraud charges when the “contracting parties take it for granted that neither of them infringes the Act against Restraints of Competition,” see Baumann and Arzt, n. 70, 35; for essentially the same argument in the UK for the common law offence of conspiracy to defraud, see J. Lever and J. Pike, Cartel Agreements, Criminal Conspiracy and the Statutory “Cartel Offence” (2005) *European Competition Law Review* 90, 95, and the discussion in *Ian Norris v. Government of the United States & Ors* [2008] UKHL 16 [59]–[62] (holding that at least in the 1990s there was no sufficient consensus that secret price fixing in itself would be enough to find conspiracy to defraud, because there was no implied promise that the price was reached independently, but making a possible exception where “aggravating features” were present, arguably referring to additional dishonesty such as “lying to potential purchasers about the existence of the agreement;” *ibid.* [51]).

75 For a more elaborate justification of the legitimacy of criminalisation, see A. Stephan, Four Key Challenges to the Successful Criminalization of Cartel Law, (2014) 2 *Journal of Antitrust Enforcement* 333, 336–44.

76 Decree of 14 July 1797 against various abuses in judicial and other public subhastations and auctions, reprinted in Carl Ludwig Heinrich Rabe (ed.), *Sammlung Preussischer Gesetze und Verordnungen*, Vol. IV (Halle and Berlin 1817), 204.

77 See Wagner-von Papp, n. 27, 160–6, for a brief summary in English of the historical development of criminal sanctions in Germany from these early times to the Weimar Republic, the Third Reich, the post-war Allied decartelisation laws, the Act against Restraints of Competition 1958, the practice of criminal courts since 1992 to classify certain forms of bid rigging as criminal fraud, and the eventual introduction of the bid-rigging offence in § 298 of the German Criminal Code.

78 Above §§ 21–28.

79 Here, I only refer to the notification to the competition authority; most of the other defences present issues that would better have been avoided. See Stephan, Purposive Interpretation, and Gilbert, both n. 17.

80 *United States v. Nippon Paper*, 109 F3d 1 (1st Cir 1997); *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir. 2015) cert. denied, 135 S. Ct. 2837, 192 L. Ed. 2d 875 (2015).

81 P. Girardet, “What if Uncle Sam Wants You?”: Principles and Recent Practice Concerning US Extradition Requests in Cartel Cases, (2010) 1 *Journal of European Competition Law & Practice* 286; see also A. Stephan, n. 75, 353.

era.⁸² Travelling even within Europe has become perilous for anyone who participates or participated in a cartel affecting the US. The US has negotiated extradition treaties with many countries over the last two decades. While these extradition treaties require double criminality, this criterion is fulfilled whenever there is “*law in the books*” in the Member State in question. Through this backdoor, even the largely or completely unenforced criminal provisions in some Member States can result in cartelists being ordered to “[g]o directly to Jail. Do not pass Go. Do not collect \$200.”

41. A more problematic aspect of multi-jurisdictional criminal enforcement is the complexity it creates for leniency programmes. In the single-jurisdictional context, it is relatively easy to conceive an immunity rule for the successful leniency applicant which reinforces rather than impedes the leniency programme. Things become much more difficult if conduct leads to criminal liability in several jurisdictions and a leniency applicant is not certain to be the first in all these jurisdictions. Two solutions to resolve this problem appear possible from a theoretical perspective. First, immunity provisions could let it suffice that the leniency applicant was first in any jurisdiction (or at least any EU or EEA jurisdiction). This, of course, could lead to gaming the system: all cartelists could avoid criminal liability by coordinating such that each of them is first in one jurisdiction. The second solution appears overdue in any case: to come up with an international clearing agency for leniency applications. On the level of the EU or EEA, such a clearing agency appears necessary anyway, given the malleable criteria for case allocation within the European Competition Network.⁸³

IV. Conclusion

42. Criminal competition law enforcement is possible and desirable. However, great care has to be taken in its implementation. Criminal immunity must be provided for in order to protect leniency programmes. In the multi-jurisdictional context, the EU should provide both for a clearing agency for leniency applications, and for a prohibition of individual sanctions for those who applied successfully for immunity under leniency programmes via the clearing agency. Institutionally, competition authorities should be well integrated into criminal investigations and prosecutions. The prosecutions should preferably be centralised with a dedicated prosecutor instead of the decentralised local enforcement we currently see in Germany and France. Prosecutions should be well publicised; this does not require that the names of the prosecuted individuals are made public where privacy concerns prevail. However, deterrence can only work if sanctions are not only imposed, but also seen to be imposed. ■

82 For the decision by the German Federal Constitutional Court rejecting the alleged cartelists’ constitutional challenge, see BVerfG, 17 February 2014, 2 BvQ 4/14, WuW/E 4275—*Auslieferung wegen Kartellverstoßes*. For an analysis in English, see M Röhrig, Nowhere to Hide? Extradition in Antitrust Cases from a European Perspective, 6 *Journal of European Competition Law & Practice* 168–76.

83 See, for some of the issues that may arise under the current system of independent leniency programmes, CJEU, 20.01.2016, *DHL Express (Italy) v AGCM*, case C-428/14, ECLI:EU:C:2016:27. But see Competition and Markets Authority, Response to the European Commission’s Public Consultation on ‘Empowering the National Competition Authorities to be More Effective Enforcers’ (10 February 2016) §§ 45–51 (suggesting that national solutions are sufficient and that other states should copy the criminal immunity approach that the UK uses, but largely disregarding the cross-jurisdictional effects in a network of national solutions).

Individual criminal sanctions in France

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1. There is a growing insistence, amongst scholars, practitioners or lawmakers interested or involved in competition policy and enforcement, on the need to complement corporate fines with fines on individuals, in order to increase deterrence and align the interests of staff and management with those of shareholders, the latter bearing in practice the brunt of the corporate fine. This call was made only recently by the European Parliament in its resolution on the Annual report on EU Competition Policy.¹ However, such demands oftentimes are made together with a critical appraisal of the growing level of corporate fines.²

2. There is a wide array of systems within the EEA foreseeing individual sanctions for antitrust infringements: while 17 Member States foresee only criminal sanctions and 5 only administrative sanctions, 3 comprise a mix of criminal and administrative sanctions, with the remaining 4 including no provisions within their legal framework on individual antitrust sanctions.³ Interestingly, the landscape of individual sanctions in the EEA is the reverse image of the situation as regards corporate fines, with only 4 Member States in which a criminal or quasi-criminal system is in place.

3. The French legal system reflects the binary distinction criminal/individual vs. administrative/corporate, which holds sway in a majority of Member States. This contribution aims to account for the specificities, borne out of history, experience and necessity, which bring nonetheless to the French criminal system of enforcement its unique features.

4. The first provisions foreseeing the sanction of antitrust infringements under French law were criminal in nature and hail back to 1810 and Napoleonic rule. Article 419 of the former Criminal Code thus provided that he “*who, by reunion or coalition amongst the main holders of a same merchandise or good, seeks not to sell it, or only at a certain price*” or “*who, by whichever fraudulent means or ways, brings the price of goods or merchandise upwards or downwards (...) above or below the prices which natural competition and free trade would have determined,*” is liable to a maximum of one year imprisonment and ten thousand francs in penalty. The wording was partially revised in 1926, the maximum custodial sentence was extended to two years and the maximum fine increased, but these provisions essentially remained the same for 176 years, until 1986, when the independent, administrative, enforcement of competition law was established.

5. In conjunction with these provisions, separate antitrust prohibitions, likewise on a criminal law basis, were introduced in the period following the Second World War. Two executive orders (*ordonnances*) of 30 June 1945, initially adopted to deflect looming inflation and manage shortages, were subsequently amended by a decree of 9 August 1953 and a law of 2 July 1963, which introduced cartel (the 1945 executive order was initially restricted to price cartels) and abuse of dominance prohibitions under French law. These prohibitions mirror to a significant extent the wording of current antitrust prohibitions foreseen under Articles 101 and 102 of the Treaty on the Functioning of the European Union.

6. This system of criminal antitrust enforcement relied on the determination of the liability of the individual infringer, management or staff, and the imposition of sanctions thereupon, for which the undertaking was held jointly and severally liable.⁴ This criminal model was in force in a context, post-war France, in which centralized economic planning by the State was prevalent and took precedence over the implementation of fledgling

1 European Parliament resolution of 19 January 2016 on the Annual report on EU Competition Policy: “29. Considers that the existing rules on fines to be imposed on legal persons for infringements must be supplemented by concomitant penalties against the natural persons responsible; takes the view that the fines should be high enough to act as a deterrent; emphasises the importance of a successful whistleblower policy, which has allowed the Commission to detect cartels.”

2 See, for example, Ian Forrester’s intervention at the Bundeskartellamt’s 17th International Conference on Competition mentioned in “Le Bundeskartellamt organise sa 17ème conférence internationale à Berlin et rassemble la communauté de la concurrence pour faire un état des lieux des convergences et divergences sur les sujets brûlants”, D.V., *Concurrences* No. 2-2015. The European Parliament’s above-mentioned resolution may also implicitly allude to the level of corporate fines: “30. Regards legal certainty as crucial, and calls on the Commission to incorporate the rules on fines, such as those imposed in cartel proceedings, into a legislative instrument.”

3 Source: ECN, February 2014. Figures only account for custodial and pecuniary sanctions. Disqualification orders, in particular, are not taken into account. Specific criminal sanctions only applicable to bid-rigging practices are, for the purpose of this estimate, counted as criminal antitrust sanctions.

4 Article 56 of Executive Order 45-1484 of 30 June 1945.

instruments of competition enforcement.⁵ A marked shift was witnessed in the late 1970s with the passing of important legislative reforms bolstering the profile of the renamed *Commission de la concurrence*, culminating in 1986 with the creation of the *Conseil de la concurrence*⁶, immediate predecessor to the present *Autorité de la concurrence*. The targets of enforcement have henceforth been undertakings and legal persons, through the imposition of administrative fines and injunctions.

7. However, lawmakers did not forgo in 1986 the possibility to sanction individuals but circumscribed instead the remit of criminal antitrust law to them. Accordingly, administrative and criminal enforcement have coexisted ever since, in relation respectively to legal persons, on the one hand, and natural persons on the other.⁷

I. Individual criminal sanctions: Article L. 420-6 of the Commercial Code

8. Pursuant to Article L. 420-6 of the Commercial Code, “*If any natural person fraudulently takes a personal and decisive part in the conception, organization or implementation of the practices referred to in Articles L. 420-1 and L. 420-2 [anti-competitive practices], this shall be punished by an imprisonment of four years and a fine of 75,000 euros.*”

9. From the outset, it must be noted that besides the existence of an anti-competitive practice,⁸ three cumulative elements must be proven to incur a criminal sanction, whether pecuniary or custodial. The involvement of the individual concerned must be (i) personal in the accomplishment of the competition infringement, as well as (ii) decisive and (iii) fraudulent.

10. The involvement is personal if the individual takes part in person in the series of acts, or part thereof (meetings, exchange of information, etc.), that are the material support of the antitrust infringement. The offence is thus linked to the person who materially participates in the infringement rather than to the person who is the legal representative or exerts strategic or operational control over the concerned activity, if she or he is different.⁹

11. The involvement must also be decisive, thus limiting the scope of the offence to the individuals who are active in the infringement, not only by their presence, but also because of the role they played when initiating or actually organizing the infringement. This does not preclude holding a plurality of persons, within a single undertaking, responsible should they each have played a decisive role, respectively, as regards the conception, the organization and the implementation of the practice.

12. Finally, the fraudulent intent requirement adds to the burden of proof by seemingly requiring that the individual, not only took a deliberate and conscious part in the infringement, but also manifested, in his actions, a bad faith element through deceptive means or attempts at concealment. This sets the bar high for a finding of misdemeanour under Article L. 420-6 and explains why convictions so far have been mostly limited to bid-rigging cases, with Article L. 420-6 convictions oftentimes combining counts of misuse of company assets, corruption or favouritism.¹⁰ This somewhat ancillary nature of criminal antitrust convictions is also reflected in its decentralized enforcement: prosecution is carried out at the district level, before the territorially competent court, as opposed to serious tax or securities fraud which is prosecuted by a national, specialized public prosecutor.

13. Since its entry into force, convictions under Article L. 420-6 have remained scarce, albeit not insignificant. Based on available figures regarding the first two decades of enforcement of Article L. 420-6,¹¹ an average of

5 See The role of competition Policy in regulatory reform – Regulatory reform in France, OECD, 2004. By way of illustration, the *commission technique des ententes et positions dominantes*, advisory body set up to provide expertise and support to the Minister of Economics in matters relating to antitrust law and the institutional predecessor of the current French competition authority, issued 133 opinions on cases from 1953 to 1977, 23 of which led to a transmission to the Public Prosecutor with ultimately 8 convictions (figures quoted in *Inflation, État et opinion en France de 1948 à 1952*, M.-P. Chélini).

6 Executive Order (*ordonnance*) 86-1243 of 1 December 1986

7 Article 54 of Law No. 2004-204 of 9 March 2004 (“loi Perben”) eschewed the so-called “speciality principle” which restricted corporate criminal liability to offences which explicitly provided for the liability of legal persons. As a consequence, pursuant to Article 121-2 of the Criminal Code, this entails that undertakings were liable in the same manner as individuals for all crimes and offences from 1 January 2006. A doctrinal debate is ongoing as to whether this can be extended to criminal antitrust violations under Article L. 420-6 of the Code of Commerce, which explicitly refers to a “natural person” (“*personne physique*”), and the consequence, should this be the case, in relation to the application of the *ne bis in idem* principle.

8 In the absence of reference to Articles 101 and 102 TFEU, and seeing as criminal prohibitions must be strictly interpreted, pursuant to Article 111-4 of the Criminal Code, the criminal sanctions set out under Article L. 420-6 do not apply to 101/102 infringements, with limited practical consequences inasmuch as the substantive requirements of Articles L. 420-1 and L. 420-2 are aligned with their EU counterparts.

9 This clear intention of ascribing criminal liability to the individual who took a direct and material part in the infringement is apparent in the Report drafted by the Working Group presided by Jean Donnedieu de Vabres, then Head of the *Commission de la concurrence*, which submitted to the Government a draft text which greatly inspired the 1986 *Ordonnance*: “*Il y aurait poursuite pénale de nature délictuelle à l’égard de la personne physique qui ‘aurait pris une part déterminante dans la conception, l’organisation, la mise en œuvre ou le contrôle de telles pratiques’ en agissant ‘par contrainte, abus d’autorité, dissimulation ou tout autre moyen frauduleux’.* On aboutit ainsi à une délimitation plus précise des domaines pénal et non pénal. L’article 56 de l’ordonnance no 45-1484 du 30 juin 1945 créant en matière économique une responsabilité pénale du commettant ne serait pas repris. Ne pourrait être déferé devant le tribunal correctionnel que celui qui est responsable de son propre fait.”

10 E.g., Criminal Chamber of the *Cour de cassation* (hereafter, “Crim. Chamber”), 16 May 2001, 97-80888 99-83467: the defendant, sitting at the committee reviewing the bids and holding an electoral mandate at the local, contracting, authority, was charged and convicted of “passive” corruption, embezzlement, breach of trust, fraudulent participation in a cartel as well as of being an accessory to misuse of company assets. See, for further information on the interplay between anti-corruption and antitrust enforcement, the French contribution to the OECD Global Forum on Competition of February 2014: http://www.autoritedelaconcurrence.fr/doc/fev14_corruption_uk.pdf.

11 Source : Internal figures, Autorité de la concurrence ; Les poursuites pénales contre les auteurs de pratiques anticoncurrentielles, *Concurrences* No. 2-2006, E. David.

two cases per year have led to pecuniary and/or custodial sentences, the latter consisting, for the most part, in suspended prison terms. In five instances, convicted offenders were actually jailed, serving up to one-year sentences.¹²

14. A case in point is the Ile-de-France high-school bid-rigging cartel, which involved 14 undertakings implementing for 7 years a concerted and organized effort to allocate amongst themselves 88 public works tenders launched by the Ile-de-France region to renovate public schools. The contracts amounted to a total of 10 billion French francs (circa €1.5 billion). This wide-spread bid rigging was encouraged by officials of the contracting authority, as part of a kickback scheme, and facilitated by the assistant to the contracting authority, itself chosen by the said authority in order to facilitate the implementation of the cartel and kickback effort. On appeal, convictions for 11 offenders were upheld, with fines in the range of €10,000 to €120,000 and 6 prison sentences ranging from 10 month suspended term to 3 years, of which 2 were suspended. The French competition authority fined the undertakings involved a total of €47.3 million for their liability under Article L. 420-1 of the Commercial Code, a sum which reflected the cap on fines as it was set at the time of the practices¹³.

II. Interplay between administrative and criminal proceedings

15. The prosecution of criminal antitrust infringements resides fully within the remit of the public prosecutor. The *Autorité de la concurrence* cannot launch, investigate nor sanction violations of Article L. 420-6. Conversely, the *Autorité de la concurrence* is fully responsible for the launch, investigation and sanction of infringements to Articles L. 420-1 and L. 420-2 and their EU Law equivalent. However, this clear dividing line between administrative and criminal enforcement does not exclude some level of interplay and mutually reinforcing cooperation.

16. Firstly, the rules governing limitation periods and their interruption reflect a *continuum* between criminal and administrative proceedings as part of a broader public enforcement. Thus, investigatory action by the *Autorité de la concurrence* will interrupt the running of the limitation period applicable to criminal proceedings,

as foreseen by Article L. 420-6, paragraph 3. Conversely, investigatory action by the public prosecutor in respect of an infringement to Article L. 420-6 will interrupt the running of the limitation period applicable to administrative proceedings: the Civil Chamber of the *Cour de cassation* grounded this solution on the fact that the material element of a violation of Article L. 420-6 rests in part on the finding of a violation of Article L. 420-1, to which Article L. 420-6 refers; this commonality in the object of investigations pursued by the public prosecutor and the *Autorité* results in the actions of the former interrupting the limitation period applicable to proceedings before the latter. This solution is now enshrined in Article L. 462-7. Together, these rules on the interruption of the limitation period safeguard the effectiveness of the reciprocal means by which the *Autorité* and the authorities charged with criminal enforcement refer cases and files to one another (see below). This holds particularly true when the *Autorité* refers a case to the public prosecutor, as such a referral is made concurrently with the adoption of the infringement decision, therefore at the very end of the administrative proceedings.

the very end of the administrative proceedings.

The public prosecutor or the investigating judge may give the *Autorité* access to the criminal investigation file

17. Secondly, the public prosecutor or the investigating judge may give the *Autorité* access to the criminal investigation file so as to substantiate the latter's own proceedings regarding similar facts. Article L. 463-5 of the Commercial Code reads: "*Investigating and decision-making courts can disclose to the Autorité de la concurrence, at its request, the minutes, the investigation reports or any other documents relative to the criminal proceedings which have a direct link to the facts under assessment by the Autorité.*" Such communication interrupts time limits.¹⁴

18. The *Autorité* is entitled to use this evidence to find an infringement, as long as all the parties are given access to the evidence communicated by the public prosecutor or the investigative judge, during the course of the administrative proceedings, and thus allowed to dispute its content and the conditions under which they were obtained.¹⁵

19. Pursuant to article L. 463-5, the *Autorité* requested several times the disclosure of criminal evidence, which subsequently served as evidence to find an administrative infringement. Indeed, five decisions of the *Autorité* in the last ten years relied in part on criminal evidence: *Road public works in the Seine-Maritime department*¹⁶ (2005),

¹² Crim. Chamber, 9 November 1995, 94-84204; *Tribunal correctionnel* (first instance court), 13 novembre 1997, *Asphalt mix* case; Crim. Chamber, 16 May 2001, 99-83467 97-80888; *Tribunal correctionnel*, 30 June 1999, *Grenoble regional hospital* case; Crim. Chamber, 20 February 2008, 02-82676 07-82110.

¹³ Five per cent national turnover in the last full year prior to the decision. As of 16 May 2001, this cap was increased to 10% of the highest worldwide yearly group turnover from amongst the accounting years between the year prior to the inception of the infringement and the year prior to the infringement decision.

¹⁴ Commercial Chamber of the Cour de cassation, 15 January 2008, 07-11.677 07-12.132 07-12.357.

¹⁵ Crim. Chamber, 13 October 2009, 08-17269 08-17476 08-17484 08-17616 08-17622 08-17640 08-17641 08-17642 08-17669 08-17772 08-17773 08-21132.

¹⁶ Decision 05-D-69 of 15 December 2005.

public procurement in the Ile-de-France region¹⁷ (2006), High schools in the Ile-de-France region¹⁸ (2007), Road signs (2010)¹⁹ and Monument restoration (2011).²⁰

20. The investigatory powers of the investigative judge exceed those of the *Autorité's* agents: the evidence thus communicated can present the *Autorité* with some “smoking guns” it would not have been in a capacity to obtain otherwise. These powers include in particular the interception, recording and transcription of telecommunication correspondence, unbeknownst to those involved (Article 100 to 100-7 of the Code of Criminal Procedure). In the aforementioned *Monument restoration* case, the *Autorité*, as per Article L. 463-5, obtained from the prosecutor hearings, seized documents and transcripts of telephone recordings, collected in the context of criminal proceedings initiated before the Rouen Criminal Court against the directors of a number of building firms for having participated in cartels involving the restoration of historic monuments. The content of wiretaps accounted significantly for the establishment of the impugned practices and the imposition, by the *Autorité*, of an overall fine of nearly €10 million.

The investigative judge may request the assistance of an agent of the *Autorité* by letter rogatory, in order to conduct criminal investigations

21. Thirdly, the investigative judge may request the assistance of an agent of the *Autorité* by letter rogatory, in order to conduct criminal investigations, pursuant to Article L. 450-1-IIbis of the Commercial Code, introduced by a Law of 19 March 2014. The investigative “firepower” of the *Autorité* may thus support and increase the application of Article L. 420-6, while the judge’s prerogatives in directing the investigation and referring the case to the criminal court for judgment remain intact. Two requests have been lodged to date, for which assistance is currently being provided.

22. Fourthly, the criminal judge can request the *Autorité's* opinion in a given case, pursuant to Article L. 462-3, which opens to any court, whether civil, administrative or criminal, this possibility, provided the question relates to the application of Article L. 420-1 and/or L. 420-2. As mentioned above, the violation of Article L. 420-1 and/or L. 420-2 being one of the material elements of a finding pursuant to Article L. 420-6, the criminal judge is thus entitled to seek the *Autorité's* opinion. It remains to be seen whether the possibility now offered to the investigative judge to request the *Autorité's* assistance in the investigation will diminish the incentives to seek the *Autorité's* formal opinion on the matter (in particular as regards requests for opinion issued by the investigative judge himself, which he has standing to do²¹).

17 Decision 06-D-07 of 21 mars 2006.

18 Decision 07-D-15 of 9 May 2007.

19 Decision 10-D-39 of 22 December 2010.

20 Decision 11-D-02 of 26 January 2011.

21 E.g., Opinion 99-A-20 of 23 November 1999.

Cooperation goes both ways and the *Autorité* may take the initiative to communicate, on its own motion, its case-file to the public prosecutor

23. Finally, cooperation goes both ways and the *Autorité* may take the initiative to communicate, on its own motion, its case-file to the public prosecutor when it considers that the facts at hand warrant an Article L.420-6 investigation. This action interrupts the limitation period for prosecuting the said practices.

24. This provision has been applied moderately, with 10 cases sent to the public prosecutor’s office since 1994, although there has been a definite increase since 2000, mostly in relation to bid-rigging cases for public procurements. After transmission of the file, the outcome of the criminal procedure very much depends on the public prosecutor concerned, in whose hands lies the power to prosecute the infringement.

25. The adoption of the *Autorité's* first leniency notice in 2006 and the significant contribution of the leniency programme towards the attainment of the objectives of effective and deterrent enforcement, with 10 cartel decisions issued so far on the basis of one or several leniency applications for a total of circa €3 billion in fines, have made it necessary to acknowledge the need to maintain incentives to apply for leniency, when considering transmitting a case-file to the public prosecutor. The *Autorité* has thus publicly stated, in its leniency notice, that it considers that the existence of a leniency application is a legitimate reason for abstaining to communicate the file to the public prosecutor.

26. In January 2008, an official report, known as the Rapport Coulon, after the presiding member of the commission, a former president of the Paris Court of Appeal,²² was submitted to the Minister of Justice. Its main aim was to reflect on corporate offences and introduce greater consistency, where needed, between criminal and administrative offences in the area of company, distribution and consumer law. The report suggested introducing a leniency system for individuals, in the form of a certification by the public prosecutor of the leniency application submitted to the *Autorité*. This recommendation is echoed, several years after, by the European Commission’s focus, in the context of its recent public consultation on the “empowerment of national competition authorities” as well as in its Communication on the ten years of Regulation 1/2003,²³ on the issue of the interplay between leniency programmes and sanctions on individuals. ■

22 La dépenalisation de la vie des affaires, Rapport au Garde des Sceaux, ministre de la Justice, janvier 2008.

23 Communication from the Commission, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (COM(2014) 453, 9.7.2014).

Individual sanctions in German competition law: The case for a criminalisation of antitrust offences?*

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I. Introduction

1. The optimal design of competition law enforcement by authorities and private parties currently constitutes a focal point in the legal and political discussion of competition law in Germany. The conception of the official system of sanctioning, especially under the law of regulatory offences, is the subject of broad discussion in Germany, and encompasses problems of constitutional law and procedural law,¹ as well as aspects of corporate liability.² One issue to come up in recent years in the discussion on an effective system of sanctions is whether it is in the interest of an improved cartel enforcement to criminalise other hard-core violations besides bid rigging which is a criminal offence (Sec. 298 of the German Criminal Code). Similar debate has taken place before in Germany, at the time of the enactment of the Act against Restraints of Competition, but also in the 1970s and 1980s, although the discussion did not find its way into the statutes.³ Current impetus for considera-

tions on extending the criminalisation of competition law violations comes for the most part from the US, where such violations are traditionally prosecuted not only in civil court but also under criminal law, as well as from certain EU Member States that have recently introduced criminal sanctions in this area.⁴ The OECD has also repeatedly dealt with this topic in recent years.⁵

2. The discussion on extending the criminalisation of competition law violations focuses on the criminal enforcement of so-called hard-core cartels, that is, horizontal price, output and territorial cartels. The German Monopolies Commission considers a restriction of possible legislative measures to hard-core cartels to be appropriate and—for constitutional reasons—necessary. For one thing, it is generally agreed that such cartels cause particularly severe damage, which is why they are prohibited in all competition law regimes of the EU Member States, in the law of the European Union and in many other legal systems. Secondly, the threat of criminal sanction exclusively for horizontal hard-core cartels precludes the risk of over-regulation. If one affirms the potential of criminal penalties to have a higher deterrent effect, the risk could arise that those in charge of a company would refrain even from behaviour that is legal and competitively efficient simply for fear of criminal-law consequences. Such a risk is particularly high when the delimitation of legal and illegal conduct is difficult. We can assume this to be true in the area of vertical agreements, but also with unilateral conduct in the area of abuse control. The same kind of difficulties do not, however, arise with horizontal price, output and territorial cartels. In this respect, there are no legal grey zones;

* The presentation is based on the Chapter “Kriminalisierung von Kartellrechtsverstößen in Deutschland” in the Twentieth Biennial Report 2012/2013 by the German Monopolies Commission (published in 2014). A more extended version has been presented at the Conference, The Fight against Hard Core Cartels: Trends, Challenges and Best International Practices, in November 2014 in Madrid. Many thanks go to Ms. Alison Felmy for translating the text.

1 Cf. Bundesgerichtshof (BGH) decision of 26 February 2013, Case No. KRB 20/12 — *Grauzementkartell*.

2 In this respect, the law on regulatory offences was developed further in the eighth amendment to the Act against Restraints of Competition, which entered into force in June of 2013. The future conception of the procedure for competition law fines was also a topic of discussion for the Working Group on Competition Law of the Bundeskartellamt in the year 2012: Bundeskartellamt, Hintergrundpapier zur Tagung des Arbeitskreises Kartellrecht am 4. Oktober 2012, Kartellbußgeldverfahren zwischen deutschem Systemdenken und europäischer Konvergenz.

3 Cf. M. Dreher, *Wirtschaft und Wettbewerb* 2011, p. 232 et seq. n. 11 with further references.

4 Criminal penalties were introduced e.g. in Ireland and the UK; there are also tendencies toward decriminalisation, however, e.g. in Austria and the Netherlands.

5 OECD, Policy Roundtables 2003 Cartel Sanctions against Individuals, DAF/COMP(2004)39, 10 January 2005.

rather, hard-core cartels generally paint a clear picture in terms of illegality. Limiting the criminal prosecution to especially severe competition-law violations would have the additional advantage of avoiding extensive economic balancing tests in the course of a criminal procedure.

II. Competition Law enforcement practice: Administrative fines and criminal statistics

3. In recent years, the fines imposed by the *Bundeskartellamt* have increased drastically. Since 2007, each year's total has continually amounted to more than €180 million, and in some years the total has been far higher. According to the authority's own statistics, the fines for the years 2012 to 2014 have steadily increased. In 2014, the total exceeded the sum of €1 billion.⁶

4. The *Bundeskartellamt* does not publish detailed statistical information on the number of cartel cases prosecuted or the decisions issued that involve fines. The most recent reports on its activities do, however, provide insights on a number of significant cartel cases and the individual decisions issued regarding undertakings, associations of undertakings and natural persons. The report for 2011-2012 alone includes 19 cartel cases of great significance and over 220 decisions on fines.⁷

5. The criminal statistics concerning Sec. 298 of the Criminal Code (bid rigging) have presented considerable numbers of cases for the past several years. In the period from 2003 to 2012, these show that between 42 and 230 cases were handled each year. In the years 2011 and 2012 there were 53 and 115 cases noted, respectively. These statistics include all violations registered with the police, however; not in every case was there a charge brought by the public prosecutor, or main proceedings instituted by the court, much less a conviction. We can therefore obtain a better impression from the numbers provided by the Federal Statistics Office, which inform us that in the years from 2008 to 2012 there were 20, 19, 17, 20 and 22 convictions made.⁸ A prison sentence was issued in five cases in 2008, three cases in 2009, one case in 2010 and in seven cases in 2011; in the year 2012 only fines were issued.⁹

6 http://www.bundeskartellamt.de/SharedDocs/Interviews/DE/WIWO_Rekordjahr.html.

7 Bundeskartellamt, Report of Activities 2011-2012, BT-Drs. 17/13675, p. 30 f.

8 Statistisches Bundesamt, Fachserie 10, Reihe 3, 2008, p. 70, 2009, p. 70, 2010, p. 72, 2011, p. 70 and 2012, p. 72. Wagner-von Papp points out that in the statistics, a case with unity and plurality of acts is listed only under the act incurring the highest punishment: F. Wagner-von Papp, *Wirtschaft und Wettbewerb* 2009, p. 1236 et seq., 1243 and n. 51.

9 Statistisches Bundesamt, Fachserie 10, Reihe 3, 2008, p. 102, 2009, p. 102, 2010, p. 106, 2011, p. 102 and 2012, p. 106.

III. Sufficient deterrent effect of the current system of sanctioning?

6. A central question in the discussion of farther-reaching criminalisation of competition law violations—going beyond the specific constellation of bid rigging—is whether the deterrent effect that the existing official and private possibilities of sanctions have on companies and natural persons is strong enough. The threat and the imposition of sanctions are intended to create incentives to act in a manner in conformity with competition law. Current members of a cartel are supposed to be kept from carrying on with the cartel, potential members kept from forming new ones. An indication that such prevention is not sufficient could be seen—albeit on the surface—in the increased numbers of cases and fines. Such an argument would be short-sighted, however, for it fails to consider that the legal conditions for combating cartels have changed drastically in the last few years, and the competition authorities have greatly intensified their activities in this area.

7. As regards the high number of cases, a factor that deserves particular mention is the introduction of the “Bonus Rule” by the *Bundeskartellamt* in the year 2000, which was amended and expanded in 2006. According to the authority, this rule played a central role in the detection of cartel violations, both directly and indirectly. In enforcing the cases on which it receives direct notification, the *Bundeskartellamt* often receives information on further violations that would otherwise have gone unnoticed. Another factor to be named in this context is the introduction in June 2012 of an informant system that facilitates the anonymous reporting of cartel violations. Furthermore, one can observe that the competition authorities in recent years have focused their activity on the prosecution of cartels, a policy that is reflected in the very formation of three divisions of the *Bundeskartellamt* that have the sole task of prosecuting misconduct in connection with violations of Sec. 1 GWB and Art. 101 TFEU. This shift of focus, in turn, is likely closely connected with the introduction of the Bonus Rule and the possibility of closing a case by settlement, which makes the detection and quick prosecution of cartels easier. It should not be ruled out, furthermore, that the competition authorities exert their discretion under the discretionary principle more frequently than they once did in favour of taking up potential cartel cases. Finally, it may be due in part to improved cooperation and reciprocal information in the network of European competition authorities that cartel violations have been prosecuted more often and with greater success.

8. Not only the basic conditions for governmental prosecution of competition law violations, but also the conditions for private enforcement of competition law have

been developed further in the last few years. With the seventh amendment of the Act against Restraints of Competition, such provisions were introduced as the binding effect of competition agencies' decisions on damage compensation claims of third parties who had suffered damages and the mandatory payment of interest on damages. The Act's eighth amendment led to an expansion of the collective claims law, in that Sec. 33(2), No. 2, of the Act against Restraints of Competition now granted consumer collectives in particular the right to claim an injunction as well as third-party profits in cases of mass or scattered damages. The new Damages Directive¹⁰ will signal only a slight need for adjustment, as German law on the whole already is in line with the Directive.¹¹

9. Although private compensation claims are still as a rule follow-on claims of cartel victims who do not directly contribute to the detection of competition law violations, still the risk has recently grown that companies participating in cartels will be confronted with considerable damages claims.¹² This risk is especially great when the damages are incurred not by the end consumer, but by companies or other legal persons. It is true that orders to pay damages have until now been the exception to the rule.¹³ However, in some individual cases that ended in settlements a considerable monetary compensation was obtained.¹⁴ It is furthermore not out of the question that damaged companies that continue to do business with cartel members may obtain a certain compensation within this framework, for instance in the form of future rebates.

10. In addition to these measures, and due in part to the intensified official and private enforcement of competition law violations in the recent past, awareness within the companies of the issue of conduct contravening competition law has undergone a change. The extent of this change in awareness likely varies depending on sector

and company. And yet, one must acknowledge that the overall significance of compliance measures in companies has increased in recent years. Another area receiving more and more attention concerns the possibilities and duties of management and supervisory committees of the company caught up in a cartel to raise claims against employees who are responsible for cartel activities and to enforce personnel consequences.¹⁵ Such measures that directly impact the responsible party can develop a not inconsiderable deterrent effect if they are applied consistently. It must be remembered, however, that this development is still in its fledgling stage.

11. The fact that both official and private cartel enforcement are currently undergoing changes makes it very difficult to give a conclusive assessment of their deterrent effect. It is possible that the existing system of sanctions has not yet reached the full height of its preventive effect. This is intensified by the fact that many of the cartels detected and prosecuted in the past few years, such as the hydrogen peroxide cartel or the escalator cartel, go back to the beginning of the century, or as far as the 1990s. However, in the opinion of the Monopolies Commission, there are several reasons to believe that the current system of sanctions is achieving only a meagre deterrent effect.

At what amount do these fines realise a sufficient preventive effect?

12. When sanctions are threatened and imposed, the aim is to deter current and potential participants in cartels. Because, at least under the current system, the fines threatened by law and imposed by authorities on companies stand at the centre of the penalisation of competition law violations, one question is decisive: At what amount do these fines realise a sufficient preventive effect?

13. According to the theory of optimal sanctions, companies calculate a potential fine into their decision of whether to act in conformity with or in contravention of competition law.¹⁶ The gains of violating competition law and the prospective costs of a violation are weighed against each other considering the probability of being penalised. In theory, determining the level of an effective fine is a matter of comparing values of expectation. A sufficient deterrent effect is only reached if the fine equals at least the product of the expected profits from the cartel and the inverse of the expected probability of discovery. For the probability that a cartel will be detected there are estimates with results between under

10 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ 2014 L 349/1.

11 On this see P. Stauber and H. Schaper, Die Kartellschadensersatzrichtlinie – Handlungsbedarf für den deutschen Gesetzgeber?, *Neue Zeitschrift für Kartellrecht* 2014, 346 et seq.; see also e.g. H. Schweitzer, Die neue Richtlinie für kartellrechtliche Schadensersatzklagen, *Neue Zeitschrift für Kartellrecht* 2014, 335 et seq.

12 Deutsche Bahn brings an action against rail cartel, *Frankfurter Rundschau*, 20 December 2012, <http://www.fr-online.de/wirtschaft/bahn-klagt-gegen-ex-schielenkartell-um-thyssenkrupp,1472780,21154944.html>; Municipal transportation services file suit against rail cartel, *Süddeutsche Zeitung*, 21 February 2013, <http://www.sueddeutsche.de/wirtschaft/schielenkartell-zu-lasten-der-deutschen-bahn-kommunen-vor-klage-gegen-schielenfreunde-1.1605741>; Deutsche Bahn and 15 municipalities file suit against escalator cartel, <http://www.sueddeutsche.de/wirtschaft/aufzugs-und-rolltreppen-kartell-wiederholungstaeter-thyssen-krupp-droht-millionenzahlung-1.1540752>; Commission goes to court over damages suffered from elevators cartel, Press release of the European Commission, IP/08/998 of 24 June 2008.

13 Mannheim District Court, decision of 4 May 2012, Case No. 7 O 463/11 Kart – Feuerlöschfahrzeuge.

14 <http://www.tagesschau.de/wirtschaft/thyssen128.html>, as of 11 March 2014, reporting that the Deutsche Bahn and ThyssenKrupp agreed to a settlement in the rail cartel case in the amount of €150 million.

15 H. Fleischer, *Betriebs-Berater* 2008, p. 1070 et seq.; C. Altemeier, *Verantwortlichkeit des Vorstands für Kartellrechtsverstöße: Ein Beitrag zur Organhaftung und zur Organuntreue*, Frankfurt, 2013; F.-J. Säcker, *Wirtschaft und Wettbewerb* 2009, p. 3.

16 W. Landes, Optimal Sanctions for Antitrust, *University of Chicago Law Review* 50 1983, 652 et seq.

20 to 33%.¹⁷ According to a widespread belief, the current level of fines therefore is not sufficient to deter all companies from entering into or continuing to participate in a cartel.¹⁸ To do so, the fines—the probability of discovery remaining the same—would have to be much higher than those currently being imposed.¹⁹

14. Besides the fact that often the necessary data to calculate the optimal fine in a concrete cartel case are lacking, the prospect of again drastically raising fines is confronted with constitutional law concerns, among others, concerning such principles as proportionality.²⁰ Furthermore, a renewed increase of the fines imposed could lead in particular to jeopardising the existence of those companies involved, which would have further social consequences on third parties, especially employees and creditors. The *Bundeskartellamt* and the European Commission could certainly take account of the economic performance of a company in the concrete individual case when determining the level of the fine.²¹ And yet, if the Guidelines on fines were to announce that constrained economic performance, or a risk to economic viability, would result in a reduction of fines, this would simultaneously reduce the deterrent effect of the threatened sanctions.

15. In addition, companies in the current system can hope that dextrous maneuvering on their own part will leave them fine-free or with a reduced fine, owing to the Bonus Rule, if they should one day expose the cartel or assist in its discovery.²² Therefore, the Bonus Rule cannot be stripped of all credit in bringing cartels to light (and prosecuting them). On the other hand, it contributes to a reduction of the deterrent effect of regulatory sanctions, since adroit behaviour on the part of the cartel offender can achieve a remission or reduction of the fine.²³ Such considerations will likewise be taken into account by economically rational-thinking representatives of companies. Accordingly, the threat and imposition of deterring fines should, under the theory of the optimal sanction, again be higher.

17 P. Bryant and E. Eckhard, *Price Fixing: The Probability of Getting Caught*, *Review of Economics and Statistics* 1991, p. 531 et seq. (13 to 17% probability of detection). This estimate is based on the period of 1961-1988, however, which is before the European Commission and the *Bundeskartellamt* introduced leniency programmes; Wils therefore bases his calculation on a rate of 33% and considers a sufficient deterrent effect as given only for fines at or above 150% of the annual revenue generated by cartel products. W. Wils, *Efficiency and Justice in European Antitrust Law Enforcement*, §§ 550 et seq.

18 Cf. Monopolkommission, Hauptgutachten XIX, Subsec. 476 with further references.

19 Thus in the US fines of five times the amount of damages are under discussion; cf. R. Lande, and J. Connor, *Cartels as Rational Business Strategy: Crime Pays*, *Cardozo Law Review* 34, 427-490.

20 W. Möschel, *Wirtschaft und Wettbewerb* 2010, p. 869 et seq., who sees the proportionality principle as already violated by the current amount of fines.

21 European Commission Guideline on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No. 1/2003, op. cit., § 35; *Bundeskartellamt* Guidelines for fines §§ 2, 16.

22 This idea also applies to the possibility of ending a proceeding by mutual consent to a settlement agreement. But here the reduction of the fine is limited to 10%, so the reduction of a deterrent effect should also be limited as compared to the Bonus Rule; cf. press release of the *Bundeskartellamt* of 23 December 2013 on settlements.

23 K. Stockmann, *Festschrift für Rainer Bechtold*, 2006, p. 559, 567.

16. The deterrent effect may be significantly less on natural persons. As explained already, the probability that cartel violations will be detected is, as far as we currently know, around 30%. If we assume that as a rule a good many natural persons participate in a cartel, and yet the European Commission cannot impose a fine on them, and the *Bundeskartellamt* only brings charges against a portion of the natural persons responsible for each cartel under the law on regulatory offences, the probability of being charged is again much smaller than in the case of punishing companies participating in a cartel. Therefore the deterrent effect must also be considered to be even less. Under these circumstances it seems quite questionable whether increasing the standard fines from €500,000 to €1 million for severe cases, or from €25,000 to €100,000 for minor competition offences in the framework of the seventh amendment of the Act against Restraints of Competition is enough to achieve an effective deterrence.

17. The preventive effect of fines on natural persons is furthermore doubtful when these can be sure to receive a corresponding compensation from their employers. Such compensation can be paid *ex ante* as well as *ex post*, for instance when a higher salary or an additional bonus is agreed upon before an authority discovers the cartel, or when the employee is reimbursed in the amount of the fine after a regulatory offence proceeding is conducted.

18. Certainly, the legal admissibility of such compensation payments is increasingly being called into question. In this context, the discussion focuses on questions of the social and criminal liability of those who arrange for compensation to be paid out of company assets. Among the measures being considered are damage compensation claims on grounds of breach of obligations pursuant to Sec. 93 of the Stock Corporation Act (AktG) or criminal liability on grounds of breach of trust according to Sec. 266 of the Civil Code.²⁴ A criminal liability based on obstruction of punishment, on the other hand, is normally out of the question because there is at least presently no offence at hand—with the exception of bid rigging—on which this could be based. Another point to be made is that, at least when no direct compensation is made subsequent to the fine, it will be difficult to prove there was compensation.

19. Finally, the deterrent effect of individual fines would fall to zero if the risk of actually having to pay a fine out of one's own pocket could be ruled out by means of an insurance policy. As far as Directors and Officers (D&O) insurance is concerned, however, we must assume that an offender has no claim to compensation, at least when deliberate conduct has been proven.

24 H. Fleischer, *Betriebs-Berater* 2008, p. 1070 et seq.; C. Altemeier, *Verantwortlichkeit des Vorstands für Kartellrechtsverstöße: Ein Beitrag zur Organhaftung und zur Organuntreue*, Frankfurt, 2013.

IV. Conclusion

20. The question of whether to extend the criminalisation of cartel violations constitutes an important aspect in the current discussion in competition law and policy on a system of adequate sanctions. In recent years, both official and private enforcement have undergone, and still are undergoing, far-reaching developments—in terms not only of legal parameters but also of their application in practice. This makes it difficult to estimate conclusively how deterrent the current system of sanctions actually is. Furthermore, it is possible that the latter has not yet reached its highest point of deterrent effect. This assessment is supported by the fact that a number of cartels that have been detected and prosecuted in the last few years go back to the 1990s. The central question of the appropriate level of deterrence, therefore, calls for further investigation in the medium term.

21. And yet there are several reasons to believe that the deterrent effect of the current system of cartel sanctions should be augmented. If future analyses should confirm this assessment, the Monopolies Commission deems it worthwhile to consider particularly such measures with which incentives can be offered directly to personally responsible employees of a company. In this respect, a primarily criminal enforcement—going beyond bid rigging—of hard-core cartels could be taken into consideration. To increase the effectiveness of a possible criminal punishment, flanking measures would be necessary; in particular, a criminal-law informant programme for cartel participants should be created, and the position of competition authorities in criminal proceedings fortified.

22. Another sanction directly affecting the acting individuals and therefore leading to greater deterrence would be an occupational ban, to be imposed by competition authorities. Besides this, the probability of detecting cartels could be increased by a regulatory reward for informers. The introduction of corporate criminal law, in contrast, is not a measure that the Monopolies Commission considers to be constructive, at least not in the area of competition law. ■

Criminal enforcement of competition law: Implications of US experience*

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I. Introduction

1. How should competition law punish offenders? In 1890, the United States answered this vital query by treating violations of the Sherman Act as crimes.¹ Today criminal enforcement against companies and individuals anchors the Department of Justice (DOJ) campaign against cartels. The typical compliance talk on US law recites a steep modern increase in fines collected and prison terms served. For business officials around the world, the grim warning is the same: Get caught in a cartel that sells in America, and go to jail.

2. It is hardly inevitable that other competition systems—more than 125 jurisdictions have competition laws, and the number grows yearly—would emulate this feature of the US regime. Other nations might recoil from what they see to be another manifestation of an unhealthy American obsession with incarceration to enforce laws. Yet more than twenty jurisdictions have chosen to denominate some or all antitrust offenses as crimes.² Still others, concerned that even huge corporate fines deter cartels inadequately, are debating whether to add criminal sanctions.³

3. For actual and would-be adopters of criminal enforcement, the US program is an indispensable point of reference. This article uses US experience to illuminate the institutional challenges that confront an antitrust regime

in going criminal. It takes no view on whether criminal enforcement improves the quality of competition policy.⁴ Instead, it underscores the significant institutional consequences that criminal enforcement entails. Among other tasks, criminal sanctions require a jurisdiction to:

- Develop an internal norm within the enforcement agencies that encourages employees to treat certain acts as extremely grave offenses worthy of aggressive investigation.
- Persuade external constituencies—legislators, business officials, the bar, and the broader society (including potential jurors)—to respect an enforcement norm that deems certain antitrust violations to be worthy of criminal condemnation.
- Convince courts and juries that wrongdoers deserve conviction and severe punishment.
- Clearly delimit the category of offenses that will elicit criminal prosecution to avoid the fact or perception of unfair surprise in the application of the law.
- Accumulate evidence that provides a confident basis for prosecution and conviction.
- Ensure that sanctions are sufficient to accomplish remedial and deterrence goals.

* Parts of this article are adapted from William E. Kovacic, *Criminal Enforcement Norms in Competition Policy: Insights from US Experience*, in A. Ezrachi and C. Beaton-Wells (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford: Hart Publishing, 2011). The views expressed here are the author's alone.

1 15 USC §§ 1–2.

2 A partial list includes Australia, Brazil, Canada, Chile, France, Indonesia, Ireland, Israel, Japan, South Africa, South Korea, and the United Kingdom.

3 K. J. Cseres, M. P. Schinkel and F. O. W. Vogelaar (eds.), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Cheltenham: Edward Elgar, 2006).

4 The normative arguments raised in debates about the wisdom of criminalisation of antitrust offenses are examined in W. P. J. Wils, *Efficiency and Justice in European Antitrust Enforcement* 155–201 (Oxford: Hart Publishing 2008).

4. US experience has much to say about what it takes to perform these tasks effectively.⁵ American antitrust history teaches a crucial lesson: Nothing about building effective criminal antitrust enforcement is quick or easy. Success requires years (more precisely, decades) of arduous, sustained effort.

5. This is hardly surprising. Criminal sanctions raise the stakes in any body of law. As one leading scholar has observed, criminalisation and similar major adjustments in a legal system do not “occur in a vacuum.”⁶ Social and political acceptance for robust criminal antitrust enforcement varies according to each country’s legal framework and culture. It is unlikely to emerge automatically on the day a criminal statute becomes law. Existing norms that disfavour criminalisation of antitrust offenses may not be immutable, but careful analysis of existing conditions is essential to see what must be done to gain acceptance for criminal punishment.⁷

Institutional mechanisms for applying criminal sanctions likely will be difficult to create

6. Even when a social consensus supports criminalisation, the institutional mechanisms for applying criminal sanctions likely will be difficult to create. For example, the US system vests criminal enforcement responsibility in an executive ministry (DOJ), which has competence to gather evidence and prosecute offenses. By contrast, criminal antitrust enforcement in civil law systems often requires cooperation between a civil administrative body (the competition agency) and executive branch prosecutors. Effective collaboration between public institutions with shared duties seldom emerges smoothly and spontaneously.

7. To set these and other vital foundations in place requires careful deliberation in the law drafting process and skilful management in the development of an enforcement program. The difficulty of these challenges has important implications for how a jurisdiction should go about adopting criminal sanctions and for the expectations it should bring to this element of law reform.

8. This article uses US experience to identify major implementation issues for criminal antitrust enforcement and suggest how other jurisdictions might resolve them.

5 On the history of US experience with criminal enforcement, see D. I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, (2001) 69 *George Washington Law Review* 693; S. Hammond and A. O’Brien, *The Evolution of Cartel Enforcement Over the Last Two Decades: The US Perspective*, in M. Krasnodebski-Tomkiel (ed.) *Changes in Competition Policy Over the Last Two Decades* 11 (Polish Office of Competition and Consumer Protection, 2010); D. C. Klawiter, *After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Cartel Enforcement*, (2001) 69 *George Washington Law Review* 745.

6 A. P. Reindl, *How Strong Is the Case for Criminal Sanctions in Cartel Cases?*, in Cseres, Schinkel and Vogelaar, n. 3, 110, 120.

7 On the United Kingdom policy deliberations leading to legislation in 2002 to criminalise some antitrust offenses, see M. Furse and S. Nash, *The Cartel Offence* (Oxford: Hart Publishing, 2004).

Comparative and historical perspectives—especially awareness of how systems have evolved—provide rich insights for institutional design. Perhaps most important, the history of the US system indicates that the establishment of an effective criminal enforcement program for competition law likely will be a slow, incremental growth.

9. The article begins by discussing how criminal enforcement affects the key elements of a competition law system. The article then applies the concept of norms to the implementation of a criminal enforcement program. The final section uses US experience to suggest how an enforcement program can gain acceptance for a norm that treats certain conduct as worthy of criminal punishment.

II. Criminal enforcement and institutional interdependencies

10. To assess how criminalisation affects competition law, it is useful to view the choice of remedies as one feature of a system of interdependent elements. A change in one element can alter the operation and importance of other elements in ways that either accentuate or mute the impact of the first adjustment. In competition law, “equilibration” responds to perceived imperfections in one aspect of a legal framework by adjusting other system elements.⁸ For example, a court that is concerned that the remedies mandated by law are excessive when compared to the harm caused by certain violations may bolster the liability standard to reduce the number of instances in which an infringement of the law will be found to exist.

11. A system of competition law has six interdependent elements: the substantive scope of the legal command, the volume and quality of evidence required to prove an infringement, the means for detecting violations, the prosecution of violations, the adjudication process that determines guilt or innocence, and the sanctions imposed for infringements. Each is significant to criminal enforcement of competition law.

1. Substantive scope of the legal command

12. Competition laws differ in their coverage, but most address horizontal and vertical agreements, dominant firm conduct, and mergers. These behaviours vary significantly according to their perceived competitive dangers. Competition law specialists agree that cartels

8 S. Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, (1986) 74 *Georgetown Law Journal* 1065.

ordinarily cause economic harm and rarely benefit society.⁹ By contrast, a dominant firm's use of exclusive dealing is believed to have more ambiguous consequences.

13. In establishing criminal sanctions, a competition law could (a) require the competition agency to challenge all conduct through criminal proceedings, (b) give the agency discretion to file civil or criminal charges; (c) single out specific behaviour as subject to criminal sanctions. In the United States, the Sherman Act makes all covered conduct subject to criminal prosecution but gives the DOJ discretion to bring civil cases, as well. An express narrowing of the underlying statutory command to make criminal sanctions available only to address demonstrably harmful conduct (i.e., cartels) has the benefit of providing more complete assurance that prosecutors will not use criminal process to address behaviour with more ambiguous competitive effects.

2. Volume and quality of evidence required to prove a violation

14. The availability of criminal sanctions affects the evidentiary burdens that an enforcement agency must bear in two ways. First, criminal offenses ordinarily must be established "beyond a reasonable doubt," whereas civil offenses generally must be shown by a balancing of probabilities. To challenge conduct as a crime, the prosecutor must accumulate and present evidence that is more robust than needed for a civil violation.

15. The second effect concerns the tendency in competition law to form evidentiary presumptions based on widely held views about the competitive significance of specific conduct. The general method of analysis in competition law is a reasonableness assessment which weighs positive and adverse economic effects. Conduct that always or almost always yields net economic harm usually receives a more abbreviated inquiry ("per se" illegality or condemnation by object) that focuses mainly on whether the parties entered a forbidden category of agreement.

16. The adoption of a per se prohibition seeks to mark the zone of illegality clearly. US antitrust law instructs business managers that the bell of illegality rings at the moment a firm agrees with a rival to set prices, regardless of actual effects. The bright-line rule weakens a firm's capacity to claim that application of criminal process involved unfair surprise. Rule of reason offenses, which often involve deeper inquiry into motive and effect, generally are seen as unsuitable for criminal prosecution.

⁹ See Organization for Economic Cooperation and Development, Cartels: Sanctions Against Individuals, (2007) 9 *Journal of Competition Law & Policy* 7, 36–46 (reviewing modern enforcement trends).

17. A competition law that treats all offenses as crimes and allows no possibility for civil prosecution can create crippling rigidities. The prosecutor not only must prove all infringements beyond a reasonable doubt, but also bears the often difficult burden of convincing a jury of laypersons that the conduct at issue (e.g., a merger) is grave enough to deserve criminal sanctions. For decades, this rigidity robbed Canada's competition system of effective enforcement. In the United States, as discussed below, the application of powerful criminal sanctions became routine and effective only after DOJ adopted a policy to apply the criminal process only to cartels.

3. Detection of violations

18. By raising the hazards of misconduct, criminal sanctions induce firms to act covertly and take stronger precautions to avoid generating evidence that establishes a violation. In US experience, the strengthening of the enforcement framework (e.g., by adopting more powerful sanctions) tends to inspire business counterstrategies that seek to conceal collusion.¹⁰

19. As modern evidence with criminal anti-cartel enforcement shows, enforcement agencies and cartel participants employ, respectively, ever more powerful enforcement techniques and defensive measures.¹¹ Enforcement of the Sherman Act drove illicit collaborations underground and reduced the amount of direct evidence readily available to prosecutors.¹² Early judicial decisions established that a jury could rely on circumstantial evidence to infer an illegal price-fixing agreement,¹³ yet such proof provides a less confident basis for a jury to find concerted action beyond a reasonable doubt.

20. Recent experience has featured numerous efforts to improve access to direct evidence and to enhance the evidentiary basis for prosecuting cartels as crimes. The Justice Department's leniency reforms of the 1990s provided strong incentives for firms and individuals to reveal the existence of unlawful arrangements.¹⁴ Today leniency provides the chief evidentiary means by which DOJ prosecutes cartels. US experience underscores how criminal sanctions may require adoption of high-powered information gathering techniques to detect covert schemes and prosecute them successfully.

¹⁰ See K. J. Cseres et al., Law and Economics of Criminal Antitrust Enforcement, in Cseres, Schinkel and Vogelaar, n. 3, 1, 11.

¹¹ R. Marshall and L. Marx, *The Economics of Collusion* (Cambridge: MIT Press 2013).

¹² See W. E. Kovacic, Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels, (2001) 69 *George Washington Law Review* 766, 785–6 (Sherman Act caused cartel members to take greater precautions to avoid detection and successful prosecution).

¹³ *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 US 600, 612 (1914).

¹⁴ On DOJ's leniency program, see A. O'Brien, Leadership of Leniency, in C. Beaton-Wells and C. Tran, *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Oxford: Hart Publishing 2015) 17.

4. Prosecution

21. As noted above, the allocation of law enforcement authority may complicate the decision to apply criminal sanctions. In most jurisdictions, the power to prosecute crimes rests exclusively with the executive branch. In the United States, an executive department (DOJ) is responsible for criminal antitrust enforcement. DOJ conducts the investigation, accepts and considers applications for leniency, negotiates plea agreements, files cases, and litigates trials and appeals. One institution (DOJ) formulates criminal enforcement policy and prosecutes all criminal cases.

22. In most nations, the principal competition authority is an administrative body which lacks authority to file criminal cases. To bring criminal antitrust cases, the competition authority must enlist the assistance of the executive branch prosecutorial body. Harmonious cooperation seldom materialises immediately or automatically. Substantial, patient effort on behalf of top leadership and case handlers in both institutions is necessary to make the team effective.

23. One vital frontier of cooperation involves leniency. Leniency facilitates detection only if prosecutors make credible commitments to reduce punishment in return for information. Firms are unlikely to reveal misconduct to one government body if disclosure may lead to criminal prosecution by another. In a system of shared authority, the competition agency also must persuade the executive branch prosecutor to devote adequate resources to criminal antitrust enforcement.

5. Adjudication

24. Successful prosecution of a criminal antitrust case requires the government to persuade the judge and a jury that the offense warrants criminal sanctions. Judges and juries may associate criminal sanctions with offenses such as murder or robbery; they may not immediately view antitrust offenses as posing serious dangers. Suppose judges and jurors think price fixing does not warrant the imprisonment of culpable individuals. Judges might interpret the antitrust statute in ways that make it harder for prosecutors to prevail on criminal antitrust claims. Juries simply might engage in “nullification” by refusing to find guilt, regardless of the evidence before them.

25. To obtain convictions of individuals charged with antitrust crimes, the prosecutor must build awareness that the challenged behaviour is truly pernicious. Outside the courtroom, this education process involves speeches, media appearances, and other forms of outreach to emphasise the harm of antitrust misconduct. Inside the courtroom, the prosecutor must demonstrate the grave social hazards of the defendant’s acts. As described below, modern US experience underscores the value, in building a criminal enforcement program, of selecting cases that involve readily apparent harm.

6. Sanctions

26. The discussion above has highlighted how the perception of judges and juries about the appropriateness of sanctions can affect the interpretation and application of legal standards. Moving from lower-powered to higher-powered sanctions generates pressures for courts to take steps to ensure that higher-powered sanctions are visited upon genuinely harmful conduct. Courts may insist that the forbidden acts be well defined (to give clear notice of what conduct will trigger severe punishment) and pose serious dangers to society. Jurors in criminal antitrust cases may want stronger assurances that the conduct warrants the imprisonment of individuals.

The decision to challenge conduct as a crime or a civil offense is entrusted to DOJ’s discretion

27. In the United States, concerns about the scope of criminal enforcement have led to a significant narrowing of conduct subject to criminal prosecution. The Sherman Act provides no criteria to guide the choice between criminal and civil proceedings. The decision to challenge conduct as a crime or a civil offense is entrusted to DOJ’s discretion. From 1890 until the early 1970s, DOJ generally focused criminal enforcement on cartels, yet some prosecutions in this period challenged non-cartel offenses as crimes. In the early 1960s, the DOJ brought criminal charges against firms (and individuals) accused of illegal monopolisation.¹⁵

28. The 1970s marked an important turn in US enforcement policy. In 1974, Congress raised the Sherman Act criminal offense from a misdemeanour to a felony. DOJ subsequently narrowed the behaviour subject to criminal sanctions. Since 1974, with the exception of a single resale price maintenance case,¹⁶ DOJ has applied criminal enforcement to cartel behaviour only.¹⁷ The increase from 1974 onward in the severity of criminal sanctions created a policy imperative to ensure that only grievous misconduct receives criminal sanctions. To do otherwise could raise questions about the fairness of US antitrust enforcement and create doubts about its political legitimacy.

¹⁵ In 1963, DOJ obtained an indictment for illegal monopolisation against United Fruit and several of its executives for oversupplying Los Angeles with bananas. *United States v. United Fruit Co.*, [1961–1970 Transfer Binder] Trade Regulation Reporter (CCH) ¶ 45,063 (CD Cal, filed July 16, 1963).

¹⁶ *United States v. Cuisinarts, Inc.*, 1981 WL 2062 (D Conn 1981).

¹⁷ See Antitrust Modernization Commission, Report and Recommendations 297 (Apr. 2007) (“The DOJ has made quite clear that it does not currently prosecute anything other than hard-core cartel activity criminally, and it has no plans to change that policy in the future.”).

III. Norms and criminal antitrust enforcement

29. “Norms” are consensus views about how members of a group ought to behave.¹⁸ By contrast to formal legal commands, norms are customs or standards that members of a group develop voluntarily and apply to themselves. Antitrust systems operate within a statutory framework, but formal mandates usually give enforcement agencies discretion to decide how to implement the formal rules. In many jurisdictions, enforcement agencies play a central role in determining how the commands will be applied. Formal legal rules define the outer boundaries of the agencies’ operations, but the agencies often develop norms that shape the exercise of prosecutorial discretion.

30. When a competition agency adjusts enforcement norms, it must account for the preferences and likely reactions of various external audiences. As mentioned above, successful implementation of a criminal enforcement program requires enforcement officials to persuade courts that certain antitrust offenses deserve criminal sanctions. In criminal antitrust enforcement, DOJ has engaged in a continuing interaction with the courts with the aim of demonstrating the sensibility of its law enforcement program. After the statutory reforms of 1974, DOJ carefully chose matters whose suitability for criminal prosecution would be most evident to a judge or a jury. DOJ also used speeches and issued guidelines to clarify for business officials and their advisors its criminal enforcement intentions.

31. Whatever the exact process of change, antitrust enforcement norms are certain to change over time. This flows from the inherently evolutionary character of competition policy.¹⁹ The policy evolution that successfully introduces criminal sanctions is likely to be incremental and cumulative. Dramatic adjustments sometimes take place, but they ordinarily are not followed by dramatic changes that entirely or largely restore the status quo ante. New ideas or theories can modify, sometimes dramatically, an existing intellectual framework, but the “new” idea often has antecedents in earlier thinking. The intellectual status quo at any moment usually reflects a synthesis of older and newer thinking rather than a wholesale displacement of earlier perspectives.

32. Competition policy has a substantial experimental quality. Officials identify the “right” mix of cases over time by testing different theories and enforcement

methods. Experimentation sometimes involves bringing cases or applying remedies of a sort not previously prosecuted; in other instances, the experiment entails withholding prosecution for a matter that might have been challenged in the past. Routine evaluations of past enforcement measures provide an essential ingredient for deciding which policies to pursue in the future.

IV. The Development of modern US antitrust criminal enforcement norms

33. Since the Sherman Act’s earliest days, the prosecution of cartels has supplied the core of federal antitrust enforcement. Modern US experience indicates that building a successful criminal antitrust program is a long, cumulative process in which agencies test and refine enforcement techniques.

34. The Justice Department’s prosecution of criminal antitrust violations advanced through several phases in the second half of the 20th century and into the beginning of the 21st century. A pivotal development in the late 1950s and early 1960s was the successful prosecution of cases against producers of turbine generators and other equipment used to produce and transmit electricity.²⁰ The electrical equipment cases yielded prison terms for a number of company executives. Although the sentences served (a few weeks) pale in comparison to incarceration periods that later became routine, the prosecutions helped build business and public awareness that horizontal price fixing grossly violated competition law and warranted incarceration.

35. The second key steps took place in the 1970s. In 1974, Congress elevated the Sherman Act criminal offense from misdemeanor to felony; increased the maximum prison sentence for individuals from one year to three; and boosted the maximum fine from \$50,000 to \$100,000 for individuals and from \$50,000 to \$1 million for corporations.²¹ In 1955, Congress raised the amount to \$50,000 from the original Sherman Act amount of \$5,000.

36. The evolution of US antitrust fines from 1890 to 1974 underscores an important point about the criminal punishments. The prospect of any criminal punishment likely chastened business managers whose careers would end or decline by the mere fact of sentencing. Yet the deterrent impact on the business entity may be

18 R. D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralized Law, (1994) 14 *International Review of Law & Economics* 215, 218. The discussion of norms and criminal enforcement here builds upon the treatment in W. E. Kovacic, The Modern Evolution of US Competition Policy Enforcement Norms, (2003) 71 *Antitrust Law Journal* 377.

19 *State Oil Co v. Khan*, 522 US 3, 20 (1997) (in antitrust, Supreme Court has distinctive role “in recognizing and adapting to changed circumstances and the lessons of accumulated experience”).

20 On DOJ’s prosecution of the electrical equipment conspiracies, see J. G. Fuller, *The Gentleman Conspirators: The Story of the Price-Fixers in the Electrical Industry* (Grove Press 1962).

21 Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended in various sections of 15 USC).

weak unless the fines are formidable. By the early 1970s, a maximum fine of \$50,000 was a laughably small sum. In the mid- to late 1970s, DOJ urged courts to apply the enhanced penalties vigorously and pressed to make the imprisonment of culpable individuals routine.²²

37. The 1980s featured further enhancements to criminal sanctions for antitrust offenses. In this decade the Reagan administration pressed for increases in statutory sanctions and sentencing policy reforms that would increase the average prison term served by individuals guilty of antitrust offenses. In 1984 Congress created a new mechanism for calculating criminal fines that permits the maximum Sherman Act fine for corporations and individuals to be set at twice the loss suffered by victims or twice the gain realised by the offender.²³ The double-the-loss, double-the-gain mechanism would supply the basis for the eight- and nine-figure recoveries in the food additives, graphite electrodes, vitamins, and art auction cartel cases in the 1990s.²⁴ In 1987 new federal sentencing guidelines took effect and increased the likelihood that individuals convicted of Sherman Act offenses will serve longer prison terms.²⁵ In 1990, Congress raised the maximum Sherman Act fine for individuals to \$350,000 from \$100,000 and for corporations to \$10 million from \$1 million.²⁶

38. Enforcement since 1970 increased in parallel with enhancements in sanctions. In the 1970s, the Antitrust Division expanded efforts to prosecute collusion criminally. DOJ in the 1980s and early 1990s further augmented criminal enforcement. From 1981 through 1988, DOJ initiated more criminal prosecutions than the total of government criminal antitrust cases from 1890 to 1980; the Department continued to emphasise imprisonment for individual offenders.²⁷ In the late 1980s and early 1990s DOJ pioneered the use of criminal actions to prosecute invitations to collude.²⁸

39. By the end of the George H. W. Bush Administration in 1992, the legislative and policy adjustments of the previous two decades had accomplished several important ends. The augmented sanctions increased the likelihood of imprisonment for guilty individuals and boosted DOJ's ability to seek large fines from companies. The aggressive prosecution of cartel schemes served to

establish the social and political legitimacy and regularity of severe criminal sanctions for cartels. By the early 1990s, the fact of routine prosecution and severe punishment had become accepted elements of the nation's competition policy.

40. DOJ criminal enforcement through the early 1990s focused heavily on public procurements to construct or improve major infrastructure assets. The emphasis on public procurement played an important part in helping to build broad social and political acceptance for the idea that cartels should be condemned strictly and that individuals engaged in misconduct should be imprisoned. One way to socialise acceptance of strict criminal penalties for collusion is to target activities that society regards as contemptible. Theft from the public treasury through bid rigging is such an offense.

41. The 1990s brought important innovations in cartel detection. Since the early 1980s, federal enforcement officials had increased their ability to obtain direct evidence of collusion. The Antitrust Division resorted more extensively to wire-tapping and electronic surveillance and broadened cooperation with other law enforcement entities and government bureaus.²⁹ In 1993 and 1994 DOJ expanded leniency to increase incentives for cartel participants to inform.³⁰ Better detection and enhanced sanctions spurred major enforcement breakthroughs in the 1990s.³¹ From 1995 through 2000 DOJ collected more fines for antitrust crimes than it obtained from 1890 to 1994. From the vitamins cartel alone, DOJ obtained hundreds of millions of dollars in criminal fines³² and gained prison terms for individual offenders, including foreign nationals.³³

42. In the 2000s, the US criminal enforcement program obtained additional upgrades. In 2004 Congress adopted the Antitrust Criminal Penalty Enforcement and Reform Act, which increased the maximum prison sentence for individuals to ten years; lifted the maximum fine for individuals to \$1 million; raised the Sherman Act fine for corporations to \$100 million; and reduced the exposure of certain leniency applicants in private treble damage follow-on suits.³⁴

22 See Baker, *supra* n. 5, 705 (describing evolution of US criminal enforcement scheme).

23 18 USC §§ 3571(d) (1994). Congress first enacted this provision in the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat 3143, and reenacted the measure in the Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, 100 Stat 1279.

24 See Klawiter, *supra* note 5 (discussing double the loss, double the gain fine).

25 The sentencing guidelines for antitrust offenses appear at USSG § 2R1.1 (2005).

26 Antitrust Amendments Act of 1990, Pub. L. No. 101-588 (1990), 104 Stat 2880 (codified at 15 USC §§ 1, 2).

27 See Baker, *supra* n. 5, 695–96, 705–07.

28 See *United States v. Ames Sintering Co.*, 927 F2d 232, 236 (6th Cir 1990) (*per curiam*) (upholding convictions for wire fraud and attempted wire fraud resulting from defendant's attempt to arrange bid-rigging scheme by telephone).

29 See J. Whalley, Priorities and Practices—The Antitrust Division's Criminal Enforcement Program, (1988) 57 *Antitrust Law Journal* 569, 571-2 (describing expanded use of wiretaps and other surveillance techniques to gather evidence of illegal collusion).

30 US Department of Justice, Antitrust Division, Corporate Leniency Policy (10 August 1993), reprinted in 4 *Trade Regulation Reporter* (CCH) § 13,113; US Department of Justice, Antitrust Division, Individual Leniency Policy (10 August 1994), reprinted in 4 *Trade Regulation Reporter* (CCH) § 13,114.

31 See G. R. Spratling, Detection and Deterrence: Rewarding Informants for Reporting Violations, (2001) 69 *George Washington Law Review* 798 (describing criminal enforcement accomplishments of 1990s).

32 Hoffman La Roche and BASF paid criminal fines of \$500 million and \$225 million, respectively, to resolve DOJ's claims.

33 See H. First, The Vitamins Case: Cartel Prosecution and the Coming of International Competition Law, (2001) 68 *Antitrust Law Journal* 711, 716-18 (describing guilty pleas by foreign nationals in *Vitamins* case).

34 Pub. L. No. 108-237, § 215(a), 118 Stat. 661, 668 (2004).

43. The progressive enhancement and increasingly successful implementation of DOJ's criminal enforcement program from the late 1950s to the present has built upon a commonly held belief about the competition policy role of criminal prosecutions. After the 1974 legislative reforms, DOJ's leadership made criminal prosecution DOJ's highest competition policy priority. Each decade's accomplishments—ascending levels of cases prosecuted, fines collected, individuals imprisoned, and average length of sentences served—rested upon the contributions of previous decades. In each period DOJ rolled out new enforcement approaches, tested the policy “prototypes,” assessed the results, expanded the use of successful techniques, and pursued necessary modifications in Congress or by means committed to the Department's discretion.³⁵ A commitment to continued improvement underpinned this process.

V. Conclusion: Institutional implications

44. The impact of a system of legal commands depends vitally on the institutions created to execute them.³⁶ Close study of US experience illuminates the special institutional demands of a criminal enforcement regime and identifies how a jurisdiction might best implement a system of criminal sanctions.

1. Transparency

45. Through the meaningful disclosure of processes, policies, and decisions, competition agencies promote clarity, increase understanding, and discipline their exercise of discretion by subjecting their actions to external review and criticism. Transparency guides business operators about the content of and rationale for specific decisions and helps ensure the regularity and honesty of public administration. This quality is especially significant for criminal enforcement. Because criminal sanctions are the most powerful means by which a society can enforce its laws, a government agency must take additional measures to ensure that their application is sensible.

46. Recognising how enforcement norms develop and change over time underscores the importance of transparency devices. Policies that commit the agency to reveal information about how it exercises the decision to prosecute help inform the competition policy community about the content of enforcement norms within the agency and permit discussion about whether existing norms are worthy of adjustment. Extensive public discussion before the enactment of a criminal enforcement regime and revelation of the agency's enforcement intentions during the process of implementation serve to build needed acceptance for criminal sanctions and to establish their political legitimacy.

2. Institution building

47. Antitrust agencies arrive at a given policy equilibrium by periodically expanding and contracting the zone of enforcement. Testing the validity of different hypotheses involves making enforcement decisions that calculate risks about intervening too aggressively or not intervening enough. Without experiments that sometimes intervene too much or sometimes intervene too little, enforcement authorities could not determine the correct mix of policies. As noted below, the experimental quality of competition policy demands that the agency periodically assess the effects of chosen policies.

48. US experience shows that the success of criminal enforcement programs depends upon the willingness of leadership to make long-term investments to build administrative capacity and to enhance the agency's reputation. This requires fidelity to a norm that emphasises long-term institutional improvement and discourages the inclination to focus chiefly on measures that generate immediately appropriable results for incumbent leadership.³⁷ US experience underscores how the construction of the US criminal antitrust program was a slow growth, and its success has hinged upon investments made in each decade in each key element of the enforcement program.

49. Among the most important means to achieve policy improvements is to embrace a norm favouring *ex post* assessment of outcomes.³⁸ A habit of evaluation can perform the broader function of placing individual policy initiatives in a larger historical context. By seeing how policy actually evolves, agencies can better understand what they must do to improve performance.

35 See, e.g., 60 Minutes with Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, (1986) 55 *Antitrust Law Journal* 255, 260 (discussing Reagan Administration's support for sentencing reforms that would increase prison terms served by individuals guilty of price fixing).

36 See J.-J. Laffont, Competition, Information, and Development, in B. Pleskovic and J. E. Stiglitz (eds.), *Annual World Bank Conference on Development Economics 1998* (Washington, D.C.: The World Bank, 1999) 237 (discussing institutional foundations for successful competition policy systems).

37 See H. Hecl, *The Spirit of Public Administration*, (2002) 35 *PS: Political Science & Politics* 689, 691 (“Nothing closes so many doors on real opportunity as opportunism. A person who is forever weighing the odds of immediate success can never believe in anything long enough to make it succeed.”); W. E. Kovacic and D. A. Hyman, Consume or Invest? What Do/Should Agency Leaders Maximize?, *University of Washington Law Review* (Forthcoming 2016), available at <http://ssrn.com/abstract=2705919>.

38 On the importance of *ex post* assessment as an element of competition policy, see W. E. Kovacic, Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities, 31 *Iowa Journal of Corporation Law* 503 (2006).

50. The tasks of system design and evaluation for criminal enforcement can benefit considerably from comparative study. Each jurisdiction considering or implementing a criminal enforcement program can benefit from the experience of other jurisdictions that already have set out on a policy path. Comparative study and international cooperation may not provide perfect answers to each challenge that a jurisdiction faces in considering criminalisation of

antitrust law, but they can provide an accurate prediction of the institutional challenges that criminalisation entails. To know these challenges in advance creates the best possible opportunity to prepare for and surmount them. For criminal enforcement, careful study of the US experience is an indispensable part of this comparative inquiry. ■

Is there public support for cartel criminalisation?

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I. Introduction

1. This article draws on the findings of four surveys carried out in 2014 to answer the question of whether there is public support for cartel criminalisation.¹ Following the proliferation of substantive competition laws and then leniency programs, one of the most distinctive trends in global antitrust over the past decade has been the increasing number of jurisdictions that can impose criminal sanctions on individuals and/or firms responsible for cartel conduct. These typically exist alongside civil enforcement regimes and are reserved for the most serious horizontal restrictions. The countries with criminal cartel laws number around 25-30 (depending on how one defines a criminal cartel offence), but this does not include jurisdictions that apply criminal sanctions only to bid rigging (sometimes restricted to public procurement). While the increasing number of criminal cartel offences poses a number of challenges for competition lawyers advising multinational firms, the level of actual enforcement outside the United States is still very low, with only a handful of individuals ever having served custodial sentences in other jurisdictions.²

2. The trend towards criminalisation is likely to continue, but diverging approaches to enforcement are already emerging. Perhaps the most obvious of these is within the European Union, where around 11 of the EU's 28 Member States have criminal cartel laws, while a number of others have explicitly rejected them. Reasons for rejecting cartel criminalisation range from fears about undermining leniency programs to objections from the business community.³ Moreover, there have been no moves to criminalise cartel laws on the European Community level. Administrative fines and criminal antitrust enforcement actually serve the same function. Indeed, for the purposes of the European Convention on Human Rights, the Strasbourg Court has made clear that administrative antitrust fines are of a "criminal nature" and must comply with fundamental rights.⁴ At their core, both enforcement approaches impose a punitive sanction and seek to achieve some level of deterrence so as to protect individual consumers and the wider economy from serious anticompetitive harm.

1 For a summary of the full results, see: A. Stephan, Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA, *CCP Working Paper* 15-8.

2 See A. Stephan, Four Key Challenges to the Successful Criminalization of Cartel Laws (2014) *Journal of Antitrust Enforcement* 2(2) pp. 333-362.

3 See, for example: *Practical Law*, Swedish Competition Authority Opposes Proposal to Criminalise Cartels (31 May 2005); A. Stephan, New Zealand Rejects Cartel Criminalization for the Wrong Reasons (9 December 2015) *Competition Policy Blog*; and Finnish Competition and Consumer Authority, Report on the Criminalisation of Cartels was Presented to Stakeholders (28 May 2014), available: <http://www.kkv.fi/en/current-issues/press-releases/2014/report-on-the-criminalisation-of-cartels-was-presented-to-stakeholders> (accessed 25 Jan 2016).

4 See *A. Menarini Diagnostics S.R.L. v. Italy* (2011) App No. 43509/08. See, generally: A. Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* (Kluwer 2013).

II. Framing the criminalisation debate

3. Criminalisation is being driven largely by deterrence theory, which tends to assume that cartelists weigh the expected benefits and costs of collusion and decide whether to engage in the activity accordingly.⁵ Viewing cartel conduct from this perspective, there is a growing realisation that administrative sanctions alone (which are usually some form of financial penalty) may not be enough to discourage the most damaging forms of cartel conduct.⁶ Anecdotal evidence suggests that businesses treat administrative fines as a cost of doing business and empirically we know that antitrust fines may not exceed the illegal profits earned by cartel members.⁷ As any individual monetary sanctions can be indemnified as part of cartel arrangements, a purely administrative enforcement regime does not adequately reach the individual decision makers responsible for cartel conduct. Indeed, the length of time between cartel formation and the imposition of administrative fines is such that those responsible for the conduct may very well have retired or moved to another firm.⁸ It is thought that only the threat of imprisonment serves to deter those individuals. Its power is clear from the enforcement success of the US Department of Justice and the fact that, anecdotally at least, some international conspiracies appear to be avoiding the United States.⁹

4. However, using the criminal law in antitrust is controversial. Many view it as an extreme form of regulatory control and argue that it is wrong to use the criminal law to prevent a largely “morally neutral” activity. Traditionally, criminal offences are reserved for the most serious and objectionable acts in society. The trend towards “over-criminalisation” risks eroding the power and significance of the criminal law, ultimately weakening the deterrent effect of all criminal offences. Specifically, the traditionalists’ objection to a criminal antitrust offence is that it is not clearly underpinned by the prevention of social harm and by morality.¹⁰ Morality is perhaps of particular significance because cartel laws generally punish the entering into of a cartel agreement, not its harmful effects.

5 G. Becker, (1968) Crime and Punishment: An Economic Approach, *Journal of Political Economy*, 76, 169.

6 See Department of Trade and Industry (DTI), *A World Class Competition Regime* (London: The Stationery Office, 2001), Cm.5233, §§ 7.13-7.18.

7 E. Combe and C. Monnier, Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement (2009) *Cahiers de Recherche PRISM-Sorbonne Working Paper*; C. Craycraft, Antitrust Sanctions and a Firm’s Ability to Pay (1997) *Review of Industrial Organization* 12, 17.

8 A. Stephan, The Direct Settlement of EC Cartel Cases (July 2009) *ICLQ* 58(3) pp. 627–654.

9 D. I. Baker, Punishment for Cartel Participants in the US: A Special Model? in C. Beaton-Wells and A. Ezrachi (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, (Oxford: Hart, 2011).

10 See, for example: J. S. Mill, On Liberty, in Gray (ed.), *On Liberty and Other Essays* (Oxford: OUP 1991), and Lord Devlin, *The Enforcement of Morals* (Oxford: OUP 1965).

Indeed antitrust laws are rarely concerned with whether a hard-core cartel arrangement actually achieved any harm or was even successfully implemented. If the person on the street cannot easily identify the harm or describe what is objectionable about the act of price fixing, say, then one might argue it is appropriate that antitrust be regulated by civil, not criminal law.

The difficulties associated with building a prosecution around dishonesty

5. Some point to the UK’s experience of cartel criminalisation as proof of this. The original cartel offence introduced by the Enterprise Act 2002 only applied to individuals who acted “dishonestly.” It was hoped the offence would “send out a strong message to the perpetrators, their colleagues in business, the general public and the courts.”¹¹ This suggested there were some doubts as to whether each of those constituent groups understood why cartels were objectionable. This appears to have been confirmed by the difficulties associated with building a prosecution around dishonesty. The first criminal cartel trial to be contested before a jury only came in 2015 and resulted in two defendants being acquitted based solely on the cross-examination of prosecution witnesses, casting doubt on the existence of dishonesty.¹² Some point to the many difficulties associated with the dishonesty test, arguing that the case simply vindicated the UK Government’s decision to drop the dishonesty requirement in 2014 and replace it with a series of carve outs and defences where there is no secrecy.¹³ Yet others believe that an attempt to use the criminal law to increase deterrence and the moral opprobrium of an activity that is not already widely regarded as being immoral is wrong.¹⁴ Williams notes, “this amounts to a kind of legal alchemy which ultimately will not work, and instead risks damaging the moral credibility of the criminal law more generally.”¹⁵

There is something unsatisfactory about describing price fixing as theft or fraud

6. Most responses to this criticism seek to draw parallels between cartel conduct and either fraud or theft. This is evident in the language used by competition authority officials, even in jurisdictions where the only sanctions available are in fact administrative. The most famous expression of this parallel with traditional property offences probably comes from Klein, who spoke of price fixing as

11 Patricia Hewitt, Secretary of State for Trade and Industry, Hansard HC Deb vol. 383 col 48 (10 April 2002).

12 *R v. Dean and Stringer* (2015) Southwark Crown Court, unreported. See also Competition and Markets Authority, CMA statement following completion of criminal cartel prosecution (24 June 2015).

13 Enterprise and Regulatory Reform Act 2013, s. 47.

14 A. Jones and R. Williams, The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution? (2014) *Journal of Antitrust Enforcement* 2(1) pp. 100–125.

15 R. Williams, Cartels in the Criminal Law Landscape, in C. Beaton Wells and A. Ezrachi (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, (Oxford: Hart 2011), p. 312.

being “*nothing more than theft by well-dressed thieves.*”¹⁶ Yet there is something unsatisfactory about describing price fixing as theft or fraud. It does not usually involve violence or result in a critical mass of harm that can be easily identified. Crucially it is questionable whether the level of deception in cartel conduct is strong enough to amount to a fraud. This is perhaps more straightforward in the context of bid rigging because bidders deliberately submit false bids in manipulation of what is clearly a process that invites competitive bids. It explains why bid rigging is treated more harshly than other forms of cartel conduct in some jurisdictions.

7. In the context of price fixing, output restriction and market sharing, demonstrating a positive deception becomes a little more difficult. First there is the fact anti-trust laws make no effort to estimate the actual harm caused by a cartel, despite the fact the strongest justification for criminalising cartel conduct lies in the enormous amount of economic harm caused by such arrangements. The second problem is that without fairly sophisticated analysis, it is not easy to identify the harm, as this would require some estimation of the counterfactual. Where, for example, three firms form a cartel out of crisis and the alternative would have been one of the three firms going bust and leaving a duopoly, prices may not have been very different absent the cartel. The final problem is that the deception—giving the appearance of competition when in fact there is none—requires that consumers expect markets to be competitive and that prices are calculated by firms independently of each other. Wardhaugh goes further, asserting that in a liberal society that relies largely on the free market economy, cartels strike at an important institution, hindering individuals’ ability to secure their own well-being.¹⁷ One might consider, for example, the fact that some consumers will be priced out of the market and denied access to certain products, because cartels tend to reduce output and raise prices to levels beyond the reach of poorer buyers, in pursuit of higher profit. As Whelan notes in his excellent analysis of the criminalisation question, there are actually a number of theoretical, legal and practical aspects to cartel criminalisation and these must be considered together in order to give a meaningful and comprehensive evaluation.¹⁸

III. Studying public perceptions and criminalisation

8. It is therefore with some caution that this paper now turns to the issue of consumers’ expectations and perceptions. These are important to the criminalisation question in a number of respects. First, if consumers expect markets to be competitive and for separate undertakings to set their prices independently of each other, this lends support to any arguments for criminalisation centred on deception. While cartels may be able to function without the need to make a positive deception of the kind we would expect in a traditional fraud (e.g. making statements to customers that are completely untrue), they tend to be highly clandestine. Cartels almost universally go to great lengths to hide the arrangement—in particular by operating outside the institutions of the firm and communicating covertly. However, there is a whole host of commercially sensitive information that firms withhold from consumers. The argument that a clandestine cartel amounts to a deception only holds if consumers expect competition to be the norm. Second, they help us understand the extent to which members of the public consider cartel practices to be objectionable and deserving of punishment. This alone may not be justification for imposing criminal sanctions, but it does help us understand whether they are viewed as purely regulatory matters. Views of whether cartels should be punished also help us understand whether ordinary consumers (many of whom may serve procurement functions of various kinds in their professions) recognise the harmful effects of cartels without the need to demonstrate a quantifiable overcharge. This would lend some support to a social harm basis for cartel criminalisation.

9. The survey projects used to assist us in exploring the abovementioned issues were carried out online between 27 June and 15 July 2014, by YouGov Plc in the UK, Germany and the US, and in cooperation with Research Now in Italy. The sample was selected from online panels and drawn to be representative of the general population in each country according to a list of demographic characteristics. The sample sizes were: 2,509 (UK); 2,648 (Germany); 2,521 (Italy); and 2,913 (USA). The study was a follow-up of a 2007 survey carried out only in the UK¹⁹ and asked a variety of questions relating to price fixing. Questions generally gave respondents two alternative options and were asked to indicate which they agreed with more.²⁰

16 J. Klein, The Antitrust Division’s International Anti-Cartel Enforcement Program, Speech at the American Bar Association Spring Meeting, Washington, D.C., April 6, 2000.

17 B. Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge: CUP 2014).

18 P. Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (Oxford: OUP 2014).

19 A. Stephan, Survey of Public Attitudes to Price-Fixing and Cartel Enforcement (2007) *CCP Working Paper* 07–12.

20 Full question wording available in the working paper: Stephan 2015 (n. 1).

1. Do consumers expect independent pricing decisions?

10. One of the most significant findings of the surveys was that around two thirds of respondents in the UK, Germany and Italy expected “*each business they buy from to have set their prices independently of each other*” and objected to “*firms talking with each other about the prices they charge.*” The proportion in the US was just over half. Less than one in three felt it was normal for competing businesses to talk to each other about prices, and that proportion was only one in five in the UK. These findings suggest consumers are far from indifferent to the way firms calculate their prices. It also suggests that where competing firms depart from the competitive process and cease calculating prices independently of each other, most consumers will continue to assume prices are competitive unless they are told otherwise by the firms. Attempts, therefore to hide or suppress the disclosure of information about the existence of a cartel, may amount to a significant deception.

11. Throughout the survey results it is surprising how uniform attitudes to price fixing were between the European countries and how they were comparatively weak in the United States. Indeed this was despite some significant differences in attitudes to the role of government and the free market. Almost two thirds of Americans believed “*that a free market economy, in which government control is kept to a minimum, is the best economic system for creating wealth and prosperity.*” By contrast almost half of Italians believed “*that wealth and prosperity can be better achieved through greater government intervention in the economy.*” This would suggest that expectations about independent pricing are not closely linked to perceptions of the free market in the way some may expect. Perhaps the expectation of independent pricing is more to do with values of fairness than faith in the benefits of the competitive free market process.

2. Is the act of price fixing considered objectionable?

12. In all four jurisdictions a strong majority of respondents (79% GB; 78% DE; 73% IT; 66% US) recognised price fixing as a harmful practice that was deserving of punishment. It is notable that in all jurisdictions other than Italy those unsure were greater in number than those who felt price fixing was a harmless practice that should be left unpunished. The survey questions were silent on how price fixing was treated in law by each of the four jurisdictions. Indeed, despite such a high proportion of respondents recognising cartel conduct as a harmful conduct that deserved punishment, there was a significant amount of uncertainty as to whether price fixing was actually illegal. Only 53% of Britons and Italians thought price fixing was illegal and, surprisingly, only 41% of Americans. The proportion in Germany was significantly higher (75%), but this may have been due to a number of high profile cartel cases that occurred in Germany over the six-month period immediately preceding the fieldwork

and the *Bundeskartellamt*'s efforts in recent years to target infringements involving consumer products. When asked to explain why they felt price fixing was a harmful practice deserving of punishment, respondents strongly related to statements indicating price fixing was harmful, unethical, immoral and dishonest. There was even overwhelming support in all four jurisdictions for price fixing to be treated as a “crime.” Unfortunately this question proved of limited use as it was unclear whether respondents had understood the difference between a crime and other forms of illegality. Nevertheless, it would therefore appear that, despite obvious confusion about how cartels are actually treated in law, a strong majority of respondents in each of the four jurisdictions recognised price fixing as objectionable and harmful enough to deserve punishment.

13. In order to determine how objectionable consumers felt price fixing was, the surveys turned to questions about sanctions and comparisons with more traditional forms of wrongdoing. These revealed some limitations to popular perceptions. While there was strong support for public naming and shaming, the imposition of corporate fines exceeding the illegal profits, and a personal fine for individuals responsible, support for imprisonment of those individuals was comparatively weak (27% UK; 28% Germany; 26% IT; 36% US). It is important to note that the question asked specifically about imprisonment and this implied incarceration. Therefore the level of support for criminal enforcement (for example where first offenders get a suspended sentence) may be higher. While a majority of respondents in the UK, Germany and the US felt price fixing was of equivalent severity to fraud, at least 40% in all four jurisdictions felt fraud and theft was more serious. Opinions were also divided about how price fixing compared to other forms of financial crime. Respondents generally felt price fixing was comparable to tax evasion (50% UK; 41% DE; 35% IT; 44% US) and insider trading (56% UK; 49% DE; 41% IT; 47% US), but many felt even these practices were more serious (Tax evasion: 45% UK; 52% DE; 59% IT; 48% US. Insider trading: 29% UK; 31% DE; 43% IT; 39% US). Price fixing compared far less favourably against misleading consumers about the safety of goods (more serious than price fixing: 64% UK; 59% DE; 75% IT; 63% US) and driving while under the influence of drink or drugs (more serious than price fixing: 76% UK; 69% DE; 84% IT; 69% US). Out of the range of other misbehaviour put to respondents, a strong majority only agreed that price fixing was more serious than a person illegally downloading music. These are likely to reflect the remote nature of the harm caused by cartel conduct and suggest that respondents do not fully appreciate the magnitude or extent of the economic harm cartels are capable of achieving.

14. Despite these limitations, it is worth noting that support for imprisonment in the UK was only 11% in the 2007 study (amounting to a threefold increase in support) and the proportion of people who felt price fixing was dishonest also appears to have increased significantly. The weak results from the US suggest any hardening in attitudes may have little to do with rigorous antitrust

enforcement, as one would expect the American respondents to be far more willing to condemn price fixing. It may instead reflect increased awareness and anger towards corporate wrongdoing following the financial crisis and well-publicised cases such as Libor manipulation. Any such effects of the financial crisis and their extent are hard to estimate and need further research. Finally, it could simply be due to poor information dissemination and coverage of antitrust issues in the popular media.

IV. Concluding remarks

15. The findings of the survey study suggest that consumers do expect competing businesses to calculate prices independently of each other. They also suggest a clear sentiment that cartel practices are objectionable because they result in harmful price increases and are deserving of punishment. These appear to satisfy the morality and social harm prerequisites to criminalisation, especially as the clandestine nature of cartel arrangements appears to strengthen arguments that they amount to a deception. Yet there are clear limitations to this. While cartels may

not be “morally neutral” in quite the way some critics of criminalisation suggest, especially as around half of respondents across the board feel it is as serious as fraud, some struggle to equate it to other types of wrongdoing, some of which are arguably significantly less harmful than price fixing. The weak support for imprisonment is also problematic because the custodial sentence is key to the deterrence objective of cartel criminalisation. Proponents of criminalisation will find it difficult to depart from calls for custodial sentences for as long as there are no viable administrative sanctions against individuals that cannot be indemnified by the cartel.

16. Neither side of the criminalisation debate is likely to have been converted by the analysis in this paper. Public perceptions are another instructive element which help us further develop the discourse on cartel criminalisation—especially in relation to normative arguments, criticisms and justifications. They should not be taken as definitive indicators of whether criminalisation is justified or viable in practical terms. The US has enjoyed significant success in cartel criminalisation, yet the survey results suggest it is far from a special case when it comes to public perceptions. Practical and institutional aspects of criminalisation may be of equal importance. ■

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