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DETECTING CRIMINAL BEHAVIOUR IN BUSINESS ORGANISATIONS

Leniency Application in Detecting Hard Core Cartels

Bachelor's Thesis
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Abstract

Criminogenesis is inherent in business organisations. Business organisations are criminogenic for various reasons such as blind loyalty and compliance, the normalisation of deviance and ambitions for profits (Glebovskiy, 2019). Especially, linking pay to performance without taking ethics into consideration can invite criminal behaviour in business organisations (Jurkiewicz & Giacalone, 2016; London Economics, 2011; Pinto, Leana, & Pil, 2008). Criminogenic factors in business organisations can be categorised into crime-coercive and crime-facilitative factors with the first pressuring individuals into criminal activities and the latter attracting and enabling criminal behaviour (Glebovskiy, 2019).

Hard core cartels are one manifestation of criminal behaviour in business organisations. They partake in price fixing, restricting output, market allocation or bid rigging, or a combination of these (OECD, 2020b). The basic elements of hard core cartels are widely agreed upon (ICN Working Group on Cartels, 2005). Hard core cartels cause financial, physical and environmental harm by negatively affecting competition, market legitimacy, entire countries, consumers and market participants (Chen, J., 2020; European Commission, 2019a; OECD, 2019a; Van Erp & Lord, 2020).

The detection of hard core cartels and their enforcement are top priorities shared by competition authorities worldwide (Chen, Z. & Rey, 2013; Tavares de Araujo, 2010). Hard core cartels can be prosecuted as per se illegal or for their effects (ICN Working Group on Cartels, 2005). Hard core cartels can be detected either through proactive or reactive methods. Leniency application, a reactive detection method, is considered the most important detection method and is also the most widely used (Abrantes-Metz, 2013; Jaspers, 2020).

Leniency policy is based on three main assumptions: cartelists are rational and their actions are determined by profit incentives, cartelists have accurate information on the expected benefits of the cartel and leniency is only affective if implemented alongside sufficient penalties (Jaspers, 2020) Leniency programs attempt to destabilize cartels by creating distrust between the involved parties by offering benefits for betraying fellow cartelists (Jaspers, 2020; Spagnolo, 2000).

Leniency programs have however been subject to criticism. Rewarding people who should be punished can be seen as moral dilemma (Abrantes-Metz, 2013; Motta & Polo, 2003; Spagnolo, 2000). Also, cartelists may decide together to calculatedly report their behaviour in order to receive leniency (Chen & Rey, 2013; Miller, 2009). Furthermore, it is uncertain how sophisticated cartels are detected through leniency (Schinkel, 2014).

Most notably, my thesis implies a need to possibly re-assess the reasons behind hard core cartels; leniency policy assumes cartelists as rational (Jaspers, 2020) yet they can be just as irrational (Paternoster, 2016). Finally, my thesis indicates a constant battle against criminal behaviour in business organisations such as hard core cartels for the foreseeable future (Connor, 2016; Glebovskiy, 2019).

Keywords hard core cartel, leniency, detection, criminogenesis, business organisation

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1. Introduction

Business organisations are inherently criminogenic (Glebovskiy, 2019). On account of this tendency towards criminal behaviour, I believe it would be illogical to assume that criminogenesis in business organisations would weed out on its own. Rather, it is critical to notice that according to current literature criminal behaviour in business organisations is an ongoing issue with no foreseeable end. Therefore, it becomes important to look into ways to detect this behaviour in order to combat it.

Because criminogenesis in business organisations is a vast subject taking into consideration the diversity of criminal behaviour and various organisations, I will conduct a case study regarding leniency application as a hard core cartel detection method. This limitation will help in bringing focus to my thesis. I am choosing to focus particularly on hard core cartels out of sheer interest for competitive methods and policy in business, and hard core cartels are seen as the worst violation of competition policy (OECD, 2019). They are also the most harmful cartels and the "most difficult to prosecute" (Connor, 2016, p. 2).

I will limit my examination of detection methods to leniency application, because it is the most widely used hard core cartel detection method (Jaspers, 2020). Accordingly, my thesis question is "how leniency application works in detecting hard core cartels?" In my examination of criminal behaviour in business organisations, I have excluded solely unethical practices. Criminal behaviour can be viewed as unethical, but I am personally interested in researching strictly illegal practices, not ones that are only viewed as unethical and therefore having no basis for legal action.

I believe it is important to lay a solid foundation for my case study. I trust that a look into criminogenesis in business organisations and hard core cartels will give added value to the reader. My goal is to provide the reader with an understanding of where my case study fits in with the subject of criminogenesis in business organisations overall; I do not want to produce a disconnected case study and leave the reader wondering how it is related to the subject matter.

Hence, I will begin my thesis by exploring the inherent criminogenesis in business organisations, which will support my argument that this issue has to be actively attended to. I

will focus on crime-coercive and -facilitative factors in business organisations in order to conceptualise theorised sources of this criminogenic tendency. Next, I will narrow my focus down to hard core cartels as an example of criminal business organisations. I will look at what hard core cartels are, what are their most significant effects and the subject of detecting them. Lastly, I will conduct a pros and cons analysis of how leniency application works in detecting hard core cartels based on relevant literature. Afterwards, I will discuss my case study of leniency application as a hard core cartel detection method and the overall subject of detecting criminal behaviour in business organisations.

I back the importance of this subject by referring to the financial, physical and environmental harm hard core cartels cause by negatively affecting competition, market legitimacy, entire countries, consumers and market participants (Chen, 2020; European Commission, 2019; OECD, 2019; Van Erp & Lord, 2020). Additionally, hard core cartels cause a lack of innovation by making business unworthwhile for new entrants (Chen, 2020; London Economics, 2011) and produce overcharges that make services and goods inaccessible to consumers (OECD, 2019b). Finally, I wish to note that hard core cartels reduce peoples' trust in economic and political institutions (Van Erp & Lord, 2020).

Regarding whether or not this subject will remain relevant, hard core cartels have been a persistent issue and are growing in numbers based on current statistics (Connor, 2016). They last between 4 and 10 years, but some have persisted for up to 100 years (London Economics, 2011). Additionally, this thesis indicates a possible need for improvements in leniency policy; I would argue a need for the critical examining of the assumptions from which leniency policy is built. I therefore believe the subject of detecting hard core cartels is and will remain a relevant issue for the foreseeable future.

2. Criminogenesis in Business Organisations

I begin laying the grounds for examining leniency application by looking into the subject of inherent criminogenesis in business organisations. This will help in comprehending the reasons for criminal behaviour in business organisations overall, including hard core cartels.

Taking into consideration the diversity of criminal behaviour, it is difficult to define criminal behaviour in business organisations. In literature, the terms corporate crime, organisational crime and business crime are at times used interchangeably to refer to criminal behaviour in business organisations. By one definition, "corporate crime is a form of fraud in business organisations" and can be categorised into administrative, environmental, financial, labour, manufacturing and unfair trade practices (Glebovskiy, 2019, p. 433). Of these criminal activities, hard core cartels fall primarily into the financial and unfair trade practices categories, as they partake in price fixing, restricting output, market allocation or bid rigging, or a combination of these (OECD, 2020).

2.1 Tendency for criminogenesis

Criminal organisational behaviour can be seen as a natural by-product of legitimate activity. Calling business organisations criminogenic means that business organisations and various parts of them such as management or employees have a tendency to deviate from set policies and procedures and to opt for illegal means (Glebovskiy, 2019). This tendency may not manifest in illegal activities at first, but it can create an environment for such behaviour down the road. Business organisations can for example foster a corrupt atmosphere "that invites fraud … as a means to of achieving commercial goals" (Glebovskiy, 2019, p. 434).

Business organisations are prone to being criminogenic for various reasons. For one, the ethics of a company are not always considered as central to the business strategy. Secondly, blind loyalty and unquestionable compliance may be a source of criminal behaviour. Coercive group thinking, the herding effect, a lack of critical thinking, the normalisation of deviance, unrealistic goals and ambitions for profits may also cause business organisations to become criminogenic (Glebovskiy, 2019). According to economic theory the goal of business organisations is to maximise long term profits (London Economics, 2011), which suggests that ambitions for profits in particular could affect a wide range of business organisations. Moreover, the general unfriendliness towards government and market regulations results in a diminished respect for the law and supports criminogenesis in business organisations (Heath, 2008).

Criminal behaviour in business organisations can manifest either as an organisation of corrupt individuals or as a corrupt organisation in itself. The difference between the two is that in the first a notable number of the organisation's members act corruptly for their own gain and in the latter they act for the benefit of the organisation making the organisation the primary offender and beneficiary. Organisations that have loosely connected divisions, strongly link performance to compensation, are very dependent on other entities or are a part of an industry with set norms are more prone to criminal activity (Pinto et al., 2008).

2.2 Crime-coercive and crime-facilitative factors

Criminogenic factors in business organisations can be categorised into crime-coercive and crime-facilitative factors. The first pressures individuals into criminal activities and the latter attracts and enables criminal behaviour (Glebovskiy, 2019). I suggest these factors could be viewed either as pushing or pulling; coercive factors push towards action and facilitative factors pull towards action. Crime-coercive factors are present especially in business organisations in which bending the rules and deviance is accepted, seen as a norm or even promoted. In other words, employees may feel that they have no other option than to break the rules. These factors most often stem from conditions created by management (Glebovskiy, 2019). Linking pay to performance without taking ethics into consideration can for example act as a crime-coercive factor as risks may be necessary for rewards (Jurkiewicz & Giacalone, 2016; London Economics, 2011; Pinto et al., 2008).

Crime-facilitative factors on the other hand are present where there are high incentives and opportunities to commit crime alongside a low risk of being caught (Glebovskiy, 2019; Heath, 2008). I argue that crime-facilitative factors can be viewed as having a why not effect regarding criminal behaviour. Crime-facilitative factors remove inhibitions to commit crime, motivate to commit crime without the pressure of coercive factors and help in rationalising and explaining criminal actions. As an example, business organisations are usually large, complex, impersonal and lack transparency making it hard to point out individual criminal actors. The business world is a subculture of its own, which may protect individuals from targeted, personal scrutiny likewise reducing the probability of being caught. Additionally, possible ideological hostility towards the government and market regulation may manifest in a lowered respect for the law removing inhibitions and making it ethically easier to commit crimes (Glebovskiy, 2019; Heath, 2008). Lastly, business organisations enable illegitimate profits that would otherwise

be out of reach for an individual motivating people to take criminal action (Pinto et al., 2008; Van Erp & Lord, 2020).

With regards to explaining criminal actions, researchers have applied techniques of neutralisation to the examination of crime-facilitative factors. The techniques of neutralisation are, at their core, excuses for bad behaviour. The framework offers a way of categorising explanatory crime-facilitative factors. The techniques can be used afterwards to shield one from accusations, but they can also be used pre-emptively as excuses for crime to give oneself permission to break the law (Heath, 2008). Cartelists also use these factors to explain their actions to competition officials (Jaspers, 2020). These techniques are however not seen as valid by the legal system. The techniques may of course also serve as legitimate excuses from time to time, but criminals tend to take notable liberties in using them (Heath, 2008). The techniques of neutralisation go as follows:

Denial of responsibility

In business organisations it can be hard to point out any single individual responsible for criminal actions, which makes denying personal responsibility possible. One can pass the blame on to for example their superior. Conversely, superiors can claim that their subordinates acted independently. It is also possible to blame tradition or the business setting for not allowing for any other option than to break the law for example due to the competitive structure of the market (Heath, 2008; Jaspers, 2020). Additionally, markets offer limited information to individuals to act upon, which allows criminals to deny knowledge of the full consequences of their actions (Glebovskiy, 2019; Heath, 2008).

Denial of injury

Because harm caused by business organisations often diffuses to a vast base of people, it may be hard to indicate the true victims. In such cases business organisations may deny that anyone was injured by their actions. Business organisations might refer to the satisfied customers in order to redirect the attention of the condemners. They can also refer to the assumption that market outcomes are efficient unless proven otherwise. Hence, the injured should have known the outcome of their actions and in fact injured them self (Heath, 2008).

Denial of victim

While the denial of injury -technique claims no one was injured due to the business organisation's actions, the denial of victim -technique focuses on denying the victim status of the injured. A common manifestation of this technique is claiming that the victim actually started the altercation and that the business organisation is simply reacting on par to what was done to them (Heath, 2008).

Condemnation of condemners

Another tactic for business organisations is to condemn for example the antitrust and competition authorities by undermining their status. Business organisations can also attack the reasons behind imposed regulations in order to imply ulterior motives to further undermine the legitimacy of the authorities (Heath, 2008).

Claim to entitlement

Claiming entitlement is close to the previous technique in the sense that they both rely primarily on attacking the condemner. However, claiming entitlement focuses more on the business organisation's own status and alleged good motives compared to everyone else's motives while the previous technique focuses purely on attacking the condemner (Heath, 2008).

Appeal to higher loyalties

In order to justify criminal actions, individuals may claim to have acted for the benefit of their business organisation even though their true motives might have been of another kind. This technique can stem from for example the loyalty felt toward one's superior (Heath, 2008).

Everyone else is doing it

Lastly, this technique is very common when it comes to explaining criminal acts in general. In competitive settings such as business, it can be easy to excuse criminal behaviour by referring to levelling the playing field (Glebovskiy, 2019; Heath, 2008). Another manifestation of this technique is to claim that there was no other choice, but to follow suit due to mutual dependencies with another firm that was taking illegal action (Jaspers, 2020).

Now that I have delved into the subject of criminogenesis in business organisations, I believe I have provided sufficient insight into why business organisation have a tendency for criminal behaviour. I trust this examination will help the reader understand why I believe in the

persistence of this issue. Next, I will focus on hard core cartels as an example of criminal behaviour in business organisations.

3. Hard Core Cartels

3.1 Definition

Hard core cartels are a subset of cartels, therefore I conclude that general definitions of cartels also apply to hard core cartels. Also, if a source does not specify what type of cartel it is discussing, I believe it is fair to assume that the discussion also relates to all cartel subsets, including hard core cartels. I will naturally use this assumption in this thesis. Therefore, if I am discussing simply cartels, I am only doing this, because the original work referred to cartels, not hard core cartels.

Merriam-Webster defines a cartel as "a combination of independent commercial or industrial enterprises designed to limit competition or fix prices" or "a combination of political groups for common action" (Merriam-Webster, 2020). Investopedia defines a cartel as a group of businesses or countries that "collude in order to manipulate the price of a product or service" (Chen, 2020). The Organisation for Economic Co-Operation and Development (OECD) defines a cartel as a "conspiracy among competitors to raise prices or control output or both" (OECD, 2019, p. 7). All the definitions above fit hard core cartels, but they are simplified. Especially Merriam-Webster's second definition can be misleading as it does not contain the notion that cartel activity is almost always seen as a form of illegal collusion.

The basic elements of hard core cartels are widely agreed upon (ICN Working Group on Cartels, 2005). The OECD's Recommendation of the Council concerning Effective Action against Hard Core Cartels reads as follows:

> Hard core cartels refers to anticompetitive agreements, concerted practices or arrangements by actual or potential competitors to agree on prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by, for example, allocating customers, suppliers, territories, or lines of commerce. (OECD, 2019, p. 5)

While discussing hard core cartels, in my thesis, I am referring to this precise definition by the OECD, because I believe it gives the most complete picture of hard core cartels.

3.2 Overview

From 1990 to 2016, gross cartel overcharges and nominal affected sales surpassed 1.5 and 50 trillion USD respectively. During this time period 1336 potential cartels were detected globally of which 953 were found guilty and 296 were still under investigation as of 2016. Unfortunately, cartels appear to be increasing in numbers as a record 75 new cartels were detected per year for six years leading up to 2016. Cartels managed to overcharge between 1.482 and 4.652 trillion USD worldwide from 1990 to 2016 while the monetary fines towards these cartels totalled only 169.7 billion USD (Connor, 2016).

As previously stated, cartels, such as price-fixing hard core cartels, overcharge. This is one of the many negative welfare effects cartels have. Even though hard core cartels are not monopolies by definition, the most successful cartels would theoretically be able to raise prices to monopoly levels (London Economics, 2011). In markets where hard core cartels are active price mark-ups reach on average 10-20 % compared to them not being present, and in the worst cases mark-ups have risen to 50 % (Tavares de Araujo, 2010). Mark-ups do not only cause harm to buyers by overcharging, but they also cause harm to the people who become incapable of buying due to the higher prices (London Economics, 2011).

In addition to mark-ups, cartels cause a lack of innovation (Chen, 2020; London Economics, 2011). The anticompetitive nature of cartels reduces the pressure to innovate. Therefore, members of a cartel do not tend to innovate, as they have no need to differentiate in order to compete. Innovation can in fact destabilise cartels (London Economics, 2011) by for example differentiating one cartel company from the other making it more difficult to defend identical prices.

Moreover, cartels cause various efficiency losses. Losing buyers due to mark-ups represents an allocative inefficiency as wealth does not transfer as it would normally. Cartels also cause allocative inefficiencies as supply drops below the competitive level and not all regular buyers are served. This welfare loss can be especially significant if both the mark-ups and price

elasticity of demand is high. Other resulting inefficiencies include internal inefficiencies that lead to a loss of productivity and higher production costs as employees work less with reduced competition (London Economics, 2011). Below you can see an overview of the welfare effects of cartels (Figure 1).

WELFARE EFFECTS OF CARTEL ACTIVITY					
AFFECTED PARTY	**EFFECTS OF CARTELS**				
	TRANSFER OF RENT	**ALLOCATIVE MARKET INEFFICIENCY**	**INTERNAL INEFFICIENCY**		**LOW PRODUCT INNOVATION**
			LOW PRODUCTIVITY	**LOW EFFORT**	
ACTUAL BUYERS	red				red
LOST BUYERS		red			
CARTEL COMPANY OWNERS/EMPLOYEES	green		red	red	
NON-CARTEL COMPETITORS				red	
OVERALL WELFARE		red	red	red	red

Welfare gain (green) / Welfare loss (red)

Figure 1 Welfare effects of cartel activity (London Economics, 2011, p. 32)

3.3. Prosecution

Hard core cartels can be prosecuted as per se illegal or for their effects. A per se analysis takes into consideration whether an organisation fits the definition of a hard core cartel. In comparison, prosecuting based on the effects of an organisation takes into consideration whether or not the conduct in question actually had any effect regardless of what the conduct could be labelled as. (ICN Working Group on Cartels, 2005). Therefore, I conclude that prosecuting business organisations as per se illegal is less forgiving, as this method can find defendants guilty even without them having caused harm. Notably, competition authorities are generally not obligated to calculate the estimated harm caused by cartels. This is due to the fact that calculating the exact harm caused by a cartel would require actual knowledge of the same situation without the cartel in question (Tavares de Araujo, 2010). The following articles and policies exemplify competition policies according to which hard core cartels are prosecuted.

In European Union legislation, action against cartels is regarded as a type of antitrust enforcement (European Commission, 2017). "European Union law has direct or indirect effect

on the laws of its Member States and becomes part of the legal system of each Member State" (European Parliament, 2020). The European Commission has the power to investigate, to take binding decisions and to impose fines. European Union competition law is enforced together by the European Commission and the National Competition Authorities (NCA) of each member state. Additionally, national courts can decide if a particular agreement conforms to European Union competition law or not, and companies and consumers can claim damages if they have suffered due to violations of EU competition law (European Commission, 2019b). Therefore, cartels are illegal according to European Union competition law (European Commission, 2017).

The Treaty on the Functioning of the European Union dictates two principal rules from which European antitrust policy is developed: Article 101 and Article 102. Article 101 prohibits making vertical and horizontal agreements, which restrict competition, between two or more independent market operators. A severe infringement of Article 101 is for example a hard core cartel established between competitors with the intent to fix prices. To enforce Article 101, the European Commission's abilities include, but are not limited to, sending information requests to companies, entering the premises of companies and sealing the business premises and records during an inspection (European Commission, 2013). Article 102 forbids the abuse of a dominant position within a given market. Case in point, "charging unfair prices" would be an infringement of Article 102 (European Commission, 2014).

The OECD on the other hand is a widely recognised, international organisation that focuses on shaping common policies (OECD, 2020a). The OECD adopted the Recommendation of the Council concerning Effective Action against Hard Core Cartels (OECD/LEGAL/0294) in 1998 and replaced it with an updated version in 2019 (OECD/LEGAL/0452), which better reflects the developments in anti-cartel policy (OECD, 2019). The OECD Council recommends its member states to implement an effective cartel detection system and to ensure that competition authorities have the ability to investigate hard core cartels. Additionally, the OECD Council recommends its member states to enable cooperation of their competition authorities with other public entities to enable early case resolution and to establish effective sanctions to deter hard core cartels and incentivise self-reporting of cartels. Lastly, the OECD Council recommends providing victims of hard core cartels with means to claim for compensation and to limit exemptions regarding hard core cartels (OECD, 2019).

Because information on cartels is hard to come by, circumstantial evidence insinuating cartel conduct is widely accepted (Jenny, 2016). Circumstantial evidence may include evidence of communication between probable cartel operators and their actions and economic evidence regarding specific markets. However, circumstantial evidence can be hard to interpret, so it has more of a cumulative effect on a cartel case as a whole rather than it being take into account on a case-by-case basis (OECD, 2007). Competition authorities also have to sometimes rely on information accumulated naturally through the work of other organisations (ICN Working Group on Cartels, 2005).

Regardless of all the existing policies and laws regarding cartels, some cartelists in fact have little to no knowledge of competition law and thus really believe that their actions are justified through for example the techniques of neutralisation (Jaspers, 2020; Thompson, 2018). A survey of 1 200 business organisations revealed that only 57 % of the businesses knew that prices fixing was illegal and 25 % thought that dividing customers between rivals was legal (Thompson, 2018).

3.4 Detection

As hard core cartels are illegal (European Commission, 2017), information regarding their existence and operations is naturally not easily available to those enforcing the law. Because hard core cartels are very hard to detect, the best way to combat them is to stop them from forming in the first place (OECD, 2020). Competition authorities aim to simultaneously raise the risk of detection and to set sufficient sanctions in order to increase the deterrence of hard core cartels (Tavares de Araujo, 2010). However, since hard core cartels have not been fully deterred, they must be detected to be prosecuted.

The detection of hard core cartels and their enforcement are top priorities shared by competition authorities worldwide (Chen & Rey, 2013; Tavares de Araujo, 2010). Dedicated cartel units can vary in size from less than 10 to more than 250 members. These numbers reflect the varying sizes of competition authorities and the various sizes of economies involved (ICN Working Group on Cartels, 2005). According to the OECD, hard core cartels can be detected either through proactive or reactive methods (Figure 2). Proactive methods consist of the use of economics, case analysis, industry monitoring and agency cooperation. Reactive methods,

which I will examine further, include complaints by competitors, customers, other agencies and employees, external information from whistleblowers and informants and most importantly leniency application, which I will further look into (OECD, 2019). Reactive methods rely on information being reported to the authoroties concerning possible cartel conduct and proactive methods consist of actively working to identify potential cartels or markets prone to cartelisation (OECD, 2019; Schinkel, 2014). Both are important and support each other. Proactive methods are especially important in areas where reactive methods have had little to no effect. For example, leniency programs may be unable to detect sophisticated cartels and only end up detecting cartels, which were on the brink of failure (OECD, 2019).

Screening is one example of a proactive detection method that uses economics to detect hard core cartels. The Department of Justice of the United States of America proposes looking for certain warning signs which might indicate a hard core cartel. Signs of price-fixing include prices staying exactly the same for long periods of time, prices becoming nearly identical when at first they were not, prices increasing more than costs, the removal of usual discounts and charging higher prices to local customers. Warning signs of bid rigging include the same suppliers taking turns in winning a particular bid, a fewer number of bidders than what is commonplace, bid prices dropping when a newcomer bids and companies withdrawing bids only to become subcontractors to the winner of the bid (Abrantes-Metz, 2013; Schinkel, 2014).
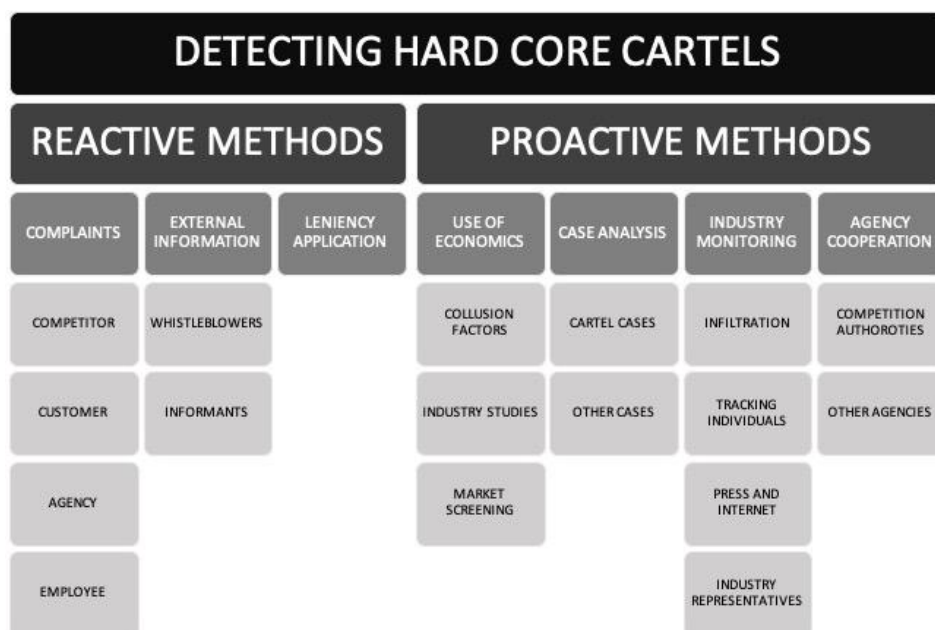

Figure 2 Methods for detecting hard core cartels (OECD, 2019, p. 23)

Now that I have looked into hard core cartels as a manifestation of criminal behaviour in business organisations and criminogenesis in business organisations in general, I feel I have laid sufficient grounds to examine leniency application. The reader should now have an understanding of why criminal behaviour in business organisations is likely to persist if not interfered with and how a tendency for criminal behaviour can manifest. Additionally, I have referenced competition policy, which gives the basis for detecting and prosecuting hard core cartels. I will now focus on leniency application as a hard core cartel detection method in order to give provide insight into what the most widely used hard core cartel detection method has to offer.

4. Leniency Application

Leniency offers cartel members the possibility to come clean about their involvement in cartel conduct in exchange for immunity or a reduction in penalties. Leniency application is considered as the most effective means to detect cartels (Abrantes-Metz, 2013; Jaspers, 2020); nearly 60 percent of detected cartels in Europe are detected through leniency application (Jaspers, 2020). It is also the most widely used detection method (Abrantes-Metz, 2013; Jaspers, 2020); leniency programs are being implemented by most OECD countries (OECD, 2020). Altogether over 50 jurisdictions worldwide have leniency programs regarding cartels (Jaspers, 2020). In addition to detecting cartels, leniency also considerably reduces reoffending (Bigoni, Fridolfsson, Le Coq, & Spagnolo, 2012). Leniency programs are considered as one of the most important developments in cartel detection and deterrence and are used in increasing numbers (Chen & Rey, 2013; ICN Working Group on Cartels, 2005). Leniency policy is based on three main assumptions: cartelists are rational and their actions are determined by profit incentives, cartelists have accurate information on the expected benefits of their cartel and leniency is only effective if implemented alongside sufficient penalties (Jaspers, 2020) Leniency application is indirectly affected by all other detection methods, because they increase the risk of the cartel being detected and becoming subject to sanctions therefore making leniency an attractive option.

Leniency programs attempt to destabilize cartels by creating distrust between the involved parties by offering benefits for betraying fellow cartelists (Jaspers, 2020; Spagnolo, 2000). In other words, leniency programs play the different parties of a cartel against each. Theoretically the situation becomes a Prisoner's Dilemma, and along with every sanction and benefit the

different parties are further persuaded to tell on each other. The Prisoner's Dilemma comes into play when the parties have already been put under investigation, but leniency programs in general work whether or not a cartel is under investigation. In a Prisoner's Dilemma, one party gets a higher benefit if they alone tell on the other and not together. Theoretically, granting leniency to only one, usually the first, informant per cartel is theoretically better than granting leniency to all informants (Harrington, 2018; Sauvagnat, 2014; Spagnolo, 2000). Within the European Union, full immunity is given to the first firm to submit information regarding their involvement in a cartel. The firm must end its participation in the cartel and provide on-going cooperation to the European Commission. Other firms that come forth later can also receive penalty reductions, if their information is truly valuable (European Commission, 2013). In the United States of America, the Department of Justice gives amnesty to only one firm per cartel (Harrington, 2018) .

Because corporate crime is more prominent alongside a low certainty of punishment and even lower severity and swiftness, it is possible to assume that criminals in general are rational (Paternoster, 2016). In general, the standard economic model of criminal activity assumes that potential criminals are rational (London Economics, 2011). However, rational individuals can also act irrationally while being subject to "perceptual and computational biases and heuristics, overconfidence, and hubris" (Paternoster, 2016). This makes predicting behaviour and formulating suitable leniency programs difficult. If cartelists acted only rationally, they would not partake in activities which expected gains were less than the expected costs (Combe & Monnier, 2011). Sanctions reduce these expected gains, enhance deterrence and incentives cartelists' self-reporting. Sanctions can range from fines against organisations to the imprisonment of individuals (ICN Working Group on Cartels, 2005; OECD, 2020; Tavares de Araujo, 2010).

A simple and common formula suggests that expected costs equal the average sanctions multiplied by the probability of conviction. Determining optimal sanctions requires estimating the illicit gains realised by the cartel and the probability of being caught (Combe & Monnier, 2011; ICN Working Group on Cartels, 2005; OECD, 2019). Authorities must also consider how to scale sanctions. They must decide whether or not to impose sanctions that might bankrupt a company as this could lead to the monopolisation of the market or should the ability of the company to pay the sanctions be taken into consideration (ICN Working Group on Cartels, 2005). Nevertheless, sanctions must be higher than the illicit gains made by cartels and

the threat of detection must be high enough to encourage applying for leniency instead of running the risk of being caught (Tavares de Araujo, 2010). Other notable parameters for determining optimal sanctions include the duration of the cartel, affected market, competitive mark-up, price elasticity of demand and increase in price (Combe & Monnier, 2011).

In addition to its incentives, leniency does have disincentivising qualities as well. Self-reporting parties run the risk of not being able to provide sufficient information to the authorities. If they do not provide sufficient information, they cannot be granted leniency, but they have revealed the cartel they are involved in, which can in turn have a negative effect on the cartel. Another disincentivising quality is the risk of getting caught telling on your peers. This can cause a lack of trust towards the reporting party in the future. A third disincentivising quality has to do with the act of telling on someone itself; people might feel that telling on someone is immoral and therefore find it hard to tattle. Lastly, the leniency process can cause strain on the reporting party and be a financial burden whether it be from going through the leniency process itself or possibly receiving claims for losses from consumers or other related parties (Jaspers, 2020). In this case, competition authorities might feel the need to hide damning evidence from parties seeking reparations for damages in order to secure a leniency application. Unfortunately, this may prevent private individuals from detecting cartels and thus make it hard to indicate the damages inflicted by the cartel in question (Schinkel, 2014) and so the OECD recommends the opposite (OECD, 2019).

Furthermore, leniency programs are criticised for multiple reasons. For one, they reward the people who should be punished (Abrantes-Metz, 2013; Motta & Polo, 2003), which can be seen as a moral and political dilemma (Spagnolo, 2000). Leniency programs might therefore have a pro-collusive effect (Motta & Polo, 2003). Cartelists may decide together to calculatedly report their behaviour in order to receive leniency (Chen & Rey, 2013; Miller, 2009). Furthermore, sophisticated hard core cartels may be able to cause additional work for competition authorities through smaller, meaningless leniency cases while hiding their true agenda (Schinkel, 2014). If leniency programs are too generous, collude-and-report-systematically strategies might be adopted (Hinloopen & Soetevent, 2008).

Another criticism of leniency programs refers to the incentive to generate false information in order to gain rewards. However, all other cases in which victims can receive damage payments pose the same risk, yet they continue to function. It is the job of the competition authorities

amongst others to verify what is the truth and what is not. Additionally, the issue of falsifying information for rewards can be met with for example increased penalties for falsified information (Spagnolo, 2000).

Research claims that leniency programs that reduce or completely remove sanctions of the self-reporting cartel member rarely affect long-term organised crime. This is argued by the fact that expected gains from the long-term criminal cooperation are high. If net expected gains from a collusion are positive, the self-reporting member causes a loss of expected gains when reporting. Instead, leniency programs, which pay high rewards to reporting parties, can have an effect even on long-term criminal cooperation (Spagnolo, 2000).

Regarding the true effectiveness of leniency in detecting hard core cartels, it is hard to determine exactly which cartels could have been found without leniency. Authorities may for example receive leniency applications without having had a need for them with a particular case. Authorities might also accept leniency applications regarding cases that are already ongoing. Because these factors distort statistics regarding the effectiveness of leniency application, the statistics cannot be taken at face value when examining what part leniency plays in the success of various cartel detection programs (Schinkel, 2014).

It is also uncertain how sophisticated cartels are actually revealed through leniency application. It can be logically argued that the revealed hard core cartels are not likely to be of the more sophisticated kind out of all in existence. It is more likely that they are either the less-organised type, no longer profitable and withering away or even fully collapsed and just randomly found. It is assumed that the more sophisticated cartels have grown with the current leniency policies and have found a way to cope with them (Schinkel, 2014). Cartel statistics show that cartel activity is at least not in decline (Connor, 2016), and I would also argue that it is most likely the most sophisticated cartels that are thriving. The inefficiency of leniency is further supported by the decreasing amount of leniency applications in some jurisdictions. Also, authorities are accused of taking the easy way out by applying leniency, as the evidence is brought to them instead of having to do hard, proactive fieldwork. This may cause an over-reliance on leniency programs and reduce the probability of detecting more sophisticated cartels and overall agency efficiency (Schinkel, 2014).

5. Summary and Conclusions

In this bachelor's thesis, I have examined the detection of criminogenesis in business organisations. I started by exploring the inherent criminogenesis in business organisations focusing especially on crime-coercive and -facilitative factors (Glebovskiy, 2019), which explain the criminogenic tendency of business organisations. I especially looked into the techniques of neutralisation (Heath, 2008). Then I narrowed down my focus to hard core cartels as an example of criminal behaviour in business organisations. I went over what hard core cartels are, what are their most significant effects and the subject of detecting them. Finally, I specifically concentrated on leniency application. I examined the pros and cons of leniency application as stated in relevant literature in order to form a comprehensive picture of what the most widely implemented hard core cartel detection method has to offer (Jaspers, 2020; OECD, 2020).

While taking into consideration the vast forms of criminal behaviour to be detected in business organisations, my thesis is very limited. My goal was to create a natural, easy to follow continuum throughout my thesis through which the reader can delve deeper into the subject of detecting criminal behaviour in business organisations. I wanted to separate my thesis into distinct layers: the subject of inherent criminogenesis in business organisations (Glebovskiy, 2019), hard core cartels as a notable manifestation of this tendency and methods for detecting had core cartels. This way the reader can clearly follow my thought process regarding how the different layers intertwine and relate to each other. I did not want to provide a shallow look into the broader subject of detecting criminal behaviour in business organisations, as I do not believe that examination would have been as fruitful and interesting.

I decided to conduct a case study regarding the detection of hard core cartels, especially leniency application, as the detection of hard core cartels and their enforcement are top priorities shared by competition authorities worldwide (Chen & Rey, 2013; Tavares de Araujo, 2010). This seriousness gives a sense of urgency to the subject of my thesis instead of the subject matter being of a less important kind. Additionally, I felt leniency application was a fit distinction, as it is the most widely used hard core cartel detection method (Abrantes-Metz, 2013; Jaspers, 2020). Thus, possible findings could have vast implications as opposed to being less significant.

Due to the limitations I imposed, I could not comment on the ethics of cartels, as I only based the need for their detection on widely accepted policies. I did not draw a line where ethical behaviour ends; I only noted the moment when a group of business organisations fits the definition of a hard core cartel and becomes subject to prosecution based on competition law. This limitation leaves out a wide range of opinions regarding the definition of a hard core cartel and how they should be handled.

Because I chose to focus on hard core cartels and leniency application in particular, the reader is subjected to a very limited representation of the various manifestations of criminal behaviour in business organisations and methods for their detection. Examining my thesis requires understanding, that I chose to focus on these subjects for two main reasons: out of sheer interest and due to the vast effects of hard core cartels and leniency application. My thesis does not aim to represent all criminal behaviour in business organisations, as I believe that would be impossible to do at all, let alone within the parameters of a bachelor's thesis. The limitations of my thesis run the risk of leaving the reader with a very restricted view on criminal behaviour in business organisations, as my thesis is built from a very particular point of view of a very vast subject matter.

With regard to my thesis question, my case study of leniency application as a hard core cartel detection method provided the following findings: leniency application is an effective detection method and widely accepted (Abrantes-Metz, 2013; Jaspers, 2020; OECD, 2020), but effective leniency policy consists of more than just leniency programs. Leniency must be implemented alongside effective proactive methods and sanctions (ICN Working Group on Cartels, 2005; Jaspers, 2020; Tavares de Araujo, 2010). Otherwise, little to no incentives exist for cartelists to apply for leniency. In worst case scenarios leniency programs are used tactically by sophisticated hard core cartels in order to receive leniency when they expect to be prosecuted anyways. Because of this, it is hard to determine the actual effects of leniency programs on the detection of hard core cartels (Schinkel, 2014).

As an example of criminal behaviour in business organisations, hard core cartels cause financial, physical and environmental harm by negatively affecting competition, market legitimacy, entire countries, consumers and market participants (Chen, 2020; European Commission, 2019; OECD, 2019; Van Erp & Lord, 2020). Hence, I argue that criminal behaviour in business organisations is not to be taken lightly, but actively seen to. Furthermore,

based on my examination of criminogenesis in business organisations, criminal behaviour is inherent in business organisations and not just an incidental occurrence (Glebovskiy, 2019). Therefore, I conclude that detecting criminal behaviour will most likely remain a relevant issue for competition authorities in the foreseeable future. Hard core cartels in particular are profiting and increasing in amounts (Connor, 2016; European Commission, 2019), which suggests a need for improvements in cartel detection and deterrence.

In addition to implicating possible needs for overall improvement in hard core cartel detection, my thesis implies a need to possibly re-assess the assumptions concerning hard core cartel conduct. Based on the literature I familiarised myself with, basic human psychology appears to be a key driving factor behind criminal behaviour in business organisations (Heath, 2008). Yet, I am left uncertain with regards to how this knowledge is being used in the formation of competition policy. For one, leniency policy is based on three main assumptions of which one is that cartelists are rational (Jaspers, 2020) even though studies have shown that even rational people can act irrationally under the right circumstances for example due to overconfidence (Paternoster, 2016). I too agree that cartelists are most likely driven by profit-incentives if anything (Glebovskiy, 2019; Jaspers, 2020), but I still see cartelists as only human and also prone to irrational behaviour. I believe that leaning too heavily on the assumption of rational behaviour can easily lead to misconceptions. Assuming cartels acted rationally, they would base their actions on available data. Competition authorities do not have full access to this data, so I do not believe that they can fully understand what cartels deem rational. Therefore, I argue a need to look further into human psychology in order to better understand seemingly irrational cartel conduct and to determine proper sanctions. As an example, would it be fair to assume that most cartel conduct is affected by hubris, as most cartelists knowingly partake in illegal activities putting themselves above the law?

I believe switching the focus from assuming rational behaviour to examining general tendencies of cartelists could serve as another solution. Competition authorities are already studying the tendencies of cartelists through for example the use of economics and various cartel cases, and this does provide insight into what cartelists deem rational. However, based on the criticism leniency application has received, I would argue that not all authorities are actively supporting leniency with proactive methods. I trust that emphasizing the need to examine the tendencies of cartels would help in understanding how cartels make decisions and lower the risk of projecting the examiner's views of what is rational on the cartel in question.

Naturally, if the assumptions behind leniency policy are false or misunderstood, leniency policy formed from these assumptions cannot be expected to work in detecting hard core cartels.

Regarding frameworks handled in my thesis, I feel that the logic of the OECD's model for separating hard core cartel detection methods (Figure 2) is inconsistent between reactive and proactive methods. Proactive methods are separated more clearly into different methods while reactive methods not separated solely into methods. I suggest separating the reactive methods into just two separate categories instead of three: external information and leniency application. Leniency application does produce external information, but the difference between these two categories would be whether or not it involves cartel members. External information would contain complaints coming from cartel-affected parties and informants that are not part of the cartel. Leniency application on the other hand is aimed at the hard core cartel members and it would naturally contain the cartel whistleblowers and informants.

In the future I would be interested in looking into how cartelists actually make decisions and how much of their behaviour could actually be argued as rational and irrational. I am generally very interested in the subject of what drives competitive behaviour for example within business organisations and how individuals act under a competitive business setting and why. I would also like to look into how well cartelists are able to determine expected profits, because the second main assumption behind leniency policy is that cartelists have accurate information on the expected benefits of their cartel (Jaspers, 2020) and what part opportunism plays in the decision making of cartelists.

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