

CRIMINALIZING BUSINESS CARTELS IN EUROPE – A COMPARATIVE PERSPECTIVE

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1 Introduction

The subject matter of this thesis revolves around cartel regulation in Europe. By way of example the current Finnish Competition Act prohibits agreements between undertakings that fix prices, limit production and share markets in the Section 5 of the Act. The Finnish prohibition is closely modeled on Article 101 TFEU. Price-fixing for instance leads to higher prices, which are then extracted from the consumers who will have to pay the cartel price.

Cartels do not tend to carry redeeming virtues. There is indeed a compelling case to make the fight against cartels effective in terms of detection, sanctions and remedies. The OECD has recommended to its member countries that they see to the realization of this objective.¹

Indeed, increasingly high and punitive fines against infringing companies and a growing tendency of holding individuals accountable have been witnessed around the world.² Nonetheless there appears to be a disagreement over the appropriate measures employed against cartel conduct. Such measures may include inter alia custodial sanctions, director disqualification orders, fines and private actions.

1.1 THE STRUCTURE OF THE BOOK

It appears that the egregious nature of cartels is recognized to the extent that criminalizing cartels as a trend has emerged.³ One of the main objectives of

¹ See to this effect OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels. 1998.

² OECD, Roundtable on Promoting Compliance with Competition Law, 07-Oct-2011. p. 2; Harding points out that [g]enerally there has been a clear shift towards increasingly incursive legal process and more severe sanctions, but the more detailed method of criminalisation has been varied and very much subject to local factors.' See Harding 2010, p. 48.

³ In Europe, the UK has imprisoned three individuals in relation to the Marine Hose cartel, see to this effect the discussion in this work under the section '[t]he Marine Hose Cartel', in Ireland bar the case where one individual failed to pay a fine, which brought about an unsuspended prison sentence, the Irish judges have handed down suspended prison sentences, see Whelan 2012d, p. 178; The US seems to be in a league of its own, since worldwidely the US holds a record of actually sending executives to prison on a regular basis, followed by Israel with 'closer normative ties to U.S. antitrust policy.' It may be noted that within the EU Austria (concerning bid-rigging), Belgium, Denmark, Estonia, France, Germany (concerning bid-rigging), Greece, Hungary, Ireland, Italy, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the UK criminally prohibit cartels – outside the EU cartels are subject to criminal prohibitions in Australia, Brazil, Canada, Iceland, Indonesia, Israel, Japan, Korea, New Zealand, Norway, Russia, Thailand and the United States, see Shaffer and Nesbitt 2011, p. 1, 8, 12, 15, 18, 26,

this research endeavor is to answer whether European anti-cartel regimes could benefit from a mode of enforcement, which inter alia by means of custodial sanctions criminally holds responsible the individuals who have brought about hard-core cartels.

For example, under the current Finnish administrative antitrust enforcement regime individual perpetrators get off scot-free as enforcement heavily relies on corporate fines that may ultimately target the wrong people, namely the shareholders and other stakeholders.⁴ The same lack of individual accountability plagues EU anti-cartel enforcement.

This study seeks to compare the pros and cons of the introduction of individual criminal liability in Europe. Arguably this also requires the evaluation of the benefits of adopting criminal sanctions through an EU harmonization, since it may be argued that the EU is better placed to pursue such a project than individual EU member states. This then could affect any national consideration on the matter.

The assessment of the pros and cons is conducted by way of a comparatively oriented analysis. Several arguments have been advanced both in favor and against the cartel criminalization project.⁵ The author has sought to single-out the most compelling arguments in relation to all the jurisdictions subject to a comparison, and sets out to discuss them one by one. Each one of the arguments presents one with sub questions. Such a treatment of the matter at hand inherently requires tackling the arguments separately which has occasionally resulted in unavoidable overlaps between the chapters, but is necessary for the purposes of this study.

In the following the reader will be made aware of the outline of the thesis. Thus while the main research question is whether European anti-cartel regimes would profit from the criminalization of cartels, several sub-questions require examination prior to any answer to the main research question.

The natural starting point for such a discussion is the optimal deterrence theory, which has been cited as a robust argument in favour of introducing custodial sanctions, as it tends to indicate the necessity of individual accountability. While the comparative part takes note of the fact that several

27, 28, 29; In the UK the collapse of the British Airways case underlined the absence of successful criminal prosecutions in that jurisdiction. Joshua 2011, pp. 154-155; In Germany the fraud-related bid-rigging prosecutions are not a rarity: between 1998 and 2008 184 convictions were handed down and the prosecutions totaled 264, there was also one individual who actually served prison time, see Wagner-Von Papp, 2011, Under the heading 'F.Statistics on the Bid Rigging Offence section 298', at para. 2, and 'ii. The Pipes Cartel Case' at para 3; Harding noted that [t]he sharp end of the criminalisation debate is in relation to individual criminal liability, and the application of severe criminal sanctions to such human cartelists.' See Harding 2010, p. 48.

⁴ The matter has received scarce attention in the Finnish scholarly discussion, though Olli Wikberg has touched upon similar questions, see to this effect, Wikberg 2009.

⁵ For such a list of arguments, see Wagner-Von Papp, 2011, pp.173-174

jurisdictions have used the optimal deterrence argument in their reasoning to introduce a criminalized regime, one of the main purposes of the chapter is to determine what sort of weight the optimal deterrence theory carries.

Another weighty argument has to do with the moral content of cartels: one of the fundamental underpinnings of any criminalization contains an analysis of the moral qualities of the conduct possibly subject to a criminal prohibition. The book subsequently looks into the academic discussion on the matter and cites the positions that various jurisdictions have adopted. This is done in an attempt to determine how the moral qualities of cartel activity are perceived – the answer may to a significant degree dictate whether cartels merit criminal sanctions.

Instead of criminalizing cartel conduct at the national level there is room to argue that first and foremost such a criminal prohibition should occur at the EU level or at the national level through a harmonization measure. The implications of such a move by the Union are relevant and will be touched upon.

The Director Disqualification Orders (DDOs) could arguably be an alternative to individual criminal liability and custodial sanctions. The assessment of the DDOs is undertaken by way of a comparison with a focus on the materials derived from Sweden and the UK. Especially the detractors of a cartel criminalization project may commend an attempt to use instead the DDOs. Whether the DDOs represent a true alternative will be subject to scrutiny.

Regarding the national level the study will look into the rationale behind the administrative mode of anti-cartel enforcement particularly in Finland and Sweden and whether the reasoning reflects a rational choice with respect to the system of sanctions as a whole.

The Swedish Contemplation elaborated on the possible scope of the criminal cartel offence,⁶ the *mens rea* and *actus reus* elements of the offence. In light of the Swedish position a discussion of a comparative nature is pursued in order to outline the desirable design of the offence.

What is more, the Swedish deliberation considered the role of the competition authority under a criminalized anti-cartel regime – something, which has a link to the parallel existence of criminal and administrative regimes and information exchange as provided under regulation 1/2003. A related question is the possibility that parallel enforcement could give rise to a situation where the *ne bis in idem* principle would be infringed.

The UK experience of its criminal cartel offence and case law, notably the remarkable failure of the *British Airways* case will be examined. Since the underlying reasons that brought about the collapse of the prosecution in the *British Airways* case have been discussed fairly widely, it seems appropriate

⁶ See, for instance, the Swedish Green Paper, SOU 2004:131.

to engage in a discussion regarding the lessons that can be derived from the debacle.

Another matter is how Regulation 1/2003 affects national criminal anti-cartel enforcement.

To some extent the underlying questions related to parallel criminal and administrative anti-cartel enforcement regimes serve as a leitmotiv in the book. It has been noted both in the UK and Sweden that parallel enforcement in this context could possibly compromise anti-cartel enforcement. Subsequently it would supposedly provide a reason to reject the introduction of a criminalized regime. The parallel enforcement argument may relate inter alia to the operation of the leniency program. Further, the right against self-incrimination and higher standards of proof under a criminalized anti-cartel regime as possible disadvantages of a criminalized cartel regime will be explored to determine the robustness of the claims. Arguably the introduction of a criminal regime could translate into a situation where due to heavier procedural safeguards or higher standards of proof it might be more difficult to secure convictions. On the other hand more robust investigative powers are available under a criminal regime and could be portrayed as an advantage of a criminalization project.

A very strong argument against criminalizing cartels in Finland and Sweden has been the absence of a crownwitness system. The corporate leniency applications appear to be currently an important detection tool of the Competition Authorities in cracking secretive cartels.

The first company to report the cartel benefits from full immunity under the current administrative regime in Finland. Such immunity under a criminal regime would raise controversies in the Nordic context. However it seems that such immunity against criminal penalties would be indispensable in order to maintain the integrity of the leniency program as a detection tool.

Furthermore, the lack of a system of plea-bargaining may be problematic and needs to be touched upon. The Author seeks to determine whether an overhaul of the system is called for in this respect.

Finally, besides the DDOs, by strengthening private enforcement one could seek to corroborate anti-cartel enforcement, but whether it is the panacea in the fight against cartels is a matter of scrutiny.

1.2 THE COMPARATIVELY ORIENTED APPROACH

Under the comparatively oriented approach employed the anti-cartel enforcement regimes of especially the UK, Sweden, Finland and Ireland will be subject to a comparative analysis while occasional observations will be derived from other jurisdictions such as Denmark and Norway – the jurisdictions will be compared in an attempt to produce conclusions with

regard to the viability of criminalizing cartels in Europe. It should be noted however that it would not serve the purposes of this study to compare at equal length each of aforementioned jurisdictions in terms of space devoted. Rather the aim is to explain the material derived in relation to each jurisdiction to the extent that it sheds light on the ultimate research question at hand: whether individual criminal liability and custodial sanctions would be viable in the European anti-cartel context. The discussion concerning the UK experience and the extensive Swedish elaboration play a major role, whereas the smaller amount of material available in relation to Finland and Ireland sets certain limits. Among the aforementioned jurisdictions Finland is the only one to lack all individual accountability in terms of hard-core cartels.

The aforementioned jurisdictions are close enough to one another in terms of the antitrust rules – apart from Norway, all are EU Member States and enforce the EU competition law rules and have domestic anti-cartel regimes modeled on Articles 101 and 102 TFEU to varying degrees and are parties to the European Human Rights Convention – yet the jurisdictions are still distant enough to provide a fertile ground for a comparison.

The appropriate way to determine the jurisdictions subject to a comparative treatment crucially depends on the research questions.⁷ While from a historical point of view the first known cartel prohibitions belong to the distant past,⁸ more recently the first European modern Competition Act was passed in Germany in 1923,⁹ namely the Regulation Against Abuse of Economic Power Positions. The Act sought to catch only a certain number of the existing cartels, rather than all of them. Further, the 1957 Act provided for a more active enforcement regime than most other contemporary European countries.¹⁰ Germany's enforcement however relied on the administrative mode of enforcement for decades to come.¹¹ Yet Germany is not at the core of the comparison conducted in this study due to the resemblance between its enforcement and the one in Finland currently – for instance price-fixing in Germany does not give rise to criminal liability. The predominant mode of enforcement is administrative in Germany and would therefore not provide a fecund ground needed for a comparison, as it does not provide sufficiently different solutions from the Finnish ones.

⁷ Zweigert and Kötz 1998 p. 41

⁸ It appears that already Aristotle acknowledged the detriments of excessive market power by coining the term 'monopoly,' and the late Roman Republic saw the *lex Julia de Annona*, a predecessor of modern competition laws, whereas the constitution of Zeno banned trade combinations in 483 AD, for further treatment of the truly ancient nature of cartel prohibitions, see (in Finnish) Kuoppamäki 2012, p. 20ff.

⁹ Kuoppamäki 2012, p. 22.

¹⁰ Alkio and Wik 2009, p. 28.

¹¹ See Harding and Joshua, 2010, pp. 105-106.

It should be noted that Germany has explicitly criminalized bid-rigging cartels in 1997, but does not provide whistle-blower protection, which may be deemed to be a crucial cartel-cracking tool.¹² Indeed the absence of a crown witness system and whistle-blower protection under criminal law was in Sweden an important reason for the government to reject the introduction of a criminalized anti-cartel regime.¹³

It may be said that a number of the criminal big-rigging convictions under the German law have occurred under the general criminal offence of fraud and not under the bid-rigging offence.¹⁴ Such criminally condemning judgments in bid-rigging cases may remain a possibility under the Finnish fraud rules as well, albeit perhaps a remote one.¹⁵

Ireland on the other hand is a forerunner in Europe in terms of its criminal antitrust enforcement in the sense that it has a record of actually prosecuting and convicting the perpetrators. Its criminal regime dates back to the late 1990s.¹⁶ The UK is a notable European country to have criminalized cartels in 2003 by the Enterprise Act and thus provides important insights. What is more, the UK, unlike Germany, operates a whistle-blower program, which grants immunity against criminal prosecution to the first leniency applicant.

Sweden on the other hand shares close legal and cultural ties with Finland and is therefore a natural part of a comparatively oriented approach as a fellow country in the Nordic community. Furthermore, notably in 2008 the new Swedish Competition Act introduced individual liability in the form of the director disqualification orders (DDOs) under the administrative regime. The viability of the DDOs as the primary tool in establishing individual liability is a matter of interest.

Oliver Wendell Holmes wrote in 1897 that '[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.'¹⁷ Similarly the current author believes that the comparatively oriented approach looks into the future and provides one of the most illuminating ways of addressing the research questions at hand.

The comparatist should, after he has made his inquiry into the subject-matter, proceed to the phase where he assesses the varying solutions offered

¹² See Finnish Ministry of Employment and the Economy, *The Competition Act 2010, Competitiveness 4/2009* p. 51; Wils 2008a, p. 146; See Wagner-Von Papp, 2011, under the title 'iii. Mandatory Prosecution v Principle of Expediency – Leniency and Immunity'.

¹³ See Prop. 2007/08:135 p. 151.

¹⁴ Wagner-Von Papp, 2011, pp. 164-168.

¹⁵ Ministry of Employment and the Economy, *The Competition Act 2010, Competitiveness 4/2009* p. 47.

¹⁶ See to this effect Massey and Cooke 2011.

¹⁷ Holmes 1897, p. 1001.

by the jurisdictions. Based on his evaluations he may devise a new solution, which reflects a combination of the solutions that the legal systems subject to scrutiny provide. The comparatist may also conclude that no solution is better than the other or that one is superior to other solutions.¹⁸

Employing a comparative approach, but not extensively, is popular among the competition law scholars.¹⁹ The comparative approach is helpful in the evaluation of the soundness of the regulation.²⁰

Zweigert and Kötz noted the criticism directed towards purely nationally oriented legal science. Indeed preferably the legal science should more often take stock of what happens in the real world. The legal science should not limit itself to the national doctrinal analysis.²¹

Eser offered a bit more sobering views on the prospects of a comparative approach especially in the field of criminal law. Eser rather pessimistically pointed out the possibility of dilettantism when the comparatist is not sufficiently knowledgeable about the foreign law.²² Furse who compared the criminalized anti-cartel regimes of Ireland, the UK and the US also noted 'the dangers of making simplistic comparisons across regimes' and that '(c)omparative legal literature is replete with criticism of the dangers of inappropriate comparisons.'

However as the chosen jurisdictions in this study are still part of the common tradition shared by the EU member states the aforementioned dangers do not appear imminent.²³ The jurisdictions subject to a comparison may be different to a certain extent as long as there are a sufficient number of shared qualities.²⁴ Still a comparative approach particularly between Finland and Sweden both belonging to the civil law legal families and the UK and Ireland, both common law jurisdictions, is beneficial, since it may raise questions that have not been previously tackled. This is especially so, because Finland has been strongly influenced by the German tradition.²⁵

As Zweigert and Kötz note: '...one can almost speak of a basic rule of comparative law: different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation.'²⁶ The similarities are evident also in the difficulties that antitrust enforcement faces: inter alia the burden of proof, the states intervention's

¹⁸ See Zweigert & Kötz 1998 p. 46-47.

¹⁹ Kuoppamäki refers to 'a light comparison' (author's translation), see Kuoppamäki 2003. p. 9.

²⁰ Kuoppamäki 2003, p. 9.

²¹ Zweigert & Kötz 1998. p. 45; Kuoppamäki 2003. p. 10.

²² Eser Albin 1998 pp. 102-103

²³ See Simonsson 2009, p. 53.

²⁴ Hahto, Vilja. 'Rikosoikeustiede ja oikeusvertailu.' *Lakimies* 8/2001. pp. 1303-1304.

²⁵ See *ibid.* p. 1306.

²⁶ Zweigert and Kötz 1998, p. 39.

effects and the extent to which information exchange should be allowed between competing firms all puzzle both within the EU and in the US.²⁷ Actually it might be preferable to drop all limitations in the comparative investigation of foreign legal systems.²⁸

The comparative approach saves one from the typical narrow perspective that jurists tend to entertain and protects against ‘absolute truths.’²⁹ It is important to bear in mind that the basic premise of a comparison is functionality. Only the laws that have comparable purposes may be subject to a comparison. As Zweigert and Kötz put it ‘incomparables cannot usefully be compared.’³⁰

According to Zweigert & Kötz the legal solutions found in various jurisdictions should be treated without the burden of doctrine and context and evaluated entirely based on the task assigned to them.³¹ The current author, while mindful of the aforementioned limitations, is convinced that a comparatively oriented approach serves exceptionally well the chosen research endeavor – a fact, which is reflected in the layout of the book. While the Chapters concerning for instance Sweden or the UK specifically discuss criminalized anti-cartel regimes in the aforementioned contexts, they may also observe points of discussion that have arisen in other jurisdictions to either reinforce or refute positions taken in the jurisdiction subject to scrutiny – this type of treatment adheres to the underpinning of a comparative approach that inherently requires juxtaposing the standpoints of the chosen countries.

This thesis draws inter alia on the government documents and committee contemplations that have been available in particular in the UK and Sweden. The legal draft work will be used wherever it sheds light on the policy choices.

In addition statutory texts and case law are made use of where it serves to illuminate the research questions. Another source of great value has been the international legal literature in relation to the cartel criminalization project. All of the aforementioned sources will be used throughout the book, whenever it benefits the discussion.

²⁷ Simonsson 2009, p. 52.

²⁸ Zweigert and Kötz 1998, p. 35.

²⁹ Eser 1998, pp. 107-108.

³⁰ Zweigert K & Kötz, 1998, p. 34.

³¹ Zweigert & Kötz 1998, p. 44.

2 Is Individual Accountability needed in the Area of Competition Law?

With regard to cartels, it has been indicated that recidivism may be rampant in Europe. In a study of 389 recidivists over a period of 20 years, Connor identified a particularly high concentration of recidivists in Northern Europe and Japan.¹ This could mean that the current sanctioning system does not have the potential that is needed to prevent the infringements. The European Union's sanction system does not take into account the fact that individuals act in lieu of the company. This has prompted commentators to argue in favour of individual liability, which may include imprisonment, but also director disqualification orders or personal fines.² Crucially it is the managers who initiate the collusion and the members of the board or other superiors who failed to ensure the lawful operation of the firm.³

As Polinsky and Shavell have pointed out, even when corporate fines are levied, the firm may not be capable of controlling its employees responsible for infringements. For instance sacking employees is not sufficient as the employees will come across new opportunities. Further, the viability of bringing legal action against the employee is tied to the assets of the employee.⁴ It is also possible that once the infringement comes to daylight the employee has already left the company. Employees may be just induced to act in the interests of their employer in the absence of personal sanctions. Also the credibility of the competition law may suffer due to the lack of individual accountability.⁵ Indeed a UK survey indicated that the people surveyed were not at all eager to reveal their employer's cartel activities – actually 14% would not become whistleblowers even if they were rewarded with a sum amounting to one year's salary. Further the anonymity of the

¹ Connor 2010, p. 101; Harding noted that '[t]here is now a body of evidence of cartel recidivism, the same actors continuing or repeating their cartel infringements, sometimes in the very same markets. More systematic surveys of legally established prohibited cartel activity are beginning to appear and serve to verify repeat offending on the part of some major players in certain markets, confirming a hitherto impressionistic reading of reported cases', see Harding 2011, p. 369.

² See Öberg 2011 p. 308; Khan 2012 p. 78.

³ Ginsburg and Wright 2010, p. 17, 22.

⁴ Polinsky and Shavell 1993, p. 240.

⁵ Whelan 2007 p. 24.

whistle-blower should be ensured – if the condition of anonymity is met almost half of the people would become informants.⁶

The condemnation conveyed does not appear to be sufficient since the administrative sanctions are directed against the company, not the individual directly responsible for the infringement, and in hopes of profits the firm may not even be induced to discipline its employees, this is at least what the employees assumed in a study, ‘*The Enforcement and Effects of European Competition Policy: Results of a Survey of Legal Opinion*’ by Robert. M. Feinberg in 1985. Additionally the study results suggested the importance of individual sanctions due to the assumed deterrent effect, an effect more powerful than what corporate fines could create.⁷

While the ECJ has put forward that the competition law fines have both retributive and deterrent goals,⁸ it may be argued that neither goal is sufficiently achieved, as condemnation for former or latter purpose is not fulfilled.⁹ Werden and Simon argued that the condemnation by society of price-fixing alone would greatly deter, and would send a clear signal. As a general rule business people are scrupulous and condemnation would affect their views regarding price-fixing, even if they could rest assured of not being detected. Deterrence could also be improved since some may be swayed by the possibility of public mockery rather than by the personal sense of right and wrong.¹⁰

The introduction of a punishment could alter the perceptions of the graveness of the infringement and as white-collars typically read newspapers they would learn of tough penalties due to their newsworthiness.¹¹ Arguably as the prison sentences would be publicized they would also raise the awareness regarding the competition laws.¹² The Swedish 2006 committee¹³ noted inter alia that several studies indicate that negative publicity is likely to deter managers and owners and referred to a study comprising a sample of 38 firms between 1928 and 1981, indicating that previous sanctions diminished the likelihood of recidivism to some extent.¹⁴

A number of commentators acknowledge that criminal sanctions may deter although measuring the deterrent effect is extremely difficult, thus

⁶ Stephan 2008a, p. 145.

⁷ For the study see, Feinberg 1985, p. 377, 380; Whelan 2007 p. 28.

⁸ C-41/69 ACF Chemiefarma, 1970, para 173.

⁹ See Whelan 2007 p. 27.

¹⁰ Werden and Simon 1987 p. 933; on the signal sent see also Baur’s paper where he opines that criminal prosecution is integral to compliance, Bauer 2004, p. 307.

¹¹ Baker and Reeves 1977, p. 625.

¹² Liman 1977 p. 632.

¹³ SOU 2006:99 pp. 547-548.

¹⁴ Simpson and Koper 1992, p. 347.

making some commentators more skeptical than others.¹⁵ Therefore below will follow an overview of some of the arguments used in this context.

2.1 DETERRENCE – A COMPARATIVE OVERVIEW

The UK white paper, '*A World Class Competition Regime*', argued in favor of criminal threat against infringing individuals since then 'individuals are more likely to think very carefully before engaging in cartels' and if instructed to enter cartel by the management are more likely to become whistle-blowers under a criminal regime.¹⁶ Prior to the mentioned White paper a government commissioned peer review, which had been conducted with a sample of more than 100 experts in the fields of law and economics, indicated that criminal penalties would enhance the competition law regime, with 83% of UK experts in favor of such sanctions.¹⁷

The Swedish Governmental report noted as an advantage of a criminalization of cartels that it would be especially deterrent against individuals who may enter cartels, and fines alone against companies would not always be deterrent enough against such individuals.¹⁸ Similarly the Finnish memorandum prior to the enactment of the Competition Act 2011 acknowledged that the deterrent effect could be improved if natural persons were also held accountable.¹⁹ In Ireland the working group in 2002 decided in favor of retaining the criminal penalties, principally due to the view that deterrence would be created.²⁰

The Danish committee highlighted that while there is a lack of empirical evidence regarding the general preventive effect, it should not be interpreted to mean that such an effect is absent, one just cannot measure it. Further, it seems that the general preventive effect would not be different from what it is when targeting other white-collar crimes.²¹

The Danish 2012 committee, echoing the optimal deterrence theory, assumed that economically speaking the corporate fines up to 10% of

¹⁵ See Öberg 2011, p. 308; Parker 2011, p. 256; Wils 2005a, p. 143; Frese 2006, p. 208; Reindl 2006, p. 117; Whelan 2007, p. 33.

¹⁶ Department of Trade and Industry, '*A World Class Competition Regime*', July 2001. p. 40

¹⁷ Price Waterhouse Coopers, '*Peer Review of the UK Competition Policy Regime*', A report to the Department of Trade and Industry, 18 April 2001. p. 2, 25; See also A report prepared for the Office of Fair Trading by Sir Anthony Hammond KCB QC and Roy Penrose, '*Proposed criminalization of cartels in the UK*', November 2001. p. 33

¹⁸ SOU 2006: 99 pp. 537-539

¹⁹ Publications by the Ministry of Employment and the Economy, '*Kilpailulaki 2010 –työryhmä*' *Competitiveness 4/2009*. p. 50

²⁰ The Competition and Mergers Review Group 2000, pp. 77-78.

²¹ 'Rapport fra udvalget om Konkurrence Lovgivning' March 2012, p. 35.

the preceding year's turnover are not sufficient to create a deterrent effect and that due to the graveness of the cartel violations custodial sentences besides fines should be available. The committee also pointed out that while substantial fines seem to deter mostly the company management, custodial sanctions would deter the employees as well and make it easier for the company to establish compliance at all levels of the firm.²²

The committee envisaged that custodial sanctions in conjunction with an improved risk of detection and publicizing the risk of detection would create a general preventive effect.²³ As a result of the introduction of custodial sanctions, firms could view compliance as more significant due to increased consciousness of the antitrust laws. Moreover the seriousness of the offence would be better reflected.²⁴

In Norway too in terms of deterrence the retention of individual liability in parallel with the corporate liability was seen as important.²⁵

The 2006 committee acknowledged that it is possible to assume that preventive effect is created in terms of the law-abiding people who exercise rational decision-making. Also the consulted practicing lawyers had told the 2006 committee that corporate people appeared to perceive individual criminal liability reflecting a tightening of the system of penalties.²⁶ The Norwegian Committee had also referred to a Norwegian study that surveyed lawyers' opinions who were of the view that prison sanctions are the most deterrent tool against directors. The Norwegian committee further pointed out that international experiences supported the effectiveness of a mixture of corporate and individual sanctions in terms of deterrence.²⁷

However the 2006 committee argued that the creation of the preventive effect however would depend for instance on whether the criminalization brings about an undermining impact on cartel investigations – something which might translate into a situation where at first the general preventive effect is boosted but soon subsides to an even lower level than was the case prior to the introduction of the criminal prohibition.²⁸

One may note however that three Danish committee members who were well versed in criminology, while pointing out that there is no evidence that the separate introduction of custodial sanctions reinforces anti-cartel enforcement, concurred with nine other committee members in that it is incoherent that custodial sanctions are not available since other comparable

²² *ibid.* p. 40

²³ 'Rapport fra udvalget om Konkurrencelovgivningen' March 2012, p. 39.

²⁴ 'Rapport fra udvalget om Konkurrencelovgivningen' March 2012, p. 39.

²⁵ Prop. 75 L (2012-2013) Proposisjon til Sortinget (forslag til lovvedtak) Endringer i konkuranseloven, at para. 4.1.2.

²⁶ SOU 2006:99 p. 563

²⁷ See the Norwegian Committee Report under para 6.3.2.

²⁸ SOU 2006:99 p. 564

offences are subject to custodial sanctions. This fact alone indicated in the committee's view that custodial sanctions should be adopted.²⁹

In an attempt to assess the preventive effect in relation to the severity of the sanction in the area of white-collar crimes, the Danish Ministry of Justice reviewed inter alia 155 articles and books. The literature review supported the idea that a more robust risk of detection affects the general preventive effect. On the other hand there was not sufficient evidence available to support harsher sanctions in the pursuit of an increased deterrent effect.³⁰ However it was highlighted that while there is not sufficient empirical evidence available which would support harsher sanctions from a deterrence point of view, it may not be inferred the deterrent effect is absent: the only thing that one may gather is that it is impossible to give a conclusive answer regarding the existence of a deterrent effect.³¹

Indeed the problem regarding the optimal deterrence theory is presented by the fact that it is difficult to show what is the full extent of cartel activity.³² Richard Posner has argued that in light of the low number of imposed prison sentences, the deterrent effect may not be significant.³³ Werden argued that the recent statistics do not support such a view.³⁴ The argument may be made however that a low number of convicting judgments could indicate also that the criminal penalties do deter and conversely that the high number of penalties could be indicative of a low deterrent effect - as Kannianen and Määttä point out, this is pure speculation either way.³⁵

Although there exists no conclusive evidence as to the decrease of cartels, it is still not accurate to draw the conclusion that criminal sanctions would not reinforce compliance.³⁶ The scholars who have questioned the reliability of the deterrence theory have still conceded that criminal sanctions may have an educative function by shaping the normative landscape thus contributing towards compliance. As Reindl puts it 'sanctions can induce compliance with the law not only because of immediate deterrence-based value-maximizing considerations, but also indirectly by contributing to a subtle change in social norms.'³⁷

There is anecdotal evidence from the United States indicating that sending people to prison attracts attention which then arguably creates

²⁹ 'Rapport fra udvalget om Konkurrencelovgivning' March 2012, p. 38.

³⁰ 'Rapport fra udvalget om Konkurrencelovgivning' March 2012, p. 203.

³¹ *ibid.* p. 203; See also Harding 2012, p. 152.

³² See Stucke 2011, pp. 263, 287, 288; Harding 2011, pp. 358-360.

³³ Posner 2001, p. 270.

³⁴ Werden 2009, footnote 22.

³⁵ Kannianen Vesa and Määttä Kalle, 'Kartellit teoriassa ja käytännössä' Published in Edilex 18th of October 2011. p. 110

³⁶ Reindl 2006, p. 117.

³⁷ Reindl 2006 p. 117.

deterrence:³⁸ The OECD has cited in its report the US experience that individuals have offered to pay significant fines in order to escape a prison sentence, but no one has ever preferred prison over fine.³⁹ Further, in the case of *United States v. McDonough* a defendant had committed suicide as he was convicted of price-fixing to prison for a short period.⁴⁰ Arguably the deterrent effect of criminal penalties against the white-collar offenders is unique, especially when compared to the narcotic addict. Bryan Allison, a convicted cartel offender, told that while in shackles after the arrest, ‘one of the other guys whispered to me, “This is so extreme”’.⁴¹ One can also imagine how the incarceration of the deep-pocketed Alfred Taubman, the chairman of Sotheby as a result of price-fixing may have affected the potential price-fixers and what message they got.⁴²

The Danish report noted that the OFT⁴³ commissioned report prepared by Deloitte, indicated that firms regarded prison sentences as the number one deterrent, followed by director disqualification orders.⁴⁴ The Danish committee referred also to a study by the Humboldt Viadrina School of Governance, which surveyed 223 experts on corruption who indicated by a majority of approx. 70% that imprisonment is ‘one of the most effective mechanisms to penalize business representatives for not adhering to anti-corruption principles’.⁴⁵

One may seek to determine and measure deterrence of antitrust enforcement by identifying the number of potential offenders abstaining from cartel activities as a result of antitrust enforcement. The cartel abandonment rate may then be used to indicate the benefit that the enforcement activity brings, and such an endeavour was the aforementioned study made by Deloitte for the UK Office of Fair Trading. Based on interviews with lawyers and companies the company survey indicated that for every OFT decision 16 cartels were abandoned and the survey of lawyers suggested that 5 cartels were abandoned every time the OFT reached a decision.⁴⁶ The OFT made

³⁸ Baker 2012, p. 13.

³⁹ The OECD report however admits that systematic evidence as to the deterrent effect of criminal sanctions is absent, see OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation*. 15.12.2005. p. 27

⁴⁰ Werden and Simon 1987, p. 936.

⁴¹ Furse 2012, p. 44-45; O’Kane 2011a, p. 486.

⁴² See Wils 2005a, pp. 143-144; Reindl 2006, p. 117.

⁴³ Office of Fair Trading (hereinafter OFT).

⁴⁴ OFT, ‘The deterrent effect of competition enforcement by the OFT, a report prepared for the OFT by Deloitte’, November 2007. OFT 962; ‘Rapport fra udvalget om Konkurrencelovgivningen’ March 2012, p. 203.

⁴⁵ Humboldt-Viadrina School of Governance, ‘Motivating Business to Counter Corruption, A Global Survey on Anti-Corruption Incentives and Sanctions’ 2012. p. 2, 3, 6, 7; See ‘Rapport fra udvalget om Konkurrencelovgivningen’ March 2012, p. 203.

⁴⁶ For an in depth analysis of measuring deterrence with regard to cartels see, Harding 2011, p. 361; OFT, *The Deterrent Effect of Competition Enforcement by the OFT*, A

also another study concerning the construction industry, which suggested that respondents could have been better informed of the criminal sanctions and that improving the information on these sanctions would be beneficial in terms of deterrence.⁴⁷

Another indication of deterrence is if the illegal activities are transferred to another country as a result of enforcement. Clarke and Evenett studied the US and EU enforcement of the Vitamins Cartels and indicated that 'the vitamins cartel raised prices more in nations without active cartel enforcement regimes.'⁴⁸ Anecdotal evidence corroborates such results, for instance that cartel meetings were held within jurisdictions regarded as 'safe'.⁴⁹

Repeat offenders may offer another perspective on deterrence. Evidence of repeat offenders has been provided by Connor and Helmers who found 174 cases of recidivism in a sample of cartels from 1990 to 2005. As already mentioned, perhaps tellingly, the worst recidivists came from the EU.⁵⁰

All in all, measuring deterrence is difficult and it tends to be a crucial factor in anti-cartel enforcement. Thus further research on the deterrent impact is needed. Yet the available evidence seems to support the introduction of individual accountability into an anti-cartel enforcement regime. It may also be noted that to a varying extent all the jurisdictions subject to comparison appreciated the possible added value that the individual accountability would bring about in terms of deterrence.

2.2 THE ECONOMIC ARGUMENT IN RELATION TO DETERRENCE

Introduction

Ginsburg and Wright have underlined that managers and shareholders may not abstain from price-fixing as it is profitable.⁵¹ Fines alone as a sole form of sanction are problematic due to the infeasibility of levying the optimal fines (insolvency cap).⁵² In Ginsburg and Wrights' view there should be a shift toward individual sanctions from corporate fines to increase deterrence in a

Report Prepared for the OFT by Deloitte (OFT 962, November 2007).

⁴⁷ Office of Fair Trading, 'Evaluation of the impact of the OFT's investigation into bid rigging in the construction industry', a report by Europe Economics, June 2010 OFT 1240, p. 55; Harding 2011, p. 365.

⁴⁸ Clarke and Evenett 2003, p. 692.

⁴⁹ Harding 2011 p. 367.

⁵⁰ Connor and Helmers 2007, p. 23.

⁵¹ Ginsburg and Wright 2010, p. 17; See also The Economist, 'Boring can still be bad', March 29th 2014.

⁵² Wils 2008a, p. 56.

cost-effective way.⁵³ Moreover the possible deterrent effect gives incentives for the cartelists to become whistle-blowers thus supporting the functioning of the leniency programs.⁵⁴

Consequently, the foregoing economic argument supports the effectiveness of imprisoning individual cartel offenders,⁵⁵ and substantial corporate fines.⁵⁶ This line of argument may be traced to Becker's seminal paper in 1968 where he put forward the idea that it is better to rely on monetary sanctions than incarceration as the former is less resource intensive.⁵⁷ Notably Werden and Simon contested this view in case of hard-core cartels, arguing that the optimal sanction for price-fixers is a prison sentence.⁵⁸ The optimal fine would be so high that neither companies nor natural persons would be able to pay it: ⁵⁹ the likelihood of the cartel getting caught is likely to be low⁶⁰ and the harm caused by the cartel considerable, which would make the optimal Beckerian fine beyond the ability of most defendants to pay it.⁶¹

2.2.1 The Deterrence Theory as a Justification for a Criminalization

The deterrence theory as a justification for criminal law emanates from the utilitarian point of view. Punishment under such an approach may be warranted if a positive social result may be identified – for instance the deterrence of crimes.⁶² The moral quality of a conduct is not important under this approach, whereas the utility derived from the punishment

⁵³ Ginsburg and Wright 2010, p. 17, 22.

⁵⁴ Harding 2011, p. 345.

⁵⁵ Furse 2012, p. 41.

⁵⁶ Harding 2011, pp. 358-359.

⁵⁷ Becker 1968 p. 169-217.

⁵⁸ Werden and Simon 1987, pp. 917-937.

⁵⁹ Furse 2012, p. 41.

⁶⁰ The rate of detection has been estimated to be between 10%-20%. See Bryant and Eckhard 1991, p. 535.

⁶¹ Furse 2012, p. 41; It may be mentioned however that Buccirossi and Spagnolo have made the argument that while criminal sanctions could boost deterrence, the bankruptcy argument regarding optimal fines does not seem to be such a compelling reason to advocate criminal sanctions, since the leniency programs have brought about a situation where the fine required for deterrence 'falls to extremely low levels (below 10% of the optimal "Beckerian" fine)', See Buccirossi and Spagnolo 2005. p. 1.

⁶² Whelan 2007 p. 10; Utilitarianism as a doctrine allows certain measures to be taken when this is useful and with a view to greatest happiness is supportive. The detractors say that such an approach emphasizes the consequences and omits to pay attention to the inherent value of a certain conduct and ignores justice and equality perspectives. See "Utilitarianism." The Oxford English Dictionary 2005.; See also Mill, J.S. *On Liberty* First published in 1859, see Chapter 1.

is.⁶³ The economic argument makes the case to boost efficiency. Welfare maximization is sought through the allocative efficiency. When the costs are greater than benefits, and inefficiency is the outcome, under the economic argument, such conduct merits prohibition.⁶⁴

Becker has evaluated deterrence through the economic analysis, subsequently further developing the utilitarian argument. He replaced the traditional happiness concept with the notion of wealth maximisation. Under such an approach it is assumed the individual acts rationally to get the best outcome in terms of wealth and refrains from certain behavior when the costs exceed the benefits⁶⁵ – individuals are maximizers of self-interest and will engage in unlawful activities if the expected utility is greater than the anticipated cost.⁶⁶ An optimal punishment would change the expected utility of the offence and make the potential perpetrator to refrain from acts that do not benefit the society.⁶⁷

For instance, the 2006 Guidelines on setting fines the European Commission refers to ‘specific increase for deterrence.’⁶⁸ Thus having as its objective the creation of a sufficient deterrent effect through fines. Indeed the fines imposed by the European Commission have been record high over the recent years.⁶⁹ However as Whelan points out the supporters of a criminal ban on cartels tend to rely on the optimal deterrence theory arguing that supposedly only custodial sanctions would bring about the desired level of deterrence.⁷⁰ In light of the foregoing it seems an account of the optimal punishment is required.

⁶³ Whelan 2007 p. 11.

⁶⁴ Whelan 2007 p. 11.

⁶⁵ Whelan 2007 p. 11; See also Becker 1968 p. 193

⁶⁶ Wils 2002. p. 13.

⁶⁷ Wils 2002, p. 13

⁶⁸ Already in 1970 in the Case 41/69, *Chemiefarma NV v Commission of the European Communities*, said regarding the fines levied in paragraph 173 that the ‘object is to suppress illegal activities and to prevent any reference’. Wils 2002 pp. 12-13.; See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (2006/C 2010/02) at para 4

⁶⁹ Regarding the level of fines, see The Economist, ‘Just one more fix’, March 29th, 2014.

⁷⁰ Whelan 2013 p. 3; Whelan refers to the works of Wils 2005a, p. 138ff.

2.2.2 *The Optimal Fine in case of hard-core competition law infringements*

In Becker's view the optimal fine consists of the harm caused to the victims.⁷¹ This has been referred to as the harm based approach⁷² or the internalization approach.⁷³ When the price-fixers compensate for the harm that the society has incurred, it would translate into a situation where only efficient offenses took place, as the benefits of the act would exceed the harm.⁷⁴ This approach could be said to be more aligned with the Chicago School which sees the most important aim of cartel laws to be in the maximization of total economic efficiency.⁷⁵

Landes argued based on Becker's work that the optimal fine for antitrust activity would be the '...equal net harm (which includes enforcement costs per case) divided by the probability of apprehension and conviction.'⁷⁶ However as Furse notes this approach assumes that an efficient violation exists which should be allowed. However Werden and Simon were of the view that hard-core price-fixing is almost never efficient, with no redeeming effects.⁷⁷

Wils argued however that the primary meaning of cartel laws is to hinder the transfer of wealth from consumers to producers in the form of higher prices. He calls this the deterrence approach: it seeks to deter also infringements that may produce gains above the level of the harm to the consumers and would thus not be targeted under the internalization approach. Wils reasons that fines will only deter antitrust violations if the expected fine is more than the expected gain derived from the infringement.⁷⁸

It could be said that while the internalization or the harm approach only puts a price tag on a violation, the deterrence or the gain approach prohibits the violation.⁷⁹ Wils says that the harm/internalization approach undermines the moral effect, because the competition law fine may rather be viewed as the price for conduct that is allowed, rather than as a penalty resulting from prohibited conduct.⁸⁰

Similarly Husak has pointed out that in case of theft, which conflicts with the common values of a society, compensation may restore the situation

⁷¹ Becker 1968 p. 192.

⁷² See Simonsson 2009, p. 370.

⁷³ Wils 2008 p. 56-57.

⁷⁴ Werden and Simon 1987 pp. 919-920.

⁷⁵ Wils 2008 p. 57.

⁷⁶ Landes 1983, p. 657.

⁷⁷ Furse 2012 p. 32; Werden and Simon 1987 p. 932.

⁷⁸ Wils 2008 p. 56.

⁷⁹ Wils 2008 p. 58.

⁸⁰ Wils 2008 p. 59.

to what it was prior to the theft, but criminal punishment against thieves should be used to address the wrongfulness, not only the loss.⁸¹ Husak argues that if the wrong is to be negated, compensation is not enough – adding public condemnation seems to be called for, even when the rational offender had the sufficient resources to indemnify and thus could be deterred by such a possibility.⁸²

Moreover, the internalization approach is in practice more difficult due to reasons related to the determination of the harm done, as it includes both the transfer of wealth from consumers and the deadweight loss and the probability of the fine being levied.⁸³

While Becker argued that social welfare is improved if fines are employed every time that it is practical,⁸⁴ what is relevant in the anti-cartel context, is that Becker acknowledged that when the perpetrator cannot compensate for the infringement prison would have to be added to the array of sanctions.⁸⁵ Drawing on this argument Werden and Simon pointed out that most firms would not be able to bear the optimal antitrust fine and thus prison would actually be the only option.⁸⁶

With regard to antitrust penalties Elzinga and Breit have argued that prison sentences can be measured in money and that prison sentences are not efficient. Arguably a given period of time in prison has its equivalent in a fine in the amount that deterrence is being created. As prison sentences and their incremental use requires more resources, whereas the imposition of heavier fines does not, Elzinga and Breit argue that fines should be preferred always to prison sentences. ‘Whenever any penalty can give the same amount of deterrence at less cost, or additional deterrence for the same cost, that option is economically superior’.⁸⁷ Lande and Connor estimated that the deterrence value of one year in prison would be 2 million dollars.⁸⁸ However as Furse has pointed out, also the imposition of fines may involve

⁸¹ Husak 2008, p. 186.

⁸² Husak 2008 pp. 186-187.

⁸³ Wils 2008 p. 58.

⁸⁴ Becker 1968, p. 193.

⁸⁵ Becker 1968, p. 196.

⁸⁶ Werden and Simon 1987 pp. 928-929; Whether offenders are risk-neutral or risk-averse will not be discussed here, but it may be mentioned that the crux of the matter is that if offenders are risk-averse the optimal sanctions is arguably a little lower. See Werden and Simon 1987 p. 920; Werden and Simon further surmised that prison sentences should not be lengthy as the marginal deterrent effect is considerable with regard to white-collars for relatively short periods of incarceration. Due to stigma already attached to a prison sentence, adjustment to the prison environment and a lower likelihood of being able to enjoy one’s money indicated that the marginal deterrence wanes with the passage of time. See Werden and Simon 1987 p. 935.

⁸⁷ Elzinga and Breit 1976, p. 123.

⁸⁸ Connor and Lande 2011 p. 28.

significant transaction costs as the spectre of substantial fines could result in attempts to hide assets.⁸⁹

It should be noted however that Elzinga and Breit did not recommend the imposition of fines on managers since it would be difficult due to problems relating to the identification in large firms and due to the possibility that the infringing managers would be compensated by the firm in the hopes of large gains derived from the violation.⁹⁰

2.2.3 Could the Optimal Fine be imposed?

Wouter Wils has been a staunch proponent of criminal penalties against natural persons responsible for hard-core cartels due to normative reasons and the deterrent effect. Especially his calculations on the sufficiently high fines are noteworthy as they explain well the economic rationale behind the viability of criminalizing of cartels.⁹¹

Wils has argued that effective deterrence would require fines that are unbearably high. In his view the expected fine should be more than what would be gained through the violation.⁹² ‘The expected fine is the fine imposed if the violation is detected and punished, multiplied by the probability of detection and punishment.’⁹³ The gain from the infringement divided by the probability of detection is the threshold below which the punishment tends not to deter. Wils illustrates this in the following way: if the gain is 100 and the probability of conviction is 20% or 1/5, fines below $100/(1/5)=500$ would not tend to deter.⁹⁴

Wils has calculated that if a 10% increase in prices is assumed, and thus a 5 % increase in profits for a period of 5 years and a 16% likelihood of conviction, the fines fail to be deterrent unless they amount to 150% of the annual turnover with regard to the products affected by the cartel.⁹⁵ Connor has studied cartels and argued that the median overcharges are between 17% and 21%.⁹⁶ In the area of branded consumer goods the median overcharge is above 40 %.⁹⁷ The rate of detection is presumably not high, it has been suggested to range from 10% to 20%.⁹⁸ In relation to the sub-

⁸⁹ Furse 2012 p. 32.

⁹⁰ Elzinga and Breit 1976 p. 133.

⁹¹ Wils 2012, p. 25; See also the discussion in Wils 2005; Werden 2009.

⁹² Wils 2002 p. 199.

⁹³ Wils 2002 p. 199.

⁹⁴ Wils 2002. p. 199; Wils 2008 p. 56.

⁹⁵ Wils 2002 p. 201.

⁹⁶ Connor 2009, p. 100.

⁹⁷ Connor, Foer and Udwin 2010, p. 200.

⁹⁸ See Connor, Foer and Udwin 2010, p. 203; Bryant and Eckhard 1991, p. 535; Wils 2005b, p. 28.

optimal fines, it may be pointed out that the optimal fines could actually be more than 150% of annual turnover, when the interest payments are added to the fine and considering that Wils used conservative estimates as to the mark-up and detection rate in Europe.⁹⁹

Wils has listed reasons why such fines cannot be imposed: firstly the imposition of such fines is prevented by the turnover cap of 10% set out in regulation 1/2003 article 23. Importantly, they would exceed the firm's ability to pay and repercussions would ensue, and collecting fines requires substantial resources possibly too. Finally such fines would contradict the principle of proportionality.¹⁰⁰

A bankruptcy would have enormous social consequences to stakeholders such as the suppliers, customers, creditors and tax authorities. Even lower fines that are still payable by the firms are problematic, as stakeholders, such as bondholders and creditors may see a diminution in the value of their securities. Employees' salaries may be cut, tax revenues diminished and consumers may end up paying the fines in the form of higher prices. What is more, due to possible fierce litigation the collection of a fine is also a costly business.¹⁰¹ Bankruptcy itself is very undesirable due to repercussions to employees who would be made redundant. The employees have not been able to diversify their risk the way that shareholders for instance can, and therefore would arguably suffer a comparably larger damage than the shareholders.¹⁰² Further, the market would become more concentrated as a result of the exit of the bankrupted company.¹⁰³

The profits made from price-fixing are smaller than the actual fine, due to the deadweight loss and since the profits would have been used to pay taxes, wages and dividends.¹⁰⁴ A study by Craycraft et al. had a sample of 386 companies responsible for price-fixing between 1955 and 1993 and showed that 58% of the companies could not have survived the imposition of the optimal fine without a technical bankruptcy.¹⁰⁵ Thus even the liquidation of a company's assets would not often suffice to pay the optimal fine – arguably it would be only big corporations with considerable assets that could bear such a fine.¹⁰⁶

⁹⁹ Whelan 2007 p. 26.

¹⁰⁰ Wils 2002 p. 202; The same 10 % turnover cap on fines is being employed in Finland as set out by article 13 of the new Competition Act, the Finnish Act refers to the turnover which took place during the last year of the infringement.

¹⁰¹ Wils 2002 p. 205-206; Regarding the firm's ability to pay fines, Craycraft et al. used a sample of 386 companies indicating that many firms could survive the Beckerian fine. For further details see Craycraft et al. 1997, p. 182.

¹⁰² Kraakman 1984, p. 882.

¹⁰³ Calvani and Calvani 2011, p. 192.

¹⁰⁴ Werden and Simon 1987 p. 928.

¹⁰⁵ Craycraft et al. 1997, p. 180.

¹⁰⁶ Werden and Simon 1987 pp. 928-929.

2.2.4 The Value of the Optimal Deterrence Theory as an Argument to Support Cartel Criminalization

Besides Wils, for instance Whelan has pointed out that to remedy the insolvency problem with the optimal fines, the custodial sanctions could be adopted, as the repercussions to the innocent stakeholders would not be of a similar scale.¹⁰⁷ Since imposing optimal fines in the Beckerian sense appears to be beyond reach, in the spirit of Werden and Simon, it may be noted that the economic argument strongly supports prison sanctions against persons responsible for hard-core competition law infringements.

A shadow of doubt has however been cast over the underpinnings of the above theory: behavioral economists have argued that the argument about optimal deterrence accompanied by the assumption of rational actors is limited in its ability to explain why people act a certain way.¹⁰⁸ As Stucke argues ‘it makes little sense to assume that executives behave as rational profit maximisers who readily respond to incremental changes in criminal penalties’. Informal norms may have a strong impact on behavior.¹⁰⁹ For instance the concern that peers will disapprove may trump the inclination to fix prices – in the opposite case, the argument goes, where peers approve the unlawful behaviour the deterrent effect of penalties may be undermined. Stucke acknowledges however the usefulness of the optimal deterrence theory in cases where individuals are not induced to refrain from unlawful conduct by informal norms.¹¹⁰ That said it may be concluded that the optimal deterrence model is vulnerable to criticism and cannot be exclusively relied upon to support a criminalization of cartels.

¹⁰⁷ Whelan 2007 p. 32.

¹⁰⁸ Harding 2011, p. 360; Öberg 2011, p. 306.

¹⁰⁹ Stucke 2011 pp. 287-288.

¹¹⁰ See Stucke 2011, pp. 287-288.

3 *The Moral Content of Hard-core Cartels*

3.1 THE REASONING BEHIND THE EMPLOYMENT OF CRIMINAL PENALTIES – RETRIBUTION AND DETERRENCE

Retribution and deterrence are the long-established philosophies behind the employment of criminal punishment.¹

Under the retribution theory individuals are seen as morally responsible for their own acts. The individuals are not a mere means towards an end, but an end in themselves, which may contribute to favorable views of the theory and is in accordance with the Kantian approach.² The deterrence theory on the other hand may be credited with the preciseness of the level that the effective sanction is expressed.³

Both approaches however have been criticized: the retribution theory may not always be able to show why certain unwanted conduct should attract criminal penalties. In consequence it has been put forward that besides the retribution theory also the forward-looking approach (deterrence) has its part to play.⁴ The deterrence theory on the other hand does not seem to be able to tell when a punishment is not justified and further does not appear to be in accordance with the principle of responsibility and autonomy, and it may not seem to limit the punishment merely to those who are responsible in moral terms, especially when this undermines the maximization of utility.⁵

Therefore Whelan has advocated an approach that takes into account both the retribution and deterrence theories:⁶ A criminalization of cartels should thus observe the principle of efficiency emanating from the economic argument seeking to promote the maximization of welfare. The principle of responsibility on the other hand would ensure that an individual gets punished only where he is at fault, whereas the principle of proportionality

¹ Whelan 2007, p. 8.

² See Kant 1996, p. 177.

³ Whelan 2007, p. 14.

⁴ Whelan 2007, pp. 14-15.

⁵ Whelan 2007, p. 15, 18.

⁶ Whelan 2007, p. 18.

would require proportionate penalties. Further the principle of autonomy would treat individuals as moral agents and finally the imposition of the penalty should be fair and just.⁷

Arguably the dependence on the deterrence theory could produce a cartel offence that is 'morally-neutral', which may be problematic, *inter alia* because of a possible undermining effect on the legitimacy of criminal law, thus allowing the argument to surface that criminal sanctions should target only conduct clearly condemned by the society.⁸

Criminal sanctions against cartel conduct are favoured out of reasons related to deterrence and the moral wrongfulness, and are the reasoning that proponents of a criminalized anti-cartel regime cite. Beaton-Wells and Parker have said that while there is not evidence to support the assumptions of deterrence, there is even less evidence to back the idea that cartels are intrinsically morally wrongful. They however acknowledged the theoretical backing for the moral wrongfulness that has been pursued.⁹

As Whelan says for the retribution theory to be an argument in the cartel criminalization discussion the morally wrongful nature of cartels is important.¹⁰

Also in order to justify a criminal measure under the *ultima ratio* principle it is of foremost importance to demonstrate from a moral perspective the seriousness of the violation. In the most reprehensible cases only criminal law as the ultimate measure could provide sufficient condemnation, both from a normative and the actual damage perspective.¹¹ Therefore an analysis of the moral wrongfulness and harmfulness of cartels will be undertaken below.

3.2 MORAL WRONGFULNESS OF THE CONDUCT SUBJECT TO CRIMINAL PROHIBITION

Besides the retributive and deterrent aims, a criminalization could be scrutinized from the perspective of wrongfulness and harmfulness of the given conduct.¹²

While morality is important in terms of retribution, which is one notable aim of criminal penalties, on the other hand it could be argued that mere harms would warrant criminal sanctions even when the conduct

⁷ Whelan 2007, pp. 19-20.

⁸ Whelan 2013, p. 7.

⁹ Beaton-Wells and Parker 2012, p. 2-3.

¹⁰ Whelan 2013a, p. 9.

¹¹ Harding 2012, p. 142.

¹² Whelan 2007, p. 20.

could not be characterised as morally wrong.¹³ It may be argued however that observing the morality involved could be important to elicit support for criminal penalties, and if the corporate people internalize the pertinent moral standards the deterrence of the criminal penalties may be reinforced.¹⁴

One may note that on the one hand the economic viewpoints of the Chicago school seem to have had such an impact that morality is not an important consideration in the antitrust analysis.¹⁵

On the other hand Sayre wrote in 1933 an article that still holds sway among the criminal law scholars who do not see that white-collar conduct should attract criminal penalties and¹⁶ as Green explains such views stem from the perception that a criminal label is attached to a behaviour that is morally neutral, making the criminal penalty unfair, thus diluting the meaning of the sanctions. On this view only the traditional offences merit criminal sanctions.¹⁷

While the community does not favour a given criminalization, the prohibitions in question may be referred to as ‘sticky norms,’ – it connotes the idea that when the public’s view on moral wrongfulness diverges from what the laws dictate the legitimacy of the criminal law may be undermined.¹⁸

As Beaton-Wells has pointed out such perceptions of overcriminalization seem to ignore however the educative function of criminal law that moulds the attitudes of the public.¹⁹ Stucke too who has pointed out that the overcriminalization critique overlooks the educative role of criminal law, society may come to condemn conduct that was once considered morally neutral, such as the environmental offences.²⁰

It may be argued that the public becomes aware of the reprehensibility of a given conduct through the application of a punishment.²¹

Wils has pointed out in relation to the criminalization of cartels that the criminal punishment is important with regard to the moral incentives that people get. A criminal punishment attaches a stigmatizing label on the perpetrators and the message sent spreads across the society, to the law-abiding citizens as well, subsequently promoting the sense of justice.²² The corporate sanctions that currently are the mode of sanctions at the EU level fail to send such a strong message that individual criminal sanctions would

¹³ Beaton-Wells 2007, p. 679 footnote 31.

¹⁴ Beaton-Wells 2007, p. 680.

¹⁵ Stucke 2006, p. 445.

¹⁶ Sayre 1933, p. 79.

¹⁷ Green 1997, p. 1536.

¹⁸ Beaton-Wells and Parker 2012, p. 14; See Kahan 2000.

¹⁹ Beaton-Wells 2007 p. 677; Beaton-Wells and Parker 2012, p. 14 see footnote 57; See Robinson 2009.

²⁰ Stucke 2006, p. 537; Whelan 2013, p. 8.

²¹ Coffee 1991, p. 200.

²² Wils 2002 p. 216.

send. Further, punishing the company instead of the culpable executive undermines the signal regarding the seriousness of the violation.²³

‘Crimes have traditionally been said to be *mala in se* if they involve conduct that is wrongful regardless of whether the conduct has been made illegal.’²⁴ Originally the *mala in se* (evil in itself) category of crimes got their wrongfulness by a reference to God. As opposed to that *mala prohibita* crimes received their wrongfulness simply from the disobedience to law.²⁵ These days the characterization as a *mala prohibita* offence gives the impression that some behavior derives its wrongfulness solely from it being prohibited by law.²⁶ For example, under Husak’s minimalist approach, decreasing the amount of the so called *mala prohibita* offences is seen as desirable as arguably the *mala prohibita* offences do not meet the wrongfulness criterion.²⁷ Green too points out that as a starting point criminal law should be reserved for conduct that is clearly blameworthy - it is the normal approach taken to possible criminalizations.²⁸

The moral disapproval regarding cartels may be derived from the welfare losses that cartels bring about, the defiance of policy and collusion.²⁹ Stephan has argued that the criminalization of cartels could have its sole basis in the prevention of the harm, and that the moral aspects should be ignored, as in his view the moral quality of a given conduct is not important as follows from the evolution of the criminal law.³⁰ Stephan recognizes however that the argument by Wardhaugh is persuasive: Wardhaugh argues that cartels undermine the institution in the society on which the individuals draw on to assure their own welfare and that the justification of a criminalization of cartels could be derived from that.³¹

In a similar vein Whelan has argued that while cartels have been viewed devoid of moral content, and therefore *malum prohibitum*, as opposed to *mala in se*, the foundation of the Western democracy being the free market economy, cartels could be seen problematic from a moral point of view as they weaken the market economy.³² The public opinion on cartels may not seem indignant however, and Whelan has consequently proposed that the public should be educated regarding the harmful effects of cartels.³³

²³ *ibid.* p. 217.

²⁴ Green 2012, in chapter 2, under the heading ‘Theft in Unjust Societies’, at para 4.

²⁵ Green 2006 p. 118.

²⁶ Green 2006 p. 118.

²⁷ Husak 2008. p. 119.

²⁸ Green 2006 p. 1.

²⁹ Harding 2012, pp. 148-150; Wagner-Von Papp, 2011, p. 179; Connor, Foer and Udwin 2010, pp. 210-211; See also Whelan 2007, p. 28.

³⁰ Stephan 2012, pp. 137-138; Cf. Macculloch 2012 (pre-print version), p. 15.

³¹ Wardhaugh 2012b, p.1; See also Harding and Joshua, 2010 pp. 274-275.

³² Whelan 2007 p. 29.

³³ Whelan 2007, p. 30.

Harding has argued for example that a criminalization of cartels would require an authentic feeling of delinquency to be successful.³⁴ He points out that it seems that the movement to criminalize cartels is more of a product of aspirations of the regulators than that of public perceptions of cartels as so reprehensible that they merit criminal sanctions. As Harding points out however, it is far from unheard of that the public opinion is influenced by the legal opinion and ‘especially in relatively technical areas of conduct, and to this extent public opinion may need to be formed by expert opinion.’³⁵ In the cartel context this may be all the more so since the UK survey showed that education of the respondents did not correlate with severe attitudes towards cartels. This could mean that people who follow the news and are well informed still lack the knowledge of the sinister nature that cartels have and do not receive sufficient information from the media that they follow.³⁶

While exploring the case to criminalize cartels Harding points to the notion of crime that ‘is about *conduct* as much as *harm*’. Considering this it is interesting to note that the US approach is to target conspiracy and the attitudes of the cartelists rather than the economic effects of cartels and that the US model provides ‘the convincing justification for using criminal law’.³⁷

The moral reprehensibility of cartels is arguably on par with tax fraud, insider trading and intellectual property offences. Such conduct is mostly criminally prohibited in the Western countries. Thus one may point to the principle that like cases should be treated alike and unlike cases differently.³⁸ In this respect it seems relevant that the EU Commission has recently made a proposal to introduce minimum criminal law rules for market abuses.³⁹

The principle of fair labeling should inform the legislature of how to grade various wrongdoings based on how they are commonly perceived. The sanction should reflect the graveness of the violation, meaning that sanctions should be proportionate. The law’s educative function is furthered by the proportionate sanctions that the principle of fair labeling supports.⁴⁰ As Stuart Green points out, the principle of fair labeling should be taken

³⁴ Harding 2006, p. 181.

³⁵ Harding 2006 p. 200.

³⁶ Stephan 2008a, p. 144.

³⁷ Harding 2006, p. 200.

³⁸ Matikkala 2009, p. 278; See also Whelan 2007, p. 28.

³⁹ COM (2011) 654 final; The market abuse Regulation No 596/2014 and the Directive 2014/57EU regarding the criminalization of market abuse appeared in the EU Official Journal and the regulation will enter into force in July 2016, the directive has a 2-year implementation phase. To this effect see Daily News of 2014-06-12, European Commission – 12/06/2014; Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), Brussels, 20.10.2011. COM(2011) 651 final.

⁴⁰ Ashworth 2009, p. 78.

into account also when considering of criminalizing a given conduct.⁴¹ As Stuart Green puts it ‘when legal rules fail to square with people’s common understanding of what is wrong, the result is unfair labeling.’⁴²

Whelan acknowledges that if there is a large gap between the views of the public and what criminal law condemns it could bring about a ‘problem of resistance’. If however there is public support for criminal sanctions adopting them could save resources as a result of ‘an internalization of the moral norm’.⁴³ It follows that the envisaged cartel offence should not be devoid of moral content, even if the main rationale behind criminalizing cartel conduct would boil down to the deterrence theory.⁴⁴

The 2006 committee noted that from a perspective of fairness and proportionality criminal sanctions against cartels are called for since comparable offences such as tax fraud attract criminal sanctions. Moreover the 2006 committee acknowledged the criminal label is the strongest message that the state can send regarding the conduct that is not tolerated. Such argumentation is drawn from a call for a coherent proportionate and fair criminal justice system that takes note of the penal value of the offence and treats comparable offences alike.⁴⁵ The 2006 committee however took the position that the gravity of the offence was not sufficient to require the introduction of criminal law regime.⁴⁶

More recently the Danish 2012 committee pointed out that the cartel offence falls within the category of white-collar offences. Other white-collar offences, the committee noted include inter alia insider trading, tax fraud, the copyright infringements that attract prison sentences. The prison sentences have also been enforced in practice, while the maximum prison terms may be up to 8 years. Yet the harm caused by cartels is at least equivalent to the harm derived from the aforementioned offences, while the sanctions that the cartelists are subject to are much more lenient.⁴⁷ Nine committee members argued that the coherence of sanctions in the area of serious white-collar crimes calls for custodial sanctions.⁴⁸

In a similar fashion in Norway in the course of the revision leading to the introduction of the Competition Act of 2004, the Ministry had argued in favor of retaining criminal enforcement in parallel with the administrative one, due to grave character of competition law infringements or else the

⁴¹ Green 2006, p. 42.

⁴² Green 2006, p. 42.

⁴³ Whelan 2013a, p. 8.

⁴⁴ Whelan 2013a, pp. 8-9.

⁴⁵ SOU 2006:99 p. 561.

⁴⁶ SOU 2006:99 p. 563.

⁴⁷ 'Rapport fra udvalget om Konkurrencelovgivningen' March 2012, p. 35.

⁴⁸ 'Rapport fra udvalget om Konkurrencelovgivningen' March 2012, p. 39.

penal value of competition law infringements could be perceived to be of a more lenient sort than other serious white-collar offences.⁴⁹

Indeed the Australian Cartel Project findings indicated that those who thought that cartel conduct should attract criminal sanctions mostly saw the conduct on par in terms of seriousness with many other offences, including insider trading, tax evasion, theft and fraud. In contrast offences concerning an injury or a threat to physical health were perceived to be more severe.⁵⁰

Matikkala has pointed out in the Finnish context that the legal values that merit protection are the market force and healthy competition and that the overall impression is that the criminal law protects several other interests that are comparable in nature. After all antitrust practices harm both directly and indirectly individuals and fellow competitors outside the cartel. Also the core structure of our society, namely the market economy is eroded he said.⁵¹ Pöyhönen has argued that an implied right of workable markets that strives for the collective good exists. Arguably the ever-increasing role of the market economy underscores this right. The market participants by entering the markets assume the obligation to act in the interests of the workable markets.⁵² Indeed cartels challenge the prevailing economic mode and have therefore been dubbed as “cancers on the open market economy” by Mario Monti.⁵³

While Connor et al. point out that criminal cartel prosecutions have a long history explaining that criminalizing cartels is not a new phenomenon as prohibitions of anticompetitive practices have been around since the ancient times,⁵⁴ it may also be pointed out that when the trade was not liberalized to the extent that it is today, the prevention of cartels might not have seemed as important as today when the benefits that the free trade brings are destroyed by cartels. The defiance of this whole system, according to Harding and Joshua, seems to be the most delinquent part of cartels, rather than the harm that the consumers incur, thus making the analogy between environmental offences better than between the traditional property offences. The cartelists collude to evade the legal prohibition, and especially the collusion shows the disagreeable sense of their conduct.⁵⁵ Thus Harding and Joshua argue that the Sherman Act, which targets cartel conduct as

⁴⁹ Prop. 75 L (2012-2013) Proposisjon til Sortinget (forslag til lovvedtak) Endringer i konkurranselover, see Chapter 4, at para. 4.1.2.; Regarding the more recent Norwegian revision of competition laws, see the Amendment to the Competition Act that was adopted by the Norwegian Parliament on 28th of May, 2013.

⁵⁰ Beaton-Wells and Parker 2012, p. 18.

⁵¹ Matikkala 2009a p. 276.

⁵² Pöyhönen 2003, pp. 82-83.

⁵³ Monti 2000.

⁵⁴ Connor, Foer and Udwin 2010, p. 205; Also Stucke has pointed out that attaining material gain unfairly at the expense of others has been censored for long, Stucke 2006, p. 498.

⁵⁵ Harding and Joshua 2010, pp. 274-275.

conspiracy rather than something similar to theft is a better definition for the offence to capture the delinquency of cartels.⁵⁶

Further cartel behaviour may also be seen as delinquent, because a possible significant economic power of a company is used to exercise the private power over other private and public interests.⁵⁷ As Amato Guiliano has eloquently put it, in a democracy, power should be based on law, and the owners of a firm only should enjoy certain privileges that however do not extend the power over other people unless consent has been obtained from the people concerned. Competition law then seeks to address this issue, on the one hand so that private power, which is not legitimated through the democratic process, would not form a threat to other essential freedom rights of a democracy and on the other hand in a way that the public power does not become too far-reaching.⁵⁸

Harding and Joshua argue however that for the purposes of a criminal offence, something more practical may be needed: coercion for example manifests in a more concrete way the abusive nature of the private power. The other way that large firms may abuse their power is the deceptive tactics that they use to conceal the cartel.⁵⁹

The Moral Content of Breaking the Law

Most crimes may be classified either as *mala in se* or *mala prohibita* depending on the perceptions of the society.⁶⁰ The immorality of a behavior characterized as *mala prohibita* can be found in the fact that the actor defies the letter of law by not following it.⁶¹

It has been thought that people do not commit the *mala prohibita* crimes only due to the possibility of sanctions whereas what restrains people from engaging in criminal activities concerning the *mala in se* crimes is the internally entertained morality.⁶² More recently studies suggest somewhat divergent views from the foregoing, emphasizing things such as personal morality as the key determinants in how to disincentivize criminal conduct – this then would not respect the presumed dividing lines between the *mala in se* and *mala prohibita* crimes.⁶³

Green indicates that also with respect to the *mala prohibita* crimes that actually breaking law itself carries important moral weight and moral wrongfulness and thus rejecting the proposition that the element of

⁵⁶ Harding and Joshua 2010, pp. 276-277.

⁵⁷ Harding and Joshua 2010, p. 275.

⁵⁸ Amato 1997, pp. 3-4.

⁵⁹ Harding and Joshua 2010 p. 276.

⁶⁰ Green 2006, p. 120 footnote 33.

⁶¹ Green 2006, p. 120.

⁶² Ibid. p. 121 footnote 36.

⁶³ Green 2006. pp. 121-122 footnote 36; See Tyler 1990, p. 68.

immorality is missing.⁶⁴ This may be worth noting while taking stock of the arguments against a possible cartel criminalization project.

3.2.1 The Length of the Prison Sentence: A Comparative Outlook

Under the Canadian anti-cartel enforcement regime the range of penalties include a maximum sentence of 14 years' incarceration, while prior to the amendment the maximum sentence was a 5-year term. This is one of the toughest sanctions available across jurisdictions. Until the Canadian amendment the US maximum prison sentence of 10 years had been the harshest. As has been noted this may in part enhance the ability of the prosecutors to induce guilty pleas. Also the individual fines became more substantial, with a maximum of 25 million Canadian dollars per count.⁶⁵ What may be said is that while an assault attracts a maximum sentence of 5 years in prison, an assault using a weapon a maximum 10-year term and torture a maximum of 14 years in prison, thus making it obvious that the cartel offence is treated as a very serious offence.⁶⁶ Low QC and Halladay point out therefore that the treatment of conspiracy is far removed from so called the 'regulatory offences' – yet previously the cartel offence also could have been classified as a regulatory offence in Canada.⁶⁷

In the UK the Hammond and Penrose report had recommended a maximum 5-year term in prison, since a lesser sentence would not display the seriousness of the offence, and in order to be an arrestable offence, a maximum sentence of 5 years had to be available.⁶⁸

9 Danish committee members took the position regarding the length of the prison sentence, especially due to the harm caused, that the prison term should be up to 1,5 years prescribed in the Competition Act. When 'particularly aggravating circumstances' prevail individuals could be jailed up to 6 years.⁶⁹ During the parliament hearing, it was put forward by the Minister that if an individual committed several infringements the maximum prison sentence could be 9 years.⁷⁰

⁶⁴ Green 2006 pp. 121-122.

⁶⁵ Low QC and Halladay 2011, under the heading 'C. New Penalties and the Law of Unintended Consequences' at para 1.

⁶⁶ Low QC and Halladay 2011, under the heading 'C. New Penalties and the Law of Unintended Consequences' at para 2.

⁶⁷ Low QC and Halladay 2011, under the heading 'C. New Penalties and the Law of Unintended Consequences' at para 2.

⁶⁸ Hammond and Penrose Report 2001 at para 1.22

⁶⁹ Rapport fra udvalget om Konkurrence Lovgivningen' March 2012, p. 47; See also Dittmer and Meyer 2013, p. 1.

⁷⁰ Folketingstidende B, Betænkning, over Forslag til lov om ændring af konkurrence loven og straffeloven, Betænkning afgivet af Erhvervs-, Vækst- og

The Danish white-collar prosecutor, Hans Jakob Folker, who will take on the criminal cartel cases in Denmark commended the new legislation as more fitting and presumed that the dividing line between custodial sanctions and fines, and the harsher (up to 6 years) and more lenient custodial sanction (1 year and 6 months), would be set up once a handful of cases have reached the courts.⁷¹

In Sweden the 2004 committee pointed out that the property crimes in Sweden attract for trifling offences fines or a term of 6 months in prison, in case of an offence of normal degree the maximum prison term may be 2 years, and for grave offences the prison term may vary between 6 months and 6 years. As the committee pointed out the whole idea about criminalizing cartel conduct is that administrative sanctions are not adequate. The committee was instructed to concentrate on the most serious infringements and therefore violations whose penal value attracts fines should be excluded from the scope of the criminal offence. The criminal prohibition should be designed in a way according to the Swedish 2004 committee that it only attracts prison sentences. A cartel offence of normal gravity should attract a maximum prison term of 2 years while a grave offence could attract a minimum prison term of 6 months and a maximum prison term of 6 years the committee envisaged.⁷²

The Swedish 2006 committee however argued that the envisaged custodial sanction, which would usually not exceed two years, would mean in the Swedish context that sentences would not necessarily be unsuspended prison sentences. Therefore the committee postulated that in order for the custodial sanction to emerge as the customary penalty to be prompted by the cartel offence, the scale of penalties should be increased to an extent that would not be consistent with other comparable offences.⁷³

Notably in Ireland the maximum prison sentence has been recently increased up to 10 years. Whelan points out that the increase in the length of the prison sentence may send a message to the trial judges that cartels should attract prison sentences.⁷⁴ As Whelan says it is noteworthy that only hard-core cartels give rise to prison sentences in Ireland.⁷⁵

Ekspertudvalget den 6. december 2012, Til lovforslag nr. L 41. p. 2; Dittmer and Meyer 2013 p. 1.

⁷¹ Gitte Holtsø's Interview with the Public Prosecutor for Serious White-Collar Crime, Hans Jakob Folker 2012; See also Dittmer Martin André and Meyer Michael, 'Material amendments to the Danish Competition Act passed by the Danish Parliament' *Newsletter – EU & Competition, February 2013*. At Slide 2.

⁷² SOU 2004:131 pp. 194-195.

⁷³ SOU 2006:99 p. 566.

⁷⁴ The increased sanctions followed an IMF bailout package that required reinforced competition law enforcement, see Whelan 2012d. p. 175.

⁷⁵ See Whelan 2012d, p. 177.

The amended Irish Competition Act had the objective of especially countering white-collar crime and reinforcing the fight against hard-core cartels, and the Minister particularly said that the cartel members would thereby receive a message regarding the severe nature of the violation.⁷⁶ It may be noted that previously the level of fines may seem meager in Ireland in light of the EU practice since Furse reported a fine in the order of €80,000 (in the Duffy case) being the maximum fine that had been imposed in Ireland.⁷⁷

One point of interest is that the Competition Amendment Act 2012 sets out in section 2(h) that a convicted person who is guilty of the offence, may be ordered by the court to fully compensate the competition Authority the costs that the investigations, detection and prosecution gave rise to, it is in the discretion of the court to omit to do so if 'there are special and substantial reasons'.⁷⁸

Massey has been critical of the increase of the maximum prison terms in Ireland, pointing towards the argument that relatively short prison sentences create a sufficient deterrent effect, since we are dealing with white-collar offenders. The Irish problem in his view boils down to a lack of adequate enforcement, and not penalties biting enough. 'Lengthy sentences obviously involve greatly increased costs to the State (of incarcerating such individuals for lengthy periods) with little extra benefit.'⁷⁹ As Whelan notes since the introduction of prison sentences for competition law offences in 1996, there remains to be a case where one individual actually is incarcerated. One individual has been incarcerated however in response to his omission to pay the competition law fines he was subject to. Therefore in terms of deterrence actually imposing unsuspended prison sentences seems vital in the Irish context. Whether it pays off to increase the level of maximum prison terms in Ireland thus heavily relates to its actual impact on the enforcement rate – it is possible as Whelan points out that the increase in the length of the prison sentences may send a message to the trial judges

⁷⁶ 'Maximum prison sentence for competition offences doubled to ten years – Minister Bruton', Department of Jobs, Enterprise and Innovation, on the 3rd of July, 2012; See also Whelan 2012d.

⁷⁷ Furse 2012 p. 176-178; See also Galbreath 2010, p. 4; Furthermore with respect to Ireland, the Competition Amendment Act 2012 brought about changes in terms of the severity of sanctions. As per Section 2(b)(i) both the corporate fines and individual fines prompted by hard-core cartels now have an increased maximum: upon conviction of an indictable offence the fine may be up to €5,000,000 instead of the previous €4,000,000, and individuals may face a prison sentence up to 10 years as per section 2(b)(ii). What is more, as Whelan noted that while prior to the Amendment the DDOs could only be imposed against persons convicted on indictment, now the DDOs may be prompted upon summary convictions as well. The change is brought about by the Section 9 of the 2012 Act, amending the section 160 of the Companies Act 1990. See Whelan 2012d, pp. 177-178.

⁷⁸ See Whelan 2012d, p. 178.

⁷⁹ Massey 2012, p. 170.

that cartels should attract unsuspended prison sentences and regarding the availability of DDOs in case of summary convictions.⁸⁰

Whelan argued in favour of the maximum 10-year sentence that was adopted in Ireland, and said that naturally such sentences would target only the most egregious violations, where the cartelists may have resorted to brutal measures.⁸¹ Whelan predicted that if adequate resources are available in Ireland enforcement may be improved and referred also to the '25% increase in the staff numbers of the Competition Authority'.⁸²

Finally, it seems that there is some merit to the argument that the availability of lengthier custodial sanctions may be useful in prodding judges into awarding unsuspended prison sentences.⁸³

3.3 PRICE-FIXING AND THE EVERYDAY MORAL STANDARDS

Stuart Green has suggested that the white-collar crimes could in general be examined from the perspective of everyday moral norms. Price-fixing can be determined under his approach to be equivalent to a violation of the prevailing moral norms against cheating,⁸⁴ deceiving and stealing. Stealing may be perceived to be a *mala in se* violation, something that would be perceived wrong even in the absence of a statutory prohibition.⁸⁵ Instead of concentrating on rights-based approach (when someone's interests are

⁸⁰ Whelan 2012d, p. 178.

⁸¹ Whelan 2012d, p. 180.

⁸² 'Maximum prison sentence for competition offences doubled to ten years – Minister Bruton', Department of Jobs, Enterprise and Innovation, on the 3rd of July, 2012; Whelan 2012d, p. 6.

⁸³ In terms of tax fraud offences, mostly suspended prison sentences have been awarded in Finland, see Oikarinen 2012, p. 761.

⁸⁴ Green 2006, p. 60.

⁸⁵ See Green 2006. pp. 55-56 and p. 88ff. ; Beaton-Wells Caron 2007, p. 698; Deception could be deemed to be particularly conspicuous in bid-rigging cartels: the tenderers intend to convey the misleading message that the tenders were made independently which is a false message See Beaton-Wells 2007 p. 700; Macculloch 2012 (pre-print version), p. 12; Perhaps tellingly bid-rigging is in Germany and Austria the only antitrust infringement to attract criminal law penalties, see Dawes and Lynskey 2008, p. 153; Harding 2010, p. 48; See the Irish Case *D.P.P. V Duffy & Anor*, [2009] IEHC 208, where the judge says of cartels *inter alia* that 'They are offensive and abhorrent, not simply because they are *malum prohibitum*, but also because they are *malum in se*.' At para. 22.; According to Stuart Green viewing stealing merely as law-breaking would not sufficiently account for what is wrong about it. It would reduce it to the *malum prohibitum* category. Green 2006, p. 89.

violated) Green elaborates on wrongfulness from the perspective of everyday norms.⁸⁶

One point of consideration is how the definition of the cartel offence could be devised in order to catch the level of blameworthiness that is usual for criminally prohibited conduct⁸⁷ and as Beaton-Wells notes that under Green's approach price-fixing may be perceived to be 'implicitly wrongful', thus no further support for its wrongfulness is needed.⁸⁸ Arguably this could have the effect that there would no longer be a need to include a mental element to the cartel offence, such as dishonesty.⁸⁹ Beaton-Wells has pointed out that, cartels usually are the result of dishonesty, and the cartel members intend to achieve an advantage at a cost to the customers and rivals. Therefore incorporating dishonesty in the design of the offence might not help in the pursuit of separating conduct that should attract an administrative sanction from conduct that should be subject to a criminal penalty. It seems the moral reprehensibility of cartels should be signalled, but this should take place outside the definition of the cartel offence.⁹⁰

To warrant a criminalization, at least moral wrongfulness, culpability and harmfulness should all be present under Green's approach. Harmfulness as the sole underpinning of a criminalization in Green's view is not sufficient, the conduct in question should also be morally wrongful.⁹¹ One may differentiate between culpability and wrongfulness in that if the offender may resort to the insanity excuse for example, the act may be wrongful, while the issue of culpability does not arise.⁹² The moral wrongfulness and harmfulness do not have to coincide either, lying, for example, while on the face of it is wrongful may not cause necessarily harm.⁹³

Green's approach is non-consequentialist, whereby the results of an act are not central, but the infringement of a moral norm is.⁹⁴ Moral wrongfulness, Green describes, is the infringement of a moral norm via a criminal act.⁹⁵ It is precisely the infringement of the 'free-standing moral rule' wherefrom the wrongfulness may be derived, and not the results that the act causes.⁹⁶

Under Green's framework 'culpability' mirrors the blameworthiness of the conduct of the perpetrator. Instead of reflecting the results of the act

⁸⁶ Green 2006 p. 45.

⁸⁷ Beaton-Wells 2007, p. 676

⁸⁸ Beaton-Wells 2007, p. 698.

⁸⁹ Beaton-Wells 2007 p. 698.

⁹⁰ Beaton-Wells 2007 p. 703.

⁹¹ Green 2006 p. 44 and Beaton-Wells 2007 p. 678.

⁹² Green 1997 p. 1552.

⁹³ Green 1997 p. 1552; See also Beaton-Wells 2007 p. 694.

⁹⁴ Green 2006 p. 39.

⁹⁵ Green 2006 p. 39.

⁹⁶ Green 2006 p. 39; Beaton-Wells 2007 p. 694.

or the act itself, culpability is centred on the actor.⁹⁷ Green notes that with regard to regulatory offences, the removal or lowering of the mens rea has become ordinary, despite the fact that many see this as incongruent with the moral aspect that pertains to the criminal law.⁹⁸

Green refers to harmfulness under his framework as something that indicates the extent to which the criminal deed brings about harm.⁹⁹ The harm is something that violates someone's interests pronouncedly or on an enduring basis.¹⁰⁰ Besides the harm to individuals, a 'criminal harm' may refer to the collective interests of the society, such as 'fair and efficient markets'.¹⁰¹ While culpability is more pronouncedly related to the actor, harm on the other hand has a connection to the results of the act. As Green points out, an act may have harmful results, while the wrongfulness is absent.¹⁰²

With these basic premises in mind, the moral content of hard-core cartels is further explored below drawing on the everyday moral norms as explained by Green.

3.3.1 Hard-core Cartels as Stealing

Green says that 'the norm against stealing does have an independent moral significance, which is neither wholly derivative of law nor wholly reducible to other moral norms.'¹⁰³ According to Stuart Green viewing stealing merely as law breaking would not sufficiently account for what is wrong about it. It would reduce it to the malum prohibitum category.¹⁰⁴ Beaton-Wells has pointed out that the concept of stealing under Green's framework seems to be applicable to the cartel overcharge that is extracted from the customers as a result of the cartel. It is clear that the cartel members intentionally sought to take the money away from the customers, who have the legitimate interest in the money.¹⁰⁵ She points out that 'what is stolen is the amount that is paid constituting the margin between the competitive price (that is, the price

⁹⁷ Green 1997. p. 1548; See also Beaton-Wells 2007 p. 683 ff.

⁹⁸ Green 1997 p. 1548.

⁹⁹ Green 2006 p. 34.

¹⁰⁰ Green 2006 p. 34.

¹⁰¹ Green 1997 p. 1550; Beaton-Wells 2007 p. 689.

¹⁰² Green 1997 p. 1549.

¹⁰³ Green 2006 p. 88.

¹⁰⁴ Green 2006. p. 89.

¹⁰⁵ Beaton-Wells 2007, pp. 700-701.

that would have prevailed absent the cartel) and the cartel price.¹⁰⁶ Thus one could argue that the analogy between theft and a cartel appears accurate.

Harding has however pointed to the difference between theft and price-fixing, noting that consumers do not feel the damage as directly as is the case with many other thefts.¹⁰⁷

Ultimately as Whelan argues, what may be crucial is whether the public considers the infringement inherently wrongful after it has been informed on the infringement's nature.¹⁰⁸

Whelan points out that, 'Green argues that the right of ownership does not necessarily owe its existence to the law; rather, it can have a non-legal character: stealing is "in some fundamental way pre-legal". Consequently, one could argue that, irrespective of their legal rights, consumers are nonetheless entitled to a competitive price for the goods/serves on the market; that for, example, due to the endorsement of free market economics by European citizens, consumers have a right to a competitive market.' However, it seems that this interpretation is open to challenge since it is difficult to say when exactly and in what way the consumers became entitled to the overcharge.¹⁰⁹

Whelan makes the point that whether cartel conduct may be viewed as stealing depends also on whether the consumer welfare or total welfare standard is chosen. The total welfare standard regards wealth transfers from customers to the manufacturers as welfare-neutral.¹¹⁰ Therefore, while the cartel overcharge may infringe the ownership rights of the consumer, this is not important from the perspective of the total welfare standards. Whelan notes that by adopting the consumer welfare standard the stealing argument regarding cartel conduct becomes more robust, since then the overprice most clearly belongs to the consumers.¹¹¹

¹⁰⁶ Beaton-Wells 2007, p. 700.

¹⁰⁷ Harding 2010, pp. 51-52.

¹⁰⁸ As Whelan notes, the public may need education on the matter prior to the criminalization, see Whelan 2007, p. 20

¹⁰⁹ Whelan however suggests that consumers' right to 'to a competitive market' could possibly be derived under EU law from Article 101(3) TFEU, which exempts an agreement prohibited by art. 101(1) TFEU if the consumers get 'a fair share of the resulting benefit', Whelan 2013a, p. 10, see also footnote 68.

¹¹⁰ Whelan 2013a, p. 11.

¹¹¹ Whelan 2013a, p. 12; Whelan referred to Majumdar who explains that the consumer welfare standard makes firms opt for the strategies that are most commercially viable but still do not injure consumers. As opposed to that the total welfare standard makes it possible for the firms to pursue an avenue which would appear to be the most lucrative from the firms' perspective, but which would also seriously injure consumers, '...the very high profits just offset the loss to consumers', while the 'overall total welfare may hardly increase at all.' Whelan 2013 p. 12; see also Majumdar 2008, p. 145; Whelan argues that in light of the foregoing the consumer welfare standard should be opted for, 'even absent an express political judgement on the desirability of consumer-producer wealth transfers.' Simultaneously the view that cartel conduct equals stealing becomes more robust See Whelan 2013 p. 13.

On another note, Whelan said that while the cartel member obtains the surcharge there is a violation of the consumer's property rights, but crucially if the cartel agreement is never implemented there would be no 'fundamental violation,' since the customers' ownership rights would not be infringed. There would only be an agreement regarding such an infringement. Thus in terms of the possible design of a cartel offence, the definitional elements designed to catch 'stealing' ought not to cover agreements that were never implemented.¹¹²

What is more, for cartel conduct to fall under the concept of 'stealing' the cartelist should have the intent to extract the surcharge.¹¹³

Criminal law separates direct and indirect intentions. Whelan referring to Simester et al. explains how intention is widely seen in criminal law: direct intention refers to a perpetrator who either seeks to cause a given effect or thinks that a main objective may be reached only via causing the effect. Whelan further points out that it is recognized that while the perpetrator is pursuing a given objective by causing a certain effect the latter is considered 'an intentional act in its own right'. As opposed to that the indirect intention refers to a perpetrator who thinks the effect is the nearly unquestionable effect of his deed, while the effect may not have been the final goal and not a method of reaching the goal.¹¹⁴

Whelan notes that there is not a lot empirical evidence available regarding the intentions entertained by cartel members. In terms of the optimal deterrence theory cartelists are however expected to be rational profit-maximisers. But as he points out this supposition may be questioned. He referred for instance to Parker who has indicated that cartels are not exclusively motivated by greed and profit-maximisation, but also by 'social and emotional (not just financial) rewards, and indirect (rather than direct) financial rewards, such as promotions and bonuses.'¹¹⁵ Yet as Whelan points out the empirical evidence may not categorically contradict the theory of cartelists being rational actors and does not have to undercut the suppositions made by the optimal deterrence theory. As he says while cartelists may even have well-meaning intentions such as avoiding redundancies, reaching the well-meaning objective requires the extraction of the overcharge – the objective, the cartelist believes, can be achieved only via cartel conduct.¹¹⁶ Importantly Whelan notes that while the perpetrator may have numerous intentions in the pursuit of a specific goal, what matters is whether the actus reus was intended.¹¹⁷

¹¹² Whelan 2013a, p. 13.

¹¹³ Whelan 2013a, p. 13.

¹¹⁴ Whelan 2013a, p. 14; See Simester and Sullivan 2007, pp. 131-132.

¹¹⁵ Parker 2011, under the heading 'D. Attraction of Cartel Conduct is Not Always Pure Greed' at para 1.

¹¹⁶ Whelan 2013a, p. 15.

¹¹⁷ Whelan 2013a, p. 14.

In contrast regarding indirect intention which requires that the perpetrator regarded the effects of his actions as ‘virtually certain’, Whelan noted that while the agreement between the competitors is only entered, it is not ‘virtually certain’ that ultimately consumers will suffer, since the cartelist may be induced to deceive the cartel itself by cutting prices, as this way it may attract more customers. The result is that the cartel agreement did not reach the stage of implementation.¹¹⁸ On the other hand implemented cartel agreements in terms of intentions would fall under the concept of stealing due to the ‘virtually certain result.’¹¹⁹

3.3.2 *Hard-core Cartels as Cheating*

Green defines cheating as follows: ‘...for us to say that X has cheated, X must (1) violate a fair and fairly enforced rule, (2) with the intent to obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship.’¹²⁰ The cheater gets to cheat and achieve an unfair advantage over others because the rule-abiding people perceive themselves to be morally tied to the mandatory rule.¹²¹ The moral standard against cheating would be violated, as Beaton-Wells argues, where companies fix prices, as in a market economy companies are expected to act separately from each other.¹²²

Green has specified the character of the rule that is infringed under his approach: the rules should be *inter alia* general, as opposed to a situation where they apply only to a particular case, the rule ought to be prescriptive rather than descriptive, mandatory instead of optional and fair.¹²³ As Beaton-Wells argues the rule that companies act independently is a rule that would fall under Green’s aforementioned characterization of the rule.¹²⁴ Whelan too has pointed out in his analysis of ‘cheating’ in the cartel context, that cartel conduct may be conceptualized as cheating. The cartel prohibition is prescriptive, since it dictates the conduct of the market participants instead of characterizing how market participants behave. The rule is mandatory in that it prohibits cartel conduct instead of giving recommendations.¹²⁵

Since *inter alia* cartels cause considerable harm and the chances that efficiencies would be found are very remote, it can be said that it does not

¹¹⁸ Whelan 2013a, 2013 pp. 15-16.

¹¹⁹ Whelan 2013a, p. 16.

¹²⁰ Green 2006 p. 57.

¹²¹ Green 2006 p. 60.

¹²² See Green 2006 pp. 58- 63; Beaton-Wells 2007 p. 699.

¹²³ See Green 2006 pp. 58- 63; Beaton-Wells 2007 p. 699.

¹²⁴ Beaton-Wells 2007 p. 699.

¹²⁵ Whelan 2013a, pp. 21-22.

appear to pose problems to say that the cartel prohibition falls within the tenet that the rule be fair.¹²⁶

Participating in the markets is beneficial for both the consumers and the companies. It could be argued that the parties have consented to refrain from certain acts and to be bound by certain rules in order to make the joint enterprise worthwhile. The interests of the parties may be diverging, as long as there is a potential benefit for both.¹²⁷ Thus an obligation to follow the rules is created and so is the legitimate expectation that also others follow the rules.¹²⁸ While becoming market participants there is the implied acceptance of being bound by the cartel prohibition.¹²⁹

It is not necessary that the cheater is aware of the identity of her victim, but¹³⁰ the violation of the rule should have taken place intentionally, in the pursuit of an advantage over others with whom the perpetrator is in a cooperative relationship governed by rules – the people obey the rules, thereby restricting their own freedom and in exchange expect benefits to accrue.¹³¹

The victims of cheating in light of the foregoing are then most conspicuously the competitors of the perpetrator, but they could also be customers and suppliers as Beaton-Wells points out.¹³²

Whelan however singled out also final consumers, besides competitors and customers as the injured parties.¹³³ Singling-out the advantage over the final consumer is hard, since cheating occurs under Green's framework when the cartelist thinks that the consumer is obeying the cartel prohibition, while she herself seeks an advantage by ignoring the cartel prohibition, as Whelan notes however the final consumer intrinsically is not able to participate in cartel conduct. Whelan however takes the view that this may be a too strict interpretation. Under a broader interpretation arguably various market rules exist and the consumer may suppose that the seller has not engaged in cartel conduct and in return observes herself another rule, which Whelan points out could be refraining from lodging a complaint with the officials. In order to further illustrate his argument Whelan envisaged an exam situation where cheating could be said to be unfair not only with respect to others taking the same exam, but since other stakeholders with an interest are tricked too: for instance the examiner who on her part observes fairness rules. Thus one

¹²⁶ Whelan 2013a, p. 23.

¹²⁷ Green 2006, p. 65.

¹²⁸ Green 2006, p. 64.

¹²⁹ Whelan 2013a, pp. 23-24.

¹³⁰ Green 2006, p. 65.

¹³¹ Green 2006, pp. 65-66; Beaton-Wells 2007 p. 699.

¹³² Beaton-Wells 2007, p. 699.

¹³³ Whelan 2013a, p. 23.

could by analogy argue that the cartelist has also an unfair advantage over the final consumer.¹³⁴

Cheating requires the intent to obtain the advantage over somebody. Whelan indicated that such advantages could be the cartel overcharge and perhaps more interestingly the freedom to engage in cartel conduct.¹³⁵ The final goal of the cartel conduct may lie elsewhere (such as getting bonuses) but it could not be reached if there was not the intention to exercise 'one's freedom to engage in that cartel activity,' thereby infringing the prohibition against cartel conduct. Whelan points out that the direct intention in relation to the goal reached via cartel conduct suggests that the cartelist had the direct intention to enter cartel conduct. Subsequently the direct intentionality would not concern only cartel agreements that have been implemented, but extends to the instances where only a cartel agreement has been concluded, since this is required for any implementation to take place and thus the method to approach the final goal that may be the cartel profits. Thus, the definition of the cartel offence could be linked to cheating and would cover also the mere entering into a cartel agreement.¹³⁶

Whelan notes that if rationality in the sense assumed by the optimal deterrence theory was proved, this would theoretically support a case to argue that the persons engaging in cartel activity intentionally infringe the moral norms discussed above and subsequently support the idea that from the perspective of retribution criminal sanctions are called for. However if cartelists were not rational the arguments based on deterrence and retribution would be undermined and showing the intentions for the purposes of the moral norms would become problematic. In order to surpass such a potential obstacle, Whelan said that it is possible to incorporate the fitting intentions into the offence in order to catch the morally unfair conduct, but this does not appear to be a desirable solution since the deterrent impact of the offence could suffer as a result of the increasing evidential burden.¹³⁷

3.3.3 *Hard-core Cartels as Deception*

Besides cheating, price-fixing may under Green's framework be conceived as deception as well: The price-fixers send the false message that they set the prices separately from each other, when the opposite is the case. This would give the wrong impression to the potential purchasers and competitors regarding the prices. In case of a bid-rigging cartel, the intended

¹³⁴ Whelan 2013a, p. 24.

¹³⁵ Whelan 2013a, p. 25.

¹³⁶ Whelan 2013a, p. 25.

¹³⁷ Whelan 2013a, pp. 26-27.

false message is that offers were made independently which means that the concept of deception appears to apply particularly well to bid rigging.¹³⁸

Typically, the cartelist does not make the explicit statement that she has not entered a cartel. Despite the lack of such a statement Whelan said that there would be on part of the consumers an untrue belief due to the presumption that competition between rival market players prevails: since the cartelist puts her goods on the market this suggests that there is no cartel at work. Whelan however points out that a lack of empirical evidence exists regarding such an assumption made by the consumers. Whelan argued however that it could be inferred that consumers do indeed make such a presumption – the UK survey of people’s views on cartels indicated that that most people regarded cartels as ‘dishonest’ which in turn could mean that such views are prompted by the expectation that rival firms engage in competition. Furthermore, consumers may simply expect that the vendors are law-abiding, which however depends on the people’s knowledge of the illegality of cartels.¹³⁹

The cartelist should act intentionally, something that the secrecy of the cartel may indicate although there is a lack of empirical evidence regarding the relevant intentions. However, in the absence of such evidence, one can draw on theoretical arguments when determining the intentions of the cartelist. The cartelist may engage in deception as a method of achieving the final goal of cartel profits. When the consumers are deceived into believing that there is no cartel, the cartelists seek *inter alia* to escape fines.¹⁴⁰

The argument of comparing cartels to deception is undermined by the requirement that the cartel agreement has to be implemented, since the untrue message involves a price with a mark-up. The customers should incorrectly assume that the price has been determined by competition, an assumption derived from the fact the goods are on the market. Thus the customers’ assumption can be incorrect only if the price has been subject to a mark-up. Subsequently Whelan points out that if the cartel offence is going to be connected to deception, from its ambit should be excluded agreements that never were implemented.¹⁴¹

3.3.4 Conclusion

Cartels challenge the whole market based economy and the concept of cheating embodies the worry that cartel conduct ‘is wrong in that the act of making or implementing a cartel arrangement denies the marketplace

¹³⁸ Beaton-Wells 2007 pp. 699-700; Green 2006 p. 76.

¹³⁹ Whelan 2013a, pp. 19-20; Stephan 2008a, p. 123.

¹⁴⁰ Whelan 2013a, p. 20.

¹⁴¹ Whelan 2013a, p. 21.

of the legitimate expectation of a competitive process.’ Yet, as Macculloch has pointed out in terms of ‘traditional cartels’ the concept of cheating is problematic: ‘[i]t begs the questions of who is being cheated and where “the rules” are set out. A case can be made that markets are expected to be competitive in nature and therefore any attempt to avoid competition is cheating on that norm. However, if one needs to stretch the meaning of “cheating” that far, I can see no reason why it would not be better to clearly set out the limitation in a more natural use of words’.¹⁴²

It seems that the concepts of deceiving and stealing would not cover cartel agreements that have not been implemented. Furthermore, Harding noted that ‘[i]t is the combination of conscious defiance and collusive action (or, put another way, heretic belief and trickery, in the sense of pretending to be good competitors but actually duping the system) which lies at the heart of cartel delinquency. In those terms Sherman Act definition of the offence, invoking the vocabulary of conspiracy, would seem to be closer to the mark than any attempt to draw upon the analogies of theft, fraud or dishonesty.’¹⁴³

All in all, it appears that the viability of the concepts of cheating, deceiving and stealing in the context of cartel activity is not beyond criticism.

3.4 THE HARMFULNESS OF THE CONDUCT SUBJECT TO A CRIMINAL PROHIBITION

The general view is that criminalizations that seek to protect a person from harming himself should not be enacted.¹⁴⁴ One may ask for example whether prostitution should be criminalized as it does not contain direct harm to other people and could be characterized as a victimless behavior, but could still be claimed to be immoral.¹⁴⁵

Moral wrongfulness and harmfulness do not always coincide: For example natural disasters may cause immense harm, but moral wrongfulness is absent. Distinguishing between the harm that is the result of a lawful conduct from what is unlawful is not necessarily easy: as Green has pointed out intense lawful competition may have the same consequences as unlawful

¹⁴² Macculloch 2012, pp. 87-88; Stucke argued that [o]ften the antitrust crimes’ defilement originates from within, namely borne out of the executives’ hearts to deceive, steal, and cheat’, see Stucke 2006, p. 494; Connor et al. maintained that ‘[t]he criminalization of cartel behavior has a long history that reflects the universal moral reprobation of secret conspiracy, theft, deception, extortion and fraud’, Connor, Foer and Udwin 2010, p. 217.

¹⁴³ Harding 2010, p. 58.

¹⁴⁴ See Huomo-Kettunen 2011, p. 38.

¹⁴⁵ Green 2006, p. 43.

price-fixing in the sense that jobs or market shares are lost.¹⁴⁶ Assuming that the competition has not been restrained by unlawful means, such harms are not considered morally wrongful though.¹⁴⁷ Kahan has said that ‘economic competition may impoverish a merchant every bit as much as theft. The reason that theft but not competition is viewed as wrongful, on this account, is that against the background of social norms theft expresses disrespect for the injured party’s moral worth whereas competition (at least ordinarily) does not.’¹⁴⁸ Indeed one way of looking at wrongfulness is whether the victim’s value is somehow undermined, or whether his rights are violated.¹⁴⁹

A criminalization should not be based on the moral perceptions that inevitably are subjective. There are for example those who would readily criminalize adultery, but arguably this is not what a liberal society should do.¹⁵⁰ Criminalizing adultery is in a stark contrast with more liberal views and the position of John Stuart Mill, who famously argued the following: ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.’¹⁵¹ In sum, it may be argued that the requirement of both wrongfulness and harmfulness ensures that private matters are not criminalized.¹⁵²

Whelan points out that the criminal law should especially prohibit conduct that is very harmful. Therefore if something is to be criminalized, one should first show that the conduct is harmful. On the other hand the perceived wrongfulness of a certain conduct increases the support for a criminalization, and therefore where certain conduct is not regarded as wrongful, but is criminalized nonetheless, the public perception of the criminal law could suffer. The moral wrongfulness of a conduct however is not the necessary condition of a criminal prohibition and as previously mentioned what is important is how the public views the conduct once it has been informed of its nature.¹⁵³ And when the immorality is manifest, also the politicians may be more inclined to act on the matter and introduce a criminal prohibition.¹⁵⁴

¹⁴⁶ Green 2006, p. 40.

¹⁴⁷ A Marxist might disagree, as indicated by Green, see Green 2006, p. 40.

¹⁴⁸ Kahan 1999, p. 420.

¹⁴⁹ Green 2006 p. 41

¹⁵⁰ See Frände 2005, p. 24.

¹⁵¹ Mill 1859, ch 1, para. 9.

¹⁵² Green 2006 pp. 44-45

¹⁵³ Whelan 2007 p. 20

¹⁵⁴ Whelan 2007 p. 21

While cartels are widely prohibited, the question remains according to Harding and Joshua whether the cartels merit criminal sanctions or are they perhaps just something that the regulators desire. The harm that results from cartels economically is clear: consumer products that are subject to price-fixing are subject to at least a 10 % markup. According to the OECD, under a conservative estimate, the harm stemming from cartels is more than billions of dollars per annum.¹⁵⁵ Beaton-Wells notes however the difficulty of measuring the harm caused by cartels and singling out the injured parties is not easy.¹⁵⁶ This is a common feature of the so-called white-collar conduct.¹⁵⁷ One argument which could be made that while cartel are harmful they are doomed to collapse anyway and subsequently ‘over-enforcement should be avoided as being inefficient,’ has been rejected for instance by Furse. He notes that ‘real world’ experience indicates otherwise.¹⁵⁸

Furthermore the cartel harm may feel remote, because it is spread out between the consumers – this way the analogy with traditional property offences such as theft may not be the most accurate one. Harding and Joshua argue that the reprehensibility of cartels arguably exists rather at the macro-level than at the micro-level.¹⁵⁹

The London Economics had produced an analysis for the Danish 2012 committee regarding the relative harmfulness of cartels when compared with other white-collar crimes. Both the direct harm to the victim and the indirect harm to the whole financial system were assessed. It was inter alia noted that the direct harm brought about by tax evasion (characteristically that not all income is reported) is of a smaller scale than that caused by cartels. The direct harm associated with insider trading is the smallest due to the substantial amount of possible investors that might be influenced.¹⁶⁰

While the indirect harm is more difficult to estimate due to the large amount of people affected who due to the dispersed nature of the harm may experience it as quite small, the London Economics estimated that tax evasion has the gravest indirect implications for the financial system. The indirect implications of cartels were estimated however relatively speaking significant and are for instance greater than those of a copyright infringement.¹⁶¹

In sum, the cartel harm is real and considerable, and clearly can be said to satisfy the criterion of harmfulness that may be required to warrant a criminalization.

¹⁵⁵ OECD DAF/COMP(2002)7 9 of April 2002, p. 2, 5.

¹⁵⁶ Beaton-Wells 2007 p. 689

¹⁵⁷ Green 2006 pp. 35-36

¹⁵⁸ Furse 2012 p. 21

¹⁵⁹ Harding and Joshua 2010, pp. 272-274.

¹⁶⁰ ‘Rapport fra udvalget om Konkurrence Lovgivningen’ March 2012. p. 196.

¹⁶¹ *ibid.* p. 197

3.5 HARD-CORE CARTELS AND THE AMBIGUITY OF THE MORAL CONTENT: THE PERCEPTIONS OF THE GENERAL PUBLIC

More than in other areas, in the field of white-collar crime there seems to be ambiguity with regard to the moral blameworthiness of the criminalized conduct.¹⁶²

When the law criminally prohibits what the society regards as morally wrongful, the perception of the moral wrongfulness is further reinforced. This is referred to as the educative function of the law. This way a message is sent to the society that some behavior merits strong disapproval. Where such consensus between the criminal law and public opinion is absent ambiguity follows.¹⁶³

Your average Joe could for example reason cartels in the following way: As the maximum financial profit is the goal of any business the situation where the consumers end up paying higher prices due to cartels could be viewed from the business point of view as a risk that is part of any trade whereby two parties make the exchange of goods and money and by consenting to this the paying party takes the inherent business risk and thus there would be a legitimate cause for the injury.¹⁶⁴

Furthermore, the increase in prices may appear nominal to the average Joe. Therefore the average Joe might ask how strongly should the cartelists be reprimanded after all? Arguably the most opprobrious parts of cartels that deserve the legal condemnation exist at the macro level – so how could the average Joe then associate them with something criminal?¹⁶⁵

For the lay people understanding the environment where white-collar offences take place is difficult. What may be even more challenging for the uninformed observer, is grasping what is criminal about white-collar crime as the white-collar crimes do not cause the visible result of bodily injury or someone being killed as a result of a physical assault or homicide. The identification of harm is not as easy.¹⁶⁶

Further the moral evaluation of White-Collar crimes is that they often take place in an environment that is actually producing something good – just think of companies employing a lot of people, and creating value where it previously was absent. This may affect our judgment of the harmfulness of their conduct such as price-fixing.¹⁶⁷

¹⁶² Green 2006 p. 1

¹⁶³ Green 2006 pp. 46-47.

¹⁶⁴ Harding 2010 p. 52.

¹⁶⁵ Harding, 2010 p. 52.

¹⁶⁶ Green 2006 p. 35.

¹⁶⁷ Green 2006 p. 39, see also Parker 2011, p. 252; See also Terry calvani, cartel penalties in ireland, p. 281.

What may add to the ambiguous nature of white-collar crimes is that the same behavior may be subject to either criminal law or administrative (civil) law treatment.¹⁶⁸

Further, not making a distinction between the conduct and result causes a ‘blurring effect.’¹⁶⁹ White-collar crimes may combine both incomplete and complete behavior into one offense only.¹⁷⁰

At the sentencing stage the political biases and class-consciousness of the judges may affect the severity of sentences imposed. As Stuart Green describes the conservative judge may be harsher in their thought on how street crime should be treated than what their liberal colleagues are, whereas the liberal colleagues would treat the white-collar more severely. The moral ambiguity of white-collar crime may affect the stance taken by the legislature and the prosecutors as well. In the US context this is exemplified in the lysine cartel case where the appeal court raised the prison sentences from two to three years, which was the maximum sentence under the law.¹⁷¹ In relation to the mentioned cartel Stuart Green cites Kurt Eichenwald, the author of the blockbuster book, ‘the Informant’¹⁷², who has ridiculed the sentences in general for being too lenient by saying that: ‘Again, executives who effectively cheated every grocery store in the country received shorter sentences than if they robbed just one.’¹⁷³

Despite the apparent ambivalent feelings in relation to white-collar conduct, for example Green has argued that white-collar activities often are so harmful that they merit criminal sanctions.¹⁷⁴ This is the view that this author takes with regard to hard-core cartels.

3.5.1 The Public Perception of the Cartel Offence in the UK and Australia

While studying the moral content of cartels, it is helpful to survey the public opinion and this is what has been done in the UK and Australia.

It may be argued that it is important to know how the public perceives cartels and that this should be part of the enforcement discussion.¹⁷⁵ This is relevant especially if the discussion does not only touch upon the economic harm that cartels bring about, but also the moral sphere.¹⁷⁶ Getting support

¹⁶⁸ Green 2006, p. 24.

¹⁶⁹ Green, 2006, p. 37.

¹⁷⁰ Green 2006, p. 37.

¹⁷¹ Green 2006. pp. 27-28.

¹⁷² The book gives an account of the infamous Lysine cartel, See Eichenwald 2012.

¹⁷³ Eichenwald 2002.

¹⁷⁴ Green 2004, p. 519.

¹⁷⁵ Beaton-Wells 2012. p. 267.

¹⁷⁶ Beaton-Wells 2012 p. 289.

from the public to treat a given conduct as criminal may be viewed important from the perspective of criminal law.¹⁷⁷ In Australia¹⁷⁸ and in the UK¹⁷⁹ the public opinion regarding cartels has been surveyed and the studies are unique in the sense that they are the only ones of their kind touching upon this matter.¹⁸⁰ Both studies took place online, the Australian sample consisting of 1334 respondents from Australia¹⁸¹ and the British sample of 1219 people residing in the UK.¹⁸² It seems the study results are in general in agreement with each other.¹⁸³ Both studies used factual settings to portray cartel behavior to get answers from the respondents.¹⁸⁴

The UK survey showed inter alia that only 11 % saw that the cartelists should be imprisoned.¹⁸⁵

7% saw price-fixing as something similar to theft and 8% compared it to fraud — only two in every four deemed price-fixing to be dishonest. This is problematic, because if cartel activities are not seen as something equivalent to criminal activities the criminal law based dishonesty requirement (which the Government removed) in the UK could indeed render the cartel offence ineffective. It seems that under such circumstances getting cartelists sentenced to prison will be challenging.¹⁸⁶

In Australia two-thirds of the surveyed were of the opinion that cartels should be illegal. Yet most of the public does not see that cartels merit criminal treatment, 44% supported criminal prohibition against price-fixing, the support for imprisonment in case of price-fixing was below 20 %.¹⁸⁷ Despite this both in the UK and Australia the public is of the view that firms and individuals should still be subject to penalties.¹⁸⁸ In Australia there was not a significant support for the leniency policies, even if the cartel would remain undetected absent the leniency program.¹⁸⁹

Beaton-Wells and Parker pointed out that in order for the introduction of criminal sanctions against cartelists to be successful people engaged in commercial activity would have to recognize that cartel behavior is subject to criminal penalties that may attract custodial sanctions. In this regard

¹⁷⁷ *ibid.* p. 276.

¹⁷⁸ See Beaton-Wells Caron, Haines Fiona, Parker Christine and Platania-Phung Chris, 'Report on a Survey of the Australian Public regarding Anti-Cartel Law and Enforcement' 2010.

¹⁷⁹ See Stephan 2008a.

¹⁸⁰ Beaton-Wells 2012, p. 268.

¹⁸¹ Beaton-Wells 2012, p. 268 see footnote 12.

¹⁸² Stephan 2008, p. 125.

¹⁸³ Beaton-Wells 2012 p. 268

¹⁸⁴ Beaton-Wells 2012 pp. 269-270

¹⁸⁵ Stephan 2008a, p. 144.

¹⁸⁶ Stephan 2008a, p. 144.

¹⁸⁷ Beaton-Wells 2012 . pp. 270-271

¹⁸⁸ *ibid.* p. 272; Stephan 2008 pp. 132-133.

¹⁸⁹ Beaton-Wells 2012 p. 274.

the Australian Cartel Project showed that 45 per cent of the surveyed were aware of the competition law fines and whereas 23 per cent were informed of the possibility of custodial sanctions in case of cartel conduct.¹⁹⁰ The surveyed for the most part perceived a higher probability of detection and enforcement when there was a shift from civil to criminal sanctions.¹⁹¹

Regarding the level of awareness of the sanctions and how the probability of detection and action was viewed, the Australian Cartel Project results showed that ‘the strongest predictor of knowledge and perceived likelihood of detection and enforcement was agreement with criminalization.’ The people who thought that price-fixing should not be subject to any action or criminal sanctions were 7 times more likely to suppose that cartel conduct did not contravene any laws.¹⁹² For the cartel criminalization context Beaton-Wells and Parker note that importantly deterrence depends on the person’s ‘normative appraisal of the law and its enforcement’ and therefore the deterrence theory with its rational profit-maximizing individuals is weakened.¹⁹³

15 per cent of the surveyed said that when civil sanctions were employed they themselves would probably infringe the laws, whereas the figure was 9 per cent when criminal sanctions were available. As Beaton-Wells and Parker point out this means that 1 in 10 would consider entering cartel activity while being aware of exposing themselves to custodial sanctions.¹⁹⁴

In Beaton-Wells’ view what is similar between the Australian and British studies is that the public tends to see cartel behavior as something more related to the moral sphere and to the ‘inherent nature of the conduct’ rather than the economic consequences that it produces.¹⁹⁵ She lists the following points that support this view:

- When the cartel conduct was characterized as dishonest rather than drawing on its economic results, treating it as a criminal offence got the most support from the respondents.

- The public naming of the guilty was heavily supported in both countries, and as Beaton-Wells points out, this indicates that public sees that the conduct merits censure from the whole community.

- That the public views the matter through moral lenses may be reflected also in the meager support for leniency, namely letting the whistle-blower go free.

¹⁹⁰ Beaton-Wells and Parker 2012, p. 8.

¹⁹¹ Beaton-Wells and Parker 2012, p. 11.

¹⁹² Beaton-Wells and Parker 2012, pp. 12-13.

¹⁹³ Beaton-Wells and Parker 2012, p. 13.

¹⁹⁴ Beaton-Wells and Parker 2012, p. 14.

¹⁹⁵ Beaton-Wells 2012, p. 275

-Both surveys measured robust support for the view that cartels are equally serious irrespective of results, for example in the absence of a markup in prices.

-that cartel behavior should be treated more severely, when a ringleader has forced other cartel members, found significant support amongst the Australian respondents.¹⁹⁶

Even if the cartel was entered in a bid to avoid redundancies or was formed by smaller companies or directed the cartel gains at making ‘environmentally friendly’ products generally was not seen as a mitigating factor.¹⁹⁷

Beaton-Wells however said that the study results imply that the project to criminalize cartels is more the concern of the authorities who wish to employ more robust tools than a movement amongst the general public.¹⁹⁸ Green and Kugler argued that the moral acceptability of criminal law amongst the general public has a direct bearing on the stigmatizing and compliance cultivating traits of the criminal law.¹⁹⁹ In order to develop compliance it is seen that a legal policy should be such that the law is in harmony with the moral perceptions of the public. This is so with or without the employment of criminal law measures. Where there is a gap between the law and the public perception, arguably problems could ensue, such as the incapability of the law to shape the conduct.²⁰⁰ Parker has asserted that if deterrence claims are supported by morally imbued claims that lack public support, the dedication to compliance of the firms could be impaired.²⁰¹

As Beaton-Wells points out it is not easy to bring into agreement the values of a firm and the law as was reflected in the promotion of a corporate executive while a criminal cartel charge against him was pending.²⁰² Further, it has been argued that compliance could suffer when crisis cartels are formed out of altruistic motives, such as the motivation to avoid redundancies.²⁰³ The aforementioned could be taken to mean that more emphasis should be put on the perceptions of the people working within firms so as to influence their views regarding commendable behavior and conversely wrongful behavior.²⁰⁴

It may be noted that the study of Green and Kugler ‘found that lay persons, in general are comfortable making fairly fine-grained distinctions

¹⁹⁶ *ibid.* pp. 275-276

¹⁹⁷ Beaton-Wells and Parker 2012, pp. 17-18.

¹⁹⁸ Beaton-Wells 2012, pp. 277-278.

¹⁹⁹ Green and Kugler 2012, p. 33; Stucke 2006, p. 536.

²⁰⁰ Beaton-Wells 2012, pp. 278-279.

²⁰¹ See also Parker 2006, p. 4.

²⁰² Peel 2008; Beaton-Wells 2012 p. 279.

²⁰³ Beaton-Wells 2012 p. 280.

²⁰⁴ Beaton-Wells 2012 p. 280.

regarding the law of white collar crime.²⁰⁵ That people are capable of such an assessment arguably was overlooked in the design of the UK cartel offence that incorporated the dishonesty test.²⁰⁶

Beaton-Wells and Parker noted that besides stigmatizing cartel conduct in an attempt to create deterrence the individuals normative judgments should be brought closer to what the law states in order to boost compliance.²⁰⁷ It would also be good for the authorities to establish a connection with the business community and seek to comprehend the businesses' points of views, since the emergence of normative engagement depends on the subjective views of people deeming that they have been heard.²⁰⁸ While the authorities should be willing to consider the views of the business community and communicate with it, the authorities do not have to embrace such views.²⁰⁹ Nielsen and Parker had also acknowledged in their study that the regulator also needs a stick, since in the absence of one, the regulator's attempts to shape conduct is futile, but still the regulator, in order to create a credible possibility of enforcement, should wield its power fairly.²¹⁰

3.6. CONCLUSION

From the perspective of *ultima ratio*, a central criminal law principle, the moral content of a given conduct, liable to become subject to criminal penalties, should be evident and such that a criminalization is justified, so as to reserve criminal law only to the most egregious cases.

The legitimacy of the criminal law may depend on the public perceptions of the criminalized conduct. The overcriminalization critique draws *inter alia* on this gap that exists between the written law and the public perceptions, which arguably dilutes the criminal justice system.

This author welcomes the discussion regarding the morality concerning cartel conduct and sees it as a vital part of any cartel criminalization project. Where there is ambiguity in the minds of the public regarding the moral wrongfulness of cartels, competition law advocacy is called for. On the other hand the educative function of the criminal law may alter such views held by the public. In terms of judicial attitudes prejudiced against unsuspended custodial sanctions, lengthier prison sentences may help.

²⁰⁵ Green and Kugler 2012. p. 34.

²⁰⁶ Beaton-Wells 2012. p. 281.

²⁰⁷ Beaton-Wells and Parker 2012, p. 21.

²⁰⁸ Beaton-Wells and Parker 2012, p. 21.

²⁰⁹ Beaton-Wells and Parker 2012, p. 21.

²¹⁰ Parker and Nielsen 2011, p. 116.

In the context of a cartel criminalization project it may be noted that while traditionally cartels have been viewed as *mala prohibita* crimes, the argument has been made above that they are not morally neutral – it appears that the delinquency of cartels is connected with the perception that they defy the whole market economy.

The influential theory on white-collar conduct by Green indicates that cartels might violate everyday moral norms against cheating, deceiving and stealing, this argument concerning the viability of the aforementioned everyday moral standards is however not beyond criticism. On the other hand there exists robust economic evidence on the harmfulness of cartels. Thus it seems that from a moral perspective there are grounds to criminalize cartels.

4 Should the EU or alternatively Individual Member States take on the Cartel Criminalization Project?

4.1 INTRODUCTION

When a criminalization of cartels is contemplated in the European context one should naturally take heed of the developments in terms of the EU – if the EU chooses to take measures in this area EU member states would become under an obligation to implement the relevant EU rules. Therefore exploring the possible legal basis in the TFEU to criminalize cartels is important. This task will be undertaken below. One point of debate has been whether harmonized rules at the Member State level are sufficient or should cartels also be criminalized at the level of the EU Institutions. This is a relevant question and will be touched upon. Finally, a discussion is conducted concerning the sorts of costs that might be incurred in case of an EU-wide criminal anti-cartel regime and whether individual accountability could take the form of a Director Disqualification Order (DDO).

4.2 THE EVOLUTION OF THE EU CRIMINAL LAW COMPETENCE

As a starting point it may be asked whether criminal law is something exceptional in the EU law context? On the one hand, it may be pointed out that the EU law overrides national criminal law, thus not putting this area of law on a pedestal in relation to other areas of law. As opposed to that due to the severe interference that criminal law brings about and the cultural traits that it carries, it may be regarded as something special, far removed from other areas of law.¹ The notion of the elevated status of

¹ Asp 2013 p. 74

criminal law, according to Asp, owes inter alia to the rigorous criminal law safeguards, the condemnation that it carries. Moreover, ethics, tradition and sovereignty concerns of nation states highlight such understanding of criminal law, and the national constitutional provisions that grant such a position to criminal law.² With a view to the latter interpretation of the status of criminal law, one may examine the implications of the expanding criminal law powers of the EU.

Originally the European community was a project to promote peace, but over time the competences covered for instance organized crime. The Maastricht Treaty further extended the criminal law powers, by introducing the third pillar, under which the unanimous Council could adopt criminal law measures. The Treaty of Amsterdam further reinforced this line of development.³

Before the Lisbon Treaty entered into force the pillar structure of the Union gave the impression that criminal law measures could be properly adopted within the confines of the area of Police and Judicial Cooperation in Criminal Matters.⁴ The Commission contested in 2003 the Council framework decision regarding the criminal law rules on the protection of the environment, based on art. 29 and 31(e) in the EU Treaty, instead in the Commission's view criminal measures should have been adopted on the basis of Article 175(1) in the former EC Treaty. The ECJ adopted the view in the Environmental crime case that based on art. 175 EC, now art. 192 TFEU, criminal measures could have been introduced 'when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences' and the Union legislator may take criminal law measures that are necessary in its view, thus including the community pillar as well.⁵ Consequently based on ex art. 175 EC a directive was adopted.⁶ Further in the *Ship-Source Pollution* case the ECJ took the position that 'the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence.'⁷

By analogy such criminal powers could apply in other areas of community pillar than environmental matters, and indeed a directive introducing criminal penalties against employers of unlawfully staying third-country nationals had its basis in the former art. 63(3)(b) EC, now

² Asp 2013 pp. 76-78

³ Turner 2012, pp. 5-6.

⁴ Khan 2012 p. 83.

⁵ C-176/03 para 48.; Simonsson 2011, p. 206.

⁶ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. OJ L 328 2008. P.28 ff.

⁷ C-440/05 para. 70

art. 79 TFEU. The explicit wording of the aforementioned article was silent on the criminal law powers, but this did not prevent the introduction of the directive.⁸

In the field of intellectual property law the Commission sought to tackle counterfeit products via criminal law already back in 2003.⁹ This was not however accepted by the European Parliament. In the Parliament's view administrative sanctions are sufficient.¹⁰ This was followed by a new proposal by the Commission.¹¹ As a response to the Environmental crime case the Commission later amended the proposal.¹²

The Criminal law competences under art. 83(2) TFEU may be regarded as a systematization of the notable ECJ decisions, namely the Environmental and Ship-source pollution cases.¹³

Arguably Article 83 TFEU presented an explicit dilution of the sovereignty of the EU Member States in criminal matters.¹⁴

The democratic deficit at the EU level however gives support for the contention that the decision-making on criminal law should more appropriately take place at the national level to maintain legitimate criminal law. The principles of subsidiarity and proportionality that are enshrined in the Treaties give support for this as well.¹⁵

⁸ Khan 2012 p. 83; Directive 2009/52/EC of the European Parliament and of the Council of 18 Jun. 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. OJ L 168, 2009. p. 24.

⁹ See Simonsson 2011, p. 206; See Commission proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights COM(2003) 46 final. Art. 20; See also Mylly 2012.

¹⁰ Bulletin EU 3-2004, Internal Market (23/28)), point 1.3.53.

¹¹ Commission proposal for European parliament and council directive on criminal measures aimed at ensuring the enforcement of intellectual property rights; Proposal for a Council Framework Decision to strenghten the criminal law framework to combat intellectual property offences' COM(2005) 276 final.

¹² Commission, amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM(2006) 168 final.

¹³ Asp 2013 p. 127

¹⁴ See article 83(2) of the TFEU establishing a broad competence for the EU to legislate criminal law: "If the approximation of criminal law and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned."

¹⁵ Turner 2012, p. 4.

4.3 ARTICLE 83(2) TFEU – THE REQUIREMENT OF A PRIOR HARMONIZATION

Under the Lisbon Treaty the former pillar structure was abolished and Article 83(2) TFEU was introduced, giving the Union explicit criminal law powers: ‘if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonization measure in question, without prejudice to Article 76.’

It has been postulated that art. 83(2) TFEU is the very likely basis if an EU-wide criminal ban on cartels took place.¹⁶ In addition harmonized penalties for competition law infringements could possibly be adopted on the basis of art 114 TFEU. Article 114 TFEU provides that measures may be adopted ‘for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.’¹⁷ Other possible legal bases are Article 103 TFEU and Article 352 TFEU.¹⁸

Art. 83(2) TFEU may be viewed as the main legal basis for criminal measures under the Lisbon Treaty.¹⁹ Opinions have been voiced, doubting whether the criteria introduced by Article 83(2) TFEU are fulfilled in the case of a criminalization of the competition law enforcement. Would it be regarded as ‘essential’ and has the required degree of harmonization occurred already? ²⁰

Dougan has argued that Article 83(2) TFEU seems to require that previous harmonization should have taken place via legislative instruments. Art. 101 and 102 TFEU, the primary rules on competition law, are instead Treaty provisions. As noted by Dougan, the drafters of the Treaty may not have been aware of this result. Dougan has advanced the argument that as art. 83(2) TFEU as a result of the wording seemingly would not allow the introduction criminal penalties against competition infringements, it is possible that the derived powers acknowledged in the *Environmental Crime*

¹⁶ See Furse 2012, p. 222; The Constitutional Treaty which was rejected included a wording very similar to art. 83(2) TFEU in article III-271(2) and Wouter Wils argued that it ‘...could undoubtedly be used to criminalize the enforcement of EU antitrust law in all the EU Member States...’. See Wils 2005a, p. 159.

¹⁷ See Frese 2012, p. 113.

¹⁸ Khan 2012, pp. 84-85.

¹⁹ Öberg 2011, p. 315-316.

²⁰ See for example Khan 2012 p. 84; Öberg 2011 p. 313 and 316.

case could be invoked.²¹ The powers under the *Environmental Crime* case do not require directives, as Article 83(2) TFEU does, and the directives may only provide for minimum rules and therefore one could say that there is more room for flexibility under the former approach.²² Moreover the national parliaments may more easily interfere based on subsidiarity claims under Article 83(2) TFEU and the UK, Ireland and Denmark may opt-out under it with ease. Each Member State has also the right to use the emergency brake under art. 83(2).²³ Dougan however considers the powers under the *Environmental Crimes* case latent and acknowledges that using such powers for a harmonization may be problematic from the viewpoint of the principle of legality if harmonization is accomplished via ‘non-legislative competence’²⁴

Khan has argued that while harmonization thus far in the field of competition law concerns the substantive rules, it does not as clearly concern the sanctions imposed and thus Article 83(2) TFEU requirement of prior harmonization would not be fulfilled.²⁵

Öberg says that while regulation 1/2003 was adopted on the basis of the sector specific art. 103 TFEU and it could be argued that Regulation 1/2003 is a prior harmonization measure, being the special legislative procedure required by Article 83(2) TFEU, he still believes this to be the wrong solution due to a lack of democratic legitimacy.²⁶ Democratic legitimacy may be regarded as particularly important in the field of criminal law as criminal measures are especially intrusive.²⁷ This way merely consulting the European Parliament, as Article 103 TFEU requires which is the special legislative procedure under art. 289(2) TFEU derogating from the ordinary legislative procedure to make EU decision-making easier, would not suffice to establish democratic legitimacy.²⁸ In the ordinary legislative procedure the Council and the Parliament are both legislators, whereas the special legislative procedure makes the Council the only legislator.²⁹

There is a case to argue that since Regulation 1/2003 does not concern substantive competition law rules, but rather touches upon procedural

²¹ Case C-176/03 *Commission of the European Communities v Council of the European Union*; Dougan Michael, ‘From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law’, in (ed.) Cremona Marise, *Compliance and the Enforcement of EU Law*, OUP: UK., 2012 p. 111.

²² Dougan 2012 p. 110.

²³ Dougan 2012 p. 110.

²⁴ Dougan 2012 p. 111.

²⁵ Khan 2012 p. 84; Öberg 2011 pp. 315-316.

²⁶ Öberg 2011 p. 315.

²⁷ ‘The Manifesto on European Criminal Policy’, 2011, p. 90.

²⁸ Öberg 2011 pp. 315-316.

²⁹ See the Official Website of the European Union, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0016_en.htm. Last visited on the 11th of March 2013.

aspects, and thus does not introduce sanctions on individuals, there is not a sufficient degree of prior harmonization in existence. Öberg has suggested that first the individual sanctions should be harmonized across Member States, having a legal basis in art. 114 TFEU, as a more democratically legitimate option and then if need be, in a subsequent directive having a legal basis in art. 83(2) TFEU, criminal measures against cartels would be adopted. Article 114 TFEU stipulates that measures may be introduced 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'³⁰

He points out that this way art. 83(2) TFEU as the chief legal basis for criminalization under the Lisbon Treaty would still be observed.³¹

Chalmers et al. point out that the degree of prior harmonization could be interpreted either narrowly or broadly. Under the former interpretation it would mean that prior legislation set by the EU should have been violated to justify the criminal measures whereas the latter interpretation would allow criminal measures where certain conduct has not yet been completely regulated by the EU, and no violation of the preceding EU law in the area is required.³²

Peers points out that one cannot claim that a Union policy requires to be effectively implemented unless there has already been harmonization in the field law in question previously, and also this requirement was presented in the Court's case law prior to the Lisbon Treaty changes. Peers however makes the point that a 'full harmonization' in a particular area is not what is the prerequisite.³³ Regarding the temporal criterion in Article 83(2) TFEU of a prior harmonization, the English version of the Treaty does not appear to allow a simultaneous harmonization and criminalization, but according to Peers this interpretation should be doubted. As Peers puts forward the 'effective implementation' of a Union policy could be eroded if criminal law measures could be adopted only once harmonization has occurred. Furthermore, the time period between the harmonization measure and the criminal measure is not prescribed, thus giving rise to the possibility that a criminal measure is adopted immediately after the harmonization measure.³⁴

³⁰ Frese has also argued that art. 114 TFEU provides a possible legal basis, See Frese 2012, p. 113; It may be mentioned that Cseres said that '[t]he most important legal obligations that stemmed from Regulation 1/2003 for all the Member States were laid down in Article 3, namely the obligation for national competition authorities and national courts to apply Articles 101 and 102 as well as the convergence rule for Article 101, and in Article 35 in conjunction with Article 5, the obligation to empower national competition authorities.' Cseres KJ, 2010, p. 151.

³¹ Öberg 2011 pp. 315-316.

³² Chalmers, Davies & Monti 2010, p. 617.

³³ Peers 2011, p. 775.

³⁴ Peers 2011, p. 776.

Peers does not reject criminalization of EU competition law enforcement under art. 83(2) TFEU.³⁵

Asp argues that as art. 83(2) TFEU sets out that harmonization may occur in areas where previous harmonization has taken place, and refers to the Treaty articles, such as art. 101 TFEU as a basis for such action. He notes the calls by several authors that prior to a criminal law harmonization, by means of a directive some degree of harmonization should be in place. In Asp's view Article 83(2) TFEU may suggest such an interpretation. Further the *ultima ratio* principle means that criminal should be the last resort and from that perspective requiring two separate directives could be sensible.³⁶ According to Asp it is close to irrelevant whether the harmonization measures are adopted simultaneously, without a period between, and that it may very well be the case that the legislator and ECJ accept the non-criminal and criminal harmonization through one measure only. Whether this is good criminal policy is another matter, as Asp indicates.³⁷

The *environmental crime* and the *Ship-source pollution cases* and the implied competences therein are arguably codified in Article 83(2) TFEU. Whether the former competence exists today despite the new Treaty provision is a matter of debate. In Asp's view the introduction of art. 83(2) TFEU removes the competences derived from the aforementioned case law, as accepting such powers would not be based on good sense.³⁸

³⁵ Peers points out that decision making under art. 83(1) TFEU is different from art. 103 TFEU. Peers 2011. p. 777; It may be mentioned that art. 83(1) TFEU reads as follows: *'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.'

³⁶ Asp 2013 pp. 132-134

³⁷ Asp 2013 pp. 134-135

³⁸ Asp 2013 p. 136

4.4 THE ESSENTIALITY REQUIREMENT UNDER ART. 83(2) TFEU

The Treaty on the Functioning of the EU (hereinafter TFEU) sets out in Article 83(2) the competence of the EU to employ criminal law measures if they are essential for the effective implementation of Union policies. Article 83(2) TFEU limits the Union competences to enact criminal law measures to criminal sanctions that are essential for the effective implementation of Union policies to materialize – it may be argued that the Union competence is constrained by the *ultima ratio* principle.³⁹

Prior to the introduction of the Lisbon Treaty Dawes and Lynskey argued that the Community legislature should establish in each case whether criminal penalties are essential for the attainment of policy objectives.⁴⁰

Inter alia the following grounds were given in the Commission proposal in 2007 regarding the introduction of environmental penalties: firstly the deterrent effect of harsher sanctions which would be followed by a lower number of offences and in general the need to introduce criminal penalties to implement Community's environmental policy and the stronger criminal investigatory means that are lacking under an administrative regime. The Commission opined that only criminal penalties are adequately dissuasive.⁴¹ It may be pointed out that with regard to competition law infringements Wils has argued that more robust investigatory tools that are available under a criminal regime could provide effectiveness.⁴²

Analysing the essentiality requirement is a part of a determination whether the criminalization of cartels should be undertaken. The word 'essential' may raise considerable interest, for example one commentator, Jacob Öberg, has examined the different language versions of the TFEU to determine whether variations exist as to the translation of the word 'essential' between different language versions. The result was that some versions appear to require that the criminal measures are 'absolutely necessary' whereas for example the Finnish and Swedish versions require only that the criminal measures are 'necessary.' Essentiality would then mean in the context of the Treaty that without criminal measures the Union policy could not be effectively implemented.⁴³

³⁹ Draft Council conclusions on model provisions, guiding the Council's criminal law negotiations, JAI 868, DROIPEN 160, 16542/09, Brussels, 23 November 2009, pp. 4-5

⁴⁰ Dawes and Lynskey 2008, p. 144.

⁴¹ See to this effect Commission Proposal on February 9th, 2007, COM(2007) 51 final, 2007/0022 (COD) p. 2.

⁴² See Wils 2005a, pp. 142-145.

⁴³ See Öberg 2011, p. 292.

As art. 83(2) TFEU gives competence for the EU to legislate in criminal matters when this is essential to effectively implement Union policies, Herlin-Karnell thinks that one may too easily suppose that criminal law brings with it effectiveness and checking on effectiveness is difficult – where goes the line beyond which it should be allowed to make the effectiveness claim. She points out that ‘most criminal lawyers and criminologists’ do not always regard criminal law as the best social control tool.⁴⁴ She argues that art. 83(2) TFEU is inexact in terms of the competence that the Union gets to legislate, and opines that the competence appears broad.⁴⁵

When considering a criminalization in light of the principle of effectiveness, one line of argument goes on saying that the credibility of the criminal law system suffers as a result of a stipulation that is not effective (paper tiger argument). Too strict criminal law provisions on the other hand do not produce the desired effects as they loose the respect of the people.⁴⁶

Herlin-Karnell characterizes art. 83 TFEU as *lex specialis* authorizing the EU to legislate. From a constitutional perspective she thinks it’s problematic. She is of the opinion that if art. 83(2) TFEU could undermine the idea of using criminal law as the last resort if used as a ‘carte blanche’. Further it would make attribution of powers futile.⁴⁷ She points out that overcriminalization goes against what is effective and calls for the observance of the principles of proportionality and subsidiarity in the field of criminal law.⁴⁸ Art. 69 TFEU expects the national parliaments to safeguard these principles when the Union legislates.⁴⁹

According to Herlin-Karnell, the common perception is that those who seek to resort to a criminalization also need to prove that it would be effective, such burden according to her should not lie on those who do not propose the criminalization trajectory (this is the objective of the ultima ratio principle).⁵⁰

It has been pointed out that its possible that administrative sanctions could in many instances be more effective than criminal law penalties. According to this reasoning administrative penalties would be more effective due to the lack of subjective fault requirement. She however points out that sanctions should not be disguised as administrative ones, if in reality they are criminal, at least under the autonomous interpretation of the European

⁴⁴ Herlin-Karnell 2012b p. 339; See Opinion of Advocate General Mazak, Case C-440/05 para. 115

⁴⁵ *ibid.* p. 339

⁴⁶ Herlin-Karnell Ester 2012a, p. 59.

⁴⁷ Herlin-Karnell Ester 2012b, p. 339.

⁴⁸ Herlin-Karnell 2012b . pp. 344-345.

⁴⁹ Herlin-Karnell 2012b p. 344.

⁵⁰ See Herlin-Karnell 2012a, pp. 57-58; Öberg 2012, p. 12.

Court of Human Rights.⁵¹ She underlines that it is problematic that the EU seems to use administrative penalties to in effect operate in the criminal law field. Importantly the crucial principle of *nulla poena sine culpa* enshrined in art. 6 ECHR is more limited under an administrative regime than under the criminal regime.⁵²

Herlin-Karnell argues that symbolism, which is connected to effectiveness, raises questions if one sees European criminal law as a symbol. According to Herlin-Karnell, it is problematic if a criminalization is adopted on grounds of symbolism. She asks whether criminal law as a symbol guarantees effective protection or whether the goal is to attach a symbolic label on the offender. In her view the stigmatic label, that the criminal law brings with it is automatic and therefore, should not determine what gets criminalized as the result would lead to overcriminalization.⁵³

If the objective is to influence morals, one could argue that such effects should be examined for a more extensive period of time to see how the morals of the society are affected. In Herlin-Karnell's opinion the EU is not at the stage yet where it could employ the criminal law symbolism to affect the public's views on what is morally acceptable and what is not.⁵⁴

Öberg has opined that the Union should proceed with criminalizing cartels only once less restrictive measures such as director disqualification orders in combination with personal fines have been tested and proven ineffective. He points out that the Union is not experienced in using individual sanctions and that the deterrent effect of criminal penalties remains to be proven and thus criminal sanctions should not be adopted at this point. He thinks that the Union legislator would not necessarily be able to show that criminal sanctions would prove essential for the effective implementation of Union policies.⁵⁵

As pointed out by Peers assessing whether the criterion of essentiality under art. 83(2) TFEU is fulfilled does not happen without difficulty. During the pre-Lisbon Treaty era this already applied to the criminal law competence of the Community, as per the case law.⁵⁶ The ECJ specifically referred to the essentiality requirement also in the Environmental Crime Case.⁵⁷

⁵¹ See Herlin-Karnell 2012a, p. 58; See chapter 'Punitive Administrative Sanctions in Finland: Neither Fish nor Fowl'

⁵² Herlin-Karnell 2012a, p. 59.

⁵³ See Herlin-Karnell 2012a, p. 58; See in this work the discussion in chapter 'Punitive Administrative Sanctions in Finland: Neither Fish nor Fowl'.

⁵⁴ Herlin-Karnell 2012a, p. 59.

⁵⁵ Öberg 2011, p. 313.

⁵⁶ Peers 2012, p. 775.

⁵⁷ See the 'Environmental Crime Case' Case C-176/03 para. 48.

Asp points out that the EU legislator is the one who should make the decision whether the criteria of essentiality are met, thus the criteria curbing the legislative competence of the legislator. The decision by the legislator is further possibly subject to the review by the ECJ.⁵⁸

The Court has stated that the Union legislator should have a broad freedom to decide on matters that concern ‘political, economic and social choices on its part,’ and that only manifest inappropriateness can render the measure invalid.⁵⁹

The *Environmental case*’s analysis did not assess the possibility of introducing alternative sanctions and arguably the evaluation regarding the fulfillment of the necessity requirement could have been more thorough.⁶⁰ Indeed critical views of the *Environmental case* have emerged relating to the principle of subsidiarity and attribution of powers as the Court only seemed to emphasize effective enforcement. Dougan argues that the court simply appeared to endorse the view that criminal sanctions are most effective.⁶¹ Dougan acknowledges that the decision on the criminal law measures is appropriately made by political institutions.⁶²

Asp argues that ‘it is probably not realistic to require hard empirical data supporting the assertion that criminal law measures are essential – such data will seldom be available.’⁶³ As opposed to that it could be expected that an effort is made by citing the available evidence and from a practical point of view advancing arguments of sound judgment.⁶⁴

⁵⁸ Asp 2013 pp. 130-132

⁵⁹ See Case C-210/03, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*. Para. 48

⁶⁰ Dougan 2012 p. 101

⁶¹ Dougan 2012 p. 101

⁶² ‘Such basic political choices about the appropriate role and scope of the criminal justice system are not (and should not) be open to second-guessing by the courts. The judicial function is better discharged by a careful scrutiny of whether the legislature’s more detailed choices about offences and sanctions, as well as their actual application and enforcement within the Member States, complies with the principles of proportionality and other fundamental rights guarantees.’ Dougan 2012 p. 102

⁶³ Asp 2013 pp. 130-132

⁶⁴ Asp 2013 p. 131

4.5 THE PROPOSAL REGARDING MARKET ABUSE⁶⁵

Recently the Commission has proposed a Directive that addresses the market abuse problems, namely insider trading and market manipulation, by the introduction of criminal sanctions. The legal basis is in article 83(2) TFEU. Discussion has emerged whether this is the sufficient legal basis.⁶⁶ A further Regulation is proposed by the Commission which would fight market abuse via administrative sanctions. The Regulation has a basis in article 114 TFEU. A number of questions arise due to these proposals: is the criminal law the correct tool to resort to in the first place, does sound legal basis exist and how are the fundamental rights protected.⁶⁷

This proposed Directive concerning market abuse is interesting in the sense that it is the first case to show the boundaries of article 83(2) TFEU.⁶⁸ As art. 83(2) TFEU requires prior harmonization, also that requirement will be tested. It should be noted that not much areas of law remain where no harmonization has occurred.⁶⁹

Enacting laws in this field of law might not necessarily be surprising, as historically speaking financial crimes have presented a considerable threat to the creation of the internal market. The Lisbon Treaty gives the EU expressly a competence to legislate in the field of criminal matters, but even prior to that there were views held that the as the EU was an economic union, there were grounds to take measures to prevent financial criminality.⁷⁰

When considering the legal basis in art. 83(2) TFEU for the introduction of the market abuse directive, one may note that there is not a general competence for the EU to legislate with regard to market abuse. The EU has a shared competence with the Member States as set out by article 4(j) TFEU.⁷¹

⁶⁵ It should be noted that the market abuse Regulation No 596/2014 and the Directive 2014/57EU regarding the criminalization of market abuse went on to appear in the EU Official Journal – the regulation will enter into force in July 2016, whereas the directive has a 2-year implementation phase. To this effect see Daily News of 2014-06-12, European Commission – 12/06/2014; See also the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation Brussels, 20.10.2011 COM (2011) 654 final; Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), Brussels, 20.10.2011. COM(2011) 651 final.

⁶⁶ See Herlin-Karnell Ester 2012c.

⁶⁷ Herlin-Karnell 2012c, p. 481.

⁶⁸ Herlin-Karnell 2012c, p. 485.

⁶⁹ Herlin-Karnell 2012c, p. 485.

⁷⁰ Herlin-Karnell 2012c, p. 482.

⁷¹ Herlin-Karnell 2012c, p. 483.

In the impact assessment that supplements the market abuse proposals the Commission is of the view that a lack of coordination among the Member States would mean that problems persist. The divergence in terms of sanctions among the Member States is seen as a problem, as a given market abuse could be subject to sanctions in some Member States while not in others or be so to varying degrees, which as a result could undermine the deterrence as the offenders opt for the jurisdiction that has the most lenient penalties. In the Commission's view the effectiveness of enforcement would be improved with the introduction of minimum rules for conduct that is criminal.⁷² Arguably to an extent similar reasoning could apply to a possible introduction on criminal measures concerning hard-core competition law infringements.

Further, the Directive *inter alia* provides the national authorities with strong investigative powers.⁷³

Interestingly the *Ship-Source Pollution* case meant that Member States could themselves decide on the degree of criminal law sanctions whereas now the Commission in its proposal sought to introduce penalties that deter, which could be taken to mean that the minimum level for the sanctions is high.⁷⁴

In Herlin-Karnell's view one could possibly find a better legal basis for the proposal in art. 114 TFEU, which although residual concerns the internal market. Another possibility would be art. 325 TFEU which sets out that measures countering fraud should be taken when the financial interests of the Union are affected. It could be however that art. 325 TFEU alone would not suffice, but also the support of Article 83(2) TFEU would be needed. As Herlin-Karnell points out neither the emergency brake nor the opt-outs for the UK and Ireland would be available under art. 114 TFEU or art. 325 TFEU.⁷⁵

With that in mind a few alternative bases for a possible criminalization of cartels will be examined below.

4.6 ARTICLE 352 TFEU

It may be pondered whether art. 352 TFEU would provide the Union with criminal law powers. It reads as follows: 'If action by the Union should *prove necessary*, within the framework of policies defined in the Treaties,

⁷² Commission Staff Working Paper, 'Impact assessment accompanying the proposals for a Regulation and a Directive on market abuse' SEC(2011) 121 final. pp. 31-33; See also Herlin-Karnell 2012c, p. 485.

⁷³ *ibid* p. 11

⁷⁴ Herlin-Karnell 2012c pp. 489-490.

⁷⁵ Herlin-Karnell 2012c pp. 485-486.

to attain one of the objectives set out in the Treaties, and the *Treaties have not provided the necessary powers*, the Council, acting *unanimously* on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.⁷⁶ Where art. 83(2) TFEU incorporates the essentiality requirement, art. 352 TFEU allows the adoption of measures on the condition of necessity. Based on such a resemblance, Asp has argued that it barely seems likely that situations would occur where Article 83(2) TFEU would not provide the competence to legislate, as the requirement of essentiality would not be met, but such measures would still be necessary in the sense of art. 352 TFEU.⁷⁷

Article 83(2) TFEU allows the introduction of directives regarding definitions of offences and sanctions, but further-reaching measures are excluded, for example measures touching upon the general part of criminal law. It is there that art. 352 TFEU could become useful, but Asp argues that art. 352 TFEU cannot be used when Article 83(2) TFEU requirement of a prior harmonization is not fulfilled.⁷⁸ In his view however it is possible that Article 352 TFEU could be resorted in the area of criminal law, but such possibility is undermined by the fact that the Council has to act unanimously, thus requiring the consent of the UK, Ireland and Denmark, that may use the opt-out arrangements under art. 83(2) TFEU.⁷⁹

4.7 ARTICLE 325 TFEU

Art. 325 TFEU provides the EU with the power to ‘counter fraud and any other illegal activities affecting the financial interests of the Union.’ While the ex. art. 280, the predecessor of art. 325 TFEU explicitly excluded criminal law from its scope, such exclusion is not available now.⁸⁰ Asp has suggested that Article 325 TFEU may be interpreted in a way that provides the EU with further-reaching criminal law powers than what are available under art. 83(2) TFEU. The other possible interpretation would be that art. 325 TFEU could only be used in conjunction with art. 83(2) TFEU.

⁷⁶ Emphasis added by the author.

⁷⁷ Asp 2013 p. 137

⁷⁸ Asp 2013 p. 137-138

⁷⁹ Asp 2013 pp. 138-139.

⁸⁰ Asp 2013 pp. 142-143; Connor noted that ‘[f]raudulent representation is particularly evident in one popular form of cartel activity: bid-rigging. The very idea of a buyer inviting competitive bids through a formal process is meaningless if the bidders are not competing with one another. Thus, if the bidders subvert this process by pre-arranging the outcome, they have engaged in a fraudulent strategy. This reasoning may support the criminalization of bid rigging in countries like Germany where other forms of price fixing are civil administrative violations, and may explain why U.S. federal sentencing guidelines treat bid rigging more severely than other types of price fixing.’ Connor, Foer and Udwin 2010, p. 211.

⁸¹ Due to the inclination of the Court to especially consider the efficiency perspective, Asp projects that former possibility is more likely.⁸²

As Asp points out, opinions have been voiced in support of a view that a number of provisions in the TFEU may be given the interpretation that they provide the Union with criminal law powers, such as art. 103 TFEU regarding competition law. In his view such interpretation is not logically viable, as why would a number of criteria have to be fulfilled before resort may be had to Article 83 TFEU, and still find substantial criminal law powers beyond Chapter 4 of Title V. Asp argues that only art. 325 TFEU could be considered as a relevant candidate for such powers.⁸³ This author tends to find such an interpretation convincing.

4.8 OTHER LIMITS TO EU CRIMINAL LAW COMPETENCE

One should also consider other possible limits to the EU's competence to legislate criminal law, whether explicit or non-explicit.

Criminal law may be seen to belong to the sovereign area of the Member States. The democratic deficit at the EU level arguably supports the idea that the decision-making on criminal law should more appropriately take place at the national level to maintain legitimate criminal law.⁸⁴ Article 83(3) TFEU itself provides that if 'fundamental aspects' of a Member State's criminal justice system could be affected the Member State may ask that the measure be suspended. This is the so called 'emergency brake' available under art. 82(3) and art. 83(3) TFEU which may alleviate the Member State concerns about the creeping EU criminal law powers.⁸⁵

Adopting criminal law measures against cartels specifically under art. 83(2) TFEU therefore appears to be supported inter alia by the availability of the 'emergency brake' procedure which may enhance the democratic legitimacy of the planned legislation.⁸⁶

The principle of ultima ratio, meaning that the criminal law should be used only as a last resort is recognized by the Commission Communication 'Towards an EU Criminal Policy'.⁸⁷ Further, the Treaty on the European Union incorporates in article 5(4) the principle of proportionality, which

⁸¹ Asp 2013 p. 153.

⁸² Asp 2013 p. 154.

⁸³ Asp 2013 pp. 162-163.

⁸⁴ Turner 2012, p. 4.

⁸⁵ See Herlin-Karnell 2010, pp. 1117-1118.

⁸⁶ See Kaiafa-Gbandi 2011, p. 25.

⁸⁷ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions,

may also be of relevance.⁸⁸ The EU Charter of Fundamental Rights calls for proportionality in the prescription of criminal penalties.⁸⁹

The relevance of the principle of ultima ratio may however be questioned in the following context: if criminal penalties are introduced in an area where violations already attract administrative sanctions, it could be argued that the criminal penalties are adopted due to the experience that administrative penalties do not suffice. This way criminal law is not an alternative (which is the focus of the ultima ratio principle) but an additional measure.⁹⁰ This is relevant in the EU setting, where competition law infringements are already subject to administrative penalties.

Böse has touched upon the principle of protecting the legal interest and also the ultima ratio principle, which are the sub principles of the principle of proportionality. The Manifesto on European Criminal Policy sought to make the European Legislator more attentive to these principles.⁹¹ Böse is sceptical about heavily emphasizing these principles.⁹² He points out that the principles of proportionality, ultima ratio and the principle of protecting the legal interest do not limit in absolute terms criminal law, but are something to be discussed while preparing a legislative proposal.⁹³

The Limiting Principles

Kumm has pointed out that the legislator must opt for the measure that is the least disruptive one and is necessary for the legitimate objective that addresses a common problem and sees proportionality as a limitation. He concludes that the Member States' freedom to regulate should not be circumscribed any more than what is necessary.⁹⁴ In Davies' view also proportionality is a good tool to limit the EU's competence to legislate.⁹⁵

The principles of subsidiarity and proportionality are relevant when considering the proper limits of the EU to legislate criminal law. In terms of the areas where Member States share competence with the EU, under the principle of subsidiarity, the EU may take action in situations where

Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, Brussels, 20.9.2011 COM(2011) 573 final, p. 7

⁸⁸ art. 5(4) TEU: '...the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'

⁸⁹ See art. 49(3) Charter of Fundamental Rights.

⁹⁰ Böse 2011, p. 39.

⁹¹ See European Criminal Policy Initiative, 'A Manifesto on European Criminal Policy', *Zeitschrift für Internationale Strafrechtsdogmatic*, 12/2009.

⁹² Böse 2011, p. 35, 43.

⁹³ Böse 2011, p. 42; See in the same volume the discussion on these principles by Petter Asp, who emphasizes the last-resort character of the criminal law in achieving the objectives set out by the Treaties, Asp 2011, p. 44.

⁹⁴ Kumm 2006, p. 521.

⁹⁵ Davies 2006, p. 66.

the Member State actions have not been sufficient and the EU could act more effectively. The principle of subsidiarity is enshrined in the Treaty on European Union in art. 5(3).⁹⁶ It should be born in mind however that as per art. 3 TFEU the competition law rules fall within the exclusive competence of the EU.

The principle of conferral shows the limits of the Union competences, meaning that the boundaries of the competences are set out in the Treaties. The principles of proportionality and subsidiarity are heavily linked, as was well expressed by Asp: ‘when it comes to proportionality the measure should be necessary to achieve the aim pursued; when it comes to subsidiarity it should be necessary to act on EU level’.⁹⁷

With regard to the principle of subsidiarity one should carefully observe the *nulla poena sine lege parlamentaria* principle in the context of criminal law which touches upon matters of sovereignty: The society is best created at the regional level, not at the supranational one is the main premise of the subsidiarity principle, this way the citizens get the best opportunities to have an impact on the decisions influencing them. Understandably one could argue that decisions with regard to criminal law are most appropriately taken at the national level within the EU, due to reasons relating to the election of the representatives and also the availability and standards attached to debates at the Member State level.⁹⁸ Since criminal law is connected to the deep underlying values of the societies, the art 4(2) TEU requirement of respect for national identities should be observed.⁹⁹

The Treaty on the European Union sets out in article 5(4) the following: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” The EU legislators should according to the principle show that actual contribution is achieved through the measures and that it does not reach any further than what is necessary and that the state or individual whose interests are involved, do not see an excessive effect on their interests – in other words no more force should be used than is necessary to achieve the desired result. ¹⁰⁰ The court of justice of the EU has also extensively tackled the principle of proportionality, and based on the *Fedesa* case¹⁰¹ it has been argued that the principle forms a test divided into three parts”
1. Is the measure suitable to achieve a legitimate aim? “ 2 Is the measure necessary to achieve that aim? 3 Does the measure have an excessive effect

⁹⁶ Consolidated version of the Treaty on European Union - Article 5 , Official Journal 115 , 09/05/2008 P. 0018 – 0018; See Turner 2012, p. 8.

⁹⁷ Asp 2013 p. 183

⁹⁸ Asp 2013 pp. 184-185

⁹⁹ Asp 2013 p. 186

¹⁰⁰ Turner 2012, pp. 8-9.

¹⁰¹ C-331/88 R v Minister of Agriculture, Fisheries and Food, ex parte Fedesa [1990] ECR I-4023.

on the applicant's interests?"¹⁰² Chalmers, Davies and Monti argue that there is a test of necessity and suitability where the suitability refers to 'the relationship between the means and the end' and necessity to 'weighing competing interests'. This way the Court may review the appropriateness of possible criminal law measures. Arguably the proportionality test is much more leniently applied to the EU institutions by the Court than to Member State measures.¹⁰³ Davies had argued that the national autonomy should be protected from the community's measures less worth while by giving full effect to the proportionality principle in the court's judicial review, assessing whether the EU measure truly is so important that it warrants the Member State's interests being affected.¹⁰⁴ As pointed out by Jenia Turner respecting the principle of proportionality means simultaneously that due respect is given to Article 4(2) TEU which requires the respect for national identities.¹⁰⁵ The union legislators are however adamant that criminal measures are necessary to combat cross-border crimes.¹⁰⁶

In addition to the foregoing, the principle of proportionality may be understood as referring to the proportionate relationship between the severity of the penalty and the gravity of the offence which is determined by the harm and culpability, thus calling for just deserts.¹⁰⁷ This may be witnessed in Regulation 1/2003 art. 20, whereby it is stipulated that the calculation of fines is to have regard to the severity of the violation.¹⁰⁸ In terms of retrospective proportionality one may separate the ordinal proportionality which sets out the requirement that individuals convicted of similar offences should be subject to penalties of equal harshness, whereas cardinal proportionality refers to question whether the perpetrator deserves to be punished in the absolute sense.¹⁰⁹ The retrospective proportionality is spelled out in Article 49(3) of the Charter of Fundamental Rights. Asp is doubtful of the limiting ability at the EU level.¹¹⁰ As opposed to that he believes that the prospective proportionality principle could be more important if duly observed, especially the criterion of necessity, which has arguably been ignored in the area of criminal law harmonization, despite the primary importance of the proportionality principle among other EU law principles. The *ultima ratio* principle has a connection to the prospective

¹⁰² Chalmers, Davies & Monti 2010, p. 367.

¹⁰³ Chalmers, Davies & Monti 2010, p. 368.

¹⁰⁴ Davies 2006. p. 83.

¹⁰⁵ Turner 2012, p. 9.

¹⁰⁶ Turner 2012, p. 9.

¹⁰⁷ Asp 2013 pp. 189-190

¹⁰⁸ Asp 2013 p. 191

¹⁰⁹ Asp 2013 pp. 199-200

¹¹⁰ Asp 2013 p. 203

proportionality principle, thus especially highlighting the importance of it from the perspective of criminal policy.¹¹¹

The Principle of Legality

The principle of legality may be regarded among the most important criminal law principles and therefore must be examined briefly even when discussing a possible criminalization of cartels. It may be found in art. 7 of the ECHR. It may be divided into four sub-divisions, which have been confirmed by the ECtHR¹¹²:

1. The criminal conduct must be prescribed by the written law, also referred to as *nulla poena sine lege scripta*
2. The ban on retroactive criminal law, the Latin equivalent being *nulla poena sine lege praevia*
3. The ban on application by analogy, also called *nulla poena sine lege stricta*
4. Finally the principle of certainty, the requirement precisely defined law, also known as *nulla poena sine lege certa*.

If the EU adopted criminal law regulations the principle of legality would apply to such measures at the EU level.¹¹³

The expression *nulla poena sine lege parlamentaria*, means in the context of EU criminal law that from a democratic perspective criminal laws should be adopted by the representatives of the people in the parliaments due to the lengths that criminal law can go in interfering with the lives of the people. This could be regarded as a part of the principle of legality. It further corroborates the subsidiarity principle.¹¹⁴

Besides the principle of legality, the principle of culpability is important in the area of criminal law, and is incorporated in art. 6 of the ECHR. It means that criminal liability cannot be invoked in the absence of *mens rea*. It is principally the legislator who should make laws that adhere to this principle¹¹⁵ – thus by not enacting laws that establish liability in the absence of culpability. Strict liability follows from omitting the tenets of the culpability principle.¹¹⁶

¹¹¹ Asp 2013 pp. 204-205

¹¹² See Asp 2013 pp. 168-169; See also the discussion in section 6.2. in this work.

¹¹³ Asp 2013, p. 177.

¹¹⁴ Asp 2013, pp. 177-178.

¹¹⁵ Asp 2013, pp. 178-179.

¹¹⁶ Asp 2013, p. 182.

The Principle of Coherence

Besides the principles of proportionality and subsidiarity, the principle of coherence is important with regard to the emerging EU criminal law. While the principle of coherence does not get as explicit recognition in the Treaties as the principles of proportionality and subsidiarity do, the Manifesto on European Criminal Policy urges the European legislator to see to the coherence of the criminal justice systems of the Member States by not introducing measures that would require maximum penalties that would not be in harmony with the national system. Further, the Manifesto stated that 'the European legislator must pay regard to the framework provided for in different EU-instruments' and referred to Article 11(3) TEU which calls for coherent Union actions in the horizontal sense.¹¹⁷ The foregoing is interesting with regard to competition law sanctions, which arguable are of a similar penal value as insider trading – the Commission has proposed a minimum level regarding sanctions on market abuse. Duly observing coherence is important, as Asp points out criminal law is not just a tool for attaining specified aims, but also a way of sending a moral message. When the latter function is undermined by a lack of coherence then also the former ability of criminal law will suffer. Thus EU actions might have a considerable impact on national systems and thus restraint may be in place in the absence of good grounds to act.¹¹⁸ With regard to the horizontal coherence, lest the EU measures be inconsistent, the ordinal proportionality should be observed in relation to the introduction of minimum sanctions. Arguably it would be beneficial if EU criminal policy negotiations observed the aforementioned principles in order to produce coherent legislation.¹¹⁹ It appears that this principle has an important bearing on a possible criminalization of cartels that remain outside the reach of criminal law at the EU level, especially now that the Commission has proposed criminal rules against market abuse.

EU Cartel Sanctions and a 'consistent and coherent' EU Criminal Policy

The Commission came out with a communication with regard to the EU criminal policy in the fall of 2011, which refers to a Eurobarometer survey that showed that the EU citizens were eager to see the EU put high priority on fighting crime.¹²⁰ Bearing this in mind the Commission Communication

¹¹⁷ See European Criminal Policy Initiative, 'A Manifesto on European Criminal Policy', *Zeitschrift für Internationale Strafrechtsdogmatik*, 2009. p. 709; Asp 2013, pp. 206-207.

¹¹⁸ Asp 2013 p. 207; See also on fair labeling Ashworth Andrew, 2009. p. 78

¹¹⁹ Asp 2013 p. 212

¹²⁰ See Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of

‘Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law,’ underlines that as acknowledged by the Lisbon Treaty diversity exists among the different societies that have their own ‘basic values, customs and choices’ that the criminal law reflects. Understandably this then means that EU criminal law needs to be consistent and coherent to render added value.¹²¹ Such consistency requires due respect of the principles of proportionality and the ultima ratio principle, also acknowledged by the Commission’s Communication ‘Towards an EU Criminal Policy’.¹²² The Commission states that there should exist a shared understanding of the guiding principles in the field of EU criminal law.¹²³

In principle this approach by the Commission is commendable, but as pointed out by Herlin-Karnell such a cautious approach by the Commission might be undermined by the fact that ‘consistent and coherent’ criminal law could be understood to require increasingly more EU criminal law, which would conflict with the idea of giving space for the different values of the multiple societies within the EU. For instance the recent Directive on market abuse does not convince everyone that this objective is being duly observed by the Commission.¹²⁴

How should the hard-core cartels be seen in this context considering that they severely impede the functioning of the free market system and cause economic damage? The legal interest that is protected is the free market economy, which is arguably of same caliber than several other legal interests that are protected by the criminal law.¹²⁵

Furthermore as at the EU level the cartel control is administrative in name at least and as the EU may take over serious cartel cases from national authorities a question arises in cases where the national regime is based on criminal law: can it be considered to be ‘a coherent and consistent criminal policy’, as Harding asks, that an international cartel may be subject to a corporate fine, whereas individuals at the local level may be jailed?¹²⁶ This

EU policies through criminal law, Brussels, 20.9.2011 COM(2011) 573 final, p. 2; Eurobarometer 75 (Spring 2011). Available online at http://ec.europa.eu/public_opinion/archives/eb/eb75/eb75_publ_en.pdf. Last visited on the 20th of December 2012. P. 13

¹²¹ COM(2011) 573 final, p. 3; See also Herlin-Karnell Ester 2012c, p. 493.

¹²² See Manifesto on the EU Criminal Policy in 2009. Available online at http://www.zis-online.com/dat/artikel/2009_12_383.pdf. Last accessed on the 20th of December 2012. under the heading ‘2. The ultima ratio principle’; Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, Brussels, 20.9.2011 COM(2011) 573 final p. 7

¹²³ COM(2011) 573 final, p 12; Herlin-Karnell Ester 2012c, p. 493.

¹²⁴ COM (2011) 654 final; Herlin-Karnell Ester 2012c, p. 493.

¹²⁵ See Matikkala 2009, p. 276.

¹²⁶ Harding 2012, p. 146.

calls for a more nuanced approach by the EU with regard to the dividing line between administrative and criminal sanctions, especially now that the Lisbon Treaty has explicitly broadened the EU criminal law powers.

It seems relevant that the EU Commission has made a proposal to introduce minimum criminal law rules for market abuses at the EU level.¹²⁷ It may be asked whether it can be justified that individual cartelists go unpunished under the EU anti-cartel enforcement regime?¹²⁸

It is important to juxtapose hard-core cartels with other white-collar offences of arguably similar penal value, such as insider trading. This should be part of a 'consistent and coherent' EU criminal policy. The quest for a 'consistent and coherent' EU criminal policy should include an extensive overall evaluation of the control policy, where both the criminal penalties and administrative sanctions are compared.¹²⁹

4.9 SHOULD CARTELS BE CRIMINALIZED AT THE LEVEL OF THE EU INSTITUTIONS, THROUGH HARMONIZED RULES AT THE MEMBER STATE LEVEL OR SHOULD IT BE UP TO INDIVIDUAL MEMBER STATES TO DO AS THEY PLEASE?

It may be useful to mention that one contested point is whether cartels should be criminalized at the Member State level or at the level of EU institutions or alternatively the criminalization project could be left to willing individual Member States. Harmonizing criminal law rules under art. 83(2) TFEU means that such criminal prohibition would remain absent at the level of the EU institutions. Wils has argued that the criminalization of cartels only at the Member State level would not be supportive of the leading role of the European Commission in the cartel enforcement if cartels were more effectively uncovered at the national level. In addition, the information exchange between the European Competition Authorities would suffer.¹³⁰ Furthermore, Wils has proposed that instead of a community prison, the

¹²⁷ See the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation Brussels, 20.10.2011 COM (2011) 654 final.

¹²⁸ See Matikkala 2009, p. 278; See also Whelan 2007, p. 28.

¹²⁹ See Lahti 2011, p. 46.

¹³⁰ Wils, Wouter. 'Is Criminalization of EU Competition Law the Answer?' Paper presented in Amsterdam on 17-18 February 2005. pp. 46-52; The Swedish Government deliberations on a possible criminalization of cartels in Sweden concluded in a similar fashion as Wils did that the information exchange between MS competition authorities could suffer as a result of a criminalization and inter alia for this reason ended up rejecting such a project. See to this effect (in Swedish): Regeringsproposition 2007/08:135, pp. 152-153

Member States could execute the prison sentences that at the EU level are imposed by the General Court of the EU (former Court of First Instance).¹³¹

Wils however acknowledged that the rejected Constitutional Treaty's provision which closely resembled art. 83(2) TFEU, as the legitimate legal basis, would seem to block the possibility of criminalizing cartels at the level of the EU institutions due to the possibility of using only directives and not regulations.¹³²

Article 12 of Regulation 1/2003 seeks to ensure information exchange between Member States that employ criminal enforcement with Member States that do not. Consequently Wils argues that the investigations would be supported by an EU-wide criminalization of cartels.¹³³ This would also be beneficial in terms of extradition, and director disqualification orders that could take effect across Europe.¹³⁴ As Wils points out when no leniency applicants have come forward, the investigations in Member States where criminal enforcement is absent, could suffer due to the possibility of prison sentences in other Member States and also due to the exchange of information between the competition authorities. Leniency as a detection tool could be impaired if the firms concluded that no detections occur unless there are leniency applicants. There is also the possibility that Member States lacking the criminal penalties could piggyback on the efforts of the Members States that employ such penalties.¹³⁵

The leniency applications are an important detection tool of the Competition Authorities. Frese has advanced the argument that due to the functioning of Leniency the cartel criminalization should take place at the EU level as in the opposite case, where cartels were criminalized at the Member State level, the Leniency programs could be undermined due to a lack of transparency.¹³⁶

In Simonsson's view art. 103 TFEU seems most viable as a legal basis for an EU-wide criminalization of the cartel conduct, but adds that this is dependent on the competences of the Union to do so under the Treaties.¹³⁷

However a possible alternative way forward is that cartels could be first criminalized by individual Member States. This is something that

¹³¹ Wils 2002 ch 8, point 8.7.4.6.

¹³² Wils 2005a p. 159.

¹³³ Wils 2005a, p. 154.

¹³⁴ Wils 2005a, p. 154.

¹³⁵ Wils 2005a, p. 155, also footnote 182.

¹³⁶ Frese 2006, p. 208; Whelan acknowledged that '[i]rrespective of any future institutional development, reasons can nonetheless be advanced as to why criminal sanctions should in practice be provided for and/or imposed at EC level. But any effort at EC criminalization would involve significant legal and political challenges, and perhaps popular censure. It is principally for this pragmatic reason that criminalisation is best suited to national level, at least for the foreseeable future.' See Whelan 2008, pp. 375-376 and Whelan 2007.

¹³⁷ Simonsson 2011, p. 207.

Simonson has envisaged. In her view the problems concerning inter alia a possible harmonization of cartel investigation and detection at the EU level favour a Member State led cartel criminalization project.¹³⁸ Further, Reindl has argued that a situation where Member States criminalize cartels before the EU would be supported by the more thorough experience that the Member States have in prosecuting white-collars.¹³⁹ Indeed the Competition Commissioner, Almunia, has rejected the criminalization of cartels at the EU level due to ‘the current legislative framework (e.g., there are no EU criminal courts).’¹⁴⁰ Furse has recently pointed out however that the UK’s failure in its criminal prosecutions is likely to dissuade other Member States from taking the criminalization path and that ‘it is the very lack of harmonization and control at the EU centre that is responsible, significantly, for difficulties and limitations encountered in the operation of national criminal laws, at least in the UK, and Ireland.’¹⁴¹

It should be noted, that the final call will obviously be made by the Member States and the European Commission, if they should one day desire the criminalization of cartels at the level of the institutions and through harmonized rules at the Member State level, as Wils notes, the Treaty provisions may be amended to the liking of the Member States and the Commission.¹⁴²

4.9.1 The Consistent Application of Law

One possible problem is related to the consistent application of law under an EU-wide criminal cartel regime. The task of seeing to the consistent application of law is assigned to the European Commission in art. 105 TFEU. Currently the cooperation between the competition authorities is addressed by Regulation 1/2003, but the situation could be different under a criminal regime, if the criminal prohibition of cartels would be enforced in the Member State courts due to possible practical reasons, thus circumscribing the ability of the Commission to check on the consistent application of law.¹⁴³ The Commission does not have a standing in national courts, and the Commission is not empowered to interfere in the case handled by the national court. Under the current regime the Member States have to provide the Commission with information regarding a given case

¹³⁸ Simonsson 2011, p. 216; Also Reindl opines that Cartels should be criminalized at the MS level, see Reindl 2006 p. 127.

¹³⁹ Reindl 2006, p. 126.

¹⁴⁰ Rivas 2011, p. 2.

¹⁴¹ Furse 2012, p. 223.

¹⁴² Wils 2005a p. 159.

¹⁴³ Simonsson 2011, p. 213.

and the Commission is entitled to give *amicus curiae* advice as per regulation 1/2003 art. 15(2) and art. 15(3).¹⁴⁴

Checking on consistency would be difficult *inter alia* due to variations in the national laws, for example regarding procedural questions. As Simonson indicates the ECJ might at the end of the day give a ruling on consistency.¹⁴⁵

Another possibility, put forward by Wils, would be to have resort to art. 86 TFEU which says the following: ‘In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust.’ The public prosecutor could then be entrusted with the investigation and prosecution of the relevant cases in the competent Member State courts. As Wils points out, this would mean that the European Commission could no longer be the prosecutor and the EU Courts could not adjudicate the cases.¹⁴⁶

Simonsson has suggested that the most viable option would be to let the most resourceful Member States to start criminalizing cartels while the remaining Member States could still assist in the investigation as per article 22 of Regulation 1/2003 or provide evidence as set out in article 12(3).¹⁴⁷

In Simonsson’s opinion a harmonization of cartel criminalization would further fragment the EU Competition law control as a result of the numerous regulators and countless courts dealing with it. Eventhough leaving the criminalization to only the few resource-rich Member States would let the remaining free-riding Member States not introducing a criminalization enjoy the benefits, the harmonized criminalization is not either likely to produce an evenly shared workload between the Member States as the resources vary depending on the Member State.¹⁴⁸

4.9.2 Art. 6 ECHR and the Division of Functions

In the context of a possible criminal antitrust enforcement regime issues relating to Article 6 of the European Convention on Human Rights (ECHR)

¹⁴⁴ Simonsson 2011, p. 214.

¹⁴⁵ Simonsson 2011, P. 214.

¹⁴⁶ Wils 2005a p. 159; See also Simonsson 2011, p. 214.

¹⁴⁷ It may be useful to mention that art. 12(3) provides that the evidence acquired can be used against natural persons only if the sending authority has sanctions of a similar kind with regard to the violations of TFEU articles 101 or 102. If this requirement is not met the evidence can still be used against a natural person if the gathering of the evidence has been conducted so that the rights of defense have been respected to the same degree as the law stands in the Member State of the receiving authority. See EU 1/2003 Regulation 2003; Also Whelan envisaged that if the European jurisdictions with criminalized regimes prove victorious, other jurisdictions may alter their viewpoints. See Whelan 2012a p. 2.

¹⁴⁸ Simonsson 2011, pp. 215-216.

are liable to rise. Antitrust enforcement occurs in Europe both at the EU level and at the national level. Irrespective of the level where antitrust enforcement takes place Article 6 ECHR must be observed. The same appears to be true regardless of the mode of enforcement, be it administrative or criminal or whether the accused is a corporation or a natural person. However when criminal enforcement takes place or custodial sanctions are imposed the protection is more extensive. Already the criminal charges may cause considerable harm to the defendant despite an acquittal later.¹⁴⁹

Article 6 ECHR provides the right to a fair trial. Art. 6 ECHR provides that in the determination of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹⁵⁰ The presumption of innocence until proved guilty according to law is incorporated in the second paragraph.¹⁵¹ Finally certain minimum rights are spelled out under the third paragraph. These rights include the right to be informed promptly, in a language, which the accused understands in detail and of the nature and cause of the accusations made. Further adequate time and facilities must be available for the preparation of defence. The right to legal assistance, the right to examine witnesses and the free assistance of an interpreter if needed is set out in the provision.¹⁵²

The word ‘criminal’ has an independent meaning under the European Human Rights law. Its interpretation has been liberal. Due to the liberal interpretation of the word ‘criminal’ it has previously been subject to debate whether Article 6 ECHR is also applicable to the administrative antitrust procedure initiated by the Member States or the EU. At any rate introducing the criminalization would subsequently require the observance of article 6 ECHR in antitrust proceedings. Moreover the domestic criminal law may still provide safeguards that are not equivalent to the ones under article 6 ECHR and which are applied under administrative proceedings of criminal law nature.¹⁵³

Under an administrative regime it is possible that the investigative and prosecuting authority also exercises the adjudicative function. Thus the same body will collect the evidence and employ it against the defendant, either a natural person or an undertaking and finally will decide whether an infringement has taken place. The same body would also decide which sanction to impose. Afterwards a court may merely review the lawfulness of the decision. Most EU member states operate in the aforementioned fashion

¹⁴⁹ Whelan, 2011 pp. 217-218

¹⁵⁰ ECHR article 6(1).

¹⁵¹ ECHR article 6(2).

¹⁵² ECHR article 6(3).

¹⁵³ Whelan, 2011 p. 220.

as does the European Commission.¹⁵⁴ However in Finland for instance these functions are divided between the Competition authority and the Market Court.

The European Court of Human Rights in its case law has ruled that administrative proceedings may also invoke article 6 ECHR. It does not matter whether the offence is under domestic law either disciplinary or criminal if it provides for deprivation of liberty Article 6 ECHR applies. When assessing the applicability of article 6 ECHR the domestic classification of the act, the nature of the offence, the severity of the punishment are something that the Court will assess when making a decision on the applicability of article 6 ECHR.¹⁵⁵

Article 6 ECHR entitles anyone who is criminally charged to have his case tried 'by an independent and impartial tribunal.' For example prima facie the European Commission which investigates the case, prosecutes and adjudicates does not fulfill the criteria of an 'independent and impartial tribunal.' Thus the European Commission cannot be deemed to be an independent tribunal in the sense of article 6 ECHR.¹⁵⁶ Both the case law of the European Court of Human Rights and the General Court of the EU consider this dilemma solved as the decision by the European Commission is always subject to the review by the General Court which is an 'independent and impartial tribunal.'¹⁵⁷ For example Wils has argued that the requirements of article 6 ECHR are met as a result of the General Court's review.¹⁵⁸ However this view is not commonly accepted.¹⁵⁹

Concerning custodial sanctions the above reasoning is not sufficient: Article 6 ECHR requires that already the first instance to tackle the matter satisfies the condition of an independent and impartial tribunal – this interpretation was confirmed by the European Court of Human Rights in the case *De Cubber v. Belgium*, where it was not sufficient that only the appeal level satisfies the criteria of an 'independent and impartial tribunal' as the matter was not classified by the domestic law as administrative or disciplinary.¹⁶⁰ Obviously it follows that if cartels were criminalized at the EU level the European Commission could no longer retain its adjudicatory function if it still remained the investigative and prosecutorial authority –

¹⁵⁴ Whelan, 2011 p. 226.

¹⁵⁵ *Case of Engel and others v. the Netherlands* Judgment Strasbourg 8 June 1976 paras 81, 82, 83; Whelan, 2011 p. 226

¹⁵⁶ Roth 2006, p. 5.

¹⁵⁷ See *Case of Bryan v. the United Kingdom* Judgment Strasbourg 22 November 1995 at para 40.; *Albert and Le Compte v. Belgium* Judgment Strasbourg 10 February 1983 para 29. ; *Case T-348/94 Enso Española v. Commission of the European Communities* (1998), paragraph 62.; Whelan 2011 p. 227.

¹⁵⁸ Wils 2003a, p. 10.; Whelan, 2011 p. 227.

¹⁵⁹ Whelan, 2011 p. 227.

¹⁶⁰ *De Cubber v. Belgium* Judgment Strasbourg 26 October 1984 at para 32. ; Whelan, 2011 p. 228.

this division of functions however would not have to impair the possibilities to secure convictions.¹⁶¹

It can be claimed that the division of functions requires more resources as two separate bodies would need to acquire information that may be identical and thus less convictions would be secured with a specific amount of resources which would also undermine deterrence. However this line of reasoning can be weakened if one considers a system where the investigative, prosecutorial and adjudicative functions are under one authority but in addition a review by a tribunal is often made use of – thus there is already inherently another unit that does the investigation, which renders duplicate costs inevitable.¹⁶²

The division of functions could also greatly improve the procedure by cutting its length and ease the access to documents.¹⁶³ The division would also prevent a ‘prosecutorial bias’ from taking place. Wils has identified three different kinds of prosecutorial biases related to the human psychology.

By Confirmation bias Wils refers to the inclination of people to try to support rather than to call into question something that one has believed to be true. Also the European Commission could be influenced by such a bias: under articles 101 and 102 TFEU the investigations are launched only after the officials believe that the antitrust rules have been infringed, which definitely creates a fertile ground for such a bias.¹⁶⁴

The hindsight bias refers to a situation where one thinks that after certain outcomes have taken place that they could have been predicted while underestimating the possibility that an alternative sequence of events could have taken place. Thus in the European Commission or in the DG Competition where the resources for enforcement are not abundant and the resources should be wisely allocated the people involved in enforcement are motivated to justify their decisions. However obviously miscalculations happen and at the stage of the second phase investigation or upon sending the statement of objections it could appear that no antitrust infringement had actually taken place or only a minor one. This could lead to the hindsight bias where the officials would view the initial choice to launch the second phase investigation as erroneous. The Commission officials may then experience the so called cognitive dissonance if the initial choice was erroneous as it would not be in accordance with their trust in themselves. As an experience the cognitive dissonance is not comfortable and therefore people generally seek to circumvent knowledge that could induce such a mental state. It follows that the Commission officials who initially decided to launch the second phase investigation may be unmotivated to divert the

¹⁶¹ Whelan, 2011 p. 228.

¹⁶² Wils 2003a, p. 23; Whelan, 2011 p. 228; See however Reindl 2006, p. 122.

¹⁶³ Whelan, 2011 p. 228.

¹⁶⁴ Wils 2003a, p. 16.

course of action and decide that no prohibition decision should be made after all. Besides the internal motivation to refrain from such a decision it could also be attributed to a desire to show for instance someone higher in rank who may be influenced by the hindsight bias that the initial decision was not erroneous.¹⁶⁵

The third prosecutorial bias is what could be called the desire to keep up appearances. In other words the officials working at the European Commission naturally wish show the world that they are up to their task by having for example a certain number of cartels detected and fines being imposed. These numbers are made public in the form of statistics. However the outside observers cannot easily conclude whether the infringements were justly punished, they can most likely only admire or criticize the number of decisions. This could incentivize abuse on part of the Commission officials in order to keep up appearances.¹⁶⁶

To sum it up, it can thus be argued that it would be actually commendable that a division of functions would take place at the EU level. This would improve the chances of errorless adjudication by the European Commission. The argument to oppose a criminalization at the European level could be the added costs that a required division of functions would cause. However the above reasoning goes to show that also notable benefits could ensue which might outweigh the counterarguments.

4.9.3 The 'Effect on Member State Trade' Requirement

According to Simonsson one of the problems regarding an EU-wide cartel criminalization would be that Article 101 TFEU which prohibits cartels at the EU level, is not applicable to cartels where the 'effect on trade' between member states is absent. Cartels that do not have an "effect on trade" could thus not induce criminal liability at the EU level.¹⁶⁷ The Commission has stated that 'agreements that are local in nature are in themselves not capable of appreciably affecting trade between Member States.' The trade between Member States could be affected however if a sufficiently large share of the market is foreclosed.¹⁶⁸

Consequently if a criminal enforcement regime in connection to art. 101 TFEU was introduced there are likely to occur criminal trials contesting the "effect on trade" criterion. In the absence of an "effect on trade" the

¹⁶⁵ Wils 2003a, pp. 17-18.

¹⁶⁶ Wils 2003a, pp. 18-19.

¹⁶⁷ Simonsson 2011, p. 207.

¹⁶⁸ Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, para 91; The ECJ has a ruling on the 'effect on trade' criterion in the Hugin case, see C-22/78 Hugin v Commission of the European Communities, 31st May 1979. Para. 17.

criminal case against natural persons would collapse. Under the current administrative enforcement system against infringing firms that is present at the EU level and on which most EU Member State regimes are modeled this problem does not occur since the unlawful agreements are liable to be caught by the national provisions if they escaped the supranational ones.¹⁶⁹ Thus arguably the criminal regime would be feasible only if domestic anti-cartel criminal rules would complement a criminal prohibition at the EU level. Otherwise the legitimacy of the EU criminal Antitrust Enforcement regime could suffer. However as Simonsson points out the EU competition policy targets actions that have an effect on Member State trade, while actions of lesser impact are subject to Member State Laws. If an EU-wide cartel criminalization sought to catch also cartels that do not have an effect on Member State trade, art. 103 TFEU as a legal basis appears problematic: Simonsson notes that '[i]t would seem difficult to base harmonized cartel criminalisation on TFEU article 103 if participation in all cartels, large or small, should be included.'¹⁷⁰

4.9.4 Costs of a Criminal Cartel Enforcement Regime

A Gradual Process

A 'consistent and coherent' EU criminal policy should also be informed of the costs of a possible criminal anti-cartel regime. What may be noted about criminal penalties is that arguably before the benefits of criminal cartel enforcement are likely to occur, the costs of such a system may take place.¹⁷¹ The lack of criminal prosecutions in the UK may be regarded as indicative of this.¹⁷² At an early stage of criminal enforcement there could be less convicting judgements which may raise questions as to the effective use of resources and therefore an advance awareness of this would do good both among the public and policy makers.¹⁷³ The US experience shows that the step-by-step development of criminal cartel enforcement by the Department of Justice (DOJ) began in the late 1950's and has been gradually improved with the help of the Congress, it was only after 1974 that a more severe treatment of the cartel infringements took place.¹⁷⁴ One may note that despite a span of more than a century of the Sherman act and the

¹⁶⁹ Simonsson 2011, p. 208.

¹⁷⁰ Simonsson 2011, p. 208; Art. 103 TFEU reads '1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on proposal from the Commission and after consulting the European Parliament...'

¹⁷¹ Reindl 2006, p. 126.

¹⁷² Regarding the lack of criminal prosecutions in the UK see, Joshua 2011 p.155.

¹⁷³ Reindl 2006, p. 126.

¹⁷⁴ Kovacic 2011, p. 68.

initial criminal prohibition of cartels, it was only during the past 20 years that criminal enforcement has really been stepped up in the US, regularly sending executives to prison.¹⁷⁵

Besides the material costs derived from the criminal investigation, there is the risk that notwithstanding a criminal prohibition the cartel conduct would not appear to be affected or that criminal rules would not be applied. The outcome could be that the legitimacy of criminal sanctions suffers.¹⁷⁶ This possibility could materialize for instance if the prosecution is not continually funded and supported to a sufficient degree subsequently resulting in the absence of prosecutions.¹⁷⁷

While contemplating the different options for cartel control, the costs of administrative and criminal regimes respectively may be compared.¹⁷⁸ In this regard it may be noted that in Sweden where the cartel control is of an administrative mode, the introduction of a criminal cartel offence was considered, but rejected. The Swedish discussion document estimated that an added 4,5 million euros would be needed annually if the criminal cartel offence was to be introduced.¹⁷⁹ Thus one could investigate whether a better outcome would be attained by allocating such funds to the already existing administrative regime rather than investing in the introduction of a criminal cartel offence.¹⁸⁰ In New Zealand a ministerial discussion document concluded that ‘there is a prima facie case for criminalization.’ It noted that assessing the costs of criminal enforcement is not easy and that the precise amount of resources required turns on the ‘nature of the criminal regime.’ It cited inter alia the criminal investigations, evidence rules and criminal trials as sources of costs that could make criminal enforcement more expensive than civil enforcement.¹⁸¹ In contrast a proponent of individual criminal penalties, Wils has argued that due to the more robust investigative powers

¹⁷⁵ Massey 2012, p. 166.

¹⁷⁶ Harding 2012, p. 142, 153.

¹⁷⁷ Harding 2012, p. 147.

¹⁷⁸ As Harding notes the elaboration on the costs could further take note of the possibility of ‘over-enforcement’ if one cartel is prosecuted in several jurisdictions or if in parallel both individuals and the company face liability for one infringement. Harding also mentions that the cost calculations could include a comparison between private and public enforcement modes, Harding 2012, pp. 146-147.

¹⁷⁹ See the Swedish Deliberation (in Swedish), SOU 2004:131 *Konkurrensbrott - En lagstiftningsmodell* p. 260; One reason why Finland and Sweden both rejected the criminalization of cartels is that the idea of introducing a possibility for plea bargaining/leniency under the criminal justice system was foreign, the traditional Nordic approach is to give more value to the reprehensibility of the crime rather than the perpetrator’s confession, see (in Swedish) *Regeringens proposition 2007/08:135*. p. 151 and (in Finnish) Kuoppamäki 2006, p. 66; on the Related German discussion see Wagner-Von Papp, 2011, p. 176 and Vollmer 2006, p. 259.

¹⁸⁰ Simonsson 2011, p. 213.

¹⁸¹ Ministry of Economic Development, *Cartel Criminalisation: Discussion Document*, January 2010 p. 32

available under a criminal regime, it might actually require less resources than an administrative mode of control.¹⁸² In any case assessing the costs of enforcement is a vital part of a thorough policy consideration.

Costs related to Personnel at the Member State Authorities

Cartel cases may often take several years, exceeding 10 years if appealed. This time-consuming nature of the proceedings is present both when the mode of control is either administrative or criminal. In this respect the competition authorities and courts should have the sufficient resources to tackle the cases, as the coherent application of the law is of essence for the authorities themselves.¹⁸³

It should be ensured that the competition authorities and courts have adequate resources to tackle antitrust matters in relation to the personnel working at the authority and the procedures.¹⁸⁴ Simonsson argued that essentially this is a matter of attracting competent people, by for instance providing lucrative pay schemes. The private top notch advocates litigating the cases need to be matched by professional expertise at the competition authority. Further, the efforts of the competition authorities across Europe should be coordinated in order to create an effective EU-wide criminal ban on cartels. The success of a cartel criminalization would arguably directly depend upon the resources available to its enforcement.¹⁸⁵

Simonsson has pointed out that as the Union law does not determine the required resources for example in relation to the amount of needed personnel, the Member States themselves may evaluate the needed number of staff members. Thus in terms of the lengthy proceedings, in the context of an EU-wide cartel prohibition, the Commission might not be able to ensure that the relevant Member States authorities are provided with sufficient resources.¹⁸⁶

However as Simonsson acknowledges one could argue that the decentralization of anti-cartel enforcement has brought about a situation where the Member States are already sufficiently competent to introduce a criminal anti-cartel regime, which would not be especially resource-intensive. For instance the prosecution of natural persons and firms could draw on the same pool of evidence and might even be tried under the same proceedings.¹⁸⁷

¹⁸² For Wils' comment, see Ehlermann and Atanasiu 2007, p. 244.

¹⁸³ Simonsson 2011, p. 208.

¹⁸⁴ Simonsson 2011, p. 208, 210.

¹⁸⁵ Simonsson 2011, p. 209.

¹⁸⁶ Simonsson 2011, pp. 209-210.

¹⁸⁷ Simonsson 2011, p. 210.

Costs Related to Language Translation and Extradition

Due to the multitude of languages present in the various EU Member States, Simonsson also points out that as Article 6(3) ECHR guarantees that ‘everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.’ Also legal assistance free of charge should be provided, including an interpreter. As a result of the nature of cartels as an offence not observing the borders of the Member States, criminally prosecuted natural persons might often find themselves in a Member State whose language they do not speak. Subsequently resources would be required to meet this challenge. Currently under the regime against companies this is not as central, as it may be sought to bring charges against the business residing in the Member State that pursues the case and not another unit of the business group existing outside the Member State.¹⁸⁸

Simonsson noted also the costs related to extradition that emanate from the cooperation between the countries. Extradition arguably is an integral part of an effective criminal enforcement system.¹⁸⁹

To sum it up, it appears necessary to acknowledge the costs that would accompany the introduction of an EU-wide criminal ban against cartels, but in light of the foregoing, the costs would not present one with sufficient grounds to reject a cartel criminalization project.

4.10 DIRECTOR DISQUALIFICATION ORDERS – A VIABLE ALTERNATIVE TO CRIMINAL PENALTIES?

The OECD has recommended that its member states should consider the option of introducing custodial sanctions for hard-core cartels due to the insolvency cap with regard to optimal corporate fines and as anecdotal evidence speaks in favour of incarceration.¹⁹⁰ Yet the European Competition Commissioner has rejected the introduction of criminal penalties at the EU level.¹⁹¹ In light of the foregoing and in an attempt to duly observe the ultima ratio principle it could be asked whether there are any viable alternatives

¹⁸⁸ Simonsson 2011, p. 212.

¹⁸⁹ Simonsson 2011, p. 213.

¹⁹⁰ OECD, *Hard Core Cartels, Recent progress and challenges ahead*, 2003. p. 28; OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation*. 15.12.2005. p. 27 and pp. 39-40; OECD, *Council Recommendation Concerning Effective Action Against Hard Core Cartels*, 1998.

¹⁹¹ Rivas 2011, p. 2.

to the criminal penalties in order to bring about individual accountability into an antitrust regime that relies exclusively on corporate fines. Could the Director Disqualification Orders (hereinafter DDOs) present a feasible alternative? It seems at least that this is what Sweden concluded when it introduced the DDOs, but no criminal liability.¹⁹²

As DDOs represent a method of introducing individual accountability, they share some features with custodial sanctions and individual fines. DDOs introduce a certain period of time during which the offender may not be concerned in the management of a company. DDOs may not only be considered as an alternative to prison sentences, but the DDOs could also complement the prison sentences and fines in the array of sanctions available.¹⁹³ A DDO carries with it an opportunity cost as the offender will have to step down as a manager which may affect the offender's salary and future ability to find employment. DDOs may also affect the reputation of the offender, and could prevent recidivism.¹⁹⁴ Furthermore, Ginsburg and Wright suggest that the DDOs may be useful against directors who out of negligence fail to implement compliance and are thus indirectly responsible for cartel activities.¹⁹⁵

In Finland however the Committee that produced a memorandum regarding the new Competition Act, did not propose the introduction of the DDOs due to the challenges involved in the surveillance and the identification of the responsible individuals.¹⁹⁶ The problems of monitoring were also noted by the Swedish 2006 committee.¹⁹⁷ The evidence from the UK is not encouraging: the imposition of a DDO under the Enterprise Act has yet to materialise. However, in the Marine Hoses case DDOs were imposed under Company Directors Disqualification Act 1986.¹⁹⁸ As far as the author knows no competition law DDOs have been imposed in Sweden either. Actually it has been reported that it seems that the perpetrators may circumvent the DDOs without much effort and that it appears the compliance with the DDOs is not monitored to a sufficient degree.¹⁹⁹ Bernitz has pointed out that if the Swedish solution to adopt the DDOs

¹⁹² See (in Swedish) Regeringens proposition 2007/08:135 p. 156.

¹⁹³ Ginsburg and Wright 2010, p. 19. Also Stephan argues in favour of a 'mixed' approach, see Stephan 2011a, p. 8.

¹⁹⁴ Ginsburg and Wright 2010, p. 19; see also OECD, Roundtable on promoting Compliance with Competition Law, DAF/COMP(2011)4, 07-Oct-2011. p. 17.

¹⁹⁵ Ginsburg and Wright 2010, p. 19.

¹⁹⁶ See The Ministry of Employment and the Economy, *Kilpailulaki 2010* (Competitiveness 4/2009) p. 53,

¹⁹⁷ SOU 2006:99 p. 574

¹⁹⁸ Under this Act DDOs may be used in case of criminal offences. See Stephan 2011a, p. 4.; See also the discussion under section 8.3.5 in this work.

¹⁹⁹ Sveriges television 'Brottslingarna kan enkelt kringgå näringsförbuden', 26/10 2011.

seems unsatisfactory, the issue of criminalizing cartels may well arise again in Sweden.²⁰⁰

In the UK context Stephan has pointed to the difficulty of monitoring the DDOs: a study regarding DDOs in cases of insolvency in 1997 indicated that DDOs did not present a significant obstacle for individuals seeking employment and that the perceived chance of getting caught running a firm once the DDOs had been imposed was not high. Stephan mentions also other studies, which indicate that the deterrent effect of the DDOs is not great,²⁰¹ a US study from the 1970s suggests that the antitrust offenders' value in the job markets is maintained even after a prison sentence.²⁰²

Furthermore, in the EU context it is problematic that the EU law does not recognize DDOs and in the absence of DDOs in the legislation of some member states, the fact that a DDO is imposed in one member state does not inevitably translate into a situation where the disqualified director could not assume a senior position in another member state with no equivalent sanctions.²⁰³

The DDOs may disproportionately apply to small businesses than larger ones, since it may be less plausible for a small company director to argue that he was not aware of the infringement.²⁰⁴ On a slightly different note, the Swedish Government Bill predicted that the DDO may target disproportionately smaller firms since in cartel conduct, the various individuals in the respective businesses may have comparatively speaking very different positions: for instance the individual engaged in cartel conduct from a smaller firm may be its owner or managing director whereas a lower-ranking individual, who does not occupy any managerial positions may be the human link between the bigger company and the cartel. The Government Bill suggested that while the blameworthiness of the individuals may be on an equal level, this runs the risk that only the individuals employed by the smaller companies would be subject to DDOs.²⁰⁵

It may be noted also that many of the problems associated with criminal sanctions may be present with regard to DDOs and personal fines, as individuals may have recourse to the full array of legal protections in a similar fashion as under a criminal regime.²⁰⁶ The Swedish Government acknowledged that cases concerning corporate fines could become more cumbersome if the Competition Authority pursued a DDO due to reasons related to the collection of evidence: an individual who could be the possible

²⁰⁰ Bernitz 2011, p. 213.

²⁰¹ Stephan 2011a, p. 6.

²⁰² Stephan 2008b, p. 30.

²⁰³ OFT, *The impact of competition interventions on compliance and deterrence* (OFT 1391 December 2011) p. 36.

²⁰⁴ Stephan 2011a, p. 5.

²⁰⁵ Prop. 2007/08:135 p. 158

²⁰⁶ See Furse 2012, pp. 53-54

target of a DDO could not be heard under similar conditions as previously.²⁰⁷ The Swedish Government Bill noted the DDOs may be viewed as a criminal sanction under the European Convention of Human Rights and therefore the Competition Authority in the course of investigations should observe the defendant's right against self-incrimination. What is more, Regulation 1/2003 sets out in art. 12 a restriction on the information exchange between MS authorities when the evidence could be used in the pursuit of individual sanctions and therefore the Competition Authority must be careful not to use such information in a way that violates the rules of Regulation 1/2003 lest the future cooperation be undermined.²⁰⁸

Regarding the individual fines as a tool against cartels the 2006 committee argued that the company might compensate the individual engaged in the cartel conduct something that would be difficult to prevent.²⁰⁹ The DDOs on the other hand would be probably perceived by the target group as a stringent penalty, and would not be easily reimbursed by the firm.²¹⁰ The 2006 committee rejected the idea of introducing individual fines since it argued that the sanction system could become overburdened.²¹¹

According to Wils the stigmatic effect and moral message of the DDOs could be stronger than that of the fines. Wils considers DDOs to be a viable complement to imprisonment and 'a defensible second-best,' but not a true alternative. In his view imprisonment appears to carry a stronger deterrent effect than the DDOs. In the absence of other individual penalties, it is possible that for the offender the DDO may represent just a route to retirement: the company could still compensate for the loss of salary etc.²¹² Whelan noted that one disadvantage is that DDOs may target only directors, whereas individuals engaged in prohibited conduct, but who are not directors escape DDOs – custodial sanctions do not suffer from a similar drawback.²¹³ This deficiency prompted the 2006 committee to recognize that as a cartel fighting measure the individual fines could be imposed against a larger number of individuals.²¹⁴

The 2006 committee envisaged that the DDO as a measure would be primarily concerned with increasing the general preventive effect.²¹⁵ The DDOs would put directors in a position where it is against their interests to suspect or to be aware of violations within the firm and turn a blind

²⁰⁷ Prop. 2007/08:135 p. 159

²⁰⁸ Prop. 2007/08:135 p. 168

²⁰⁹ SOU 2006:99 p. 573

²¹⁰ SOU 2006:99 p. 574

²¹¹ SOU 2006:99 pp. 575-576

²¹² Wils 2008a, p. 188; SOU 2006:99 p. 574

²¹³ Whelan took the position that DDOs should be used only to accompany criminal penalties. See Whelan 2012d, p. 6.

²¹⁴ SOU 2006:99 p. 574

²¹⁵ SOU 2006:99 p. 584

eye. The DDOs target the individuals who have the greatest sway over the employees and may seek to instill compliance within the company – the committee presumed that this may significantly increase compliance.²¹⁶

The 2006 committee argued that the individual who could become subject to a DDO would have more to lose than a business, and therefore it would create additional instability from the perspective of a company that entered cartel conduct. Thus the whistle-blower may not only be another cartel member, but also an individual.²¹⁷

For the DDO to be imposed it does not matter in what capacity the person in question exercised the managerial powers, as long as he had such powers.²¹⁸ Regarding the question how to identify the responsible individuals for the purposes of imposing DDOs, the 2006 committee said that reference should be made to the criminal law principles regarding corporate responsibility: in many larger firms tasks need to be delegated to lower-ranking individuals since the management cannot control every part. With the delegation of tasks the criminal responsibility shifts to the lower-ranking individuals. Even then however the company management however must ensure sufficient monitoring – if the management becomes aware of an infringement that was carried out by lower-ranking individuals who had taken on the delegated tasks, and if the management ignored the state of affairs, it may be held responsible the Swedish 2006 committee envisaged.²¹⁹

On a final note, a study commissioned in 2007 by the Office of Fair Trading showed that the surveyed companies regarded criminal penalties as the most important sanction followed by the director disqualification order.²²⁰ In Stephan's view this could indicate that companies view fines 'as a *cost* rather than as a penalty.'²²¹

To sum it up, it seems that as a stand-alone sanction for individual antitrust offenders the DDOs are not sufficient. On the other hand, using it as a complement to criminal penalties may be favoured.

²¹⁶ SOU 2006:99 pp. 575-576

²¹⁷ SOU 2006:99 pp. 599-600

²¹⁸ *ibid.* p. 590

²¹⁹ SOU 2006:99 p. 594

²²⁰ The study surveyed 202 UK companies, see OFT, *The Deterrent Effect of Competition Enforcement by the OFT, A Report Prepared for the OFT by Deloitte* (OFT 962, November 2007). p.5 and pp. 70- 72. Another study commissioned by the OFT and undertaken by London Economics in 2011 attempted to assess the deterrent effect of competition intervention, thus sharing objectives with the earlier Deloitte 2007 survey. The businesses surveyed amounted to 809. The results were mostly in line with those of the Deloitte study. However whereas the Deloitte study underlined the importance of individual sanctions, the newer findings suggested that reputational damage and fines are more important in the eyes of the businesses. See to this effect: OFT, *The impact of competition interventions on compliance and deterrence* (OFT 1391 December 2011) p. 75

²²¹ Stephan 2011a, p. 4.

4.10.1 *A Combination of Measures as the Ultimate Solution*

Hazel Genn has indicated that '[c]ompanies which do not have a natural interest in safety require considerable advice, encouragement and coercion.'²²² Referring to Genn's paper Beaton-Wells and Parker pointed out that business executives start weighing the costs and benefits of compliance only once the costs of not complying are publicized which in consequence raises their awareness to the perils of not obeying the rules.²²³

Various commentators have postulated tentatively that a mixture of measures may be beneficial in achieving deterrence, instilling a culture attentive to the antitrust rules.²²⁴ The variety of sanctions, including criminal penalties, fines, private damage actions and disqualification orders may possibly influence the management of a company to take the steps to change the corporate culture.²²⁵

As pointed out by Öberg this conforms to the idea of the tit-for-tat strategy as advocated by Ian Ayres and John Braithwaite. Essentially it means that an array of punishments and persuasion are available.²²⁶ Ayres and Braithwaite argue that as the toughness of the penalties increases so does the level of compliance that the agency is able to achieve and that simultaneously the need to employ tough measures decreases: 'Regulatory agencies will be able to speak more softly when they are perceived as carrying big sticks.'²²⁷ In their view this approach embraces both the rational choice doctrine and sociological studies in combination, forming the basis of the tit-for-tat strategy.²²⁸ Therefore at the EU level according to this approach penalties of varying severity should be available to the Commission, suggesting that individual penalties besides the criminal ones, could include inter alia director disqualification orders and personal fines, but as complements, not as stand-alone sanctions.

4.11 CONCLUSION

In art. 83(2) TFEU there is an explicit legal basis to harmonize criminal rules within the EU Member States, subject to the fulfillment of certain criteria.

²²² Genn 1993. p. 219; Beaton-Wells and Parker 2012, p. 6, see footnote 33.

²²³ Beaton-Wells and Parker 2012, p. 6, see footnote 33.

²²⁴ See Stucke 2011, p. 288; Harding favours director disqualification orders over prison sentences, see Harding 2011, p. 375; Stephan 2011a, p. 8; Wils 2005a, pp. 145, 147; See also Fingleton et al., 2007. p. 9ff.

²²⁵ See Harding 2011 p. 375

²²⁶ Ayres and Braithwaite 1992, p. 5; Öberg has recently used the tit-for-tat argument in the context of antitrust violations, see Öberg 2011, p. 316.

²²⁷ Ayres and Braithwaite 1992, p. 6.

²²⁸ Ayres and Braithwaite 1992, p. 19.

Views have been voiced that a criminal prohibition of cartels should have its basis in art. 83(2) TFEU. On the other hand with regard to the possible cartel criminalization project it has been proposed that the sufficient prior harmonization in the competition law area would not be in place for the Union to proceed to criminalize cartels based on art. 83(2) TFEU. This author agrees with those who argue that it seems that the non-criminal and criminal measure could be adopted almost simultaneously. Regarding the essentiality requirement, it must be concluded, that empirical evidence is extremely hard to acquire and therefore it is unrealistic to expect such evidence. It could be argued that already the existing anti-cartel regime has proved that more robust measures, including the criminal ones, are needed. The Commission has recently made a proposal regarding harmonized criminal rules on market abuse – this initiative will be the first one to show the boundaries of art. 83(2) TFEU and may be of relevance with a view to a possible future harmonization in the area of competition law.

Another question is whether cartels should be criminalized at the level of the EU institutions or at the level of the Member States or both. In terms of the arguments presented above, such as the exchange of information between Member States and leniency, it seems that having harmonized criminal rules would be desirable. However there are practical problems concerning a criminalization at the level of the EU institutions, further the introduction of art. 83(2) TFEU may rule out such an option. Therefore it may be argued that it might be feasible that individual resourceful Member States would proceed with the cartel criminalization project. However, as Furse has pointed out, the collapse of the UK criminal cartel regime seems to prove that an EU-led project could be more viable. For the time being it seems that the EU is reluctant to proceed in this area, and therefore it appears that at least in the near future, it falls on the Member States themselves to adopt criminal rules, if such a level of condemnation is seen as appropriate.

As was pointed out, the resources required to properly enforce a possible criminal prohibition of cartels would be considerable and should definitely be a part of the consideration of such a project both at the EU level and at the level of the Member States. Based on the above this author tends to think that criminal anti-cartel enforcement is needed both at the EU level and at the Member State level, and if the former requires Treaty amendments, this may not be excluded as a possibility in the future. For now, it seems however, that the intricacies of possible criminal cartel enforcement are to be solved at the Member State level.

A 'consistent and coherent' EU criminal policy with regard to cartels, an egregious antitrust violation, should take into account a number of factors. The policy should provide consistency by criminally prohibiting conduct of similar penal value to support the credibility of the criminal justice system. It may be argued that the relative penal value of cartels warrants a

criminal prohibition. While the EU exercises its criminal law competence, due respect should be given to the principle of ultima ratio, using criminal law only as the last resort thus keeping in check the broad EU criminal law powers. The EU criminal policy should have a clear approach as to the distinction between administrative and criminal sanctions in order to ensure that the appropriate message is conveyed to the public: when the ultimate condemnation of criminal law is needed the director disqualification order does not provide the proper signal as it lacks the stigmatizing label that criminal penalties carry. Arguably director disqualification orders are not sufficiently deterrent, but are still a good complement to criminal sanctions - no conclusive evidence as to the deterrent effect of criminal penalties exists, but anecdotal evidence, various attempts at measuring deterrence and the possible educative function indicate that adding criminal penalties to an anti-cartel enforcement regime could create deterrence. It is argued that the European Commission ultimately needs a mixture of measures, including a big stick, to adequately address the cartel problem in Europe.

5 *Punitive Administrative Sanctions in Finland and Sweden: Neither Fish nor Fowl*

This chapter discusses the systems of sanctions in Finland and Sweden and the criticism of the aforementioned systems that has been prompted by their arguable incoherence. Outside the US cartel regulation ‘has been of a predominantly administrative character...’.¹ However the matter has been recently a hotbed for debate, and as Whelan has pointed out the debate has extended beyond the academic realms since some European countries have moved to criminalize cartels and even more countries have considered the possibility of doing so.²

There is a range of various penalties employed against antitrust infringements within the EU member states, for instance Sweden, Luxembourg and Holland do not employ criminal sanctions, whereas the UK, Germany and Estonia do.³ Whelan predicted that due to reasons related to efficiency it is not probable that the administrative sanctions against competition law infringements would be dropped in favor of criminal sanctions, rather they are going to exist in parallel. Further the challenges involved in a criminalization project may be daunting to some member states.⁴ Some member states with less mature competition law regimes might understandably choose to wait until their competition law cultures are more developed.⁵ Against such a backdrop administrative sanctions particularly in Finland will be explored, first on a more general level.

In Finland administrative sanctions have been employed for a long time. They have been applied in parallel with criminal sanctions and control policy discussions have tackled the possible measures extensively.⁶

¹ Harding 2006, p. 181.

² Whelan 2013b, p. 144; See for instance the discussion in Beaton-Wells and Ezrachi 2011.

³ See Whelan 2013b, p. 147; For a brief statement of the criminal sanctions across EU member states see, O’Kane 2009, pp. 325-327.

⁴ Whelan 2013b, p. 147; See also OFT, *An Assessment of Discretionary Penalties Regimes*, OFT 1132, 2009 at para. 1.4.

⁵ Whelan 2013b, p. 148; See also Fingleton et al. 2007, Under the heading ‘Conclusion’.

⁶ Kiiski 2011 p. 4.

During the 1970s the criminal policy objectives were remolded and the most important goal of the criminal sanction was considered to be the condemnation that it carries. This then showed the citizens what conduct negatively affects the society.⁷ One of the aims was the curbing of the ever-increasing employment of criminal law.⁸ Further, one goal was that the culpability should be proportionately reflected in the sanction. Criminal enforcement brings costs, and the awareness of this increased during the 1970s and thus the criminal policy was to take this into account as well.⁹ What has been the outcome policy wise in the recent decades shall be the focus of this chapter. The suggested changes will be taken into account and the relevance of the EU in this regulation environment.

Several commentators have indicated that there seems to be an increasing need to develop a consistent approach as to the entire control policy, not just the criminal penalties, but also the sanctions that are administrative, but of a penal nature.¹⁰ The Nordic and Finnish approach has been to consider administrative sanctions as something complementary to the criminal sanction system, but not an alternative. Their development has not drawn on the general criminal law doctrine.¹¹ The lack of a systematic approach as to the administrative sanctions may be explained in the Nordic context by the absence of a German like ‘*Ordnungswidrigkeit*’ – system which is a coherent system of administrative sanctions.¹² Warnling-Nerep argues that the lack of a systematic approach is problematic. She highlights the legal uncertainty that the lack of a systematic approach with regard to the administrative sanctions brings about.¹³ Both administrative sanctions and criminal sanctions may aim to create deterrence.¹⁴ Thus if statutory rules were introduced regarding administrative sanctions, determining the boundaries of such rules might not be easy.¹⁵

The criminal law committee that handed over its deliberation on the Finnish criminal policy decades ago is still today influential.¹⁶ The criminal law committee envisaged already in the 1970s a system where minor violations would be addressed by a system of administrative sanctions – this proposal never materialized however.¹⁷ As opposed to this proposal

⁷ Kiiski 2011 p. 4.

⁸ Kiiski 2011 p. 5.

⁹ Kiiski 2011 p. 5.

¹⁰ Lahti 2012, p. 9; See Warnling-Nerep 2010; Kiiski 2011.

¹¹ Kiiski 2011, p. 6.

¹² Lahti 2012, p. 9.

¹³ Warnling-Nerep 2011, p. 121.

¹⁴ Kiiski 2011 p. 9.

¹⁵ See Warnling-Nerep 2011 p. 122.

¹⁶ See Rikosoikeuskomitean mietintö 1976:72; Kiiski 2011 p. 6.

¹⁷ See (The Committee deliberation on Criminal Law) Rikosoikeuskomitean mietintö 1976:72 pp. 86-90.

it was early on decided that no administrative sanction system would be created as an alternative to criminal justice system and an evaluation of the advantages and disadvantages regarding the proposed criminal prohibitions was scarcely made. Thus for instance introduction of the antitrust fines for antitrust law violations and the fines for the market abuse violations did not occur after a thorough consideration regarding the advantages and disadvantages of the criminal law and administrative sanctions. Arguably this may be regarded as a conspicuous flaw in the law drafting stage.¹⁸

Indeed administrative sanctions have been adopted in various areas without a clear coordination. For example the on-the-spot-fine system in Finland (6/2983) that was amended in 2010 (754/2010) remained under the criminal law system despite views that since such minor violations are committed in great quantities, the general preventive effect would probably not be created to any large extent and that the ever increasing use of criminal law undermines the moral educative function of criminal law.¹⁹ On the other hand the white collars are ever more sophisticated in their operations and the offences extend to various spheres of life. Obviously this poses a challenge and requires that criminal law needs to be amended more often to get to grips with the evolving behavior.²⁰

To sum it up a more consistent control policy is called for to produce a system where the relative penal value is reflected in the robustness of the legal guarantees and the severity of the condemnation. Still effectiveness considerations should not be overlooked as will be demonstrated below.

5.1 RETHINKING THE APPROACH AS TO THE ADMINISTRATIVE SANCTIONS

Partially the EU is to be blamed for the confusion regarding the Finnish control policy: Prior to the Lisbon Treaty the EU lacked general criminal law competence which arguably brought about the expansion of the administrative law sanctions. The requirement of effective, proportionate and dissuasive sanctions in the implementation of EU law measures at the national level may have had an effect.²¹ Subsequently it can be argued that the system could have been more consistently developed if criminal law competences had been earlier available.²² As Warling-Nerep notes it

¹⁸ Lahti 2006, pp. 54-55.

¹⁹ Lahti 2012, p. 11.

²⁰ Lahti 2006, pp. 59-60.

²¹ Lahti 2012, pp. 9-10; Warnling-Nerep 2011 p. 119.

²² Matikkala 2009 p. 288.

seems that the legislator, while enthusiastic about effectiveness, overlooks the requirement of proportionality.²³

In Warnling-Nerep's view the aim towards effectiveness has completely overridden the legal certainty aspects.²⁴ The administrative sanctions have been adopted out of a desire to prevent the inflation of criminal law, and to address the effectiveness concerns, that relate to the criminal law principles.²⁵ The administrative sanction has a deterrent and retributive aim, and has replaced criminal sanctions in Sweden.²⁶ Further for instance Warnling-Nerep says she agrees that the incapability of the criminal environmental law to prevent violations, also referred to as the paper tiger, may threaten the very legitimacy of criminal law.²⁷ On the other hand it is acknowledged in Sweden too that the moral message sent by the administrative sanctions is weaker than what the criminal law sanctions convey.²⁸

While the effectiveness perspective may support administrative sanctions, the tenets of legal certainty can provide arguments for certain conduct to be covered by a criminal prohibition. Under a criminal regime the right to a fair trial guaranteed under the art 6 ECHR and safeguards emanating from the principle of legality, art. 7 ECHR, get better protection.²⁹

Melander has pointed out that the ECHR requirement set out in art. 6, may have a bearing on the principle of ultima ratio: 'the European procedural safeguards may still convert the solution adopted to be considered "criminal" – in the sense of the criminal charge mentioned in Article 6.' This may frustrate possible national efforts to resort to non-criminal measures as per the ultima ratio principle.³⁰

Arguably if an administrative EU measure falls under the scope of Article 6 of the ECHR, due to the autonomous interpretation of the word 'criminal', one could perceive the measure to be actually European criminal law.³¹ At the EU level EU competition law could be regarded under the doctrine of the European Court of Human Rights (hereinafter ECtHR) as criminal law, despite the wording set forth in Regulation 1/2003 article 23 that '[d]ecisions taken pursuant to paragraph 1 and 2 shall not be of a

²³ Warnling-Nerep 2011 p. 119 .

²⁴ In one respect at least however the situation is better at the national level in Finland and Sweden than at the EU level: at the EU level the Commission acts as the police, prosecutor and judge, while in Sweden and Finland the competition authority makes a case and subsequently a relevant court of law on the initiative of the competition authority proceeds to decide the case. See Warnling-Nerep 2010 p. 79.

²⁵ Warnling-Nerep 2010 p. 17.

²⁶ Warnling-Nerep 2010 p. 17.

²⁷ Warnling-Nerep 2010 p. 19

²⁸ Warnling-Nerep 2010 p. 19

²⁹ Lahti 2012, p. 13; See also Häyrynen 2006 p. 424-425.

³⁰ Melander 2013, p. 58.

³¹ Lahti 2012, p. 10.

criminal nature.³² This view is confirmed by the fact that the European Court of Justice (hereinafter ECJ) takes into account the principles set out by the ECtHR regarding criminal proceedings while dealing with competition law.³³

Besides the development at the EU level, the Finnish control policy has been affected by an aim towards effectiveness – thus the administrative sanctions have been adopted in Finland out of a desire to complement the criminal penalties. Their design has not drawn on any given model, such as the criminalization principles. Administrative sanctions have not been opted for only when the criminal justice system is regarded as too harsh in relation to the violation. Subsequently there appears to prevail a lack of a coherent approach.³⁴ Yet more traditionally administrative sanctions have been prompted by the widespread nature of the violations and the relatively low level of reprehensibility which validates less-resource intensive measures than criminal law tools – these include for instance parking tickets.³⁵ Compellingly Kiiski has asked whether the criminal sanctions have been disguised as administrative sanctions or whether the EU model is just being used to justify the adoption of less resource-intensive measures that weaken the legal guarantees that otherwise would be available.³⁶

In light of the foregoing the Commission proposal on a directive and regulation regarding market abuse is interesting.³⁷ The proposals were touched upon by the Finnish Committee of Legal Affairs.³⁸ It has stated

³² See André Klip's book on European Criminal Law, where EU competition law is treated as criminal law. Klip 2012, p. 2.

³³ Klip 2012, p. 3; Advocate General Sharpston has stated the following: '... I have little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in article 81(1) EC falls under the "criminal head" of Article 6 ECHR... the intention is explicitly to punish and deter...' , see C-272/09, Opinion of Advocate General Sharpston of 10 February 2012, point 64 and Klip referring specifically to these points made by the Advocate General, see Klip 2012, p. 212.

³⁴ Kiiski 2011 p. 37.

³⁵ Kiiski 2011 p. 37.

³⁶ Kiiski has pointed out however that while the ECtHR distinguishes between administrative and criminal penalties, it uses as the decisive criterion the impact of the penalty on the individual autonomy. Further the competition law fines do not interfere with such individual autonomy and are proportionate to the firm's turnover. See Kiiski 2011 p. 38

³⁷ The market abuse Regulation No 596/2014 and the Directive 2014/57EU regarding the criminalization of market abuse went on to appear in the EU Official Journal – the regulation will enter into force in July 2016, whereas the directive has a 2-year implementation phase. To this effect see Daily News of 2014-06-12, European Commission – 12/06/2014; See also the Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation Brussels, 20.10.2011 COM (2011) 654 final; Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), Brussels, 20.10.2011. COM(2011) 651 final.

³⁸ Legal Affairs Committee 1/2012 vp – U 58/2011 vp, U 49/2011 vp.

that the proposal limiting corporate fines to 10% of the preceding's years annual turnover and personal fines of max. 5 million euros are high and in the Finnish regulation environment foreign, and pointed out the relevance of the double jeopardy principle (*ne bis in idem*) and the principle of proportionality in this context. The committee further underlined that the administrative fines are very high and possibly harsher than the criminal law penalties.³⁹ In this regard it may be noted that as the criminal law measures should be of last resort, the administrative sanctions should not subsequently be tougher, as this would defeat the last resort purpose of the criminal sanctions that should be the ultimate means.⁴⁰

In a similar vein the EU competition law fines on which the Finnish competition law sanctions have been modeled contradict earlier Finnish criminal policy principles in that the EU sanctions discard culpability questions, responsibility is objectively defined under the competition law rules.⁴¹ Thus the law drafting has not emphasized the determination of subjective culpability, but instead the damage caused by the violation has risen to the forefront.⁴²

5.2 THE EFFECTIVENESS CONSIDERATIONS

The assumption in Finland seems to have been that administrative sanctions are more effective than the criminal sanctions whose imposition may lag, and the higher standards of proof may even impede a conviction altogether. Thus a shift towards administrative sanctions could indicate that an increased control of a given conduct is pursued – this would owe to the perceived rigidity and ineffectiveness of the criminal justice system.⁴³

For example in terms of enforcement against market abuse violations Häyrynen has postulated that administrative enforcement is less cumbersome, since the determination of responsibility requires less robust determination

³⁹ Further the Council of State has paid attention to the proposed more robust investigatory tools, including home search and access to telephone traffic data, that the national supervising authority ought to have according to the market abuse proposal. According to the Coercive Measures Act (*pakkokeinolaki*) 1987/450 and the new Coercive Measures Act (806/2011) which is going to enter into force in 2014, the competence to do such far-reaching searches belongs to the authority conducting the preliminary investigation. The Council of State had made reference to the fundamental rights and their observance in this context and underlined that the Finnish practice requires a prior decision of the court to allow access to telephone traffic data, even when the investigation is done by the authority conducting the preliminary investigation. Legal Affairs Committee 1/2012 vp – U 58/2011 vp, U 59/2011 vp.

⁴⁰ Kurenmaa 2003, p. 350.

⁴¹ Kiiski 2011, p. 37.

⁴² Kiiski 2011, p. 37.

⁴³ Melander 2008, p. 424.

of subjective culpability.⁴⁴ Another drawback of a criminal regime may be the possibility that people through the media deem it ineffective due to the time-consuming proceedings. An administrative regime on the other hand is arguably less resource intensive, allowing more resources to be allocated to the enforcement of the most egregious violations.⁴⁵

Similarly if higher standards were required under criminal anti-cartel enforcement, the deterrent effect of the criminal sanctions in the area of competition law could suffer.⁴⁶ The problem of presumably low detection rates could possibly be addressed by introducing tougher sanctions, which may however contradict the principle of proportionality.⁴⁷ Whelan has proposed with regard to cartels that the leniency program, and other more robust criminal law investigatory tools might operate more effectively under a criminal anti-cartel regime thus neutralizing the possible counterproductive effects of more cumbersome criminal proceedings.⁴⁸

The now outdated⁴⁹ Government Bill in 2002 on Financial Supervisory Authority in Finland left it to the authority to determine in each individual case whether the general and special preventive effect gets better observed via the criminal law route.⁵⁰ According to Häyrynen one of the problems regarding criminal enforcement of the market abuse violation could be that the authority might be unwilling to bring cases if the likelihood of conviction is not significant due to the large number of decisions by the prosecutor not to raise charges.⁵¹ Such fears may not be without grounds as for instance in the UK it is the prosecutors who may have been deterred from bringing criminal charges in cartel cases due to the ‘dishonesty’ requirement, which arguably significantly undermines the chances of a conviction.⁵²

⁴⁴ Häyrynen 2006, pp. 348-349.

⁴⁵ Häyrynen 2006, pp. 350-351.

⁴⁶ Whelan 2011, p. 229.

⁴⁷ The rate of detection in the area of competition law has been estimated to be between 10-20%, see Connor, Foer and Udwin 2010, p. 203; Bryant and Eckhard 1911, p. 535; Wils 2005b, p. 28. ;Whelan 2011, p. 230; See also Lahti 2011, p. 45.

⁴⁸ Whelan 2011, p. 233, 234; Baker 2001, p. 693.

⁴⁹ A new authority supervises this area now, see the Act on the Financial Supervisory Authority No. 878, Adopted in Helsinki on 19 December 2008.

⁵⁰ HE 175/2002 p. 63; Häyrynen 2006 p. 364.

⁵¹ This in turn could induce the potential perpetrators to increase their activities in the grey area. In terms of the preventive effect, it is regrettable, if the market participants get the picture that perpetrators get off scott-free. It may be assumed that the detection rate of insider trading is low. The detection rate and the level of punishments should be sufficient to maintain the credibility of a criminal justice system in the prosecution of market abuse violations. Häyrynen 2006 p. 342-343; Oker-Blom has argued in 2003 that in the context of market abuses adding harsher punishments has not led to decrease of suspected insider trading cases by the Authority. See Oker-Blom 2003, p. 249.

⁵² Joshua 2011, pp. 154-155.

Häyrynen has pointed out that the investigations of suspected market abuse violations have rarely led to criminal convictions. This could indicate that the criminal regime is ineffective. As Häyrynen notes, this is not peculiar to Finland, criminal enforcement in this area apparently has not produced the desired effect elsewhere either.⁵³ He has cited inter alia the following reasons relevant in this regard⁵⁴:

- *The criminal law requires that the principle of legality is observed which complicates matters when the suspected market abuse violations could be out of the definition of the offence or in the grey area.*
- *Further, as in the field of competition law, the criminal prosecution of market abuse cases seems to be plagued by the evidentiary questions, both in Finland and elsewhere.*
- *Arguably due to a lack of resources and expertise within the police, getting sufficient evidence may be delayed as the investigation lags.*
- *While investigating cases relating to market abuse, telephone tapping for example could have been useful in getting sufficient evidence.*
- *Moreover the witnesses in court almost never include the victims, which at least does not contribute to the investigation of the case. The possible criminal prosecution of a cartel offence may suffer from this as well.*
- *In Finland whether investors get the position of a plaintiff in a market abuse case, has been rejected by the Finnish Supreme Court in one particular case, where it said that the victims in a market abuse case typically are an unidentified group of people, and the definition of the offence does not require that someone would have personally suffered damage.⁵⁵ As Häyrynen points out the offence protects not only the public interest, but also the right of a private party. Ultimately the individual legal interest that is being protected in the case of market abuses is related to the right to property derived from the fundamental rights.⁵⁶ Such a reasoning seems to cast a shadow on the decision of the Supreme Court.*

The administrative sanctions however lack the moral educative function of criminal law.⁵⁷ These considerations were taken into account for instance in the Government Bill on the Prevention of Pollution from Ships. Due to the blameworthiness of such violations however, the criminal prohibition

⁵³ See Häyrynen 2006. p. 335ff.

⁵⁴ Häyrynen 2006, pp. 336-338.

⁵⁵ KKO 2000:82.

⁵⁶ Häyrynen 2006, pp. 339-340.

⁵⁷ It is also noteworthy that when the detection rate is low, from the perspective of general prevention the impact of a prison sentence arguably is significant, Lahti 2012, pp. 14-15.

was retained.⁵⁸ Similarly in Häyrynen's view despite the doubts regarding criminal enforcement in the area of market abuses, using criminal law is essential, as only it can convey the proper message, the reprehensibility of the conduct – the illicit profit gained may only be addressed by the criminal law tools.⁵⁹ By analogy arguably similar assertion applies to competition law violations, namely hard-core cartels.

5.2.1 A Balancing Act between diverging Objectives

The Swedish proposal regarding the criminal rules on insider trading rejected the adoption of administrative sanctions and the decriminalization of insider trading. The proposal argued that the society's attitudes in relation to the blameworthiness of the conduct should be influenced through the criminal law rules by for example requiring a lesser degree of negligence in the definition of the offence. This is preferable to the lowering of standards of proof (under an administrative regime), since it is more transparent, but still improves the likelihood of a conviction. The swiftness of the administrative proceedings was not seen as a sufficient reason to shift from the criminal regime to an administrative one in terms of natural persons.⁶⁰

Further the proposal cited the statistics regarding the low level of convictions on market abuse under the criminal regime, which according to critics indicates the ineffectiveness of the criminal regime. The proposal however noted that without a thorough analysis of the subject matter, no conclusions on the effectiveness of the criminal regime could be drawn. The proposal pointed out that from the perspective of rule of law the argument supporting a lower standard of proof in order to obtain more convictions is problematic.⁶¹

Kiiski indicated that the legal drafting of administrative sanctions in Finland has observed principles similar to the criminal regime. At the same time the administrative principles have been excluded from the assessment in the legal drafting phase, which may highlight the ambivalent nature of the punitive administrative sanctions. It may be asked whether the legislator resorts to the administrative sanctions in order to bring about a situation where legal guarantees do not have to be granted as robust protection as under a criminal regime.⁶²

⁵⁸ Lahti 2012, p. 15; see also the Government Bill 77/2005 for an Act amending the Act on the Prevention of Pollution from Ships.

⁵⁹ Häyrynen 2006, pp. 345-346.

⁶⁰ Prop. 2004/05:142 pp. 46-47; Warnling-Nerep 2010 pp. 28-29.

⁶¹ Prop. 2004/05:142 pp. 46-47.

⁶² Kiiski 2011, p. 39.

In Warnling-Nerep's view however administrative sanctions should not be afforded the same stringent procedural treatment as criminal offences – if same requirements concerned the former, the legislator would not be as eager to adopt the administrative sanctions. Moreover the deterrent effect becomes more credible, Warnling-Nerep argues, when hefty fines are imposed on firms, instead of meager personal fines. The effectiveness perspective supports sanctions that may be speedily imposed by an administrative authority without culpability considerations while the sanctions still bite. If administrative sanctions got the same treatment as criminal sanctions, they would lose their purpose Warnling-Nerep argued. In her view the possibility of an administrative authority to impose hefty fines against companies is something that the effectiveness perspective seems to require. What is important in her opinion is the predictability of the Act, which emanates from the principle of legality and the ECHR requirement, just as under the criminal law regime.⁶³

Warnling-Nerep stressed that it should be acknowledged that if the administrative sanctions are to serve a purpose the legal guarantees have to be undermined to a certain extent, but that the restrictions on legal certainty should be allowed only to the extent that they are absolutely necessary. She assumed that the ECHR legal guarantees apply to the current administrative fines. When the aim to punish however is not compelling and the amount of the fine low, an exception to this presumption should be granted in her view.⁶⁴ Yet even if the legislator fails to enact laws in accordance with the ECHR, the application of the laws should still observe the ECHR requirements. Above all it seems that a consistent approach as to the administrative sanctions is needed.⁶⁵

Both Finland and Sweden have adopted criminal prohibitions against insider dealing. Simultaneously such a severe ban has been absent in terms of hard-core cartels. This arguable incongruence may have been brought about by the effectiveness considerations accounted for above. In the current Author's opinion the Swedish reasoning that led to the retention of the criminal prohibition against market abuse violations is convincing and by analogy is relevant to the development of competition law enforcement at the national in Finland and Sweden. In order to further reinforce such

⁶³ Warnling-Nerep 2010, p. 281.

⁶⁴ Warnling-Nerep 2010, pp. 281-282.

⁶⁵ Warnling-Nerep points out the need for new guidelines or legislation regarding the administrative sanctions. According to her another possibility is to provide by way of doctrine the legislators and the instances applying the law with a list of items as a reminder of what to consider when tackling administrative fines. The precise term Warnling-Nerep uses is *system thinking* as to the administrative sanctions: '...men det är nu definitivt dags att tillföra ett *systemtänkande*' Warnling-Nerep 2010 pp. 282-283.

reasoning the rationales behind the recent Competition Acts in Finland will be briefly touched upon.

5.2.2 The Finnish Evolution of the Competition Law Sanctions

In 1992 Finland adopted the prohibition principle in the anti-cartel context as the new Competition Act was introduced. Cartels were however decriminalized.⁶⁶ Wils has actually argued that based on the past it could be said that countries which did not employ the prohibition principle have proceeded with the decriminalization of cartels. However as a second step Wils envisaged that once again the evolution would lead towards individual custodial sanctions when it comes to hard-core cartels.⁶⁷ Indeed Kovacic has pointed out that in the US the developments towards the current state of affairs in antitrust enforcement has been a long process and has depended on investments spanning several decades.⁶⁸

According to article 12 of the Finnish Competition Act (948/2011) a fine shall be imposed on a company that infringes articles 5 or 7 of the Act or articles 101 or 102 TFEU. The fining of the infringing companies was introduced in the 1992 Competition Act. The previous criminal provisions and the scale of penalties was lenient and was regarded as ineffective. The individuals had been subject to fines or a prison sentence of a maximum one-year term. Only few cases that had reached the court led to meager fines. They appeared to lack the general preventive effect to a large extent.⁶⁹ Further, the Bill underlined the need for expertise due to the special economic nature of competition cases that required deeper insights. The aim was also to shift the focus from the individual blameworthiness of competition infringements to the detrimental effects on the businesses.⁷⁰ Melander has argued that such an aim towards effectiveness reflected in the Competition Act was foreign to criminal law ideologically.⁷¹

The Competition Act was amended in 2004. The Government Bill on the amendment stressed the low level of fines in Finland in comparison to other OECD states. An overhaul of the fining system took place and aligned it with that of the EU, whereby a statutory maximum for the fine was determined. The amendment also introduced the leniency program in Finland. Granting leniency to the cooperating company was regarded as an effective way of cracking cartels. In addition the European network of

⁶⁶ HE 162/1991 vp.

⁶⁷ Wils 2005b, pp. 23-24.

⁶⁸ Kovacic 2011, p. 71.

⁶⁹ HE 162/1991 vp. p. 5 section 2.1.2.

⁷⁰ HE 162/1991 vp p. 6 section 2.1.3.

⁷¹ Melander 2008 pp. 421

Competition Authorities (ECN) was a further reason for the adoption of the leniency program.⁷² Thus arguably the effectiveness perspective was important in this later amendment as well, for instance under a criminal regime a leniency program could be regarded as a moral compromise.⁷³

The committee that prepared the most recent Finnish Competition Act noted that the more rigorous criminal law proceedings could undermine the effectiveness of the administrative proceedings. However the committee acknowledged that the presumption of innocence and the privilege against self-incrimination, both manifestly criminal law principles, were applicable in the administrative competition law proceedings.⁷⁴ Thus the gap between administrative and criminal proceedings might not be as wide as what one might expect.⁷⁵

Melander argued that the grounds cited had not met the requirements of an alternative measure introduced instead of criminal sanctions as per the *ultima ratio* principle. Melander however acknowledged that the *ultima ratio* principle does not necessarily lend itself to the evaluation of the competition law sanctions: For instance the current penalties, monetary fines, do not interfere with an individual's autonomy, private property is beyond reach as the current sanctions target the undertaking's annual turnover (The Competition Act, article 12, 948/2011).⁷⁶

Still the antitrust fines may be exorbitant.⁷⁷ The Finnish case law has not regarded the antitrust fines as penal – the fines have been viewed to be of a confiscatory nature. A monetary sanction of confiscatory nature only seeks to eliminate the gain that has been achieved through the violation.⁷⁸ The Finnish Constitutional Committee on the other hand has regarded them as penal.⁷⁹ Melander argued that due to their penal character effectiveness

⁷² Government Bill HE 11/2004 vp p. 24; Melander 2008 p. 422.

⁷³ Government Bill HE 44/2002 vp p. 194; Melander 2008 p. 422.

⁷⁴ Kilpailulaki 2010, Työ- ja elinkeinoministeriön julkaisuja 2009. p. 44, 51.

⁷⁵ See also Matikkala 2007, p. 266; With the regard to the current administrative control of the EU Whelan has however argued that Article 6 ECHR requires a more rigorous treatment than what is afforded under EU competition law enforcement. See Whelan 2011, p. 221.

⁷⁶ Melander 2008 p. 422.

⁷⁷ See the proposal of the Finnish Competition Authority to the Market Court regarding the level of fines in the asphalt cartel case on the 31st of March, 2004, Diary no 1198/61/01 p. 105.

⁷⁸ To this effect see ruling by the Supreme Administrative Court KHO 2000:45 and the ruling by the Administrative Court of Helsinki HAO on the 18th of February, 2005 05/0151/3; Melander 2008 p. 423 footnote 154.

⁷⁹ See the opinion of the Constitutional Committee 7/2004 vp, The committee evaluated the search warrant set out in the Competition Act and which was relevant to the right to respect for private and family life, but did not reject it as inappropriate.; see also Kiiski 2011 p. 26.

considerations are not sufficient. A more thorough assessment of the sanction is needed.⁸⁰

Melander noted that very high administrative fines that are not formally of penal nature, but in reality are, do not contribute to the lowering of the general level of sanctions. He argued that the employment of administrative fines should not extend beyond cases of minor importance.⁸¹ If certain conduct is not merely of minor reprehensibility the exclusion of criminal law safeguards is dubious. The same applies to a case where significant fines may be imposed.⁸² Melander further said that especially the fines that may be imposed regarding infringements related to the businesses should be separated from the fines that result from minor violations. The disparity between the two is underlined by the vastly different levels of fines that may be imposed for the violations respectively, yet both may be referred to as administrative sanctions.⁸³

In the anti-cartel context, in light of Governmental and parliamentary documents changes may appear in the Finnish antitrust landscape: The recent publication by the Prime Minister's Office, produced by a workgroup, urged that increasingly biting competition law sanctions should be adopted, and that introducing individual criminal sanctions in case of bidding-cartels should be a matter for investigation.⁸⁴ Further the Commerce Committee of the Finnish Parliament opined while elaborating on the proposal for a new Competition Act that if it is noted that the administrative sanctions do not suffice, one must make them more effective and when the legal principles allow, the possibility to introduce criminal sanctions in the area must be investigated. This message was repeated in the Government Program of Jyrki Katainen.⁸⁵

5.3 CONCLUSION

The Finnish and Swedish scholarly discussion has pointed out that to some extent the EU may be blamed for the absence of a coherent system of sanctions – a matter, which was arguably brought about by the absence of an explicit criminal law competence prior to the Lisbon Treaty, giving rise to the introduction of administrative sanctions that possibly were regarded as effective, thus seemingly observing the requirement of effective,

⁸⁰ Melander 2008 p. 423.

⁸¹ Melander 2008 p. 424.

⁸² Melander 2008 p. 425.

⁸³ Melander 2008 p. 425.

⁸⁴ Prime Minister's Office Publications, *Finland 2020 – From thought to action, Final report by the Growth Initiative working group*, 13/2010, p. 24.

⁸⁵ See (talousvaliokunta) Commerce Committee 50/2010; The Government Program of Jyrki Katainen 22.6.2011, pp. 39-40.

proportionate and dissuasive sanctions in the implementation of EU law at the national level. While effectiveness considerations may have been embraced by the Finnish and Swedish legislators, one could contend that at the national level precisely the demands of proportionality and coherence have not been observed in the determination of the system of sanctions as is indicated by the aforementioned inconsistency of sanctions. Subsequently it is interesting that as was noted in the preceding chapter concerning the stance of the EU,⁸⁶ there are reasons that speak in favor of an EU criminal harmonization measure against hard-core cartels, and in this regard Furse specifically argued that the lack of an EU harmonization in the area of competition law may explain to some extent the problems that the UK has faced in terms of its criminalized anti-cartel regime.⁸⁷ Thus it appears that the Finnish and Swedish discussion regarding the incoherent system of sanctions further reinforces the point that Furse was making.

It seems that consensus obtains as to the need to develop a consistent approach in relation to the administrative sanctions at the national level, both in Finland and Sweden, which is arguably clearly displayed by the total absence of individual accountability in terms of hard-core cartels in Finland. Yet the antitrust fines targeting firms appear to be of a penal nature. The Swedish legal drafting on the market abuse violations may by way of analogy provide a good starting point for rethinking the administrative sanctions in the fight against cartels and whether individual criminal liability should be available. It dismissed the idea of decriminalizing insider trading and reasoned that the swifter nature of administrative sanctions does not give grounds to do so. Instead criminal law could shape the attitudes of the society regarding the prohibited conduct. All in all, it seems that the rationale behind an exclusively administrative enforcement regime against hard-core cartels is weak. Specifically, one could argue that administrative sanctions against individuals should cover only minor offences, which should not include hard-core cartels.

⁸⁶ See to this effect the discussion under the section 'Should the EU or alternatively Individual Member States take on the Cartel Criminalization Project?' in this work.

⁸⁷ Furse 2012, p. 223.

6 *An Elaboration on Criminalized Cartel Conduct Especially in Light of the Swedish Contemplation*

6.1 INTRODUCTION

In the early 2000s a Swedish Committee (hereinafter the 2001 committee) assessed competition law enforcement and as a part of that the question of criminalizing cartels. This did not lead into a legislative draft regarding a criminal prohibition.¹

Cartels, namely those concerning gross prices and bid-rigging had been criminally prohibited in Sweden already in the 1953 legislation. The same prohibition was applicable under the 1982 Competition Act. The Competition Act that was passed in 1993 adopted the administrative mode of control and dropped the criminal prohibition.

In 2001 the position regarding the criminal sanctions was reconsidered and it was concluded that competition law violations should not be subject to criminal penalties. It may be mentioned that while the discussion below has as a starting point the Swedish contemplation, it will also draw on the international legal literature and the experiences of other jurisdictions, such as the UK, in a bid to illuminate the subject-matter.

The Swedish committee argued that designing the cartel offence would be made difficult by questions related to legal certainty and due process – these are matters that will be touched upon below, especially in relation to the desirable scope of a possible criminal cartel offence. Indeed as Whelan has pointed out that the criminal anti-cartel regime should observe the ‘mandatory legalities’ – which refer to the observance of the due process requirements flowing from the ECHR and are important from a legitimacy point of view. However the due process requirements may be seen to impair the deterrence and retribution objectives, which have a bearing on the decision whether to introduce a criminal prohibition against cartels in the first place.²

¹ See Simonsson 2011, Under the heading ‘IV The Costs and Complexities...’ at para. 2.

² Overlooking the due process requirements is not problematic only from a legal perspective, but may waste resources and harm the reputation of the anti-cartel

Further the mental and physical elements of the envisaged offence will be discussed in light of the Swedish contemplation.³

Another point of consideration in this chapter is the role of the Competition Authority under a criminalized anti-cartel regime, something which is related to the existence of parallel criminal and administrative regimes, the information exchange as prescribed in Regulation 1/2003 and the operation of the principle of *ne bis in idem*.

It may be noted that the Swedish 2001 committee argued that the criminalization should meet the following criteria:

1. *The conduct subject to criminal penalties is liable to cause serious harm.*
2. *There are no alternative sanctions available, it would not be sensible to adopt the alternative sanctions or they would cause significant costs.*
3. *The reprehensibility of the violation calls for criminal punishment.*
4. *A criminal punishment would effectively tackle the undesirable conduct.*
5. *The judicial system is able to undertake from a resource point of view the criminalization project and the additional strain that it brings about.*⁴

The committee took the position that the first criterion was fulfilled, since the cartels could harm the consumers, other firms and the economy as a whole. Regarding the second criterion, the committee viewed the administrative sanctions as an alternative, despite the absence of the individual accountability. The committee further argued that the effectiveness of the criminal sanctions cannot be verified.⁵ As to the reprehensibility mentioned in the third criterion the 2001 committee stated that the legislature was of the view that criminal punishment was not required.⁶ The Committee noted that the North American perception is that criminal punishment is an effective tool in the fight against cartels and that the Swedish legislator

regime. Further as Whelan says the cartel criminalization project needs to be justified from a principled perspective – in the pursuit of a justification the advocates of a criminal prohibition usually draw on the deterrence and retribution theories, which Whelan identifies as the main antitrust enforcement goals in Europe see Whelan 2013b, p. 144; SOU 2004:131 p. 167; SOU 2001:74 pp. 130-143.

³ SOU 2004:131 p. 167; SOU 2001:74 pp. 130-143.

⁴ The liberal translation by the Author, SOU 2001:74 p. 132.

⁵ Regarding this argument the same discussion has been ongoing regarding the possible introduction of criminal sanctions at the EU level, and it has been noted that proving empirically the effectiveness is close to impossible, see the discussion in this work in the Chapter, 'Essentiality Requirement under art. 83(2)TFEU.'

⁶ SOU 2001:74 p. 132; The reprehensibility of cartels is however arguably on par with theft, see to this effect the discussion in this work under the title, 'The Moral Content of Hard-Core Cartels'.

explicitly chose criminal measures over civil ones to address insider trading – this was done in an attempt to signal the seriousness of the violation – thus the reasoning diverged from the one concerning competition law.⁷

SOU 2004:131 – The Swedish Green Paper on Criminalizing Cartel Conduct

While the 2001 committee did not produce draft legislation, another committee (hereinafter the 2004 committee) produced a green paper regarding the criminalization of cartels.⁸ The 2004 committee was instructed to concentrate on the most serious competition law infringements, the ones that carry a conspiratorial character, benefit the cartel members and greatly impair competition.⁹ The proposal was however never adopted. The Current civil prohibition against cartels in the Swedish Competition Act sets out in Chapter 2, article 1 that:

Agreements between undertakings shall be prohibited if they have as their object or effect, the prevention, restriction or distortion of competition in the market to an appreciable extent, if not otherwise regulated in this act.

This shall apply, in particular, to agreements which:

- 1. directly or indirectly fix purchase or selling prices or any other trading conditions;*
- 2. limit or control production, markets, technical development, or investment;*
- 3. share markets or sources of supply;*
- 4. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or*
- 5. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or*

⁷ For arguments why such an incoherent approach as to treatment of offences of similar penal value is not desirable, see the discussion in this work in the Chapter, 'The Moral Content of Hard-Core Cartels'; As to the fourth criterion, the 2001 Committee went on to say that criminal punishment is effective against cartels only when it is applied - the potential cartelists must run the risk of being prosecuted in order to tap on the educative function of criminal law and to create the preventive effect. This means that the authorities must have the necessary resources to investigate and prosecute cartels and to prioritize them. Therefore the 2001 committee took the position that the fifth criterion is not met: the judicial system does not probably have the required resources, see SOU 2001: 74 p. 133; Another Swedish committee took subsequently essentially the same position, see SOU 2006:99 pp. 571-572.

⁸ Simonsson 2011 p. 211; SOU 2004: 131.

⁹ SOU 2004:131 p. 169.

according to commercial usage have no connection with the subject of such contracts.’

6.2 THE CRIMINAL CARTEL OFFENCE AND THE PRINCIPLE OF LEGAL CERTAINTY

The 2001 Committee argued that even when only the serious infringements are targeted, it is difficult to design the offence in a way that excludes benign agreements. One option would be to center the design of the offence around the harm brought about – such an offence however could be difficult to apply and investigate and therefore the committee did not favor it. On the other hand providing legal exceptions could make the system complicated and a system of exemptions regarding certain agreements could require resources and is therefore not a good option according to the 2001 committee.¹⁰ The committee concluded that due to the difficulties related to the design of the offence in a way that observes the requirements of legal certainty, a criminalization is scarcely a practicable tool to fight cartels. However it was admitted that this does not constitute a complete impediment.¹¹

Despite its aforementioned position the 2001 committee had discussed the following draft provision of a criminal offence:

*He who contributes to the violation of Article 6 of the Competition Act by an undertaking via entering an agreement that includes the fixing of prices, or that production or markets are allocated and through which competition is in a significant part of the market seriously prevented, restricted or distorted, will be sentenced to prison.*¹²

Whelan has pointed out that since there is a tendency towards the criminalization of cartels, and since arguments in favor of such a project are theoretically strong, it is also good to note that art. 7 ECHR, regarding legal certainty does not have to place impediments in the way of criminalizing cartels.¹³

Whelan has discussed art. 7 ECHR in the context of criminalized cartel conduct. Article 7 ECHR provides that a person can only be subject to a criminal penalty if it has been previously prescribed in law (nulleum crimen, nulla poena sine lege).¹⁴ One should be able to establish in advance

¹⁰ SOU 2001:74 p. 138.

¹¹ See SOU 2001:74 p. 139.

¹² A liberal translation by the author, see SOU 2001:74 p. 139.

¹³ Whelan 2012c, p. 702.

¹⁴ Whelan 2012c, p. 680; See art. 7 ECHR: '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal

what conduct falls within the scope of the criminal prohibition by merely checking the law.¹⁵ Therefore a person should be able to clearly know that cartel conduct is subject to a criminal punishment.¹⁶

As a demerit of a criminalization of cartel conduct, it has been put forward that due to the harshness of incarceration and since the competition laws may be vague to some extent due to their basis in the economics, criminal penalties against individuals should not be adopted and that criminal cartel offence might fall foul of the legal certainty principle. This has been claimed especially when criminal sanctions are something new in the antitrust context.¹⁷ While this argument might be true in terms of Article 102 TFEU violations, Whelan points out that Article 102 TFEU prohibition should be juxtaposed with Article 101 TFEU prohibition concerning cartel activity – there is not much lack of consensus regarding the anticompetitive character of such conduct, especially among the Competition Authorities across the globe.¹⁸

As Whelan points out the arrangements to conceal cartels indicate a level of awareness among the cartelists regarding the unlawfulness of their conduct. For instance in the Gas Insulated Switchgear case the Commission said that ‘[a]t both the worldwide level and the European level, the participants took elaborate precautions in order to disguise or conceal their contacts and meetings.’¹⁹ As Whelan notes under the previous notification system as per Regulation 17/62 cartels were infrequently notified and the appeals contested the amount of the fines or evidential questions.²⁰ The arguments related to the principle of legal certainty have nearly always touched upon the amount of the fines, rather than the inherent infringement itself. Moreover Article 101(3) TFEU exemptions are highly improbable.²¹

Consequently Whelan underlined that while little doubt remains as to the illegality of hard-core cartels, claiming vagueness is more compelling when it comes to art. 102 TFEU infringements and the periphery of anticompetitive conduct.²² The notion of price-fixing is understandable, making clear that competitors should refrain from discussing prices, drawing on an economic insight that is not challenged and is quite uncomplicated.

offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations.’

¹⁵ Whelan 2012c, p. 681.

¹⁶ Whelan 2012c, p. 682.

¹⁷ Whelan 2012c, p. 682.

¹⁸ Whelan 2012c, pp. 682-683; Whish and Bailey 2012 p. 513ff.

¹⁹ Whelan 2012c, p. 683; Case COMP/F/38.899, *Gas Insulated Switchgear*, Commission Decision 24 of January 2007, at para 6.5.4.

²⁰ Whelan 2012c, p. 683.

²¹ Whelan 2012c, p. 684.

²² Whelan 2012c, p. 684.

Thus the economic analysis should neither pose difficulties for the offenders nor for the courts to perceive the illegality of the conduct.²³ For instance in the US the proof that the defendants had entered a conspiracy to fix-prices suffices, whereas the impact on prices or output is irrelevant. As Posner says ‘(i)n short, the law punished the attempt to fix prices; the completed act-an actual restriction of output- was incidental’.²⁴ Subsequently arguments saying that Article 101 TFEU is not clear enough for the purposes of the legal certainty principle are not convincing. In order to avoid a design of the cartel offence that must resort to prosecutorial discretion in the rare cases where doubt remains regarding unlawfulness, Whelan argues that the definition of the offence should be under-inclusive.²⁵

6.2.1 The Invocation of a pre-existing Criminal Offence against Cartel Offences

Whelan has examined the application of the legal certainty principle as set out in art. 7 ECHR in a context where a pre-existing broad criminal prohibition, which does not specifically concern cartels (‘sleeping giant’), is invoked as a response to a cartel, as happened in the Norris case. If the authorities wish to invoke such a provision in the cartel context, an advance notice should be given by the authorities, which however may not make it more reasonable to apply the ‘sleeping giant’ to cartel activity, thus colliding with the principle of legal certainty. Moreover there must be an adequate nexus between the ‘sleeping giant’ and the cartel conduct. The ‘sleeping giants’ might be awoken for instance by the US authorities who fiercely pursue the extradition of foreign individuals responsible for cartel activities.²⁶ Whelan points out that the foregoing may be of a particular relevance in the Swedish or Dutch context where the legislators have rejected the criminalization of cartels.²⁷

It must be noted however that the ‘sleeping giant’ would do nothing to alleviate the problems associated with the impaired functioning of the administrative leniency program if immunity is not available against criminal prosecution, a compelling point cited in the Swedish context – the ultimate

²³ Whelan 2012c, p. 685; Frese has pointed out that: ‘The possible complications stemming from the fact that courts are not adequately equipped to make these analyses and from the possibility that criminal law principles will be breached, will not materialize in these “by their object-cases”. Since most hard-core cartels can be qualified as such, introducing custodial sanctions for this type of infringement could be reconciled with the economic nature of the assessment under Article 81(3) EC.’ See Frese 2006, p. 205.

²⁴ Posner 2001, p. 53; Whelan 2012c, p. 685.

²⁵ Whelan 2012c, p. 686.

²⁶ Whelan 2012c, p. 701.

²⁷ Whelan 2012c p. 702.

result might be that less cartels are detected, given the importance of the leniency program as a cartel busting tool.²⁸

The ‘sleeping giant’ argument has however been raised even in the Finnish discussion, albeit in relation to the bid-rigging cartels only.²⁹ Similarly in Germany a pre-existing fraud provision was enforced against bid-rigging in the 1990s,³⁰ which was followed by the introduction of a cartel offence targeting bid-rigging cartels. While even director disqualification orders could be imposed for such conduct under s 70, StGB, the courts do not seem to be inclined to resort to them. If the imprisonment exceeds 90 days in Germany, an entry in to the criminal record will be made, something that the employers may become aware of upon inquiry.³¹

6.3 THE SCOPE OF THE OFFENCE

The Swedish 2004 committee said that the contemplated criminal prohibition should cover only the most serious cases – it would draw on a comparison with egregious property offences and the penal value of such offences that often attract prison sentences ranging from six months up to six years.³² For instance the Commission guidelines on setting fines have singled-out price-fixing, market-sharing and output restrictions as the most egregious competition law violations and as subject to substantial fines.³³ The reach of criminal law could for instance be designed in a way that the penal value of a normal offence attracts a prison sentence.³⁴ By way of an introduction below various European cartel prohibitions will be reproduced.

Similarly to the stance of the Swedish committee, 12 Danish committee members that represented the majority view took the position that custodial

²⁸ See SOU 2004:131 p. 246-48.

²⁹ Kilpailulaki 2010, Työ- ja elinkeinoministeriön julkaisuja 2009. p. 47.

³⁰ Wagner-Von Papp, 2011, under the heading ‘A. The Application of the General Criminal Offence of Fraud’.

³¹ Wagner-Von Papp, 2011, under the heading ‘B. Introducing the Bid Rigging Offence in 1997 (StGB section 298) at paras 1,2,4,5.

³² SOU 2004:131 p. 171.

³³ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006. at para. 23.

³⁴ SOU 2004:131 p. 172; the 2001 committee noted that the Swedish civil prohibition against anticompetitive agreements required that the object or effect of the agreement was to prevent, restrict or distort competition to an appreciable extent. No intention to curb competition on the part of the undertakings was required, it was sufficient that the agreement has such an effect, or has the potential effect of doing so. The agreement may be prohibited even when no competition exists between the parties when the agreement is entered– if competition could possibly occur, but it is curbed by the agreement. Since the prohibition catches only agreements that have an appreciable effect small companies are exempted. Due to the foregoing the 2001 committee argued that the outcome of a case can

sentences should be introduced with regard to cartel conduct. The design of the cartel offence would be set out in the Competition Act, and the cartel agreement would concern prices, profits and the like regarding the sale and resale of goods and services, output restrictions regarding production or sales, market or customer allocation and big-rigging.³⁵

The Danish committee pointed out that the criminal prohibition against cartels envisaged would encompass only horizontal agreements, thus excluding the vertical agreements from the scope of the criminal cartel offence.³⁶ The committee assessed various ways of designing the cartel offence, drawing on criminal prohibitions in relation to other white-collar offences that attract custodial sanctions. The core principle regarding the white-collar offences is that they should attract custodial sanctions when infringements have been undertaken intentionally. Imposing fines, in contrast, may be prompted by a gross negligence as the mental element.³⁷

The revised Danish Competition Act sets out the following in the provision 23 subparagraph 3: *'the punishment for anyone who acts in breach of Section 6(1) of this Act or Article 101(1) TFEU... by entering into a cartel agreement... may increase to imprisonment for up to one year and six months if the breach is intentional and of a grave nature, especially due to the extent of the infringement or its potentially damaging effects. In this Act, a cartel agreement under first sentence shall mean an agreement, concerted practice or decision between undertakings, operating at the same level of trade, on i) prices, profits, etc. for the sale or resale of goods or services, ii) restrictions on production or sales, iii) sharing of markets or customers, or ix) coordination of bids...'*³⁸

Section 30 of the Norwegian Competition Act says that *'[f]ines or imprisonment of up to three years may be imposed on anyone who intentionally*

be hard to predict and the investigations are complicated – therefore there should be no criminal prohibition introduced that would cover all the aspects of the civil prohibition. See SOU 2001:74 pp. 135-136.

³⁵ 'Rapport fra udvalget om Konkurrencelovgivningen' March 2012, p. 46.

³⁶ 'Rapport fra udvalget om Konkurrencelovgivningen' March 2012, p. 204.

³⁷ *ibid.* p. 205.

³⁸ The Danish ban on cartels and some other agreements reads as follows in the section 6 of the revised Competition Act: *'It shall be prohibited for undertakings etc. to enter into agreements that have restriction of competition as their direct or indirect object or effect. (2) Agreements covered by subsection (1) may, in particular be agreements made to i) fix purchase or selling prices or other trading conditions; ii) limit or control production, sales technical development or investments; iii) share markets or sources of supply iv) apply dissimilar conditions to equivalent transactions with trading partners, thereby placing them at a competitive disadvantage; v) make the conclusion of contracts subject to acceptance by the other contracting party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; vi) coordinate the competitive practices of two or more undertakings through the establishment of a joint venture; or vii) determine binding resale prices or in other ways seek to induce one or more trading partners not to deviate from recommended resale prices.'* See to this effect the Danish Competition Act, Consolidation Act No. 23 of 17 January 2013.

*or through gross negligence' violates the section 10 prohibition. If an infringement of Section 10 is made under severely aggravating circumstances, imprisonment of up to six years may be imposed. When deciding whether severely aggravating circumstances exist, factors such as whether there was an attempt to conceal the infringement, whether significant monetary damage occurred, whether considerable financial advantages were obtained, and the severity of the infringement in general, must be considered.*³⁹

The starting point for a criminalization of competition law violations, according to the Swedish 2004 committee is that the violations should be capable of causing serious damage – this implies that the competitive process is undermined, thus making the society and the consumers bear the costs – this reflects the outcome oriented approach. On the other hand the blameworthiness of the conduct may require criminal sanctions, for instance due to the conspiratorial elements employed by the companies – this reflects the conduct oriented approach – as the committee 2004 points out the blameworthiness of a given conduct may depend on its quality of bringing about damages.⁴⁰ Harding has pointed out the difference between a conduct-oriented and an outcome-oriented cartel control – under the former approach the cartel is seen as a conspiracy, and under the latter ‘as an instrument of damage.’⁴¹ The European outcome-oriented approach arguably tends to target the effects that the cartels have rather than the conduct of the company.⁴²

However criminalizing all-inclusively conduct that is liable to cause even serious damage is difficult. A criminalization should also fulfill the

³⁹ The Norwegian Competition Act sets out the ban on cartels in section 10: ‘*The following shall be prohibited: all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which: a. directly or indirectly fix purchase or selling prices or any trading conditions; b. limit or control production, markets, technical development, or investment, c. share markets or sources of supply; d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*’ See the Competition Act of 5 March 2004 No. 12 on competition between undertakings and control of concentrations.

⁴⁰ The committee 2004 recognized that cartels cause great losses to the society. Certain prevailing features of cartels are also acknowledged, such as the intent to refrain from competition. According to the committee the cartel members make significant cartel profits, and are very well aware that the competition law rules are being infringed – the cartel meetings are disguised as something else and any evidence is cleared away consciously. While the cartel operations take place secretly an outward appearance of competition is portrayed. The 2004 committee pointed out that the most enduring and serious cartels have been well organized and the company directors have either participated in it or at least been aware of the existence of the cartel. SOU 2004:131 pp. 172-173; Harding 2002, pp. 410-411.

⁴¹ Harding 2002, pp. 410-411.

⁴² Harding 2002, p. 411.

criteria of foreseeability and legal certainty from the perspective of the individual the Swedish 2004 committee noted.⁴³

The 2004 committee noted that bid-rigging cartels have been previously subject to a criminal prohibition in Sweden, as is the case currently in Germany.⁴⁴ The committee argued that the most narrow thinkable criminal prohibition would merely cover the bid-rigging cartels. The committee however opined that in light of the nature of the other types of cartels this would be a very conservative approach – a criminal prohibition should cover price-fixing, market allocation and quota and production cartels as well the committee argued. The committee pointed out that such an approach would correspond to the UK rules, and for the most part also the Norwegian, Irish and US rules against cartels.⁴⁵

In contrast to the foregoing due to constitutional reasons the abuse of a dominant position attracts criminal penalties in Ireland.⁴⁶ The Irish Competition Act 2002 sets out in sections 6 and 7 (which notably concerns the abuse of a dominant position) the criminal offences: Section 6(1) states that '*[a]n undertaking – which (a) enters into, or implements, an agreement, or (b) makes or implements a decision, or (c) engages in a concerted practice that is prohibited by section 4(1) or by Article 81(1) of the Treaty shall be guilty of an offence.*'

As Whelan says section 6(2) separates the hard-core cartels from other less severe infringements,⁴⁷ section 6(2) prescribes that '*... it shall be presumed that an agreement between competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to – (a) directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice, (b) limit output or sales, or (c) share markets or customers, has as its object the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State or within the common market, as the case may be, unless the defendant proves otherwise.*' Further, the section 6(3) states that when proceedings are pursued under section 6(1), '*it shall be a good defence to prove that the agreement, decision or concerted practice in question did not contravene that prohibition by virtue of section 4(2).*'

⁴³ Moreover the criminal regulation should be an effective tool to fight violations, also in terms of prosecutions – these imply that the risk of detection and prosecution should be substantial to create an incentive not to engage in cartel activity. When the aforementioned criteria are not fulfilled, the legal system should according to the 2004 committee rely on corporate fines. SOU 2004:131 p. 173.

⁴⁴ SOU 2004:131 p. 174; See the discussion in Wagner-Von Papp, 2011.

⁴⁵ SOU 2004:131 p. 175.

⁴⁶ See Whelan 2012d, p. 176.

⁴⁷ See Whelan 2012d, p. 176.

Section 4(2) says that ‘[a]n agreement, decision or concerted practice shall not be prohibited under subsection (1) if it complies with the conditions referred to in subsection (5) or falls within a category of agreements, decisions, or concerted practices...’. As Whelan points out section 4(5) draws on Article 103 TFEU, and sets out that the agreement not caught by the section 4(1) ‘contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not – (a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives, (b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.’⁴⁸

On the other hand a bid-rigging cartel is not subject to custodial sanctions in Ireland save for the possibility that it is seen as a type of price-fixing.⁴⁹

While various European criminal bans were reproduced above by way of an introduction, the next chapters will seek to determine what type of anti-competitive conduct should preferably be covered by a criminal prohibition.

6.3.1 Which horizontal agreements should not be caught by the prohibition?

Via the cartel conspiracy the cooperating companies assume the power that previously was wielded by the consumers or the suppliers who lack alternative ways of selling their products.⁵⁰ As the 2004 committee states cartels are distinct from other competition law violations in a sense that their damaging effects can be assumed without a closer inquiry.⁵¹ It is no wonder then that horizontal agreements between competitors are subject to particularly severe treatment, even prison sentences.⁵²

As opposed to cartels, as pointed out by the Commission in the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, horizontal agreements can also produce economic benefits: ‘[h]orizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation

⁴⁸ See Whelan 2012d p. 176.

⁴⁹ See Whelan 2012d p. 181.

⁵⁰ SOU 2004:131 p. 173.

⁵¹ SOU 2004:131 pp. 173-174.

⁵² Whish and Bailey, 2012 p. 3.

faster.’⁵³ The mentioned Guidelines seek to assess the most typical co-operation agreements, including research and development agreements, and standardization agreements, which are less likely to fix prices.⁵⁴ Certain horizontal agreements are not caught at all by Article 101 TFEU and others are covered by block exemptions.⁵⁵

As the 2004 committee points out, the aforementioned horizontal co-operations are distinct from cartels, since they do not seek to remove the competitive process. While such co-operation may have damaging effects, typically they do not seriously prevent, restrict or distort competition. The analysis of such co-operation agreements should take place on a case by case basis, and they should not be caught by a criminal prohibition.⁵⁶ Whish and Bailey also point out that importantly cooperation agreements between competitors may be economically beneficial from the consumer perspective, as recognized by the Commission in the aforementioned Guidelines on Horizontal Cooperation Agreements. There should be no categorical prohibition against horizontal agreements as the cooperation may produce efficiency gains that weigh heavier than the accompanying constraints on competition.⁵⁷

Regarding purchasing agreements the 2004 committee says that their effects can be positive often when small buyers’ bargaining position is improved viz a viz a powerful supplier.⁵⁸ As the Commission Guidelines state, as a general rule the joint purchasing agreements are not liable to hamper competition when the parties lack market power.⁵⁹ Joint purchasing agreements should also be excluded from the scope of the criminal prohibition, as they do not prioritize the removal of the competitive process the 2004 committee said. It may be noted that while the criminal prohibition does not catch horizontal agreements apart from cartels, the civil regime may do so.⁶⁰ To sum it up, the cartel offence should target only the so-called hard-core cartels.

⁵³ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01.* at para 2

⁵⁴ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01.* at para 5; SOU 2004:131 p. 176

⁵⁵ SOU 2004:131 p. 177.

⁵⁶ SOU 2004:131 p. 177.

⁵⁷ Whish and Bailey 2012 p. 585.

⁵⁸ SOU 2004:131 p. 178.

⁵⁹ *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01* para 204.

⁶⁰ SOU 2004:131 p. 178.

6.3.2 *The Abuse of a Dominant Position*

As opposed to the abuse of a dominant position, cartels distinctly conspire against the interest of other market participants, whereas the abuse of a dominant position is a unilateral act that lacks the conspiratorial character – therefore arguably cartels may more appropriately be subject to criminal measures.⁶¹

It may be noted that regarding the abuse of a dominant position, which Ireland has criminalized, it has been proposed by Massey and Cooke that this approach may not be feasible due to the high standards of proof. The EU application of art. 102 TFEU has shown that it may always be the argument of the defence that there was a legitimate reason for the conduct – ‘[t]here is frequently a very fine dividing line between abusive behavior and legitimate aggressive competition.’ Therefore the prosecutors may not be inclined to seek a conviction of abuse of dominance, requiring proof of *mens rea*, unless the case involves a monopolist engaging in recidivism.⁶² Wagner-Papp on the other hand has pointed out that by criminalizing the abuse of dominant position, vertical agreements, concerted practices besides the horizontal agreements, Ireland may deter legitimate business practices or bring about lackluster enforcement efforts due to a criminal prohibition that applies both to hard-core infringements and insignificant infringements.⁶³

The 2004 committee noted that where a company with a position approaching a monopoly seeks to prevent the setting up of new companies the conduct may be on par with horizontal agreements in terms of penal value. However there is a fine line between harmful conduct and conduct that has pro-competitive effects, for instance a given conduct may be allowed for a company that does occupy a dominant position whereas a dominant company would not be allowed the same conduct, or depending on the market conditions a given conduct by a dominant company may or may not fall under the prohibition against the abuse of a dominant position. On the other hand establishing the dominant position of a company requires carrying out a complicated economic assessment. Moreover the existence of a dominant position alone is not caught by the prohibition. Due to the maze of regulation and complex economic affairs, it may be difficult for a company to predict whether a given conduct is caught by the prohibition. In this regard the committee pointed out that the design of criminal law regulation should be such that companies have a real opportunity to determine themselves whether a given conduct falls within the scope of

⁶¹ SOU 2001:74 p. 138.

⁶² Massey and Cooke 2011, under the heading ‘Conclusion’ at para 4.

⁶³ Wagner-Von Papp 2011, at para 1, footnote 3.; See the Irish Competition Act 2002, section 7.

the prohibition. In a criminal law context such a lack of foreseeability would not meet the criteria of legal certainty.⁶⁴

Wils has argued that effective deterrence would require that corporate fines are accompanied by prison sanctions in case of a price cartel. He says that also other art. 101 and art. 102 violations that are on par with price cartels in terms of financial rewards and which can be hidden with little effort may arguably be subject to imprisonment. On the other hand, when concealment is not effortless and profits are meager, corporate fines possibly in conjunction with director disqualification orders would be adequate to create a plausible deterrence in Wils' view.⁶⁵

Wils points out that any errors in imposing prison sanctions costs more than the mistaken imposition of corporate fines – besides the distress on natural persons, the inaccurate employment of incarceration is also a cost to those having to tolerate the risk of facing an unwarranted punishment. Additionally it may have a chilling effect on lawful conduct and the normative compliance with law in general may suffer. Due to this line of argumentation Wils argues that imprisonment should be employed only in unambiguous cases. Wils proposes that incarceration should apply only in cases where, the law is willfully breached, and the evidence of a conscious and manifest disregard for the law is available – a presumption of willfulness would be made in unambiguous cases.⁶⁶ In light of the foregoing Wils would restrict the criminal prohibition to the so-called hard-core violations, namely price-fixing, bid-rigging and market allocation cases. From the ambit of a criminal prohibition Wils would exclude other horizontal cooperation agreements, vertical restraints and the abuse of a dominant position as per art. 102 TFEU – due to easier detection, the victims' usual perception of the violation and the greater likelihood of depressing lawful behavior and the thin line between pro-competitive and harmful effects corporate fines in combination with director disqualification orders could be enough in his view.⁶⁷

All in all it appears clear that an abuse of a dominant position should not be covered by a criminal prohibition.

6.3.3 Vertical Restraints

As Whish and Bailey note the application of the prohibition in Article 101 TFEU to vertical agreements has been contested on a long-lasting basis. While it appears clear that there should be a ban against hard-core violations,

⁶⁴ SOU2004:131 pp. 179-180.

⁶⁵ Wils 2005a, p. 145.

⁶⁶ Wils 2005a, p. 145.

⁶⁷ Wils 2005a, p. 146.

since they involve a combination of the market power of the companies that puts the companies into a more favorable position, vertical agreements do no such thing. Vertical agreements tend to come under closer scrutiny only when either at the supply or buyer level market power is wielded. This may bring about a situation where the competition with other companies is restricted (inter-brand competition). Where the inter-brand competition is not significant it may also be useful to see to the preservation of the intra-brand competition between distributors.⁶⁸

While concerns regarding the vertical agreements have been expressed, at the other end of the spectrum are scholars who shun all intervention by the authorities. The Guidelines on Vertical Restraints explicitly acknowledge the positive effects brought about by the vertical agreements, by enhancing non-price competition and improving the quality of service – while a company lacks market power, profits may be increased by streamlining distribution. In such a context the vertical agreements may facilitate business relations between the supplier and buyer that are not usually intimate.⁶⁹

In a similar fashion Beaton-Wells and Fisse say that vertical agreements should explicitly be outside the scope of the *per se* cartel prohibition.⁷⁰ Massey has explained that since Ireland follows the European Union in that competition law violations outside the hard-core area, namely the vertical agreements and the abuse of a dominant position, are subject to fines it is imperative that they are criminally prohibited. He points out that it is controversial whether such conduct should be subject to fines at all in terms of economics.⁷¹ Further, the Irish competition authority does not often resort to civil remedies against violations outside the hard-core area – as Massey says ‘[i]ts approach, in some instances to vertical restraints comes close to a *per se* legal standards.’⁷²

In the UK the Hammond and Penrose report noted that competition law experts do not favor a criminal prohibition of the vertical agreements due to potential pro-competitive effects.⁷³ Such agreements may make worries mount especially if resale prices are maintained the report observed. Further, vertical agreements may benefit from art. 101(3) TFEU exemptions and therefore keeping them outside the scope of a criminal prohibition prevents

⁶⁸ For a more detailed treatment, see Whish and Bailey 2012 p. 624ff.

⁶⁹ European Commission, *Guidelines on Vertical Restraints*, 2010/ 130/01. At para 106; Whish and Bailey 2012 p. 626; See also Commission Regulation (EU) No 330/2010 of 20 April 2010, *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.*; Kuoppamäki 2012, p. 127ff.

⁷⁰ Beaton-Wells and Fisse 2012 p. 54, footnote 117.

⁷¹ Massey 2012, p. 155, 164.

⁷² Massey 2012, pp. 171-172.

⁷³ The Hammond and Penrose report 2001 p. 4

situations where a given vertical agreement is exempted at the EU level, but falls foul of national criminal prohibition.⁷⁴

Finally the Swedish 2004 committee pointed out with regard to vertical agreements that assessing should take place both from the economic and legal perspective. It should be assessed how the competitive process appears in the absence of such an agreement in a specific case, especially with regard to intra-brand and inter-brand competition, while the latter is of a more compelling interest. The effects should be evaluated from a long-term and a short-term perspective.⁷⁵ The 2004 committee also pointed out that normally vertical agreements are less damaging than the horizontal agreements, and may bring about positive effects, such as improved quality or increased access. However while assessing vertical agreements attention is paid to the influence of the company on the markets and several other factors. It may be seen that it is difficult to single-out the vertical agreements that should fall under the criminal prohibition. The criminalization of the vertical agreements would be difficult to design in a way that would appropriately target the agreements and the general criminal prohibition of vertical agreements was out of the question the 2004 committee said.⁷⁶ The 2004 committee however acknowledged the possibility of criminalizing very serious vertical agreements that could concern resale price maintenance and territorial protection. Whether such arrangements bring about excluding effects requires economic analysis and therefore a criminal prohibition seems however not well suited and the civil regime may be left to catch the violations.⁷⁷

6.3.4 Should the Possible National Criminal Cartel Offence cover Art. 101 TFEU violations?

The UK approach is to not to regard the cartel offence as national competition law for the purposes of Regulation 1/2003 due to reasons related to the jurisdiction of the UK criminal Courts and the ability to prosecute cases when the EU proceedings are assumed in parallel.⁷⁸ Also the 2004 committee considered whether the criminal offence should be tied to the competition

⁷⁴ The Hammond and Penrose report 2001 p. 11.

⁷⁵ SOU 2004:131 p. 180.

⁷⁶ SOU 2004:131 p. 181.

⁷⁷ SOU 2004:131 p. 182.

⁷⁸ See the discussion in this work under in the Chapter 'The Relationship between the EU and the National Competition Law – Is the Cartel Offence 'national competition law' for the purposes of Regulation 1/2003?'; Regulation 1/2003 says in art. 11(6) that '[t]he initiation by the commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty', see Whelan 2012b p. 599.

law rules and subsequently argued that the criminal punishment should be directly linked to the competition law prohibition.⁷⁹ The 2004 committee noted that the prohibition in art. 101 TFEU and the one in the Swedish Competition Act overlap as a general rule and it may be asked whether Article 101 TFEU should be incorporated in the offence. The committee envisaged that the cartel offence could incorporate the violation of Article 101 TFEU as an alternative requirement in the offence.⁸⁰

The Committee also pointed out that Sweden must employ the same sanctions to enforce the EU competition law and the national competition law, which would indicate that the cartel offence should cover also Article 101 TFEU violations. Therefore it would according to the committee not be sensible to narrow the scope of the cartel offence to the violations of the national prohibition.⁸¹

Further, the criminal prohibition should not extend to conduct which is allowed under the competition law rules. The Swedish contemplation noted the scope of the offence should clearly be delineated in a way that the offence is committed only when the prohibition against cartels is violated.⁸² The current Author tends to favour the UK approach for reasons, which will be further touched upon in the Chapter concerning the UK design of the Cartel offence.

6.3.5 What should qualify for an agreement for the purposes of the Cartel Offence?

As Whish has pointed out the scope of art. 101 TFEU is not restricted to contracts, which would facilitate avoiding the dictates of the provision. Instead the term 'agreement' is broadly interpreted and the application of art. 101 TFEU covers also informal arrangements, concerted practices and decisions of trade associations, as does for instance the UK Competition Act of 1998 in Chapter I. As Whish notes it is difficult to say with regard

⁷⁹ The 2004 Committee noted that Regulation 1/2003 in art. 3. requires that Member State Competition Authorities and Courts while applying national competition law to agreements that may concern also Article 101 TFEU, since trade between Member States is affected, to apply art. 101 TFEU to the arrangements. There are heavy grounds in the committee's view to argue however that Regulation 1/2003 does not apply when natural persons are subject to criminal penalties, in particular since corporate fines are imposed on the company. Therefore, it was argued that Regulation 1/2003 does not hamper a criminalization project. SOU 2004:131 p. 184-185.

⁸⁰ SOU 2004:131 p. 185.

⁸¹ The envisaged criminal prohibition would be have been violated also by an agreement concluded outside Sweden, if it had effects in Sweden, see SOU 2004:131 p. 186.

⁸² SOU 2004:131 p. 184.

to an oligopolistic market whether the parallel behavior is prompted by an agreement between the firms which in turn is caught by Article 101 TFEU. If not, the appropriate response concerns the market structure.⁸³

While there is no question that a legal agreement is caught by art. 101 TFEU, also legally non-binding agreements, such as the gentleman's agreement and simple understandings have been considered agreements for the purposes of Article 101 TFEU. It may be mentioned that the agreement does not need to be enforced, may be oral, can be the constitution of a trade association, guidelines produced by one person, correspondence and even intentions expressed only by one at a meeting may amount to an agreement or to a concerted practice.⁸⁴

The Swedish 2004 committee gave a similar account regarding the Swedish cartel prohibition and the notion of the term 'agreement'. The committee said that without concluding an agreement in the normal sense firms may act on a mutual understanding amounting to concerted practices – for this to take place, at least indirect contact between the firms must have occurred. The 2004 committee also made the point that it may be difficult to distinguish between natural parallel behavior and concerted practices, and the distinction between an agreement and concerted practices is blurred, since an agreement may be entered tacitly – the legal implications of an agreement and concerted practices however often remain the same.⁸⁵

⁸³ Whish and Bailey 2012 p. 99; Article 101 TFEU reads as follows: '1. *The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:*

- (a) *directly or indirectly fix purchase or selling prices or any other trading conditions;*
(b) *limit or control production, markets, technical development, or investment;*
(c) *share markets or sources of supply;* (d) *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;* e) *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.* 2. *Any agreements or decision prohibited pursuant to this Article shall be automatically void.* 3. *The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings, -any decision or category of decisions by associations of undertakings, - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restriction which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'*

⁸⁴ Whish and Bailey 2012 pp. 100-101; Regarding Finland see Kuoppamäki 2012 p. 105ff.

⁸⁵ SOU 2004:131 p. 187.

Understandably it may be asked whether the criminal prohibition should cover concerted practices, and the committee noted that only agreements fall within the scope of the UK cartel offence due to problems related to legal certainty if concerted practices were subject to criminal penalties.⁸⁶ In contrast the Swedish 2004 committee took the position that making a distinction between an agreement and concerted practices is difficult and that also concerted practices should be criminally prohibited, as in the absence of a criminal prohibition the preventive effect could be impaired.⁸⁷

The current author argues that due to reasons related to legal certainty concerted practices should be outside the scope of the criminal cartel offence.

6.3.6 *Inchoate Liability?*

It may be noted that in Australia the cartel prohibitions are accompanied by inchoate liability for attempt.⁸⁸ In Ireland too the Section 11 of the 2002 Act provides that 'A person indicted (whether as principal or an accessory) for an offence under section 6 or 7 or the offence of *attempting* to commit such an offence or the offence of conspiracy to commit such an offence...'.⁸⁹

Rather convincingly however the Swedish 2004 committee noted that as the cartel offence involves the entering into an agreement or its implementation, the point of completion of the offence lies early. The committee suggested that the criminalization of completed offences should suffice. The forms of inchoate liability are not either of sufficient penal value to attract the intervention of criminal law in case of competition law, the committee argued. Further, such forms of liability could be problematic from the perspective of investigation.⁹⁰

⁸⁶ The recent UK government document said that there should be a meeting of minds 'that goes further than a mere concerted practice,' to establish the violation of the offence. BIS, *Growth, Competition and The Competition Regime: Government Response to Consultation*, March 2012 at para 7.32

⁸⁷ SOU 2004:131 p. 187.

⁸⁸ Beaton-Wells and Fisse 2012 p. 184ff.

⁸⁹ Emphasis added by the Author, see also Massey and Cooke 2011, under the heading 'B. Penalties' at para 3.

⁹⁰ SOU 2004:131 p. 195.

6.4 THE DESIGN OF THE MENTAL AND PHYSICAL ELEMENTS OF THE CARTEL OFFENCE

6.4.1 *Mens Rea – the ‘Guilty Mind’*

As Williams has pointed out the mens rea threshold of an offence may be purposefully set at a low level to instill carefulness.⁹¹ The mens rea requirement may be used to indicate the culpability involved. As Williams notes the Irish criminal offence does not seem to incorporate a description of a mens rea requirement at all. On the other hand in the US the Supreme Court has stated⁹² that the defendant’s intent must be established in antitrust cases – it may however be noted that a mens rea requirement is absent in § 1 of the Sherman Act.⁹³ The recent amendment in the UK dropped the mental element of dishonesty, but retained the requirement of ‘intention’ to enter the cartel agreement.⁹⁴ The Australian cartel offence under the Trade Practices Act s 44ZZRF(2) and 44ZZRG(2) requires as a fault element knowledge or belief of a cartel provision in the contract, arrangement or understanding. Additionally the s 44ZZRG requires that there is an intention to give effect to the stipulation.⁹⁵

Williams has pointed out that if cartel agreements are not viewed as reprehensible the stigmatizing effect, associated with a criminalization, does not materialize.⁹⁶ She says that even if the actus reus employs the concept of price-fixing instead of concepts such as cheating (that perhaps may arguably better reflect intrinsic criminality), ‘there is a case for requiring a mens rea of ulterior intent to produce the underlying delinquency which justifies the use of the criminal law. Thus, for example, while “price fixing” may not yet carry the necessary moral stigma, an offence of (intentional) price fixing with intent to cheat or exploit might come to do so more rapidly than an

⁹¹ Williams 2011, under the heading ‘B. Defining the Mens Rea’ at para 1.

⁹² United States v. United States Gypsum Co. – 438 U.S. 422 (1978) at para 30.

⁹³ Sherman Act § 1, 15 U.S.C. § 1 reads: ‘*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*’

⁹⁴ BIS, *Growth, Competition and The Competition Regime: Government Response to Consultation*, March 2012 at paras. 7.9-7.10.

⁹⁵ Beaton-Wells and Fisse 2011 pp. 141-142; Williams 2011, under the heading ‘B. Defining the Mens Rea’ at paras 2-3.

⁹⁶ Williams 2011, under the heading ‘B. Defining the Mens Rea’ at paras 2-3.

offence of (intentional) price fixing per se might do.’⁹⁷ She envisaged the possibility of designing the mental element of the cartel offence so that it seeks to prohibit exploitation, accompanied by a requirement of an intent as an alternative to the troubled dishonesty requirement.⁹⁸

The Swedish 2004 committee noted that as a general rule it may be presumed that one who enters a cartel is aware of the effects of the conduct. The case law regarding antitrust practices is such that it is not necessary to prove that a company consciously infringed the competition laws to establish that the offence was intentionally committed. As opposed to that it is sufficient to show that the company could not have been unaware that the conduct in question restricted competition. Individual criminal liability however, the committee argued, should only cover intentional offences while the penal value of negligent conduct does not warrant criminal punishment and should be excluded from the scope of the offence.⁹⁹

Under the Swedish 2004 committee proposal, as an element of intent it is required that the offender was aware of the conclusion of an agreement that is prohibited at the national and EU level and that the agreement involves companies at the same level of trade fixing prices, allocating markets or limiting output. Further the serious prevention restriction or distortion of competition must have taken place intentionally. On the other hand it is not required that the offender was aware that the agreement would legally be determined to seriously prevent, restrict or distort competition. However, the offender must have been aware of the factual circumstances that prompt this judgment.¹⁰⁰

It may be noted that requiring the intent to enter the agreement in the definition of the offence contradicts the approach in the national and the EU prohibitions that are of civil nature – the criminal liability can only arise if the offender understood that the measure in question was an unlawful restriction of competition.¹⁰¹

Similarly in Denmark it was proposed that only individuals who have intentionally committed offences should be subject to custodial sanctions.¹⁰²

Harding and Joshua have said that the core reprehensibility concerning hard-core cartel collusion lies in the fact that the parties to the cartel, who should compete, intentionally enter into an agreement known to be harmful and unlawful. Since hard-core cartels are prohibited, the agreements are entered in secret and have a ‘cover and contumacious character which may

⁹⁷ William 2011, under the heading ‘B. Defining the Mens Rea’ at para 3,6.

⁹⁸ William 2011, under the heading ‘B. Defining the Mens Rea’ at para 6.

⁹⁹ SOU 2004:131 pp. 189-190.

¹⁰⁰ SOU 2004:131 p. 264.

¹⁰¹ SOU 2004:131 p. 264.

¹⁰² ‘Rapport fra udvalget om Konkurrence Lovgivningen’ March 2012, p. 46, 211.

be seen as adding to the delinquent character of such conduct.¹⁰³ Harding and Joshua argued that the offence should be confined along the lines of intention, '[a]n individual is guilty of an offence if he *intentionally agrees* with one or more other persons to make or implement, or to cause to be made or implemented, *legally prohibited* arrangements of the following kind'.¹⁰⁴ Patel has criticized this approach by arguing that restricting the offence simply to the requirement of intention, could mean that defendants could be subject to prosecution after entering a prohibited agreement even if they lacked the guilty mind. Patel would favor the following design of the offence: 'An individual is guilty of an offence if he agrees with one or more other persons to make or implement, or to cause to be made or implemented arrangements of the following kind relating to at least two undertakings (A and B), which he knows, suspects, or has reasonable grounds to suspect to be illegal.'¹⁰⁵ However as Harding and Joshua pointed out the most conspicuously delinquent part about cartels is the agreement that was concluded conscious of the legal prohibition. As they say the word 'agreement' could adequately speak for the attitude, but adding 'intentionally' and 'legally prohibited' would reflect the determination and awareness.¹⁰⁶ Both the *actus reus* and *mens rea* elements would be captured in the term 'agreement' thus giving rise to criminal liability.¹⁰⁷ Harding and Joshua point out that defining the offence this way is the approach adopted in Canada and Australia.¹⁰⁸ As per the Swedish Green paper and in line with the argumentation used by Harding and Joshua this author is of the view that the reasonable approach is to incorporate an element of intention in the offence, but not requiring additional mental elements.

6.4.2 *Actus Reus – the harm brought about by the Offender*

Criminal liability requires criminal intent and prior to the demonstration of intent, there must be a finding of actus reus, the objective element, namely a

¹⁰³ Harding and Joshua 2012, p. 2.

¹⁰⁴ Harding and Joshua 2012, p. 4.

¹⁰⁵ See Patel 2012, pp. 14-15.

¹⁰⁶ Harding and Joshua 2012 p. 2, 4; See also New Zealand, see Ministry of Economic Development, *Cartel Criminalisation: Discussion Document*, January 2010. p. 48.

¹⁰⁷ Harding and Joshua 2012 p. 4.

¹⁰⁸ Harding and Joshua 2012 p. 4; Beaton-Wells 2009, pp. 5-6; Low QC and Halladay 2011, under the heading 'A. Overview of the New Cartel Offence' at paras 2-4.

violation of the national or EU prohibition against cartels – in such a context the anticompetitive objective of the agreement may come under scrutiny.¹⁰⁹

While *mens rea* refers to the ‘guilty mind’, *actus reus* (the physical element) refers to the harm brought about by the offender. Civil prohibitions usually need only the *actus reus* part.¹¹⁰

Should the Definition of the Offence draw on the Harmful Effects brought about or the ill-gotten Profits?

Whelan points out that ‘[s]ubject to the dictates of the *de minimis* doctrine, EU law does not require the proof of the actual negative effects of, say, a price-fixing cartel on the relevant market in order for the European Commission to find an infringement of Article 101 TFEU and to impose a sanction for such an infringement. “Hard core” cartels are viewed as restriction of competition by object and therefore are not subject to an effects-based analysis’. Whelan further notes that this approach adheres to the US model and also the criminalization movement tends to observe these tenets.¹¹¹ It may be mentioned however that the possibility of advancing economic evidence during court proceedings has not been rejected in Ireland, which marks a contrast between the British and Irish regimes.¹¹²

On a different note, the Danish Committee noted that while the proposed models are designed around the agreement between competitors on the same level of trade, the design of the offence could also be more confined, drawing on inter alia the cartel profits. Other property law offences in Denmark particularly draw on the profits, for instance embezzlement and fraud – in other words the offender should profit from the infringement. Following this model would require that the prosecutor show that the cartel agreement was entered in an attempt to profit. In contrast to other property offences the proposal does not set out that the cartel agreement brought about losses or a substantial risk of losses, which is something that inter alia the statutory definition regarding fraud calls for.¹¹³ If however the cartel offence was designed in a similar fashion as the property offences,

¹⁰⁹ SOU 2004:131 p. 264.

¹¹⁰ New Zealand, see Ministry of Economic Development, *Cartel Criminalisation: Discussion Document*, January 2010. P. 48; Green 2004, p. 512.

¹¹¹ Whelan 2012a p. 3; See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(2) of the Treaty establishing the European Community, Official Journal C 368, 22/12/2001 p. 0013-0015.

¹¹² For this reason and since the design of the offence makes it linked to the violation of art. 101 TFEU Furse points out that as a result Ireland has not the need to distinguish ‘between the EU law-based procedure and a separate national criminal law.’ Furse 2012 p. 173; Regarding the employment of economic evidence at trial, see section 9 of the Irish Competition Act 2002.

¹¹³ ’Rapport fra udvalget om Konkurrence Lovgivning’ March 2012, p. 208.

the prosecutor besides the profits may prove the harm brought about or a risk of a significant loss. Moreover the prosecution must prove that the elements of the statutory prohibition were all contravened purposefully.¹¹⁴

Indeed the Danish White-Collar prosecutor highlighted that it does not have to prove the damages brought about in order to pursue custodial sanctions. The possibility of damages alone is adequate, in the fashion of other white-collar crimes.¹¹⁵

The Swedish 2004 committee noted that hard-core cartels usually seek to secure profits that would be unavailable if unrestricted competition obtained – in that sense incorporating a requirement of profits in the cartel offence might be redundant. Moreover designing the possible profit requirement in a way that observes the demands of legal certainty while targeting the conduct that is intended to be covered by the criminal prohibition, is difficult according to the 2004 committee. Therefore the committee ruled out a design of the offence that draws on the cartel profits.¹¹⁶ Also Whelan has underlined that showing individual profits is difficult.¹¹⁷

Alternatively, designing the offence in a way that draws on the harmful effects brought about by the lack of competition, such as the deadweight loss is not desirable either, since in practice it could be difficult to link such damages to a lack of competition. Therefore there should be no requirement of damages to establish criminal liability – when it comes to cartels, the harmful effects may usually be presumed.¹¹⁸ Indeed the troubled dishonesty requirement in the UK had provided the defendants with a gateway to the introduction of economic evidence which was not considered desirable.¹¹⁹

In light of the above Swedish elaboration one may take note of the discussion *inter alia* by Williams regarding the question whether the offence should target the conduct or results. As she notes the English, Irish, Australian and US offences ban chiefly the conduct with no regard to the results, which may be referred to as the ‘*per se* illegality’.¹²⁰ As an example of the conduct approach Williams cites the prohibition in the Enterprise Act, enshrined in s 188, which sets out that an agreement between persons regarding the implementation of a forbidden agreement gives rise to criminal liability, and similarly with a reference to art 101(1) TFEU the s 6 of the Competition Act forbids entering into an agreement, implementing it and

¹¹⁴ *ibid.* p. 209.

¹¹⁵ Gitte Holtso’s Interview with the Public Prosecutor for Serious White-Collar Crime, Hans Jacob Folker 2012.

¹¹⁶ SOU 2004:131 pp.188-189.

¹¹⁷ Whelan 2012b p. 597.

¹¹⁸ SOU 2004:131 pp. 188-189.

¹¹⁹ BIS, *Growth, Competition and the Competition Regime, Government Response to Consultation*, March 2012. at para. 7.5.

¹²⁰ See also the discussion in New Zealand, see Ministry of Economic Development, *Cartel Criminalisation: Discussion Document*, January 2010. P. 43ff.

concerted practices. The situation is not much different in Australia where the Trade Practices Act ss 44ZZRF makes it an offence for a corporation to enter a contract, arrangement or arrive at an understanding that includes a cartel provision. Thus also the Australian offence targets conduct. Williams acknowledges that this state of affairs may emanate from the difficulty of determining the effects of a cartel.¹²¹

For instance previously the Australian civil prohibition exempted exclusionary stipulations concerning contracts, arrangements and understandings in relation to a joint venture, if they ‘do not have the purpose or effect of substantially lessening competition.’ While the joint ventures in terms of production and provision of goods and services are exempted under the revised Australian civil and criminal regimes, the test for competitive effects is absent for the criminal offence apparently out of a desire to prevent the juries from doing the evaluation of the effects.¹²² As Williams points out, from the perspective of legal certainty this approach is desirable, but pays attention to the distinction between a criminal prohibition against conduct and a criminal prohibition against effects and notes that Harding has suggested that the US approach of criminalizing conduct naturally calls for criminal enforcement due to the moral assessment involved, whereas the analysis of the market effects needs economic analysis and is therefore more suitably dealt with under the administrative regime.¹²³

As Williams says the design of the *actus reus* may be viewed to mirror the justification for the criminal prohibition – while some may favor a stricter observance of the harm principle and thus an offence that criminalizes harmful results, legal moralists would satisfy with a criminal prohibition against the conduct. The middle way along the lines set out by Feinberg,

¹²¹ Williams 2011, under heading ‘i. Should Conduct or Results be Prohibited?’, at para 1, see also footnote 104.

¹²² Beaton-Wells 2009, pp. 6-7; Williams 2011, under heading ‘i. Should Conduct or Results be Prohibited?’, at para 1.

¹²³ According to Williams the distinction between conduct and effects could reflect the decision ‘between the forward- and backward-looking approaches...’. The forward-looking approach would then be indicative of the desire of deterring a given conduct, irrespective of a lack of harm in a particular case, while harm could possibly be brought about in a future case. The backward-looking approach on the other hand requires both moral wrongfulness and harmful effects to warrant a criminal law intervention. In light of the foregoing Williams asks whether cartels would more appropriately fall under the concept of inchoate offences rather than conduct offences: no principal offence or effects are required, collusion itself suffices. It may be noted that while liberalism might not accept inchoate crimes, Feinberg however, as Williams notes does not limit punishing only to offences with effects, see Williams 2011, under heading ‘i. Should Conduct or Results be Prohibited?’, at paras 4-6; Feinberg 1995, p. 119; Harding 2006, p. 186.

would demand the presupposition of harm, but would be content with a prohibition against the disobedience to the law.¹²⁴

All in all, as for instance the Swedish contemplation acknowledged the approach drawing on the effects of the conduct is problematic from the perspective of legal certainty and thus should be avoided.

The Criminality of Actus Reus

In the UK context Whelan has argued that the cartel offence was possibly plagued by a lack of legal certainty, since the dishonesty requirement was not matched by an actus reus that is linked to criminality – this followed in Whelan’s opinion from the absence of a link between the cartel offence and the EU prohibition. ‘With no actus reus which necessarily violates the EU prohibition on cartel activity, Section 188 EA expects a cartelist to decide whether her conduct is dishonest (and therefore criminal) without providing a clear pointer to criminality in the offence itself.’¹²⁵ As an alternative to binding the cartel offence to the EU prohibition to express the criminality, the cartel activity itself could be viewed inherently morally wrongful¹²⁶ – to achieve this, Whelan points to the concepts of ‘cheating,’ ‘deception,’ and ‘stealing’.¹²⁷ As mentioned Williams too argued that the design of the offence could signal its justification by incorporating for instance concepts such as ‘cheating’ or ‘exploitation’ into the offence. While offences usually, such as the criminalization of ‘theft’ do not refer to ‘the violation of property rights’ Williams argued that cartels are not morally as intuitive and therefore it would be desirable to point out in the offence the pertinent delinquency, in order for the necessary reprehensibility to emerge over time. Thus as time

¹²⁴ At the end of the day what counts according to Williams however is that the definition of the offence is designed in ways that signals the backward-looking approach to warrant a criminal measure, see Williams 2011, under heading ‘i. Should Conduct or Results be Prohibited?’ at para. 7.

¹²⁵ Further the EU prohibition differed from the UK cartel offence, since the *de minimis* requirement does not apply in relation to the cartel offence, the effect on trade between the EU member states is not required, Article 101(3) TFEU style exemptions are not available, and finally the dishonesty requirement distinguished the cartel offence. Whelan 2012c pp. 687-688; See Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, OJ C 368, 22.12.2001.

¹²⁶ See the Irish Case *D.P.P. V Duffy & Anor*, [2009] IEHC 208, where the judge says of cartels *inter alia* that ‘[t]hey are offensive and abhorrent, not simply because they are *malum prohibitum*, but also because they are *malum in se*.’ At para. 22.; According to Stuart Green viewing stealing merely as law-breaking would not sufficiently account for what is wrong about it. It would reduce it to the *malum prohibitum* category. Green 2006., p. 89.

¹²⁷ Whelan 2012 p. 691.

passes price-fixing could eventually as a term attract rebuke in the way that theft does.¹²⁸

Whelan says that the aforementioned concepts, ‘cheating’, ‘deception’, and ‘stealing’ require that assumptions are made regarding the motivations of the cartelists, and considering what is known of such motivations¹²⁹ – it cannot be easily claimed that cartelists have automatically the applicable intentions for the purposes of the mentioned concepts. To remedy this, the offence could require for instance that there was ‘an intention to obtain an advantage’ but the downside is that this would be one more hurdle for the prosecutors to overcome that could undermine the economic deterrence.¹³⁰ In order to avoid this ordeal Whelan argues that the cartel offence would be better off if it was tied to the civil prohibition to establish the criminality of the *actus reus*.¹³¹

6.5 THE ROLE OF THE COMPETITION AUTHORITY

While the Role of the Competition Authority is related to question how its role is determined under a criminalized anti-cartel regime, it also has a heavy link to the possibly precarious parallel existence of criminal and administrative regimes,¹³² which in turn may affect issues concerning

¹²⁸ cf. Whelan 2012 p. 692; Williams 2011 under the heading ‘ii. Should the Definition Directly Refer to the Delinquency at Issue?’ at paras 1-2; See also Beaton-Wells and Fisse who say that ‘[f]urther differentiation should be achieved by means of distinctive labelling of the prohibitions, separate definition of their physical elements,...’ Beaton-Wells and Fisse 2011 p. 35

¹²⁹ Whelan refers to Parker 2011 and Stucke 2011; see also the discussion in this work in the Chapter ‘[t]he Moral Content of Hard-core Cartels’.

¹³⁰ Thus translating into a situation where the same amount of resources allow prosecutors to secure less convictions, see Whelan 2012c p. 692.

¹³¹ Whelan 2012c p. 692.

¹³² In this regard see also the chapter ‘Punitive Administrative Sanctions in Finland and Sweden: Neither Fish nor Fowl’ in this work, which looked in to the seemingly incoherent system of sanctions in Finland and Sweden, and the rationale behind administrative anti-cartel regimes in the aforementioned contexts.

information exchange between the Commission and NCAs and the principle of *ne bis in idem*, all of which will be discussed below.

6.5.1 The Division of tasks between the Competition Authority and the Authority prosecuting the Criminal Cartel Offence and questions related to parallel Enforcement

Criminalizing cartels has been described as a ‘formidable undertaking’ and it may ‘send ripples through each element of the legal process.’¹³³ One question of importance is the role of the competition authority under a criminal anti-cartel regime, which will be discussed below.

This is an important issue to raise in the discussion on criminalizing cartel conduct since the actual performance of the Authorities involved may be very important: Tom R. Tyler has suggested that whether people are motivated to observe the dictates of the legal authorities depends on ‘social relationships and ethical judgments, and does not primarily flow from the desire to avoid punishment or gain rewards.’¹³⁴ One possibility is that the criminal anti-cartel regime would become counterproductive, since businesses would try to circumvent the new rules – thus overall compliance would not be increased.¹³⁵ Also individuals may just further strengthen their secretive tactics and collusion.¹³⁶

Importantly whether this will be the case depends arguably, as Beaton-Wells explains, on the one hand on the performance of the ACCC (the Australian Competition Authority) in terms of the number of prosecutions and on the other hand on whether the business people view the ACCC as just, consistent, proportionate and transparent – the attitudes towards compliance will depend on such factors of procedural justice.¹³⁷ As

¹³³ Kovacic 2011, under the heading ‘Introduction’ at para 4.

¹³⁴ Tyler 2006, p. 170ff.; Beaton-Wells has previously used this argument in the anti-cartel enforcement context, see Beaton-Wells 2011, under the title ‘G. Unmeasurable and Possibly Counter-Productive Effects’ at para 3.

¹³⁵ Parker 2011, under the heading ‘Conclusion’ at paras 2-3.

¹³⁶ Harding has explained that ‘[d]eterrence would enter the picture only when official policy toward most forms of “private” cartel hardened during the 1970s and 1980s so that determined cartelists had to go underground and start behaving like offenders rather than subjects of consensual regulation. Thus began a vicious circle and upward spiral of enforcement: the more secretive and more evasive the cartels became, the greater the powers of investigation and enforcement required by regulators, provoking ever more subterfuge on the part of companies, which in turn required yet greater powers of investigation and sanctioning, so transforming companies and their employees into criminal-like actors.’ Harding 2011, p. 346.

¹³⁷ Beaton-Wells 2011, under the heading ‘G. Unmeasurable and Possibly Counter-Productive Effects’ at para 3; Tyler 2006 p. 170ff.

Beaton-Wells points out the agency's reputation is at stake and mistakes will cost dearly.¹³⁸

Indeed the recent UK experience of the rather spectacular collapse of the *British Airways* case regarding fuel surcharges, whereby the OFT led criminal prosecution failed, prompted a debate regarding the reform of the design of the criminal anti-cartel regime. While leniency against criminal prosecution may be an important detection tool of the competition authority, it certainly does not appear to be the panacea for the vagaries associated with criminal anti-cartel enforcement and perhaps even less so are the more robust investigatory tools available under a criminal regime that have not been used to the extent that was originally predicted in the UK.¹³⁹

The OFT had prepared the *British Airways* case for four years and the case collapsed prior to any witness hearings due to a failure to observe the standards of disclosure related to a criminal trial.¹⁴⁰ Thus questions could be raised regarding the role of the Office of Fair Trading in criminal enforcement – it shares with the Serious Fraud Office the task of enforcing the cartel offence.¹⁴¹ In relation to that it has been noted in the Australian context that the ACCC personnel is not well-versed in criminal law matters.¹⁴² Indeed as Calvani puts it 'the skills of detectives and prosecutors with experience in embezzlement cases are likely to be more valuable than those with experience in abuse of dominance matters.'¹⁴³ With such a warning in mind the Swedish Green paper proposal on the envisaged role of the Competition Authority under a criminal anti-cartel regime will be scrutinized below.

Under the Swedish 2004 Committee Proposal (the Green paper) the Competition Authority would retain the investigation obligations under the administrative regime, while the Economic Crime Authority would concentrate on investigating the cartel offences.¹⁴⁴ The prosecutor at the Economic Crime Authority would make the decision to launch the preliminary investigation of a suspected cartel offence.¹⁴⁵

¹³⁸ Beaton-Wells 2011, under the heading 'C. Enhanced Room for Investigatory Error' at para 3.

¹³⁹ See the Discussion in this work under the Chapter 'Detecting, Investigating and Prosecuting Cartels particularly in the UK'

¹⁴⁰ Joshua 2011, p. 129; Furse 2012, p. 155.

¹⁴¹ Purnell et al. 2010, p. 315, 317; Hammond and Penrose Report 2001 p. 45

¹⁴² Beaton-Wells 2011, under the heading 'C. Enhanced Room for Investigatory Error' at para 2.

¹⁴³ Calvani and Calvani 2009, p. 139.

¹⁴⁴ Such arrangements would not require legislative amendments according to the committee, see SOU 2004:131 pp. 205-206

¹⁴⁵ SOU 2004:131 p. 206; The Swedish 2004 committee noted that it is especially important that during the preliminary investigation proceedings the principle of objectivity as set out in the chapter 23 section 4 of the Code of Judicial Procedure is observed, thus also paying attention to information that is favorable to the defendant. SOU 2004:131 p. 207-208; The Chapter 23, section 4 of the Swedish Code of Judicial Procedure sets out as follows: '*At the preliminary investigation, not*

The cartel offence investigations would according to the 2004 committee be so sophisticated that the participation of the Prosecutor is needed from the very beginning. The Prosecutor could resort both to the resources for investigation available at the Economic Crimes Authority and ask the Competition Authority whether it could place resources for investigation at the disposal of the Prosecutor regarding a specific case dealt with at the Economic Crimes Authority.¹⁴⁶

In Germany worries have been expressed about the possibility that the efficient role of the Bundeskartellamt (the German Competition Authority) might suffer, if public prosecutors enforced the criminal cases – the public prosecutors may not emphasize the cartel cases, instead they may prioritize other types of crimes. Further public prosecutors may lack expertise in competition law matters. On the other hand in Wagner von-Papp's view the handling of the bid-rigging offence has decently been taken care of by the public prosecutors.¹⁴⁷

The German concern may not be without merit: the cooperation between the competition authorities and the public prosecutors has not been smooth in Israel, Ireland or Norway, where the competition authorities have been compelled to persuade the public prosecutors to take on cases. The reluctance of the public prosecutors may also owe inter alia to the higher standards of proof.¹⁴⁸

A further concern raised by Wouter Wils is if the public prosecutors were not minded to be bound by the leniency decisions made by the Competition Authority that had conducted the investigation. Wils argued that the Competition Authority should engage the public prosecutors in the leniency negotiations and thereby make them binding upon the public prosecutors as well.¹⁴⁹ Another thing that may make prosecutions outside

only circumstances that are not in favour of the suspect but also circumstances in his favour shall be considered, and any evidence favourable to the suspect shall be preserved. The investigation should be conducted so that no person is unnecessarily exposed to suspicion, or put to unnecessary cost or inconvenience. The preliminary investigation shall be conducted as expeditiously as possible. When there is no longer reason for pursuing the investigation, it shall be discontinued.'

¹⁴⁶ SOU 2004:131 p. 207; In Denmark it was suggested that when a particular case may attract prison sentences the Competition Authority should not touch upon the case. This course of action would be prompted from the moment on when the Prosecutor deems that there are grounds to prosecute. See 'Rapport fra udvalget om Konkurrence Lovgivningen' March 2012, p. 47.

¹⁴⁷ Wagner-Von Papp 2011, under the heading 'ii. The Division of Competences: Efficient Bundeskartellamt v Inefficient Prosecutors' at paras 1-2.

¹⁴⁸ OECD *Hard Core Cartels. Third Report on the Implementation of the 1998 Recommendation*, 2005. p. 28; Baker 2011, p. 29 footnote 51.

¹⁴⁹ Wils 2007, p. 37.

the US more precarious is the seeming unwillingness of judges to sentence defendants to prison.¹⁵⁰

Wagner Von-Papp has also proposed in the German context that the Bundeskartellamt could take part in criminal enforcement, perhaps in a similar fashion as the tax authorities, which investigate the case, may pose questions and express views during the trial.¹⁵¹ On the other hand Wagner Von-Papp has also envisaged the possibility of introducing specialised public prosecutors.¹⁵²

The idea of specialized public prosecutors may to some extent correspond to the Swedish position of the 2004 committee: In Sweden the Swedish Economic Crime Authority (in Swedish 'Ekobrottsmyndigheten') was deemed by the 2004 committee the most appropriate authority to prosecute the criminal cartel offence. The 2004 committee pointed out that the choice must be made between various prosecuting authorities, namely the public prosecutors and the Swedish Economic Crime Authority. While the Economic Crime Authority has a focus on white-collar criminality also experts from other authorities, such as the tax administration are on secondment to the Economic Crime Authority. The 2004 committee excluded the possibility that any other body would be entrusted with the task of investigating the cartel offence due to its serious nature. Therefore the Economic Crime Authority should undertake both the investigation and prosecution of the criminal offence. The 2004 committee noted that this solution reflects to a certain extent the state of affairs in the UK where an authority with expertise instead of the public prosecutors undertakes the aforementioned task. Yet one should note that crucially the enforcement task in the UK is a shared endeavor between the OFT and the Serious Fraud Office.¹⁵³

As a condition of cooperation between the Competition Authority and the Economic Crime Authority the Swedish 2006 committee argued that the cooperation should be formalized even to a greater extent than what the 2004 committee had proposed in order to avoid confusion regarding the

¹⁵⁰ In Ireland the judges have given suspended prison sentences. Beaton-Wells argues that this may indicate that judges prefer suspended prison terms when the criminal regime is at a more immature stage, see Beaton-Wells 2011, under the heading 'E. Uncertain Outcomes' at para 2; See also Calvani and Calvani, 2009. p. 137.

¹⁵¹ Wagner-Von Papp 2011, under the heading 'The Division of Competences: Efficient Bundeskartellamt v Inefficient Prosecutors?' at para 5.

¹⁵² Wagner-Von Papp 2011, under the heading 'The Division of Competences: Efficient Bundeskartellamt v Inefficient Prosecutors?' at para 4.

¹⁵³ Like in other economic crimes the investigation of the cartel offence would concern economic matters. While the number of cases may be presumed small, each case will require significant resources for investigation. Therefore, according to the committee, the investigation of cartels should be in the hands of a few authorities with the expertise and which can recruit qualified executive officials. See SOU 2004:131 pp. 199-201; See the discussion in this work in the Chapter 'Detecting, Investigating and Prosecuting Cartels particularly in the UK'

roles of the respective authorities. The 2006 committee specifically noted that in the introductory period of criminal enforcement such clarity of roles is important for investigation and enforcement.¹⁵⁴

Beaton-Wells who has discussed the challenges that lie ahead of the Australian Competition and Consumer Commission (the ACCC),¹⁵⁵ has singled-out as problematic the reduced independence of the ACCC under the criminal regime, as the ACCC prior to the criminal regime had an autonomous decision-making regarding competition law violations. As opposed to that now under the criminal regime the ACCC shares competences with the office of the Commonwealth Director of Public Prosecutions (hereinafter CDPP), an agency that is entrusted with the task of prosecuting federal offences. The benefit of this approach may be that the knowledge of the ACCC may be employed in the investigation while the prosecutorial decision-making will remain coherent and impartial due to a separate prosecution agency. The ACCC and CDPP have agreed to a memorandum of understanding (MOU) that sets out the 'bifurcated model', stating that the ACCC will carry out investigations and once the ACCC has referred a case to the CDPP, it will make the decision whether to prosecute. As Beaton-Wells points out, as opposed to that the US DOJ in contrast employs an 'integrated model', whereby one agency undertakes both the investigation and the prosecution.¹⁵⁶

Cooke and Massey have noted that not allocating the investigative role to the police (Gardai), but instead to the Competition Authority could slow down the pace of prosecutions due to agency's need for gaining experience. Since the introduction of the Competition Act 2002 the Competition Authority in Ireland has had two Gardai helping it to carry out criminal enquires.¹⁵⁷ The Competition Authority had initially in the early 1990s not been assigned an investigative task.¹⁵⁸ Also the Australian Competition Authority (ACCC) has enlisted people from the police force, the corporate agency ASIC and a Special Counsel who is a criminal law barrister.¹⁵⁹

¹⁵⁴ SOU 2006:99 pp. 566-567

¹⁵⁵ Beaton-Wells however said that '[n]othing in this chapter should be taken to mean that the author does not support criminalization as a policy in dealing with serious cartel conduct or has concluded that a criminal regime is doomed to failure in Australia.' See Beaton-Wells 2011, Under the heading 'Introduction' at para 7.

¹⁵⁶ Beaton-Wells 2011, Under the heading 'A. Reduced Autonomy and Potential Intra-Agency Conflict' at paras 1-2; 'The ACCC alone gets to decide which case is sufficiently serious to justify a criminal prosecution and therefore it may ultimately be asked why certain cases and individuals were given the criminal law treatment and others the civil law treatment. Beaton-Wells 2011. Under the heading 'D. Challenges in Case Selection' at para 3.

¹⁵⁷ Massey and Cooke 2011 under the title 'Conclusion' at para 2, see also footnote 95.

¹⁵⁸ Massey and Cooke 2011 under the title 'Conclusion' at para 2.

¹⁵⁹ Beaton-Wells 2011, under the heading 'C. Enhanced Room for Investigatory Error' at para 2.

By employing the ‘bifurcated model’, however the regime runs the risk of a conflict between the two agencies, which may damage the reputation of the whole regime if publicized. Beaton-Wells argued however that on the other hand remarkable benefits may materialize in the form of skilled prosecution of cartel cases and adding to the legal safeguards due to the independence of the prosecution agency.¹⁶⁰

The Swedish 2006 committee noted however that even if there were no conflicts between the Competition Authority and the Economic Crimes Authority and there would be synergies involved related to previous knowledge, the due process requirements could mean that the criminal investigation would have to be prioritized which could undermine administrative enforcement.¹⁶¹ A similar comment has been made in the UK context by Bloom who argued that the delay is still worthwhile due to the deterrence gain.¹⁶²

The Swedish 2004 committee pointed to the possibility that the administrative investigation might be delayed as the administrative inquiry could not be concluded prior to the preliminary investigation. In the 2004 committee’s view such effects could probably not be counterbalanced by the benefits accruing from the cooperation between the Competition Authority and the Swedish Economic Crime Authority. Whether the preliminary investigation into the suspected crime is commenced thus must be decided at such an early stage, that since the Economic Crime Authority will conduct the main part of the investigation, it prevents the Competition Authority from investigating the case for instance via dawn raids.¹⁶³

On a different note, in terms of parallel enforcement the 2004 committee pointed out that while criminal cartel cases would be tried at the general courts, the Market Court deals with the cases against companies, thus running the risk of the emergence of contradicting case law. What is more, the committee predicted the parallel criminal and administrative proceedings could require substantial resources, since the same evidence would have to be presented at separate trials.¹⁶⁴

¹⁶⁰ Beaton-Wells 2011, under the heading ‘A. Reduced Autonomy and Potential Intra-Agency Conflict’ at para 4.

¹⁶¹ SOU 2006:99 p. 567;

¹⁶² Bloom 2002, p. 8; See also Furse 2012 p. 127; See also the discussion in this work in Chapter titled ‘Investigating and Prosecuting Cartels’ under the section ‘the Requisite level of Evidence in criminal cases’; It may be noted that in contrast in Australia the criminal prosecution rules out the civil proceedings. See Beaton-Wells 2011, under the heading ‘B. Fewer Civil Settlements, Fewer Visible Results’ at paras 1-2, 4.

¹⁶³ SOU 2004:131 p. 255.

¹⁶⁴ SOU 2004:131 pp. 255-256.

From a due process perspective Whelan has argued that criminal sanctions in a given jurisdiction do not prevent the parallel employment of administrative sanctions in relation to a cartel case.¹⁶⁵

While administrative investigation may be first launched, it is possible that in the course of the investigations the authority becomes aware of evidence that concerns an individual – subsequently this prompts a criminal investigation. If the administrative investigation did not observe the criminal law protections while gathering evidence, using the evidence in a criminal trial would risk infringing Article 6 ECHR,¹⁶⁶ since the rights of the defendants are not afforded the criminal law safeguards throughout the investigation and prosecution.¹⁶⁷ As Whelan points out in the UK the OFT first investigates while observing the criminal law protections if it is at first obscure whether the criminal or administrative proceedings should be opted for – the administrative standards should become operative only once it is certain the proceedings should be administrative ones. Thus Whelan suggests that it might be advisable ‘to avoid situations where evidence is initially collected using administrative powers but which then must be reacquired using criminal powers.’¹⁶⁸

Under the Swedish 2004 committee proposal the Competition Authority in parallel with the Economic Crime Authority could conduct its proceedings against infringing firms. The staff of the Competition Authority could be present when the suspected perpetrators or witnesses are heard and assist the Economic Crime Authority – in this respect the committee referred to the practices between the Economic Crime Authority and the Swedish Tax Agency which organized joint meetings.¹⁶⁹ Thus the committee suggested that cooperation should take place between the Competition Authority and the Economic Crime Authority and further that the classified information regarding the preliminary investigation held by the latter authority could contribute to the investigations of the Competition Authority, meaning that such transfer of information should be allowed.¹⁷⁰ However even the Competition Authority must observe the confidential nature of the evidence

¹⁶⁵ Whelan 2013b p. 145.

¹⁶⁶ Whelan 2013b p. 158.

¹⁶⁷ Incidentally, as Whelan explains this does not prevent concurrent proceedings by one and the same authority, if sufficient measures are taken to observe the due process: it should be made sure that the administrative and criminal investigative teams are isolated from each other by virtue of the ‘Chinese walls’, if operating within the same authority. Whelan 2013b p. 159.

¹⁶⁸ Whelan underlines the importance of having an experienced team making the decision whether to undertake either criminal or administrative proceedings. Whelan 2013b p. 160.

¹⁶⁹ SOU 2004:131 pp. 215-216.

¹⁷⁰ SOU 2004:131 p. 217.

and has limited possibilities to resort to it in a prosecution against a company before the conclusion of the preliminary investigation.¹⁷¹

The 2006 committee underlined the fact that the Swedish track record of parallel enforcement had been poor and an effort had been made to alleviate the problems associated with it.¹⁷² It may be noted that in the Slovenian anti-cartel enforcement context Jager has stated that '[b]y the unwritten law of practice the administrative procedure undertaken by the specialized state agency – the CPO – takes priority and only after that is potential criminal enforcement at best even considered.'¹⁷³

Beaton-Wells has said in the Australian context that the fears of a lack of criminal prosecutions were confirmed regarding offences in the area of corporate law, which then prompted the introduction of civil sanctions.¹⁷⁴

Furse had said that in the UK there may be a difficulty in opting for either a civil or criminal enforcement in a given case. The same case may invoke both the Competition Act 1998 and the Enterprise Act. As opposed to that in the US whether a civil or criminal prosecution is brought may be decided speedily and for instance if the decision is in favour of a criminal prosecution, both the individual and the company could be criminally prosecuted.¹⁷⁵

Furse had noted that in the US the civil and criminal proceedings are never pursued in parallel with regard to one arrangement whereas in the UK the opposite may be the case.¹⁷⁶

In this regard, it is interesting that Furse argues that the constitutional constraint in Ireland, which prevented the introduction of civil fines may have brought about a situation where the Irish anti-cartel regime compares well with the UK regime.¹⁷⁷

Beaton-Wells too has been critical of the UK regime where the case will be pursued under the civil regime when undertakings are concerned and respectively when individuals are the targets the criminal proceedings

¹⁷¹ SOU 2004:131 p. 255

¹⁷² SOU 2006:99 pp. 566-567

¹⁷³ Jager 2011, p. 295.

¹⁷⁴ Beaton-Wells 2011, under the heading 'B. Fewer Civil Settlements, Fewer Visible Results' at para 6.

¹⁷⁵ Furse 2012, p. 8.

¹⁷⁶ Furse 2012, pp. 76-77.

¹⁷⁷ Furse 2012, p. 168; Criminalising the conduct of individuals in Ireland, does not according to Massey stem from the constitutional reasons, but from 'a deliberate political decision that criminal penalties should apply to individual business executives...'. Massey 2012, p. 155.

will be launched.¹⁷⁸ It has been recognized for instance by the OFT that parallel criminal and civil enforcement is not an easy task.¹⁷⁹

Beaton-Wells has acknowledged though that since the criminal prosecution rules out the civil proceedings in Australia, the Competition Authority may not be able to sustain its steady record of litigating and then settling a case.¹⁸⁰

As a response to similar concerns in Germany Wagner Von-Papp has pointed out that currently the Bundeskartellamt continues to be responsible for enforcement against firms even when public prosecutors have undertaken the case against individuals in bid-rigging cases. If a criminal regime against cartels was introduced, Wagner Von-Papps has argued in the German context on a more optimistic note that ‘the worst that could happen is that enforcement against individuals becomes slightly less efficient.’¹⁸¹

In sum, while it seems that there is some merit to the claim that parallel enforcement against cartels may have some inherent weaknesses, on balance, it does not appear to carry the sort of weight that alone would warrant the abandonment of the idea of criminalizing cartels, which constitute an egregious violation of Competition Law. Furthermore, the Swedish idea of entrusting exclusively the Economic Crime Authority with the enforcement of the envisaged criminal cartel offence seems sensible when taking into consideration the failed criminal prosecution of the *British Airways* case in the UK.¹⁸²

Criminalizing Cartel Conduct in Light of the Required Resources

The 2004 committee highlighted the importance of detection and prosecution of the guilty individuals. Thus in order to achieve the intended

¹⁷⁸ Beaton-Wells does not favor the Irish regime either since only criminal proceedings are available irrespective of the anti-competitive conduct in question. Beaton-Wells 2011, under the heading ‘D. Challenges in Case Selection’ at para 2.

¹⁷⁹ OFT, *Applications for leniency and no-action in cartel cases, OFT’s detailed guidance on the principles and process*, OFT1495, July 2013 - at para 1.3 and 1.4.; See also Crowther 2011; Furse 2012 pp. 120-121

¹⁸⁰ Beaton-Wells 2011, under the heading ‘B. Fewer Civil Settlements, Fewer Visible Results’ at paras 1-2, 4.

¹⁸¹ Wagner-Von Papp 2011, under the heading ‘ii. The Division of Competences: Efficient Bundeskartellamt v Inefficient Prosecutors?’ at para 3.

¹⁸² For a UK-specific, but directly related issue, see the discussion under the section ‘The Institutional Structure’ in the Chapter titled ‘Detecting, Investigating and Prosecuting Cartels particularly in the UK’ in this work.

outcome the relevant authorities would have to be equipped with effective tools and adequate resources to detect cartels.¹⁸³

What is more, in the Irish context the Annual Report of the Competition Authority in 2000 revealed that the Authority could not launch investigations timeously as a result of inadequate resources.¹⁸⁴

It must be born in mind also that criminal proceedings are time-consuming since the likely subjects of criminal prosecution, the corporate executives, are probably going to exhaust every possible resource to contest the prosecution against them. Beaton-Wells points to the UK and Ireland where the criminal proceedings have lasted for years – in Ireland, it is reported, three criminal cases have been successfully concluded, each lasting approximately 3 years.¹⁸⁵ Also the 2004 noted that cartel cases had shown that significant resources would be needed, for instance due the aforementioned time-consuming nature of trials.¹⁸⁶

The Swedish elaboration envisaged that the Economic Crimes Authority would need more resources as it would be the designated prosecutor of cartel cases.¹⁸⁷ The 2004 committee pointed out that it is unavoidable the overlapping investigations of both the Competition Authority and the Economic Crimes Authority would take up resources. On the other hand the results of the criminal investigation may be employed by the Competition Authority in its administrative proceedings once the prosecution has been brought. The Competition Authority itself on the other hand would not need additional resources the committee predicted, but the criminal regime would not reduce the spendings of the Competition Authority.¹⁸⁸ The total costs of a criminal anti-cartel regime were estimated to be some 44 million Swedish Crowns per annum.¹⁸⁹

In Australia, as a result of the introduction of the criminal regime, resources previously utilized in other activities of the Competition Authority will now be redirected to criminal enforcement. This may be ill-advised, since as Beaton-Wells pointed out it is possible that criminal enforcement will undermine therefore the execution of the remaining obligations of the Competition Authority.¹⁹⁰ Similarly the 2006 committee argued that

¹⁸³ SOU 2004:131 p. 252.

¹⁸⁴ Competition Authority, *Annual Report* 2000, p. 1; Massey however pointed out that in spite of the lacking resources a good result was reached in the Heating Oil case, see Massey and Cooke 2011, under the heading 'Conclusion' at para 3.

¹⁸⁵ Beaton-Wells 2011, under the heading 'F. Resource Diversion' at para 1.

¹⁸⁶ SOU 2004:131 p. 258.

¹⁸⁷ SOU 2004:131 p. 258.

¹⁸⁸ SOU 2004:131 p. 258; Simonsson too has argued that a criminal anti-cartel enforcement regime may involve the duplication of the required resources, see Simonsson 2011, p. 210.

¹⁸⁹ SOU 2004:131 p. 21.

¹⁹⁰ Beaton-Wells 2011. Under the heading 'F. Resource Diversion' at para 2.

allocating the Competition Authority's resources to criminal enforcement would be counterproductive, since under such a regime the Competition Authority would still retain the responsibility of initial investigation. The committee said that besides the Competition Authority, also the police, the courts administration and the prosecutors would lack resources for the purposes of criminal anti-cartel enforcement and that assigning resources to criminal enforcement would be unwarranted since the same resources could be allocated to the existing administrative regime.¹⁹¹

Simonsson has however taken the position that despite the resources needed, 'the argument has been made (and convincingly to my mind) that cartel criminalization against natural persons ought to be a worthwhile project.'¹⁹²

It is interesting that in contrast to the Swedish claims the Danish Government Bill estimated that the introduction of prison sentences would not put a heavy strain on the public purse: It was predicted that custodial sanctions would not be frequently employed and the more robust investigatory measures would streamline the investigations, thus possibly in conjunction with a greater probability of detection and heavier penalties, it was thought that the number of leniency applications would rise thus strengthening enforcement. Subsequently the Government Bill estimated the economic effects of the introduction of prison sentences and higher fines on the public purse to be very narrow.¹⁹³

The Author tends to subscribe to the view that despite the resources needed, the case has been made that the required resources should not be an overpowering argument against introducing criminal sanctions.

6.5.2 Information Exchange between the Commission and the NCAs

Art. 12(3) of Regulation 1/2003 makes arrangements for the exchange of information between national competition authorities (NCAs) to enforce Article 101 TFEU.¹⁹⁴ Whelan further notes that Regulation 1/2003 for instance acknowledges in recital 16 that very different sorts of sanctions are employed against natural persons across member states and the particular

¹⁹¹ SOU 2006:99 p. 571-572.

¹⁹² Simonsson 2011, under the heading 'IV. The Costs and Complexities of Enforcing Criminal Cartel Laws' at para 11.

¹⁹³ See Forslag til Lov om ændring af konkurrenceloven og straffeloven, October 26th, 2012 p. 11.

¹⁹⁴ Whelan 2013b p. 146; Wils has also pointed out that by virtue of art. 5 of the Regulation 1/2003 member states may resort to fines or 'any other penalty provided in their national law', see Wils 2005a p. 129, 152,153.

way of enforcing Article 101 TFEU is open for the member states to decide as per art. 5 of Regulation 1/2003.¹⁹⁵

Regarding the information exchange between the national competition authorities and the Commission as set out in Regulation 1/2003, the Swedish 2004 committee stated that the introduction of a criminal prohibition in Sweden could hamper the Swedish information exchange with the aforementioned institutions.¹⁹⁶

The information exchange takes place in the framework provided by Regulation 1/2003, which sets out in the recital 15 that the Commission in conjunction with the Member State competition Authorities constitutes a network that applies the EU competition laws.¹⁹⁷ While the main rule is that the information exchange is used to enforce the EU competition law rules, (articles 101 and 102 TFEU), the exchanged information may be used in the parallel application of national competition laws, provided that a result at variance is not reached.¹⁹⁸ To avoid due process problems Regulation 1/2003 art. 12(3) sets out the following: *‘Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:*

-the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

-the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.’

Thus Regulation 1/2003 explicitly takes note of the possibility that certain jurisdictions may have opted to criminalize cartel conduct.¹⁹⁹ Where only the ‘requesting state’ has a criminal antitrust regime, the evidence collected under the administrative regime by the ‘requested state’ may not be utilized as evidence, but as intelligence, bar the situations where the ‘requested state’ observed the protections of the receiving state when

¹⁹⁵ Whelan 2013b pp. 145-146.

¹⁹⁶ SOU 2004:131 p. 228.

¹⁹⁷ See articles 11 and 12 of Regulation 1/2003; See also the Commission Notice which provides that the NCAs and the Commission use the network as a forum for conversation regarding the application of the EU rules, see European Commission, *Commission Notice on Cooperation within the Network of Competition Authorities*, 2004/C 101/03, Brussels, 24 April 2004.

¹⁹⁸ Regulation 1/2003 art. 12(2).

¹⁹⁹ Whelan 2013b p. 150.

collecting the evidence, yet even in these cases the receiving state could not resort to the transmitted evidence to pursue custodial sanctions.²⁰⁰

The 2006 committee argued that a possible Swedish decision to criminalize cartels could reflect a defensive attitude, which might not be wise. What is more, the results of a criminalization in terms of the ECN cooperation are unpredictable.²⁰¹

Whelan has however rejected the argument that employing both administrative and criminal sanctions against cartel conduct would inevitably lead to divisions within the ECN by excluding the jurisdictions with custodial sanctions from the wider community. Whelan noted that while Regulation 1/2003 art. 12(3) bans the use of transmitted information as evidence, the information received may assist the cartel investigations, indeed the received information may be legally employed 'to detect and to obtain proof of – rather than to use as evidence' of cartel conduct.²⁰²

Wils has recognized that the possibility that intelligence (which cannot be used as evidence) would be sent from jurisdictions with no criminal sanctions to jurisdictions that employ criminal sanctions could prompt efforts in the jurisdictions that have criminalized cartel conduct to gather the relevant evidence to send individuals to prison. This might make the individuals and companies more reluctant to cooperate unless if they are covered by the leniency programs. When it comes to leniency applicants this state of affairs is recognized, as Wils notes, by the *Commission Notice on cooperation within the Network of Competition Authorities* which protects the leniency applicants against the employment of exchanged intelligence by requiring that the 'receiving authority' promises not to employ the information to pursue sanctions against the 'leniency applicant' or natural persons or employees to which the leniency is extended by the sending authority.²⁰³

²⁰⁰ Whelan 2013b p. 151; Whelan has noted that it is not clear why Regulation 1/2003 rules out that the evidence transmitted from a jurisdiction with administrative sanctions could be used in a jurisdiction with criminal sanctions to pursue custodial sanctions, where Article 6 ECHR obligations have been observed in the gathering of the evidence. He further argues that in the event that Regulation 1/2003 is reformed the '(unnecessary) custodial rule should be abolished...', since it undermines deterrence while from a legal perspective the rule is not warranted. See Whelan 2013b pp. 152-153.

²⁰¹ SOU 2006:99 p. 569.

²⁰² For Wils' similar argumentation, see Wils 2005a p. 153; Whelan 2013b, p. 153.

²⁰³ See Wils 2005a pp. 153-154; See *Commission Notice on cooperation within the Network of Competition Authorities OJ C 101, 27.4.2004*. Para 40 provides: '... information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the consent of the applicant'. Further, para 41 states that no permission for sending information is needed from the leniency applicant 'where the receiving authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and

As the Swedish competition authority is bound by the *Commission Notice on cooperation within the Network of Competition Authorities*, according to the 2004 committee, it seems to suggest the competition authority may not send information to an authority entrusted with criminal investigation.²⁰⁴ In the UK the OFT has said that information from the ECN would not prompt criminal investigations as it would violate the ‘spirit’ of the Network Notice.²⁰⁵ It seems that this is the reasonable approach to protect the integrity of the leniency systems across Europe. At any rate, arguably the foregoing supports Frese’s point that an EU-wide approximation of the sanctions and coordination of the Leniency programs is called for.²⁰⁶ Furse has also postulated that not giving immunity against prosecution at the national level could violate the principle of sincere cooperation.²⁰⁷

The possibility of the exchange of intelligence could in Wils’ view potentially still have an adverse effect on the inspections of the Commission or in case of the jurisdictions that lack criminal sanctions in a context where the individuals are not covered by the leniency programs and the acquired intelligence could be sent to states that have criminalized cartel conduct – in such cases ‘[i]ndividuals may for instance be less forthcoming in answering to on-the-spot questions during inspections, or companies may be more evasive in their answers to written requests for information’ when the investigation is carried out for example by the European Commission and it could potentially send information to the UK authorities.²⁰⁸ Indeed Wils has suggested that if cartel conduct was criminalized in all EU member states and also at the level of the EU institutions the cooperation between competition authorities would be reinforced.²⁰⁹

What is more, the 2004 committee noted that for the purposes of Regulation 1/2003 the Economic Crime Authority could possibly be viewed as the national competition authority, since under the committee’s proposal it would also apply Articles 101 and 102 TFEU which would subsequently

time of transmission as noted by the transmitting authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions (a) on the leniency applicant; (b) any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme; (c) on any employee or former employee of any of the persons covered by (a) or (b).’

²⁰⁴ SOU 2004:131 pp. 229-230; See *Commission Notice on cooperation within the Network of Competition Authorities OJ C 101, 27.4.2004*.

²⁰⁵ Furse 2012 p. 129; Wils 2005a p. 153; See *Commission Notice on cooperation within the Network of Competition Authorities OJ C 101, 27.4.2004*; *OFT Applications for leniency and no-action in cartel cases, OFT’s detailed guidance on the principles and process*, OFT1495, July 2013. *para 8.11, footnote 102*.

²⁰⁶ See Frese 2006, p. 208.

²⁰⁷ Furse 2012 p. 151.

²⁰⁸ Wils 2005a p. 155.

²⁰⁹ Wils 2005a p. 154.

mean that it should take part in the cooperation prescribed in Regulation 1/2003. However, in order to show that this might not necessarily be so, the 2004 committee pointed to the recital 8 of Regulation 1/2003 which states that ‘...this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.’²¹⁰ Subsequently the committee argued that it could be deduced that when natural individuals are subject to criminal enforcement related to the infringements of Article 101 TFEU, Regulation 1/2003 would not be applicable especially if the firms are subject to corporate fines.²¹¹ The Swedish 2006 committee pointed out however that the European Commission took the position that under the Swedish 2004 committee proposal under which the Economic Crime Authority applies art. 101 TFEU, the Economic Crime Authority would fall within the scope of Regulation 1/2003. Therefore, before the ECJ has given a ruling on the matter, the competence of the Economic Crime Authority would depend on the decision of the Commission to assume proceedings as per art. 11(6) in Regulation 1/2003, which means that the national competition authority no longer is tasked with enforcing the Union law.²¹²

With a view to the above, it appears that national criminal anti-cartel enforcement could pose problems in the context of the ECN cooperation, although not necessarily insurmountable ones.

6.5.3 Questions related to the Principle of Ne Bis in Idem

The Swedish 2001 committee regarded the principle ne bis in idem, as an argument against criminalizing cartels in Sweden. Discussion points that have been raised especially in Finland and Sweden will be touched upon below.²¹³ The ne bis in idem principle or the double jeopardy principle is an important criminal procedural law principle that prohibits trying or punishing twice for the same act.²¹⁴ Thus pursuing a case if the final verdict has been given, be it a convicting or acquitting one, would infringe the ne

²¹⁰ SOU 2004:131 pp. 228-230; Wils holds an opinion at variance, see Wils 2005a p. 133.

²¹¹ SOU 2004:131 pp. 228-230.

²¹² SOU 2006:99 pp. 568-569.

²¹³ SOU 2001:74 p. 139.

²¹⁴ SOU 2001:74 p. 21.

bis in idem principle.²¹⁵ The ne bis in idem principle is set out in Article 4 of the no. 7 protocol to the European Convention on Human Rights.²¹⁶

In terms of EU antitrust enforcement, importantly the ECtHR has given a ruling, which appears to confirm that administrative antitrust proceedings fall within the scope of the art 6 ECHR due to the autonomous interpretation of the word 'criminal' by the ECtHR.²¹⁷ The Swedish Green paper on the criminalization of cartels had noted that the competition law fines may be regarded as a penal sanction under the European Convention of Human Rights and therefore Article 4 of the protocol no. 7 of the European Convention of Human Rights may be infringed if a firm is subject to competition law fines while the owner/director of the company is also subject to separate criminal penalties. The Green paper however also observed that in terms of the envisaged cartel offence such an incident is likely to arise rarely since the close relationship between the company subject to the competition law fines and the individual subject to a criminal punishment that may evoke the ne bis in idem rule under the European Convention of Human Rights would be exceptional.²¹⁸

²¹⁵ Whelan 2013b, p. 154.

²¹⁶ The Protocol no 7, art. 4 sets out that: '*1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*'; For another discussion which will not be touched upon here and that relates to extradition in the context of the ne bis in idem principle, and 'means that a person cannot be extradited for an offence if they have already been convicted or acquitted of the same offence or an offence substantially relating to the same facts.' See O'Kane 2011b, under the heading 'II. Bars to Extradition' at para. 2 and under the heading 'C. Double Jeopardy' at para 1ff.

²¹⁷ *Menarini Diagnostics SRL v Italy*, complaint 43509/08, September 27, 2011.; See also Cadete 2012; Whelan 2013b, p. 154; The Finnish Supreme Court has stated that the tax surcharge falls within the meaning of the word 'criminal' by the European Court of Human Rights, see KKO 2010:45 paras. 9-13; Helenius Dan 2010, p. 769; The autonomous meaning ascribed to the word 'criminal' by the ECtHR is not dependent on the national interpretations of the word 'criminal', See Whelan 2011, p. 219.

²¹⁸ SOU 2004:131 p. 254; It may be noted that Jager has discussed the ne bis in idem principle in the Slovenian anti-cartel context, where criminal actions may be brought not only against individuals, but also against companies in relation to hard-core cartel activity. If an act could prompt both civil and criminal proceedings in Slovenia the ne bis in idem rule dictates that only the criminal proceedings are initiated. For instance when a criminal case has been concluded, administrative proceedings may not be launched. However '[t]he latest Act Amending Administrative Offences Act (ZP-1G) softens this absolute prohibition in cases of criminal non-conviction and allows for a subsequent administrative procedure if the reasons for the decision reached in criminal procedure do not exclude it.' See Jager 2011 pp. 293-294.

Harding and Joshua have regarded the conduct of a company and a natural person something that may be separated and therefore punishing the individual and the company would not fall foul of the *ne bis in idem* principle. As they point out this is the prevailing approach. While the natural person may be considered responsible for planning the activity, the company commits the violation.²¹⁹ In a similar fashion the 2001 Committee pointed out that the competition law fine is imposed on a company whereas the criminal sanctions would target natural individuals. However a sole proprietorship that is run by one individual who is subject to a competition law fine would be the same individual that would face the criminal punishment.²²⁰

While the double jeopardy principle set out in the protocol 7, art 4 of the ECHR concerns only punishments within one jurisdictions, art 50 of the EU Charter of Fundamental Rights provides a more extensive protection, covering the whole of the EU.²²¹

The *ne bis in idem* principle could be infringed since due to a broad interpretation of the word ‘undertaking’ an individual may constitute an undertaking for the purposes of the EU law and since it appears that a natural person could be the addressee of fines, while simultaneously being subject to a criminal punishment.²²²

The Discussion concerning the Ne Bis In Idem Principle in the Nordic Context

The Swedish 2001 committee had discussed situations where a tax surcharge had been imposed as a result of a violation that had prompted criminal charges as well. The Swedish Supreme Court had previously ruled that the tax surcharge was not a criminal sanction under Swedish law and therefore a criminal charge for tax fraud regarding the same act could be brought even if a tax surcharge had already been imposed.²²³

²¹⁹ Harding and Joshua 2010, p. 349.

²²⁰ SOU 2001:74 p. 140; A similar point has been made in New Zealand, see Ministry of Economic Development, *Cartel Criminalisation: Discussion Document*, January 2010. P. 88; In Australia the degree of applicability of the common law double jeopardy principles to civil penalties is not yet resolved, see Beaton-Wells and Fisse 2011a, p. 362.

²²¹ See the Charter of Fundamental Rights, art. 50: ‘Right not to be tried or punished twice in criminal proceedings for the same criminal offence’

²²² Whelan 2013b p. 156; Further, in the EU context, ‘[i]n accordance with consistent EU case law in the field of anti-competitive practices, the principle of *ne bi in idem* is subject to the threefold condition of identity of the facts, unity of the offender and unity of the legal interest protected’, see Frese 2012, p. 95.

²²³ The Court was of the opinion however that art 6 ECHR could be applicable to the tax surcharge imposed in Sweden, but this however did not mean that the imposition

The same matter regarding tax surcharges and tax fraud prosecutions in relation to one act have prompted in Finland a discussion regarding the *ne bis in idem* principle. This has led to a Government proposal, which seeks to amend the legislation concerning tax surcharges in a way that observes the obligations flowing from the ECHR and the *ne bis in idem* principle set out in that Convention. Under the proposal the Finnish tax administration may make a tax assessment decision, but omit a decision regarding the tax surcharge until the next calendar year – if a criminal offence has been reported, the general rule will be that no tax surcharges may be imposed.²²⁴

The Finnish Supreme Court has changed its position regarding the *ne bis in idem* principle in a case that concerned a business that had been subject to a tax surcharge and had been prosecuted for tax fraud in relation to the same act that had prompted the tax surcharge.²²⁵ The Finnish Supreme Court had in its previous case law ruled that based on the ECtHR case law the prohibition against *ne bis in idem* applied only in relation to successive proceedings – thus if the decision regarding the tax surcharge was not final, criminal prosecution could be contemplated. This position had been rejected by the Finnish Constitutional Committee, saying that the *ne bis in idem* does not protect against merely successive proceedings, but also against parallel proceedings regarding the same matter – this was derived from the wording of art. 4 of the protocol no. 7 ECHR and the ECtHR judgments in *Sergey Zolotukhin v. Russia*²²⁶ on 10.2.2009 and *Tomasovic v. Croatia*²²⁷ 18.10.2011.²²⁸ In the former case the European Court of Human Rights stated that ‘the approach which emphasizes the legal characterization of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for the offences having a different legal classification it risks undermining the guarantee enshrined

of the tax surcharge affected a successive criminal case – this was deduced from the fact that the European Convention of Human Rights referred to the internal law of its member states and the case law of the European Court of Human Rights did not support a view that would reject the aforementioned Swedish position. Further the Swedish Supreme Court had pointed out that the tax fraud offence required either intent or negligence whereas the imposition of the tax surcharge required neither. According to this line of argumentation the Swedish Supreme Court took the position that under the ECHR law the tax fraud prosecution could not be derived from the same violation as the imposition of the tax surcharge. See SOU 2001:74 pp. 139-140; See NJA 2000 s 622.

²²⁴ See Finnish Government Proposal HE 191/2012

²²⁵ Regarding the former position see for instance the ruling in KKO 2010:45, see para. 44; For a discussion as to the case law of the Finnish Supreme Court see Helenius and Hellsten 2013.

²²⁶ European Court of Human Rights, Case of *Sergey Zolotukhin v. Russia* 10 February 2009. See paras. 81, 82, 83, 84, 115

²²⁷ European Court of Human Rights, Case of *Tomasović v Croatia* 18 October 2011. Paras. 29-32

²²⁸ See PeVL 9/2012 vp and PeVL 17/2013

in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention.[...] Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same.²²⁹

Subsequently more recently the Finnish Supreme Court took the position based on the interpretations by the Constitutional Committee (regarding article 21 of the Constitution which concerns due process of law and article 4 of the no. 7 Protocol of the European Human Rights Convention, and the obligations flowing from Article 6 of the Constitution), that if a decision regarding the imposition or non-imposition of a tax surcharge has been made, a criminal prosecution regarding the matter that prompted the tax surcharge decision may not be launched. This applies to parallel proceedings as well.²³⁰

In accordance with the foregoing, in the antitrust context, Whelan explains that the *ne bis in idem* principle becomes operative when there are parallel prosecutions, and the latter prosecution relates to an offence regarding which a final verdict has been given. Assessing whether the latter prosecution concerns the same offence may require an assessment of the facts, and the *ne bis in idem* principle becomes operative if the facts are identical or very similar.²³¹ When the principle is operative the latter prosecution should be dropped, and if the administrative proceedings were first assumed, the criminal proceedings need to be discontinued – a factor that might affect the deterrent capabilities of criminal anti-cartel enforcement. In a case where the individual constitutes the undertaking he would subsequently face merely the administrative proceedings.²³²

To sum it up, with regard to a possible criminalization of the cartel conduct, it seems important to observe that such a project would not seem to be problematic in relation to the *ne bis in idem* principle since conflicts would be rare and could be simply resolved by dropping the latter prosecution.

6.6 CONCLUSION

In Sweden concerns have been raised with regard to criminalized cartel conduct due to fears that the principle of legal certainty might be infringed

²²⁹ European Court of Human Rights, Case of Sergey Zolotukhin v. Russia 10 February 2009. At paras. 81-82; See Also Helenius 2010, p. 776.

²³⁰ See the press release on 5th of July, 2013. 'Veropetosyytteen tutkintaan liittyvää tulkintalinjaa muutettiin'

²³¹ Whelan 2013b p. 156

²³² Whelan 2013b p. 158.

– in order to avoid such problems the above elaboration has demonstrated that such worries may be superfluous. The cartel offence and more broadly criminal enforcement should exclude from their scope horizontal agreements that do not fall within the category of hard-core cartels, vertical agreements and art. 102 TFEU conduct that may produce pro-competitive effects and may be difficult for the courts to assess. Article 101 TFEU on the other hand is clear enough for the purposes of the principle of legal certainty: as per uncontested economic insight competitors should not discuss prices.

The definition of the offence should include an element of intent, but arguably the word ‘agreement’ speaks sufficiently for the delinquent aspect, additional elements could present the prosecutors with further hurdles, that might impair the deterrent effect of the offence – importantly the Swedish contemplation did not suggest mental elements beyond the requirement of intentionality – further the idea that criminal liability would arise only if the harmful effects of the cartel were shown was rejected as such effects may be presumed and would be problematic from the perspective of legal certainty.

As was noted above the determination of the role of the Competition Authority under a criminalized anti-cartel regime is important, since it is also related to the possibly shaky endeavour of parallel criminal and administrative enforcement regimes, an argument which alone does not seem to mandate a decision to reject the criminalization of hard-core cartels. It appears that the position of the Swedish contemplation to exclusively task the Economic Crime Authority with criminal anti-cartel enforcement is sensible in light of the unsuccessful UK experience.

What is more, parallel enforcement may inherently bring about a duplication of the required resources – the current Author however tends to think that it should not represent an irrefutable argument against a criminalized cartel regime.

Also Article 12(3) of Regulation 1/2003 has been portrayed as a counterargument in Sweden concerning the criminalization of cartels, since it could possibly undermine the exchange of information within the ECN. The problem essentially lies in the fact that the transmitted intelligence, which may not be used as evidence, could still prompt investigations in jurisdictions with criminalized anti-cartel regimes, thus possibly inducing less cooperation from individuals and firms not covered by the leniency programs. While the OFT has taken the position that such a course of action would violate the spirit of the Network Notice, the foregoing further reinforces the argument made in favour of an EU-led cartel criminalization project that would not only introduce coherence in terms of sanctions, but also with respect to leniency programs. While the ECN cooperation could be encumbered by the introduction of individual criminal liability, the current Author is inclined to think that the possible hurdles are not overwhelming.

Moreover, the Swedish contemplation noted that problematically the Economic Crime Authority could be perceived to be the national competition authority for the purposes of Regulation 1/2003, since it would apply Articles 101 and 102 TFEU – thus the competence of the aforementioned Authority would depend on the decision of the European Commission to start proceedings according to Art. 11(6) in Regulation 1/2003. Uncertainty in this regard would prevail until a possible ECJ ruling on the matter is delivered.

Another problem that has been discussed in Sweden is whether the principle of *ne bis in idem* could constitute an argument against criminalizing cartel conduct: as the above discussion demonstrates conflicts would be rare and could be easily resolved by dropping the latter prosecution. It may be concluded that the legal certainty and due process arguments are not necessarily problematic in terms of a cartel criminalization project.

7 *The UK Design of the Criminal Cartel Offence*

7.1 INTRODUCTION

In line with the comparative nature of this thesis the UK criminal Cartel Offence will be subject to scrutiny below. The exploration will focus on the UK experience predating the reform of the cartel offence and the discussion in the years leading up to it. It should be noted however that on the 25th of April 2013 the Enterprise and Regulatory Reform Act (hereinafter ERRA) received Royal Assent and the amended cartel offence entered into force on April 1st 2014.

The UK is a notable European jurisdiction to have criminalized cartels. With the intention of increasing deterrence of cartels the Enterprise Act was introduced in the UK, it received Royal Assent on 7th of November 2002 and came into force on 20th of June 2003. This Act incorporated the criminal prohibition against cartel offences.¹ The relevant cartel offence provisions run from section 188 to 202. Section 188 sets out the offence. Section 190 prescribes the penalties.² Sections 191-202 concern the criminal investigations by the OFT, allowing robust measures to investigate.

The critical sections 188 and 189 read as follows:

'188 Cartel Offence

- (1) *An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).*
- (2) *The arrangements must be ones which, if operating as the parties to the agreement intend, would-*
 - (a) *directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,*
 - (b) *limit or prevent supply by A in the United Kingdom of a product or service,*
 - (c) *limit or prevent production by A in the United Kingdom of a product,*
 - (d) *divide between A and B the supply in the United Kingdom of a*

¹ Furse 2012 p. 7, 107.

² Furse 2012 p. 108.

- product or service to a customer or customers,*
- (e) *divide between A and B customers for the supply in the United Kingdom or a product or service, or*
 - (f) *be bid-rigging arrangements.*
- (3) *Unless subsection (2)(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would-*
- (a) *directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) a product or service,*
 - (b) *limit or prevent supply by B in the United Kingdom of a product.*
- (4) *In subsection (2)(a) to (d) and (3), references to supply or production are to supply or production in the appropriate circumstances (for which see section 189).*
- (5) *“Bid-rigging arrangements” are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom-*
- (a) *A but not B may make a bid, or*
 - (b) *A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.*
- (6) *But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.*
- (7) *“Undertaking” has the same meaning as in Part 1 of the 1998 Act.’*

Section 189 Cartel offence: supplementary

- (1) *For section 188(2)(a), the appropriate circumstances are that A’s supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by B in the United Kingdom.*
- (2) *For section 188(2)(b), the appropriate circumstances are that A’s supply of the product or service would be at a level in the supply chain-*
 - (a) *at which the product or service would at the same time be supplied by B in the United Kingdom, or*
 - (b) *at which supply by B in the United Kingdom of the product or service would be limited or prevented by the arrangements.*
- (3) *For section 188(2)(c), the appropriate circumstances are that A’s production of the product would be at a level in the production chain-*
 - (a) *at which the product would at the same time produced by B in*

- the United Kingdom, or*
- (b) *at which production by B in the United Kingdom of the product would be limited or prevented by the arrangements.*
- (4) *For section 188(2)(d), the appropriate circumstances are that A's supply of the product or service would be at the same level in the supply chain as B's.*
- (5) *For section 188(3)(a), the appropriate circumstances are that B's supply of the product or service would be at a level in the supply chain at which the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by A in the United Kingdom.*
- (6) *For section 188(3)(b), the appropriate circumstances are that B's supply of the product or service would be at a level in the supply chain-*
- (a) *at which the product or service would at the same time be supplied by A in the United Kingdom, or*
 - (b) *at which supply by A in the United Kingdom of the product or service would be limited or prevented by the arrangements.*
- (7) *For section 188(3)©, the appropriate circumstances are that B's production of the product would be at a level in the production chain-*
- (a) *at which the product would at the same time be produced by A in the United Kingdom, or*
 - (b) *at which production by A in the United Kingdom of the product would be limited or prevented by the arrangements.'*

As Furse points out the above provisions may attract attention by their excessive concern with form and their exactness. The same degree of precision cannot be found in the relevant TFEU articles, the UK Competition Act 1998 nor the Sherman Act.³ Basically the complex language means, Furse explains, that individuals may not dishonestly enter into arrangements with each other with the outcome or planned outcome of price-fixing, output restriction, market sharing or bid-rigging.⁴

7.2 THE HAMMOND AND PENROSE REPORT AND THE WHITE PAPER

The report prepared by Hammond and Penrose produced suggestions that were later observed in the drafting of the Enterprise Act of 2002, as did the

³ Furse 2012 pp. 108-109

⁴ Furse 2012 p. 111

White Paper.⁵ Furse notes that the White paper emphasized the clearness of the offence, so that firms and court may easily comprehend it. Further the White paper required that the cartel offence 'be actively applied so that its deterrent effect is genuinely felt'.⁶

The aim was to design the offence so that only the so-called hard-core cartels would be caught by it. This would remove the possibility to resort to the defence that the intention of the cartel members was actually pro-competitive.⁷ Apparently the UK preparation was influenced by the OECD recommendation given in 1998 saying that the member countries should make sure that their legislation especially tackles the hard-core cartels, and that sanctions should be effective and of sufficient level to deter both companies and individuals and that enforcement and the institutions should be equipped with sufficient powers to bust cartels – such as the power to acquire documents.⁸

The report by Penrose and Hammond noted in line with the foregoing that it is the opinion of the competition law experts that the criminal prohibition of cartels should only apply to horizontal cartels entered by individuals, operating at the same level of the supply-chain. The report recommended that the vertical agreements should be excluded from the scope of the offence as they may have pro-competitive effects.⁹

In a similar fashion the White Paper said the following:

7.19 The new criminal offence will cover hard-core cartels only – widely recognized as the most serious form of competition breach. The most common form of hard-core cartel involves illegal price-fixing – where a number of firms agree what price should be charged for a particular product. In most cases, this will be above what the competitive market price would be.

7.20 However, cartels can also involve conduct which achieves the same economic result by different means. This includes agreeing not to compete for each other's customers – which leaves each firm free to set higher prices (market sharing). Or firms could agree to reduce levels of output – which also increases the price that they can charge.

7.21 In some cases, firms will agree to inflate the price charged in a tender-

⁵ See Office of Fair Trading, 'Proposed criminalisation of cartels in the UK', a report prepared for the Office of Fair Trading by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM, OFT365, November 2001; Department of Trade and Industry, 'A World Class Competition Regime' Cm 5233, July 2001.; Furse 2012 p. 111

⁶ Department of Trade and Industry, 'A World Class Competition Regime' Cm 5233, July 2001 at para 7.33.; Furse 2012 p. 112

⁷ Furse 2012 p. 112

⁸ OECD, 'Recommendation of the Council concerning Effective Action against Hard Core Cartels' 25 March, 1998 C(98)35/FINAL .p. 3; Furse 2012 p. 112

⁹ Office of Fair Trading, 'Proposed criminalisation of cartels in the UK', a report prepared for the Office of Fair Trading by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM, OFT365, November 2001 at para 1.12.

bidding process and enter bids which ensure that one company in the cartel will win, but on better terms than would otherwise be the case (collusive tendering). The OFT believes that public sector contracts are particularly vulnerable to these practices. As such, they could hit taxpayers hard – because Local Authorities or Government departments have to pay more for public services.

7.22 In all these cases, the effect is the same – prices rise and consumers pay more than they should. The Government intends that the new criminal offence will cover each of these different types of cartel. Defining the offence in a way that distinguishes legitimate agreements from illegitimate ones is likely to be more difficult in some areas, in particular market sharing.

7.23 The Government is also considering whether the offence should only catch involvement in horizontal agreements between competitors or whether certain types of vertical agreement, especially those which are already outside the existing EC exemptions and involve abuse of market power, should also be caught.¹⁰

7.3 THE TROUBLED ELEMENT OF DISHONESTY IN THE CARTEL OFFENCE

An element of the cartel offence is the dishonesty requirement according to which the perpetrator should have dishonestly entered the agreement. The dishonesty requirement has been the subject of heavy criticism.¹¹ Such an element was also rejected in Australia, which more recently criminalized cartels.¹² In 2011 a consultation document, *A Competition Regime for Growth: a consultation on options for reform*,¹³ was produced by the Government, which suggested that the dishonesty requirement should be discarded.¹⁴

Joshua argued that those who promoted the inclusion of the dishonesty requirement, saw the virtue of it in the fact that, that the severe nature of the offence would be reflected, but the problem lies in the fact that among the public there is no consensus as to the blameworthiness of cartels and the defendants could thus make the argument in their defence that cartels are not reprehensible.¹⁵ The Norris Case touched upon price-fixing in light

¹⁰ Department of Trade and Industry, 'A World Class Competition Regime' Cm 5233, July 2001 p. 41

¹¹ See the discussion in Stephan 2011b; Joshua 2011.

¹² See the discussion in Beaton-Wells and Fisse 2011a, pp. 19 ff.

¹³ BIS *A Competition Regime for Growth: a consultation on options for reform* March 2011 p. 61 (Hereinafter the Consultation Document).

¹⁴ See Whish and Bailey 2012 p. 434.

¹⁵ Joshua 2010, p. 5.

of common law conspiracy to defraud. It was concluded that price-fixing alone was not dishonest 'without aggravating features'.¹⁶ This related to law prior to the entering into force of the cartel offence in 2003. As Whelan explains, while this is not directly related to the cartel offence, it could be asked that did price-fixing become dishonest just by the introduction of the cartel offence?¹⁷ Also the consultation document pointed to the dishonesty requirement as a cause of the low frequency of prosecutions, as it may not be easy to prove the dishonest nature of the defendants' conduct.¹⁸

The aforementioned consultation document also paid attention to the survey by Stephan where it was noted that roughly 6 people in 10 regarded price-fixing as dishonest, 2 people in 10 do not regard it as such. Subsequently drawing on this finding it was stated that there was not significant support for an offence incorporating the dishonesty requirement and that the juries do not easily convict when such a definitional element exists.¹⁹

The OFT has supported the removal of the dishonesty requirement from the offence,²⁰ arguing that dishonesty adds to unpredictability, especially since the juries are not dealing with a field of law familiar to them. The OFT's investigations had shown that the defendants might claim that their conduct was not dishonest, since they were motivated by the avoidance of loss of jobs, the defendants themselves did not receive financial gains, the defendants participated in the conduct only due to it being part of their work, the cartel was entered as a way to tackle considerable buying power of the customers. Finally the defendants could say that they did not consider the conduct to be dishonest, despite the fact that they realized that it was wrong.²¹

The OFT pointed out that the uncertainty stemming from the concept of dishonesty works against the interests of both firms and employees who look for advice and the defendants.²² Whelan argued that the cartel offence with the dishonesty element would not have met the foreseeability requirements set out in art. 7 ECHR, as dishonesty, the only measure of criminality, is 'itself an inherently vague and uncertain concept,' and as the

¹⁶ Norris v Government of the United States of America and others 2008 UKHL 16 at para 62.

¹⁷ Whelan 2012b p. 593.

¹⁸ BIS *A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.6; See also Furse 2012 p. 115.

¹⁹ BIS *A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.14. ; See Stephan 2008a, p. 135; Furse 2012 p. 161.

²⁰ OFT, *A Competition Regime for Growth: A Consultation on Options for Reform. The OFT's Response to the Government's Consultation*, OFT 1335, June 2011. At para 5.4.

²¹ *ibid.* at para 5.5.

²² *ibid.* at para 5.6.

national or EU law may not inform on this particular point and getting legal advice may not be helpful either.²³

The OFT further argued that those who otherwise would be willing to concede that they took part in the cartel have a reason not to do so, as they could try to convince the jury that they were not dishonest in their conduct. This would then require more resources for the cartel investigation and prosecution.²⁴ As Furse points out this was a bold statement, and showed that the OFT wanted to get rid of the dishonesty requirement as it made it harder to show that the cartel offence had been committed. Furse argued that ‘a robust response might be to suggest that the OFT, having been made to look ridiculous and not fit for purpose in light of the collapse of the BA case, was seeking simply to move the goalposts, rather than learning to play the game better’.²⁵

The OFT also believed that the inclusion of dishonesty could decrease the attractiveness of the leniency program, as getting the immunity requires the applicant to concede that the cartel offence was committed, and the applicant might have less desire to do so when dishonesty is a part of the offence.²⁶

The OFT argued that if the dishonesty requirement is dropped, the design of the offence could still be made such that agreements that are not caught by the civil regime do not fall under the cartel offence either. The dropping of the dishonesty requirement might make it more difficult prosecuting individuals who are the target of the administrative proceedings by the EU, the OFT acknowledged, unless the offence is amended in other ways as well. Further, while the dishonesty requirement was expected to relieve the juries from assessing the economic evidence, it seemed possible that the contrary was the case. In the OFT’s view the issue of economic effects should rather be tackled by the prosecutor while assessing the merits of the case, and by the sentencing court with a view to the severity of the violation.²⁷

²³ This stems from the fact that the Enterprise Act could have been infringed while the national or the EU competition law may exempt certain agreements, since the individual could be considered to have behaved dishonestly by a jury, thus committing the cartel offence, see Whelan 2012b, pp. 592-593.

²⁴ OFT, A Competition Regime for Growth: A Consultation on Options for Reform. The OFT’s Response to the Government’s Consultation, OFT 1335, June 2011 at para 5.6.

²⁵ Furse 2012 p. 120

²⁶ OFT, A Competition Regime for Growth: A Consultation on Options for Reform. The OFT’s Response to the Government’s Consultation, OFT 1335, June 2011 at para. 5.7.

²⁷ *ibid.* at para 5.8.

7.3.1 *The Ghosh test*

The case *R v Ghosh*²⁸ established in 1982 the test for dishonesty. The test is divided into two parts, which are the following:

1. 'a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.'
2. 'then the jury must consider whether the defendant himself must have realized that what he was doing was by those standards dishonest.'²⁹

The consultation document listed the reasons why the dishonesty test was initially adopted. The reasons included the desire to make sure that from the ambit of the offence would be excluded agreements that are not caught by the civil regime and assuming that the dishonesty test would do just this.³⁰ It was also thought that the dishonesty requirement would decrease the reliance on economic evidence.³¹ Further, it was argued, that the juries would be familiar with the dishonesty test, it would reflect the severity of the violation and the subsequent sanctions, thus creating the best possible deterrence.³²

The dishonesty requirement had barely been tackled in the cartel case law, but it arose in the *British Airways* case.³³ The consultation document argued that the *British Airways* case implied that also economic evidence would be considered in relation to the dishonesty requirement, and that possibly the defendants could have advanced the argument that they believed that the arrangement was not harmful to the consumers and that therefore the defendants were not dishonest.³⁴

²⁸ 2 All ER 689. [1982]

²⁹ See also Furse 2012 p. 116; *BIS A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.7.

³⁰ *BIS A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.8.

³¹ *ibid.* at para 6.9.

³² *ibid.* at para. 6.10.

³³ The dishonesty requirement has been touched upon at least in the *George* case, where the Court said that 'at an earlier stage of the preparatory hearing the trial judge ruled that the test of dishonesty in section 188(1) is the two-tier test propounded in *Ghosh*,' see *R v George, Burns, Burnett and Crawley*, [2010] EWCA Crim 1148 at para 6; See also Furse 2012 p. 116.

³⁴ *BIS A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.13.

While the dishonesty requirement has not received much support, Furse notes that maybe the difficulty of showing dishonesty as per the Ghosh criteria is what is needed, as the prosecutor seeks to send people to jail after all.³⁵

Crowther pointed out that the cases brought so far do not prove the ineffectiveness of the cartel offence as defined in the Enterprise Act of 2002 and that it cannot be said conclusively from the evidence at hand whether the dishonesty requirement deserved to be discarded. In his view rather than paying so much attention to the particular issue of dishonesty, the spotlight should be on the possible problems related to parallel criminal and civil enforcement.³⁶ Furse has made the same point arguing that there is a greater problem underlying the regime than the concept of dishonesty, namely the parallel criminal and civil enforcement of the offence.³⁷

7.4 THE FOUR OPTIONS IN THE CONSULTATION DOCUMENT AND THE REFORM OF THE CARTEL OFFENCE

The Consultation document presented four different options that could reform the UK cartel offence. They were as follows: 1. The removal of the dishonesty requirement and the introduction of prosecutorial guidance, 2. The removal of the dishonesty requirement and excluding certain white-listed agreements 3. That ‘secrecy’ as an element should take the place of ‘dishonesty’, 4. The removal of the dishonesty requirement and the exclusion of agreements made openly.³⁸

7.4.1 Option 1: The removal of the dishonesty requirement and the introduction of prosecutorial guidance

The option 1 would make the UK offence resemble more the US one. The difference is however that in the US agreements without offsetting benefits are *per se* infringements, while the *rule of reason* influences the evaluation of agreements with offsetting benefits.³⁹ Such a clear division is absent in

³⁵ Furse 2012 pp. 117-118

³⁶ Crowther 2011.

³⁷ Furse 2012 pp. 120-121

³⁸ BIS *A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6; Whelan 2012b, p. 589.

³⁹ BIS *A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.25.

the EU where even price-fixing agreements, though very rarely, may be exempted under art. 101(3) TFEU if there are adequate offsetting benefits.

The consultation document sets out the following: '[r]emoving the dishonesty element would be combined with introducing clear guidance for prosecutors (to which prosecutors would have to have regard) as to the types of agreements that are most likely to warrant investigation and prosecution.'⁴⁰

As the consultation document explains in the EU the agreements may be divided to those that have an anticompetitive *object*, and to those that have an anticompetitive *effect*, and the former may always be candidates for an exemption under art. 101(3) TFEU.

As the dishonesty element was supposed to exclude agreements from the scope of the offence that could be exempted under the civil regime,⁴¹ the concern was that with no further modifications to the offence, besides dropping the element of dishonesty, the possibility that the offence is considered national competition law for the purposes of Regulation 1/2003 could be increased.⁴² Additionally the option 1 could also fall foul of art. 7 ECHR it was feared, as instead of the statutory text, the prosecutorial guidelines would be used to limit the ambit of the offence.⁴³

7.4.2 Option 2: The removal of the dishonesty requirement and excluding certain white-listed agreements

The option 2 would have had the white-listed offences excluded from the scope of the offence. It was noted that in Australia joint venture agreements and resale price maintenance agreements are excluded from the scope of the offence, and Canada excludes ancillary agreements that are the part of a lawful one.⁴⁴ Explicitly excluding certain agreements would be the

⁴⁰ 'Option 1 removes the problems associated with the dishonesty element of the offence and it provides much greater clarity for business, by way of prosecutorial guidance. However it carries the risk of making the offence itself too broad.', *ibid.* at paras 6.23, 6.24.

⁴¹ Furse 2012 p. 161; *BIS A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.26 and para 6.27.

⁴² *BIS A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.31; Furse 2012 p. 162.

⁴³ *BIS A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6.31.

⁴⁴ *ibid.* at para 6.34

advantage of option 2 when compared to option 1, it was argued.⁴⁵ Also the predictability for firms would be better.⁴⁶

Further in order to escape the argument regarding economic effects, the white list would be designed in a way that would probably cover more agreements than would be the number of agreements that would be deemed to have countervailing effects as a result of an economic assessment.⁴⁷

The drawback of the option 2 would rely on how successful the design of the white list ultimately is, and as the consultation document admits, whatever preciseness is attempted in their design, there would always be room left for argument regarding their meaning.⁴⁸ Once again the fear arose regarding the possibility that the offence, when designed as under option 2, would not be compatible with the EU competition law, falling within the scope of Regulation 1/2003, thus halting national proceedings if EU investigations are commenced.⁴⁹

Harding and Joshua favored the Option 2, arguing that ‘it has the appeal of more accurately defining the objectionable cartel behavior in economic terms and avoiding difficult defence argument based on economic and market analysis. At the same time it bases criminal liability on the concept of an illegal agreement and brings the process of agreement to the forefront for this purpose.’ They underlined that the foremost delinquent part of cartel conduct ‘is an agreement to act in defined illegal anticompetitive ways, doing so determinedly with an awareness of the prohibited nature of the conduct. They further rejected option 4 on the basis that it would be impracticable, since if the agreements are made public civil sanctions could still ensue and thus the cartel profits would be lost. Option 3 with the secrecy requirement in their opinion would be possibly difficult to prove and the prosecution would hinge on it. Option 1 on the other hand would in their view be problematic from the perspective of legal certainty.⁵⁰

7.4.3 *Option 3: That ‘secrecy’ as an element should take the place of ‘dishonesty’*

Option 3 would have the dishonesty requirement removed and let the element of secrecy take its place in the definition of the offence, which would be committed, ‘where an individual “secretly agrees”’.⁵¹ The following

⁴⁵ *ibid.* at para 6.35

⁴⁶ *ibid.* at para 6.36

⁴⁷ *ibid.* at para. 6.37

⁴⁸ *ibid.* at para 6.38

⁴⁹ *ibid.* at para 6.39

⁵⁰ Harding and Joshua, 2012, pp. 3-4.

⁵¹ BIS A Competition Regime for Growth: a consultation on options for reform March 2011 at para 6.40

statutory text was devised: ‘*an agreement may be proved to have been made secretly where the persons who make the agreement take measures to prevent the agreement or the intended agreements becoming known to customers or public authorities.*’⁵² The cartels are secretive in character and often a great effort to keep them out of the public eye is made, as the cartelists know that the cartel is subject to penalties and is immoral. Therefore the option 3, inserting the ‘*secrecy*’ element in the definition of the offence might be appealing. It would limit the scope of the offence, excluding certain agreements, and separate it from the civil regime.⁵³

As opposed to the moral assessment involved in the Ghosh test, establishing secrecy, would depend on evidence, and if the agreement was openly made, it would be outside the scope of the offence.⁵⁴ The consultation document identified possible problems in the event that prosecution had to show that measures were actively taken to uphold secrecy. Alternatively if proving passive secrecy is sufficient, it could be problematic from the perspective of clearness and possibly not harmful agreements might caught, such agreements that the firms deemed unnecessary to make public, while they did not purposefully hide them.⁵⁵ Further, while the dishonesty element contained the assessment of objective and subjective element, the secrecy element does not, and the situation could possibly arise, albeit rarely, that an agreement that was not unlawful, but the defendant so believed, and would fall within the scope of the offence.⁵⁶ Finally, it was argued that the secrecy element would effectively separate the offence from the civil regime, in the same manner that the dishonesty element did and the prosecution could escape the problems connected to the dishonesty element.⁵⁷

7.4.4 Option 4: The removal of the dishonesty requirement and the exclusion of agreements made openly

In the Consultation document the Government said that it has a preference for the option 4.⁵⁸ Under options 4, agreements that are entered into openly, are not captured by the offence.⁵⁹

The problems relating to the establishment of active secrecy and the difficulties associated with passive secrecy under option 3 would be escaped.

⁵² *ibid* at para 6.41

⁵³ *ibid.* at para 6.43

⁵⁴ *ibid.* at paras 6.44-6.45

⁵⁵ *ibid.* at para 6.46

⁵⁶ *ibid* at para 6.47

⁵⁷ *ibid.* at para 6.48

⁵⁸ *BIS A Competition Regime for Growth: a consultation on options for reform* March 2011 at para 6

⁵⁹ *ibid.* at para 6.49

The Government thought that the option 4 would diminish the possibility that the defendants resort to economic evidence, which is hard for the jury to comprehend. Further the kinds of agreements that would have offsetting benefits under the civil regime would not fall within the scope of the cartel offence, and finally it would make it less likely that the offence would be considered national competition law, which would mean that EU action in the matter would halt the national prosecution.⁶⁰ In addition the offence could be modeled on s 188(6) of the Enterprise Act 2002, which carves out arrangements relating to bid-rigging in a situation where the one asking for bids is informed in advance or at the time of the bid of the agreement between the ones putting forwards the bids.⁶¹ The consumers made aware of the arrangements may subsequently make the decision to make purchases in other places.⁶²

7.4.5 The OFT Response to the Government Consultation

The OFT had a preference for the option 4.⁶³ It argued that option 4 would be less challenging to design into law in uncomplicated language, and would not rely on provisions detached from the offence, as would be the case with the prosecutorial guidance. Further the option 4 means that simple factual questions are tackled, thus making it less difficult for the prosecutor to decide when to mount prosecution, subsequently diminishing unpredictability. There should be no room for competing firms to have between them secret arrangements with an aim to fix prices, therefore one can arguably see that by concentrating on secrecy the harmful conduct is identified.

The design of the offence should however be possible in a way that legitimate confidential business interests do not need to be exposed. The OFT also pointed out that the civil regime could catch arrangements made openly, which do not fall within the scope of the cartel offence, as it would capture arrangements that would not be deemed hard core cartels.⁶⁴

The OFT rejected option 1, inter alia because of the possibility, besides bringing about uncertainty, the defendants could challenge decisions to mount a prosecution thus impairing the swiftness of the proceedings.⁶⁵ Regarding option 2, the OFT argued for example that designing a white

⁶⁰ *ibid.* at para 6.; Furse 2012 pp. 160-161

⁶¹ *Ibid* at para. 6.53

⁶² *ibid.* at para. 6.52

⁶³ OFT, *A Competition Regime for Growth: A Consultation on Options for Reform. The OFT's Response to the Government's Consultation*, OFT 1335, June 2011, at para 5.10.

⁶⁴ *ibid.* at para. 5.10; Furse 2012 p. 163

⁶⁵ *ibid.* at para 5.11.

list is difficult, and might need amendments in the future, depending on the varying business operations and the defendants could on a regular basis challenge the categorization of agreements.⁶⁶

The OFT liked better option 3, than 1 or 2, arguing that secrecy, a frequent element of cartels, also indicates that the cartelists were aware of the illegal nature of their conduct. The OFT argued however that proving active concealment might not be easy. ‘Concealment often consists of omissions, for example, failing to note meetings in diaries, or failing to claim for cartel related expenses. Also, requiring such proof creates a perverse incentive for cartel participants to minimize evidence, and destroy such evidence as it is created.’⁶⁷

7.4.6 *The Government Response*

The Government consultation document was followed by a Government response⁶⁸ after 115 written responses had been obtained.⁶⁹ The Government’s chosen option was the option 4 with a tweak: the dishonesty requirement would be dropped and the open agreements referred to in that particular option, that are excluded from the scope of the offence, refer to agreements that are published in a suitable format prior to their implementation, so that customers and others become aware of them.⁷⁰

The Government thought that dropping the dishonesty test will make the prosecution smoother and improves deterrence.⁷¹ The Government admitted the absence of live proof regarding problems associated with the dishonesty requirement, but went on to conclude that it is likely that it hampers prosecutions, and that it is especially tricky when the prosecution is pursuing white-collars.⁷²

The Government pointed out that while the dishonesty test is discarded, the prosecution would still need to establish the intention of entering the cartel agreement and putting it into effect (mental elements). While the Government acknowledged the need of an explicit mental element in conjunction with a physical element to justify imprisonment, it underlined the international recognition of the harms cartels cause, and believed that even without the dishonesty test the gravity of the offence is such that the

⁶⁶ *ibid.* at para 5.12.

⁶⁷ *ibid.* at para 5.13; Furse 2012 p. 163.

⁶⁸ BIS, *Growth, Competition and The Competition Regime: Government Response to Consultation*, March 2012 (hereinafter the Government Response).

⁶⁹ 45 of the responses concerned ‘A Stronger Antitrust Regime’, *ibid.* at paras 2.1, 2,3; See also Whelan 2012b, pp. 589-590.

⁷⁰ *ibid.* at para 7; Whelan 2012b p. 590.

⁷¹ *ibid.* at para 7.7.

⁷² *ibid.* at para. 7.4.; Furse 2012 p. 164.

imprisonment up to 5 years should be retained in the array of sanctions.⁷³ Furthermore, it was noted that other white-collar offences, such as insider trading, do not incorporate the dishonesty test either. For the prosecution to prove insider trading, it is sufficient, that it is shown that the defendant was aware that the information he had was inside information.⁷⁴

The option 4 was not a favored one among the respondents of the Government consultation exercise. The few supporters of option 4 however saw that the openly made agreements would make the offence more consistent with civil prohibitions, and would help to distinguish the offence from art. 101 TFEU prohibition, thus enabling parallel EU and national proceedings.⁷⁵ It may be mentioned that while the reform was supported by prosecutors, competition authorities abroad, the OFT, certain academics, and members of the bar, most of the firms, advocates specialized in criminal law, and competition law oriented law firms opposed the reform.⁷⁶

While the firms may need to protect their confidential business interests that are part of the arrangements, the Government saw that such interests of confidentiality could not justify the protection of information related to hard-core cartels.⁷⁷

Further the Government took the position that mid-level managers who act at the behest of their superiors should not escape criminal prosecution, when it is established that they have committed the cartel offence. As opposed to that, in a situation where a person lacking knowledge of the cartel agreement, puts it into practice, will not be prosecuted, as he or she is not a party to the cartel agreement.⁷⁸

Concerted practices would be excluded from the scope of the offence – there should be an agreement, a meeting of minds, ‘that goes further than a mere concerted practice,’ to establish the violation of the offence.⁷⁹

As the Government pondered the question of how the parties to the agreement should publish the agreement to escape prosecution, it was suggested that for example London Gazette could be the proper medium for this purpose, to make known the relevant details. The government argued that therefore one could barely make the argument that it was not feasible

⁷³ *ibid.* at paras. 7.9-7.10; Harding and Joshua argued that the definition of the offence should be the following: ‘An individual is guilty of an offence if he *intentionally agrees* with one or more other persons to make or implement, or to cause to be made or implemented, *legally prohibited* arrangements of the following kind’ Harding and Joshua 2012, p. 4; Patel has been critical, see Patel 2012, pp. 14-15.

⁷⁴ *ibid.* at para 7.11.

⁷⁵ *ibid.* at para 7.22; See the discussion in section 7.4.5 in this work; Whelan favoured Option 4, see Whelan 2011b, p. 15.; See also Whelan 2012b, p. 590.

⁷⁶ *ibid.* at para 7.4.

⁷⁷ *ibid.* at para 7.27.

⁷⁸ *ibid.* at para. 7.31.

⁷⁹ *ibid.* at para. 7.32.

to publish the details and the possible problems relating to the identification of customers would not arise.⁸⁰

In its response to the Consultation exercise the Government further noted that some respondents had paid attention to the fact that inter alia the Serious Fraud Office lacked experience in prosecuting criminal cartel cases. Some respondents also suggested that plea bargaining agreements should be employed and that a more extensive use of the director disqualification order would be desirable.⁸¹

Regarding the Serious Fraud Office, the Government believed that it should retain its parallel jurisdiction with the Competition and Markets Authority (hereinafter CMA), an Authority that replaced the OFT, but pointed out that it follows from the need to ensure the uniform application of leniency that the CMA should mostly mount prosecution.⁸²

Regarding plea bargaining the Government Response acknowledged the defendants might be induced to plead guilty if plea bargaining was more substantially used, but stated it could have an adverse effect on the criminal justice system and would require a thorough contemplation.⁸³

Regarding the director disqualification order, the Government was of the view that it could not take the place of the cartel offence.⁸⁴ The Government stated that that it ‘has no intention of abolishing the criminal cartel offence: doing so would be directly at odds with the Government’s aims under this part of its consultation.’⁸⁵

7.4.7 The Enterprise and Regulatory Reform Act of 2013

On the 25th of April, 2013 the Enterprise and Regulatory Reform Act received Royal Assent. The amended cartel offence entered into force on April 1st 2014.⁸⁶ The amendment to the section 188 cartel offence of the Enterprise Act 2002 in Chapter 4 of the Enterprise and Regulatory Reform Act is noteworthy and is reproduced below:

‘47 Cartel offence

- (1) *Section 188 of the 2002 Act (cartel offence) is amended as follows.*
- (2) *In subsection (1), omit “dishonestly”.*
- (3) *Omit subsection (6).*
- (4) *After subsection (7) insert-*

⁸⁰ *ibid.* at para 7.35.

⁸¹ *ibid.* at paras 7.36, 7.37.

⁸² *ibid.* at para 7.39.

⁸³ *ibid.* at para 7.40.

⁸⁴ *ibid.* at para 7.41.

⁸⁵ *ibid.* at para 7.44.

⁸⁶ OFT, *Applications for leniency and no-action in cartel cases. OFT’s detailed guidance on the principles and process*, OFT1495, July 2013. p. 25 footnote 19.

“(8) This section is subject to section 188A”

(5) After that section insert-

“188A Circumstances in which cartel offence not committed

(1) An individual does not commit an offence under section 188(1) if, under the arrangements-

(a) in a case where the arrangements would (operating as the parties intend affect the supply in the United Kingdom of a product or service, customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected,

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

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

(2) In subsection (1), “relevant information” means-

(a) the names of the undertakings to which the arrangements relate,

(b) a description of the nature of the arrangements which is sufficient to show why they are or might be arrangements of the kind to which section 188(1) applies,

(c) the products or services to which they relate, and

(d) such other information as may be specified in an order made by the Secretary of State.

(3) An individual does not commit an offence under section 188(1) if the agreement is made in order to comply with a legal requirement.

(4) In subsection (3), “legal requirement” has the same meaning as in paragraph 5 of Schedule 3 to the Competition Act 1998.

(5) A power to make an order under this section-

(a) is exercisable by statutory instrument,

(b) may be exercised so as to make different provision for different cases or different purposes, and

(c) includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate.

(6) A statutory instrument containing an order under this section is subject to annulment in pursuance of a resolution of either House of Parliament.”

(7) *After section 188A (as inserted by subsection (5) above) insert—*
“188B *Defences to commission of cartel offence*

- (1) *In a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, it is a defence for an individual charged with an offence under section 188(1) to show that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service.*
- (2) *It is a defence for an individual charged with an offence under section 188(1) to show that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from the CMA.*
- (3) *It is a defence for an individual charged with an offence under section 188(1) to show that, before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.”*

In addition the Government introduced the Competition and Markets Authority (CMA)⁸⁷, which meant that the responsibilities of both the OFT and the Competition Commission were transferred to the new Authority.⁸⁸

7.5 AN ANALYSIS OF THE MERITS AND DEMERITS OF THE OPTION 4

Wardhaugh has launched criticism of the Government Consultation and the Response.⁸⁹ While he welcomes the improvements to the UK anti-cartel regime, he argues that the reform is characterized by a ‘piecemeal approach’.⁹⁰ Rather than reforming with the whole in mind, the Government tinkers with few elements of the regime, overlooking the fact that all the elements of the regime are interrelated. At the end these reforms could tax

⁸⁷ This study focuses on the UK experience prior to the reform of the cartel offence and the institutional structure, which is reflected in the sense that references are made to the now defunct OFT rather than to the CMA.

⁸⁸ See BIS, *Growth, Competition and The Competition Regime: Government Response to Consultation*, March 2012, at para 3.

⁸⁹ Wardhaugh 2012a.

⁹⁰ Wardhaugh 2012a, p. 573.

the effectiveness of the regime in his view.⁹¹ Inter alia he points out that the design of the cartel offence has a bearing on the capabilities of the leniency functioning well, and says that this aspect was omitted in the Consultation document and the Response.⁹²

In particular Wardhaugh is critical of the new design of the offence, arguing that dropping the dishonesty requirement would be followed by a lack of transparency.⁹³ He underlines that the damaging effects of cartels occur irrespective the fact that the cartel agreement was made openly. As under the reformed cartel offence open agreements are exempted, Warghaugh argues that such conduct may even be fuelled.⁹⁴

Further, he is of the view that the new design of the offence that targets secretly made agreements brings about uncertainty, as does the reference to the exempted agreements of which 'relevant information' has been given to the customers. He predicts that future trials will focus on the details given to customers and whether it is adequate and that the prosecution will necessarily touch upon the topic in the event customers have been given some information. This is then arguably exacerbated by the indefinite term 'relevant'. As he points out an alternative would have been to make the definition of the offence such that the prosecution would only need to show the existence of an agreement.⁹⁵

⁹¹ *ibid.* p. 574.

⁹² *ibid.* pp. 579-580.

⁹³ *ibid.* p. 580.

⁹⁴ *ibid.* p. 582; Patel noted that 'given that cartels are regarded as the most serious and damaging forms of anticompetitive conduct, it is not clear why BIS has chosen not to punish those who in engage in this activity openly. The act of publishing does nothing, of itself, to justify or legitimize the existence of the cartel or make the offense somehow less pernicious.' Patel went on to say that 'it is not clear why companies will have the incentive to publish the existence of the agreement given that it is not, strictly speaking, in its interests to do so (publication affords protection to the individual, not to the company, and there are downsides to such disclosure', see Patel 2012, pp. 11-12; Harding and Joshua noted regarding option 4 that '[t]he concept of "open" or announced agreements addresses the same element of covert behaviour, by inviting cartels participants to publicise their actions, in effect automatically casting undeclared hard core cartels as secret and therefore criminal in nature, if proven. But this incentive to declare acts of price fixing, or whatever, would seem doubtful in practice. In return for immunity against criminal prosecution, cartelists would be revealing their illegal arrangements, thus undermining their planned profitable enterprise and exposing themselves to non-criminal law sanctions', See Harding and Joshua 2012, pp. 3-4; Furse observes Wardhaugh's 'substantial contribution to the debate', see Furse 2012 pp. 163-164.

⁹⁵ Wardhaugh 2012a, p. 582; It may be mentioned that while Whelan supported carving out agreements that have been made public before implementation, he has been critical of the third defence that appeared in the ERRR (regarding the defences see the previous section in this Chapter): 'this defence allows cartelists to escape a criminal conviction where they have contacted their lawyers and informed them of their future plans to cartelise. This is troubling. There is presumably no obligation to follow the lawyer's advice and the lawyers would, it seems, be under no obligation to inform the CMA of their clients' future plans: the activity in question does not fit

As the deterrent effect of a sanction turns on the severity of sanctions and detection rate, Wardhaugh, argues that the penalty level should have been addressed as well in the reform, especially considering the more severe penalties that have been introduced both in the US and Canada. Further, the Director Disqualification orders should have been subject to improvement in his opinion.⁹⁶

The question of resources of the investigative authorities was admittedly barely addressed in the UK reform. As Wardhaugh says, this would seem to be an important issue after the collapse of the *British Airways* case. The Project Condor Board Review, a paper analyzing the collapse of the *British Airways* case,⁹⁷ had specifically mentioned the more robust investigatory powers that the Serious Fraud Office has, ‘especially in relation to forensic analysis and recovery of electronic data,’ but that it lacked the OFT’s experience in competition law matters. The Condor report argued the OFT should improve its capabilities to pursue criminal cases. The Serious Fraud Office was overloaded with work, while the *British Airways* case had taken place.⁹⁸ It is true that the consultation document and the Government response paid scant attention to the possible lack of experience and resources of the investigating and prosecuting authority, and this would seem to be an important point from the perspective of deterrence.⁹⁹

Wardhaugh makes also an important point concerning the system of plea-bargaining and its introduction in the context of anti-cartel enforcement. He admits that a fully-fledged system of plea-bargaining in the US fashion may not be desirable, but that a more narrow use of it should be contemplated and that a persuasive argument advocating it could especially be made with regard to anti-cartel enforcement.¹⁰⁰

On a different note Macculloch has pointed out that one of the difficulties related to the dropping of the dishonesty element is how to distinguish between those individuals that should not fall within the scope

within the recognised exceptions to client confidentiality. In fact, lawyers will face professional discipline if they breach their clients’ confidence in this manner. The worry here is that cartelists will undermine the effectiveness of the criminal Cartel Offence by routinely seeking relevant ‘advice’ from their lawyers when they are considering entering into cartel arrangements with their competitors.’ According to Whelan: [t]he first two defenses are not really problematic. Like the “carve out” of agreements which are (in effect) publicised prior to their implementation, they can be rationalized as an attempt to link (criminalised) cartel activity to deception: an absence of an intention to conceal can be interpreted as an absence of an intention to mislead. Admittedly, their impact in practice may be negligible due to the potential difficulties in proving an absence of an intention to conceal.’ See Whelan 2013c.

⁹⁶ Wardhaugh 2012a, p. 584.

⁹⁷ OFT, ‘Project Condor Board Review’, December 2010.

⁹⁸ Ibid. p. 11; Wardhaugh 2012a, p. 585.

⁹⁹ Wardhaugh 2012a, p. 585.

¹⁰⁰ ibid. p. 588; For a more detailed treatment regarding plea bargaining see Chapter 9 in this work.

of the cartel offence and those that should: Such a situation could arise in a case where a manager at a retail store implements the regular pricing instructions as ordered by his superiors, without being aware of the fact that he is implementing the cartel agreement. In another scenario the individuals seeks to make sure that the cartel agreement is observed by the cartel members resorting to even threats. It seems sensible that only the latter should fall under the criminal prohibition. The retail manager could have argued that he was not acting dishonestly, thus the dishonesty element provides the dividing line between criminal and non-criminal conduct.¹⁰¹

7.5.1 *The Moral Censure and the Cartel Offence*

Macculloch has argued that the definition of the cartel offence would be better off not incorporating harmfulness into the offence. This would be so, as the prosecution would otherwise need to show the degree of harm to secure a conviction, thus making the trial phase more cumbersome with the introduction of complicated economic evidence.¹⁰² He further says that criminal penalties prohibiting cartels should not be warranted by citing exclusively the harmfulness perspective: ‘the nature of the harm caused by cartels is ill suited to a response through criminal law.’¹⁰³ In relation to the UK reform of the cartel offence and the dropping of the dishonesty requirement, he asks whether the criminality of the conduct should be reflected to a greater extent than what the *actus reus* does, and if answered in the affirmative, how could this be achieved.¹⁰⁴

Whelan was among the supporters of the option 4. He says that the dishonesty was incorporated in the cartel offence for three reasons, namely to make sure it is in agreement with art 101(3) TFEU, to limit the offence, and to display the wrongful nature of the cartel conduct.¹⁰⁵ According to him the dilemma is that, while criminal penalties are employed in order to engender less sympathetic views of cartels, the dishonesty element already required as a precondition that such views exist. As has been pointed out above, this is problematic when defences of questionable value are advanced.¹⁰⁶

Williams too has pointed out in the UK context that the UK cartel offence was intended to attract moral opprobrium through the element of dishonesty. The ‘forward-looking’ offence cannot be expected to signal a

¹⁰¹ Macculloch 2012, pp. 83-84.

¹⁰² Macculloch 2012, p. 75.

¹⁰³ *ibid.* p. 78

¹⁰⁴ *ibid.* p. 82

¹⁰⁵ Whelan 2012b p. 591; See also MacCulloch 2007, p. 356.

¹⁰⁶ Whelan 2012b p. 592.

‘backward-looking’ moral disapproval.¹⁰⁷ Williams further warns against the excessive use of criminal law as it may lose its stigmatizing effect. As the ability of the society to attach a label of blame on a behavior is not unlimited a careful consideration must be exercised prior to a criminalization in order not to to impair the effectiveness of criminal law.¹⁰⁸ Williams however goes on to argue that the delinquency or criminality of cartel activity can also be identified in its exploitative nature – also under English law other property and economic offences derive their delinquency from exploitation, which provides a link between cartels and other economic offences.¹⁰⁹

Macculloch has said that no strong opinions have been voiced in favor of adopting the approach that cartels should be a strict liability offence, that is lacking the mental element, which in his opinion would not be guide enough to show the proper limits of the offence. He argues that from various propositions made in the literature regarding the design of the offence, ‘cheating’ and ‘subversion of competition’ would be the best options to replace the dishonesty requirement in an attempt to capture the criminality of the conduct, and warns against a design of the offence that would only attend to the prosecutorial concerns. He underlines that the general public must also understand the message conveyed.¹¹⁰ Even if the prosecutors may then have more hurdles to overcome, he says that it ‘will increase the effectiveness of the offence, not simply through deterrence and punishment, but through people’s desire to comply with the law’.¹¹¹

The reason he favors the concepts of ‘cheating’ or ‘subversion of competition’, he says, is because they reflect the idea that the wrongfulness of cartels is derived from the fact that the competitive process, which may be rightfully expected on the markets, is hampered, thereby violating the ‘rules of the game’.¹¹²

Cheating, would arguably make the scope of the offence more limited, and it would most easily apply to a bid-rigging case. As the scope would be narrow, excluded would be cartel conduct that is not the most blatant.¹¹³ The concept of cheating would not as naturally apply to price-fixing, as it is not as easy to identify the victims of cheating, thus making it more difficult from the evidential point of view. However while there is the rightful expectation of the competitive process and thereby price-fixing could be conceived as a violation of this moral standard, Macculloch reasons that such an interpretation of the term cheating is still a stretch, and a more spontaneous

¹⁰⁷ Williams 2011, pp. 297-298.

¹⁰⁸ Williams 2011, pp. 297-298.

¹⁰⁹ Williams 2011, p. 301.

¹¹⁰ Macculloch 2012, p. 87, 84.

¹¹¹ *ibid.* p. 85.

¹¹² *ibid.* p. 87.

¹¹³ *ibid.* p. 87-88.

approach might be adopting the concept of ‘subversion of the competitive process,’ which would cover also price-fixing and other hard-core cartels.¹¹⁴

Macculloch notes that the UK cartel offence has another mental element that of intention in subsections 2 and 3. While he indicates that in foreign jurisdictions, physical elements of the offence are given more weight than the mental element, he argues in favor of having an explicit mental element in the UK cartel offence to fight the appearance of a regulatory crime, a technical violation rather than an authentic crime. His suggestion is to bring the element of intention to subsection 1 in relation to the concept of subversion of the competitive process that according to his suggestion is also inserted. This would exclude from the scope of the offence the likes of the ‘retail manager’ who just implements the pricing instructions of his superiors. In relation to proving intention Macculloch argues that experience from other countries shows, that courts deduce intent from cartel behavior.¹¹⁵

Regarding option 4 Macculloch points out that while agreements that would most likely not merit criminal prosecution, are excluded, no instruction is given as to the reprehensibility of agreements. He is of the view that it seems that the offence should be more narrowly defined than under the option 4 – the option 4 fails to pinpoint specifically the conduct that merits the condemnation of criminal law. As a result, he argues, the limitation of the offence would depend on prosecutorial judgment.¹¹⁶ Option 3, that would replace dishonesty with the element of secrecy, finds favor with Macculloch in the sense that it clearly indicates which conduct should be subject to criminal sanctions. The problem is however in his view that secrecy in itself would not be the proper indicator as to the criminality of a given conduct: ‘secrecy results from the cartelists’ awareness that they are committing a wrong; it is not the wrong itself. To effectively limit the cartel offence it would be preferable to identify the wrong itself, rather than writing into the offence a proxy such as secrecy.’¹¹⁷

Macculloch recognizes that his formulation of the offence, based on the intent to subvert the competitive process could invite the comment that, not only individuals but also corporations should be subject to criminal penalties. He however rejects this approach in the UK context. In his view ascribing intent to a firm is not easy, the retributive value in comparison with the administrative control is doubtful, and the deterrent effect would barely be improved. In contrast, as Macculloch refers to Leslie’s article¹¹⁸, according

¹¹⁴ *ibid.* p. 88; See the discussion in this work in the section ‘Price-fixing and the Everyday Moral Standards’.

¹¹⁵ *ibid.* p. 90

¹¹⁶ *ibid.* p. 85

¹¹⁷ *ibid.* p. 86

¹¹⁸ Leslie 2008, p. 1621.

to which the interests of the employee and the employer should not be aligned in order to further destabilize cartels –it is desirable to maintain distinct sanctions for the firms and the individuals. At the end of the day cartel conduct is entered by individuals, who implement the agreements, which merits retribution while the corporation remains accountable under the administrative law.

Macculloch acknowledged that once the cartel conduct is detected by the authorities, the responsible individuals may have already left the firm and in terms of liability would not be subject to penalties under an administrative regime, but if criminal penalties are available could still be held accountable. Criminal penalties could also be needed against the rogue managers, who against the internal company instructions engage in cartel conduct.¹¹⁹

Whelan on the other hand has argued in favor of the option 4. He recognized that dropping the dishonesty element invites the criticisms that the offence covers conduct that is from a moral perspective such that it should not attract criminal penalties – and he too noted that this may lead to the dilution of the criminal law as a result of unfair labeling.¹²⁰ To evade such overcriminalization critique, Whelan argues that the cartel conduct should be associated with some immoral conduct and he proposes that the concept of deception should undertake this task. At the risk of being redundant the reader is reminded that as a cartel member falsely sends the message to customers that no cartel is in operation, he effectively deceives. Whelan points out that no express message to this end is needed, as the cartel member may know that customers may act on the assumption that the cartel member lawfully competes with other market participants, as he is selling goods on the market. By not making public the cartel agreement, the assumption may be made that prices are formed as a result of unrestrained competition.¹²¹

Arguably the nature of cartels, as something hidden, worsens the false supposition that the customers hold that competition is unrestrained and assists the association of cartels with deception.¹²² This approach means that cartel agreements which are made openly, should not be covered by the cartel offence – obviously it seems difficult to argue that the cartel deceives customers, if the customers had been informed of it prior to its implementation.¹²³

¹¹⁹ Macculloch 2012, pp. 90-91.

¹²⁰ Whelan 2012b p. 594.

¹²¹ Whelan 2012b p. 595; See also the discussion in this work under the Chapter 'Hard-core Cartels as Deception'.

¹²² Whelan 2012b p. 596.

¹²³ Whelan 2012b p. 597.

Whelan points out that one advantage of employing the moral norm against deception is that, as opposed to the moral norm against cheating, which requires that the cartel member acquires an ‘unfair advantage’, it must not be shown that the individual entering the cartel got personal benefits. This is desirable since individual gains are difficult to show. Further, the option 4, would not require the assessment of the economic effects to establish that the cartel offence has been committed. As opposed to that when the dishonesty requirement was a part of the statutory definition, the defence could advance the argument that the defendant thought that the agreement would be exempted under art. 101(3) TFEU, thus possibly affecting the jury’s assessment of dishonesty.¹²⁴

In line with the Government’s arguments Whelan favors option 4, instead of option 3, which would have the dishonesty element replaced by the secrecy element, as the option 3 would require that it was shown that the agreement was secret, the option 4 would relieve the UK prosecution from such a burden, and not requiring the determination of the content of the word ‘secrecy’.¹²⁵

From the point of view of Article 101(3) TFEU, Whelan says, the option 4 may be favorably viewed. If one seeks to benefit from the exemptions under art. 101(3) TFEU and to avoid criminal penalties, one just has to make the agreement public prior to implementation. Whelan acknowledges that it could be argued that cartelists could circumvent criminal penalties by always publishing the agreements. Yet in his view it seems unlikely that this would take place, as it may be assumed that the cartelists want to reap the rewards of a cartel, which means that the cartel should be kept secret. However, if the cartelist seeks to circumvent criminal penalties by making the agreement public, the cartel could then be detected and prosecuted as a civil offence under the UK Competition Act or Article 101 TFEU.¹²⁶

Further the option 4, Whelan says, would be helpful, as the likelihood of jury nullification is smaller as the jury does not have to consider the moral aspects, and the Norris case would not have a direct impact on the assessment.¹²⁷

¹²⁴ Whelan 2012b p. 597.

¹²⁵ Whelan 2012b p. 598.

¹²⁶ Whelan 2012b p. 598.

¹²⁷ Whelan 2012b p. 597.

7.5.2 The Relationship between the EU and the National Competition Law – Is the UK Cartel Offence ‘national competition law’ for the purposes of Regulation 1/2003?

Whelan argues that option 4 should be preferred as it is less likely under that option that the cartel offence would fall within the scope of Regulation 1/2003.¹²⁸ Regulation 1/2003 would govern the enforcement of the cartel offence if it were regarded as national competition law for the purposes of the mentioned regulation. According to Whelan such a result would have two important implications, firstly it would affect the jurisdiction of the UK Criminal Courts, and secondly it could affect the ability to prosecute the cases in the UK, if EU proceedings are taking place simultaneously.¹²⁹

The latter flows from the fact that Regulation 1/2003 says in art. 11(6) that ‘The initiation by the commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty.’¹³⁰

Further the recital 8 of Regulation 1/2003 says that when national laws are applied to agreements that fall within the scope of 101 TFEU, the national competition laws may not prohibit such agreements if the Union law does not prohibit them. Crucially however with regard to the cartel offence Regulation 1/2003 provides in the last sentence of the recital 8 the following: ‘Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.’

Furse argues that one cannot be indifferent to the possibility that the cartel offence would be considered national competition law for the purposes of Regulation 1/2003, but sees that the independent existence of the offence would support the interpretation that the cartel offence is not national competition law for the purposes of the regulation. He however admits that Wils makes a good case to argue the opposite.¹³¹

As Wils points out art. 3(3) of Regulation 1/2003 says that it does not ‘preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.’ The aforementioned recital 8 Regulation 1/2003 then is in Wils’ view just to detail art. 3 of Regulation 1/2003, and his interpretation is that

¹²⁸ Council Regulation EC No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty.

¹²⁹ Whelan 2012b p. 599.

¹³⁰ Whelan 2012b p. 599.

¹³¹ Furse 2012 p. 121

art. 3(1) and (2) would be applicable to all national laws (despite a possible criminal offence against natural persons) that do not have for the most part a different objective than Articles 101 and 102 TFEU.¹³² Wils argues that one can scarcely see the possibility that the UK cartel offence would have a predominantly different objective from the one that is incorporated in art. 101 TFEU. He points out that the UK cartel offence was introduced to improve the deterrent effect as the fines against the companies were not seen as sufficient, and that cartel offence is ‘a means whereby competition rule applying to undertakings are enforced.’¹³³ Furse notes inter alia that given that the s 188 (1) of the Enterprise act itself refers to ‘undertakings’ and that the White paper¹³⁴ referred to cartels, it may be asked that if the cartel offence was not to prevent cartels and agreements between undertakings then what is its aim?¹³⁵

In the case *IB v The Queen*¹³⁶ the defendants advanced the argument that Regulation 1/2003 has the effect that the UK Crown Court cannot preside over cartel cases where there is an effect on the member state trade as then only the Competition authority would be the properly designated authority under art. 35 of Regulation 1/2003 to impose fines.¹³⁷ The Court did not accept this argument – as Whelan explains the Court ‘held that the Cartel offence is outside of the scope of Regulation 1/2003 as it is not a “national competition law” within the meaning of that piece of EU legislation: the Cartel offence does not involve a decision whether a given agreement is valid or rendered invalid for infringement of Article 101 TFEU.’¹³⁸ Further, the court said that even if it was mistaken in this interpretation, Regulation 1/2003 does not make the national competition authority the only possible instance to punish offences, which would be considered national competition law.¹³⁹

Whelan says that the option 4 by linking deception to cartel activity, aims at retribution instead of deterrence. It could be said that ‘one is in fact punishing “deception,” as opposed to the mere conclusion of a price-fixing agreement’. This would mean that while the (administrative Union) competition law aims to punish without regard to immorality, the option 4, on the other hand punishes when the moral norm against deception has

¹³² Note that art. 81 and 82 have been renumbered since the introduction of the Lisbon Treaty and are now art. 101 and 102 TFEU respectively, Wils 2005a. p. 133.

¹³³ Wils 2005a p. 133; See also Department of Trade and Industry, *A World Class Competition Regime* July 2001. In particular at para 7.2.

¹³⁴ *A World Class Competition Regime* July 2001, in particular at para 7.22.

¹³⁵ Furse 2012 p. 125.

¹³⁶ *IB v The Queen* 2009 EWCA Crim 2575; Whelan 2012b, p. 599.

¹³⁷ *IB v The Queen* 2009 EWCA Crim 2575 at para 2.

¹³⁸ Whelan 2012b, p. 599 footnote 52; see *IB v The Queen* 2009 EWCA Crim 2575 at para 34.

¹³⁹ *ibid.* at para. 38.

been infringed. This is relevant since Regulation 1/2003 in its recital 9 says, that the regulation does not apply when the objective is not the protection of competition on the market. Subsequently, the option 4 incorporating an aim of retribution could be said to have a different objective. Yet, as Whelan points out, the ECJ might one day give a ruling on this particular point, which would settle this unresolved question.¹⁴⁰

The Government argued that the cartel offence would be separate from the EU competition law regime under the option 4 and would not be more susceptible to fall within the scope of Regulation 1/2003. This would follow from the secrecy aspect, which is not an integral part of Article 101 TFEU.¹⁴¹

7.6 CONCLUSION

The UK Enterprise Act that was passed into law in 2002 has recently been reformed *inter alia* by removing the troubled element of dishonesty from the cartel offence.

The Hammond and Penrose report and the White Paper preceded the enactment of the Enterprise Act of 2002. The OECD had previously suggested that individual liability in the context of cartel conduct should be available. The UK Cartel offence would then target the hard-core cartel conduct and exclude the so called vertical agreements. Among the aims of the Enterprise Act was a clear statutory prohibition intelligible to businesses and a deterrent effect as a result of application of the law in question. It is questionable whether either of these aims was attained.

In 2011 a consultation document, *A Competition Regime for Growth: a consultation on options for reform* suggested that the dishonesty requirement should be dropped. It *inter alia* referred to a survey whose results indicated that there was not a substantial support among the general public for the view that cartel conduct was dishonest. The OFT referring to its own experience argued that the dishonesty requirement could induce unmeritorious defences and should be dropped from the cartel offence. The dishonesty requirement had arguably made it more likely that the jury would have to evaluate complex economic evidence. Ironically initially the dishonesty test was adopted to escape the problems associated with the economic evidence, and to distinguish the civil regime from the criminal one.

It is notable that the dishonesty element was dropped albeit it was barely touched upon in the cartel case law.

¹⁴⁰ Whelan Peter, 'Improving Criminal Cartel Enforcement in the UK: the Case for the Adoption of BIS's "Option 4"' *European Competition Journal* December, 2012 p. 600

¹⁴¹ BIS, *Growth, Competition and The Competition Regime: Government Response to Consultation*, March 2012 at para 7.30

The Consultation document suggested four different options to reform the UK cartel offence: 1. The removal of the dishonesty requirement and the introduction of prosecutorial guidance, 2. The removal of the dishonesty requirement and excluding certain white-listed agreements 3. That ‘secrecy’ as an element should take the place of ‘dishonesty’, 4. The removal of the dishonesty requirement and the exclusion of agreements made openly.

The Government chose the option 4, which would inter alia diminish the likelihood of defences relating to complex economic evidence. The option 4 found also favor with the OFT and a few other respondents. The OFT pointed out that the civil regime would still catch the openly made agreements that would be outside the scope of the cartel offence.

One problem identified with option 1 was that it would not sufficiently clearly distinguish the cartel offence from the civil prohibition. As to option 2, concerns were expressed that devising the white-listed offences could be exceedingly difficult, and the interpretation of the list may always be challenged. Regarding option 3, it was argued that proving active secrecy could be difficult.

The Government argued that dropping dishonesty would streamline prosecution and add to deterrence. While the Government acknowledged the importance of the mental element in the cartel offence it underlined the harm that cartels cause, and argued that even in the absence of the dishonesty test the gravity of the offence warrants imprisonment up to 5 years.

The reform has received criticism inter alia due to its ‘piecemeal approach’: arguably other parts, besides the definitional elements of the cartel offence would have deserved attention, for instance the introduction of a system of plea bargaining. This particular argument regarding plea bargaining is one that the author of this dissertation finds persuasive – relying exclusively on the information received from the leniency applicant is risky. Having the runner-up to leniency enter a guilty plea could streamline the prosecution.

Further while seeking to improve anti-cartel enforcement, it would seem that the criticism is warranted regarding the absence of analysis as to the resources available to the OFT (now the CMA), especially with a view to the argumentation in this direction in the Condor report that analyzed the collapse of the Airlines case.

One of the problems regarding the dishonesty requirement seemed to be that it presupposed that the public perception of cartels is negative. However making the cartel offence a strict liability offence has not received much support. The reformed cartel offence retains the mental element of intention. This author is not keen to add further mental elements to the offence - the physical element is already in itself implicitly immoral.¹⁴² Further exempting openly made agreements may bring about uncertainty,

¹⁴² See Beaton-Wells 2007 p. 698.

for instance the defendants may claim that ‘relevant’ information had been given to customers. Due to the inherent vagueness of the term ‘relevant’, one may expect that this point will be litigated. As one commentator has noted, the prosecution already bears the burden of proving the existence of the cartel agreement.

While the ECJ has the final say regarding the relation between the UK cartel offence and the EU law, it seems sensible that an effort is made to keep the two separate, and it appears that the option 4 supports such an interpretation. Having said that it must be acknowledged that exempting openly made agreements is problematic, not just for the potential damaging effects, but in particular by bringing unnecessary hurdles in the way of the prosecution.

8 *Detecting, Investigating and Prosecuting Cartels Particularly from the UK Perspective*

8.1 INTRODUCTION

This Chapter provides an overview of the particulars related to the detection, investigation and prosecution of cartels in the United Kingdom. The primary purpose is to draw on the UK experience in this respect and to produce recommendations as to a possible Finnish or Swedish criminal anti-cartel regime – inevitably this implies the sort of treatment of the topic that involves necessarily a fairly detailed account of the UK regime before any conclusions can be drawn.

Detecting cartels appears to be indebted to leniency programs. The notorious collapse of the airlines case,¹ involving the British Airways and the Virgin Atlantic (hereinafter the airlines case)², has prompted commentators to explore the extent of the disclosure obligations of the now replaced Office of Fair Trading (hereinafter OFT) and the relevance of a prosecutor well-versed in criminal law. These questions will be explored below.

8.2 THE UK LENIENCY PROGRAMME AND BOUNTIES

8.2.1 *Introduction*

The American regulators started to employ the criminal powers to their full potential in the 1990's. The Lysine cartel³ was cracked with the extensive investigations rights: a video recording from the cartelists' meeting was obtained. The Department of Justice introduced its stick and carrot approach

¹ See *R v George* 2010 EWCA Crim 1148.

² It has also been referred to as the *British Airways* case.

³ Regarding the Lysine cartel, See Eichenwald 2012.

to break the code of silence. These two together, the robust investigatory powers and leniency, draw on the natural instability of cartels. The apparent success of the US showed the way for other jurisdictions around the world that wished to improve their cartel cracking abilities,⁴ the UK among those jurisdictions. It has been proposed that the arguable success of the American leniency policy hinges on three different elements: firstly, a truly tempting offer made by the DOJ, secondly, the policy taps into the instability of cartels and also produces the suspicion among the cartel members and thirdly, the leniency scheme becomes even more powerful as only the first informant is extensively rewarded.⁵

As Harding and Joshua explain, the character of cartels is more of a truce than a real alliance: there is the possibility that a member of the cartel is tempted to cheat as they are still independent rivals. The members constantly estimate what are their advantages and disadvantages to retain the cartel membership. A cartel involves cooperation and the contingency of a betrayal and this has led to the application of the Prisoner's Dilemma to cartels. The firms are incentivized by the cartel profits to collude, but once the cartel operates individual cartel members may cheat by lowering prices due to another incentive which then results in competition when other cartel members lower prices as well. Therefore sustaining the cartel can be immensely difficult.⁶

Many conspicuous and successful cartels have demonstrated how the maintenance of the cartel has required constant policing and care to keep the working order despite the lucrative cartel profits for its members. Successful cartels such as the Zinc Producers' Group where the cartel bit by bit fell apart,⁷ the PVC Cartel where it was suggested that cheating took place,⁸ and the Pre-Insulated Pipes Cartel where monitoring took place to guarantee compliance among the cartel members indicate the inherent instability of a cartel.⁹ The carrot and stick strategy may exploit such a culture of distrust between the cartel members to crack the secretiveness of cartels.¹⁰ Each cartel member is then subject to the application of the Prisoner's Dilemma, wondering whether other members of cartel will confess and get the full benefits of leniency. There are two essential requirements for the efficient

⁴ Harding and Joshua 2010 pp. 228-229.

⁵ Harding and Joshua 2010, p. 235.

⁶ *ibid.* pp. 229-230

⁷ See the OJ, L 220, 17.8.1984, p. 42

⁸ See Commission Decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865, PVC) (89/190/EEC) OJ L 74, 17.3.1989 p. 5

⁹ See Commission Decision of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: Pre-Insulated Piper Cartel) (1999/60/EC) OJ L 24, 30.1.1999 p. 29.

¹⁰ Harding and Joshua 2010, p. 231.

application of the Prisoner's Dilemma: firstly, the threat of detection must be real and secondly the following sanctions must be harsh enough.¹¹ The knowledge of the full immunity to only the first applicant may affect the perceived likelihood of detection.¹²

Furthermore while leniency makes a secret cartel unstable if the cartel members believe that they could be detected in the absence of the leniency as well – it makes the cartel members to race to the authority, thus decreasing the amount of resources the authority needs for investigation. It also provides a variety of information as a result. Therefore leniency is perceived as the one of the best ways to detect cartels.¹³

8.2.2 *The Policy Rationale behind Leniency*

One reason why Finland and Sweden both gave the red light to the criminalization of cartels is that the idea of introducing a possibility for plea bargaining/leniency under the criminal justice system was foreign, the traditional Nordic approach is to give more value to the reprehensibility of the crime rather than the perpetrator's confession. Therefore delving into the UK leniency program that grants immunity against criminal prosecution to individuals is of relevance in a comparatively oriented study.¹⁴

In the German discussion it has been pointed out that granting immunity infringes the principle of mandatory prosecution.¹⁵ Removing the prosecutorial discretion seeks to eliminate possible arbitrary elements from enforcement.¹⁶ One argument in favor of a criminal anti-cartel regime is actually that it enhances the leniency program by giving incentives to individuals to come forward, whereas in the absence of individual accountability the individuals may not wish to turn in the firm that employs them or 'recall awkward facts about meetings and understandings'. On the other hand the risk of a prison sentence upends the situation, inducing speedy actions on part of the individuals who seek to provide strong evidence to the authorities in order to obtain immunity. Thus the leniency mechanism exploits the colliding interests of the firm and the individuals. Arguably this outcome may alleviate the increased evidentiary problems associated with a criminal anti-cartel regime.¹⁷

¹¹ Harding and Joshua 2010, p. 232;

¹² Harding and Joshua 2010, p. 232

¹³ Whelan 2011, p. 231.

¹⁴ See (in Swedish) *Regeringens proposition* 2007/08:135, p. 151 and (in Finnish) Kuoppamäki 2006, p. 66; See also the discussion in chapter 9 in this work.

¹⁵ Vollmer 2006, p. 259.

¹⁶ Wagner-Von Papp 2011, p. 175.

¹⁷ Whelan 2011, p. 233.

The OFT by awarding immunity to individuals against criminal prosecution and leniency against civil proceedings to companies is in an exceptional position in the UK to have such powers.¹⁸

The OFT states in its Guidance regarding its leniency policy that both individuals and firms are granted immunity in the framework of the UK leniency program, when they reveal the existence of a cartel and fully cooperate. In the OFT's view the pardon is justified by the interests of the economy. The penalties may be reduced as a result of leniency and individuals may escape prosecution and the imposition of the Director Disqualification order.¹⁹

Harding and Joshua argue that the adoption of leniency to break the silence among the cartel members indicates a move towards criminal law regulation. This follows from the fact that the genesis of leniency resides in criminal justice. Leniency however requires a trade-off of retributive values in favor of more utilitarian objectives. In order to avoid a complete abandonment of retributive values, the exclusion of the ringleader from the benefits of the leniency program reflects still retributive justice. In Europe there seems to be however a narrow definition of the ringleader or bully, which in turn indicates a very pragmatic approach.²⁰

The underlying policy idea is that it is more important from the perspective of customers and consumers that cartels are detected than punishing the cooperating responsible individuals or firms, who have informed the Authority of the existence of the cartel.²¹ Through leniency cartels are detected and become subject to legal prosecution with the help of the evidence acquired from the leniency applicants.²² Furse argues that this reflects a competition policy, which places a higher emphasis on efficiency than moral questions involved. He further points out that leniency could be supported with the view that by confessing the cartel member may put his past faults behind and make amends.²³ Confessing one's sins and then the subsequent absolution is a part of many major religions, from Christianity to Buddhism. In case of a confessing cartel member it is important that the confession is recorded and responsibility assumed, just as a sinner would. This way the cartel members also retain evidence of the cartel rather than

¹⁸ Special arrangements concern Scotland, see Furse 2012 p. 146; Lawrence et al. 2008, p. 18.

¹⁹ OFT, *Applications for leniency and no-action in cartel cases. OFT's detailed guidance on the principles and process*. A consultation on OFT guidance. OFT803con, October 2011, at para 2.2.

²⁰ Harding and Joshua 2010, pp. 249-252.

²¹ OFT, *Applications for leniency and no-action in cartel cases. OFT's detailed guidance on the principles and process*. A consultation on OFT guidance. OFT803con, October 2011, at para 2.3

²² *ibid.* at para 2.4.

²³ Furse 2012 pp. 146-47.

destroy it, in order to secure the best position for a leniency application. The emotional side of all this is that the cartel member first breaks the law by entering the cartel and subsequently betrays its fellow cartel members by applying for leniency. Harding and Joshua argue that this still does not leave too deep emotional wounds as it is 'strictly business.'²⁴

The OFT seeks to persuade both firms and individuals that have engaged in cartel activities to report their conduct and to cooperate. The OFT takes the view that firstly providing leniency promotes the detection of cartels that is difficult, secondly cartels are terminated as that is the condition to qualify for leniency, thirdly by further increasing the likelihood of the imposition of penalties leniency brings about deterrence and finally facilitates private damage actions. As a result, the OFT argues, greater compliance is achieved, prices will be lower etc.²⁵

8.2.3 *The Conditions for Leniency*

The OFT has recently updated its Guidance relating to the leniency applications and immunity.²⁶ As Furse notes the British Airways case may have partly prompted the OFT to revise the guidance regarding immunity against prosecution. The OFT consultation took place in 2011²⁷ and the Guidance followed in July 2013.²⁸ Regarding the 'relevant information' that the leniency applicants should furnish the Guidance specifically states that evidence of the existence of the cartel and on the other hand "exculpatory" material' must be provided.²⁹ Thus anything, but legally privileged information is included.³⁰

The leniency applicant must meet certain criteria to qualify for immunity against criminal prosecution or corporate fines. The individuals

²⁴ Harding and Joshua 2010 pp. 252-255.

²⁵ OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013, under title 'Foreword', p. 6.

²⁶ OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013

²⁷ See OFT, *Applications for leniency and no-action in cartel cases. OFT's detailed guidance on the principles and process*. A consultation on OFT guidance. OFT803con, October 2011

²⁸ See OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013; Furse 2012 p. 146

²⁹ Further clues as to additional information that the OFT might want to go after must be also produced. OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013at para. 5.15; Furse 2012 p. 150

³⁰ The information that the OFT might want includes anything that could be of relevance for the investigation. OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013 at para. 5.14 and 5.12

‘must admit participation in the cartel offence under section 188 of the EA02.’ They ‘must provide the OFT with all the non-legally privileged information.’ Further, ‘The applicant must maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action (including criminal proceedings and defending civil or criminal appeals) by the OFT arising as a result of the investigation.’ Regarding the time after the leniency application has been submitted, ‘the applicant must refrain from further participation in the cartel activity from the time of informing of the OFT of the cartel activity (except as may be directed by the OFT). Finally, ‘the applicant must not have taken steps to coerce another undertaking to take part in the cartel activity.’³¹

An individual no-action letter may be cancelled.³² Immunity could be cancelled where the applicant has not cooperated fully, or has acted in bad faith. In such cases the OFT can only use the information obtained against the unsuccessful leniency applicant (an individual) or third parties if ‘he/she knowingly or recklessly provided information that is false or misleading in a material particular.’³³

To qualify for criminal or civil leniency the applicant does not have to waive legal professional privilege regarding the relevant information.³⁴ As Purnell et al. point out the chief obligation of a trial judge is to make sure that the trial is fair, which may require the disclosure of privileged information and therefore the leniency applicant is under a pressure to accede to such demands as cooperation on part of the leniency applicant is the condition for leniency. This then may make it less appealing to apply

³¹ *ibid.* at para. 2.7; With regard to leniency the Enterprise Act provides the following in s 190(4):

‘Where, for the purpose of the investigation or prosecution of offences under section 188, the OFT gives a person written notice under this subsection, no proceedings for an offence under section 188 that falls within a description specified in the notice may be brought against that person in England and Wales or Northern Ireland except in circumstances specified in the notice.’

³² *ibid.* at para 5.30.

³³ *ibid.* at para 7.20 and para 7.24; See Furse 2012 p. 147.

³⁴ The OFT says however that it does not exclude the possibility that it would ask whether legal professional privilege would be waived by the leniency applicant with regard to certain information. If the leniency applicant declines no unfavorable results will follow and in the opposite case where the applicant permits the waiver he will not in return receive more favorable treatment in any respect than would have otherwise been the case. When the applicant claims legal professional privilege over certain information, and if the OFT is doubtful, it may routinely require that an independent counsel may review the information who will then form an independent opinion as to the question whether the given information is covered by the legal professional privilege. OFT, *Applications for leniency and no-action in cartel cases, OFT’s detailed guidance on the principles and process*, OFT1495, July 2013 at paras 3.15 (also footnote 30), 3.16; Furse 2012 p. 150.

for leniency than what perhaps was the case before the launching of the criminal cartel offence.³⁵

The OFT has stated that leniency applications from undertakings are much more frequent than from individuals.³⁶ When type A immunity is granted, the firm will not face corporate fines under the Competition Act of 1998, and ‘blanket immunity’ protects all, directors and employees, whether present-day or previous, from criminal prosecution. Further the directors gain immunity against the director disqualification order.³⁷

Baker has pointed out that when individuals are subject to prison sentences, an attractive leniency program tends to induce the individuals to come forward. He further argues that this is an advantage that the DOJ enjoys, but the European Commission does not.³⁸ Harding and Joshua point out that there appears to be the notion of individuals and corporations being distinct actors, which would mean that responsibility should be allocated accordingly. Arguably both the corporation and the individuals need to be subject to legal control.³⁹

When the individuals run the risk of being incarcerated the interests of the employer and employees diverge and create the ‘dog eat dog’ environment.⁴⁰ Type A immunity will be granted to an individual applying for it, but neither the firm employing the individual nor his fellow-workers are covered.⁴¹

The individual applying for immunity will be interviewed by the OFT. The information disclosed by the individual in the interview will not be utilized against them in following criminal proceedings, apart from cases where the individual has acted in bad faith or the no-action letter is cancelled.⁴²

³⁵ Purnell et al. 2010, p. 322.

³⁶ OFT, *Applications for leniency and no-action in cartel cases, OFT’s detailed guidance on the principles and process*, OFT1495, July 2013 at para. 2.8.

³⁷ Type A immunity is granted to the first leniency applicant with respect to the uncovered cartel when in the absence of the application the OFT would not have had enough information to prove the existence of the cartel, and had not launched investigation regarding the cartel. OFT, *Applications for leniency and no-action in cartel cases, OFT’s detailed guidance on the principles and process*, OFT1495, July 2013 at paras. 2.9, 2.10.

³⁸ Baker 2001, pp. 709-710.

³⁹ Harding and Joshua 2010, pp. 258- 260.

⁴⁰ See Baker 2001 p. 709.

⁴¹ Type A immunity, once the OFT has launched investigations, is not obtainable. The same is true if the OFT has already previously gotten an application for leniency or has the adequate information to prove the existence of the cartel, see OFT, *Applications for leniency and no-action in cartel cases, OFT’s detailed guidance on the principles and process*, OFT1495, July 2013 at paras 2.12, 2.14; Regarding Prisoner’s Dilemma see Kuoppamäki 2006, p. 66.

⁴² OFT, *Applications for leniency and no-action in cartel cases, OFT’s detailed guidance on the principles and process*, OFT1495, July 2013 at para 5.30; It may be noted that

As Furse points out prior to the whistle-blowing, it is probable that the firm applying for leniency has launched an inner enquiry, assisted often by legal advisors, into the matter, which may involve the persuasion of the individuals to assist – during the initial steps of an inner enquiry all the relevant particulars may not be revealed, especially if the applicant must acknowledge dishonesty. Yet the criminal prosecution crucially relies on the information produced and after the Airlines (British Airways) case it appears that in the context of parallel civil and criminal enforcement, which involves the handling of both no-action letters on behalf of individuals and corporate leniency applications these matters are of increasing curiosity.⁴³

With a view to the foregoing, it has been proposed that early on the OFT should itself interview the whistle-blowers, but this has been questioned since the OFT might not have the necessary experience and resources to undertake such a task.⁴⁴

The OFT may launch investigations either through the civil or criminal route or both, and this does not depend on who made the application, the firm or the individual. The OFT's Guidance acknowledges that the parallel civil and criminal regimes 'mean that this is a complex topic,'⁴⁵ a matter that will be discussed more thoroughly below in the context of the collapse of the airlines case.

Incidentally, parallel civil and criminal anti-cartel enforcement has been heavily criticized in the Slovenian context – Jager has argued in favor of a wholesale decriminalization due to the problems involved. The problems relate to a lack of coordination between the criminal and civil leniency that may undermine the attractiveness of the civil leniency.⁴⁶

8.2.4 The Interaction between the UK and the EU Leniency Policies

Stephan has identified as problematic the fact that individuals may be reluctant to apply for leniency with the European Commission, as it would not protect against criminal prosecution at the national level – individuals would need to apply for leniency separately at the national level where they are potentially subject to criminal prosecution.⁴⁷ Stephan notes that US enforcement benefits a great deal from predictability that Europe

the potential leniency applicants and their counselors may incognito ask about the features of the policies. See *ibid* at para 1.4.

⁴³ Furse 2012 pp. 148-150; See also Purnell et al. 2010, pp. 322-325.

⁴⁴ Furse 2012 pp. 148-150; See also Purnell et al. 2010. p. 322-325.

⁴⁵ OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013 - at para 1.3 and 1.4.

⁴⁶ See Jager 2011. p. 287ff.

⁴⁷ Stephan 2008b, pp. 22-23; See also the discussion in Frese 2006.

lacks as the civil and leniency programs are not coordinated to a sufficient degree – in the US where a firm obtains immunity against fines also the managers and employees are covered.⁴⁸ It could be argued that '[h]igher sanctions encourage the self-reporting of infringements in the US because the corporate immunity prize automatically extends to the revealing firm's employees.'⁴⁹

The OFT notes that worries have been expressed that while firms apply for leniency with the EU Commission its employees and managers could be susceptible to criminal prosecution in the UK where the infringement affected the UK markets. The OFT has sought to eliminate such fears by pointing out that most firms that are able to gain immunity at the EU level would also be able to obtain 'blanket criminal immunity' for employees and managers in the UK by making a separate leniency application for Type A immunity. Moreover the would-be leniency applicants can make use of the 'no-names marker' prior to seeking leniency with the Commission.⁵⁰

The OFT however recognizes the possibility that immunity against criminal prosecution in the UK would not necessarily be granted in all situations where at the EU level immunity could be obtained. This could be the case where for instance a preceding criminal investigation in the UK has taken place, prompted for example by a type A leniency application. In such instances, the Guidance states no-action letters should not be guaranteed despite the fact that immunity at the EU level is available.

If the OFT perceives an effort to 'game the system' immunity may not be granted: the OFT envisages a situation where type A immunity is no longer available and there is the suspicion that subsequently a leniency application has been made with the Commission as a means of getting a no-action letter in the UK, especially where the Commission would not be well-suited to look into the cartel as per the Network Notice. Finally a no-action letter may not be issued where a significant period of time has elapsed between the leniency applications first to the Commission and afterwards to the UK authorities.⁵¹

With regard to the above, Furse has noted however that such a refusal to grant leniency could be contested on the basis that it would break the UK's obligation of sincere cooperation in the EU context. Moreover Furse takes the view that it is not the probable course of action since the OFT needs to concentrate on the most important priorities and considering the OFT's lack of experience in criminal prosecutions it seems implausible that

⁴⁸ Stephan 2008b, pp. 22,23,32,33.

⁴⁹ Stephan 2008b, p. 33.

⁵⁰ OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013at para 8.2.

⁵¹ OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013 at para 8.6.

where the firm has obtained immunity at the EU level its employees would face criminal prosecution in the UK.⁵²

To sum it up, it appears that [i]n the absence of effective coordination of civil and criminal leniency programmes in Europe, increased criminal enforcement on the national level may risk discouraging leniency applications to the European Commission.⁵³

8.2.5 Bounties as an Incentive to Come Forward

The inherent secret nature of cartels may be addressed with the introduction of a system where bounties are offered in order to induce information that establishes the existence of the infringement of competition laws. It stimulates the financial motives of the one that comes forward rather than a motive for vengeance. Buccirosi and Spagnolo have suggested that bounties could be funded by the fines that the other cartel members are subject to.⁵⁴ Bounties as an incentive for whistle-blowers are being used in the United Kingdom and in Korea.⁵⁵ The Korean Fair Trade Commission for example has said that the rewards provided for the informant improves the detection possibility by further destabilizing the cartels.⁵⁶

While the UK employs criminal sanctions against cartelists it has also introduced monetary rewards for the informants. It has been argued that what spurred their introduction was the smaller number of whistle-blowers than what the OFT had expected.⁵⁷ The benefits that would accompany bounties have been identified to be the following: firstly as a tool to crack cartels besides leniency, secondly increasing antitrust litigation instigated by damage seekers by virtue of more detected cartels, thirdly it could save the resources of the Competition authority.⁵⁸ According to Whelan Bounties could effectively facilitate intelligence collection. The downside is that

⁵² Furse 2012 p. 151.

⁵³ Stephan 2008b, pp. 32-33.

⁵⁴ Baker 2001, p. 708; Buccirosi and Spagnolo 2005, p. 25, 47, 48.

⁵⁵ Whelan, 2011 p. 232; See more regarding the financial rewards offered by the OFT at <http://www.of.gov.uk/OFTwork/cartels-and-competition/cartels/rewards>. Last visited on the 6th of June, 2011.; See the Press Release by the Korean Fair Trade Commission at <http://www.ftc.go.kr/data/hwp/rewardssystem.doc>. Last visited on the 6th of June, 2011.

⁵⁶ A Press Release by the Korean Fair Trade Commission, 'A Reward of 66.87 million won Paid to Informant of Welding Rod cartel' at www.ftc.go.kr/data/hwp/informant_reward.doc Last visited on the 6th of June, 2011.

⁵⁷ The OFT offers rewards amounting up to £100,000, for more details see <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards#>. UguMdqVQUUQ. Last visited on the 14th of August, 2013. ; See Kar Nicole et al. 2008.

⁵⁸ Riley 2005, p. 391.

courts could hold information acquired through bounties as unreliable as the potential whistle-blowers could provide false evidence in the form of documents or testimony or make overstatements in hopes of a financial reward. Therefore the authorities need to check both the reliability of the evidence and the trustworthiness of the informant.⁵⁹

While both bounties and leniency can be employed under an administrative antitrust enforcement regime arguably the major benefit that the criminal regime would bring is the motivation of the individuals to come forward in the face of personal criminal sanctions. The criminal regime would induce witnesses to come forward with additional evidence provided that they are so incentivized.⁶⁰ In support of such a view commentators have underlined the fact that big international cartels such as the lysine, carbon rods, vitamins and citric acid cartels were first investigated in the US.⁶¹

Whelan has identified the following arguable benefits of offering financial rewards under a criminal regime: firstly, arguably under a criminal regime the bounties could also be more favorably viewed by the judiciary than under an administrative one – this view draws on the perception that pursuing criminal offences justifies more robust measures than regulatory violations. Secondly the unlikely possibility that companies would take turns in becoming whistle-blowers and being rewarded monetarily is arguably also lower under a criminal regime as individuals are subject to custodial sanctions.⁶²

This author subscribes to the view that while bounties may not be the bedrock of a sound anti-cartel regime, they could provide an effective complement to the leniency program – even more so under a possible criminal regime. Yet they should definitely not be the top priority for jurisdictions that lack individual sanctions, but may be considered when the regimes have reached a more mature state.

8.3 INVESTIGATING AND PROSECUTING CARTELS

8.3.1 *Introduction*

The OFT works together with the Serious Fraud Office in pursuing cartels. The Serious Fraud Office has not however been involved in such investigations yet to any great extent.⁶³ Margaret Bloom, the former Director

⁵⁹ Whelan 2011, p. 232.

⁶⁰ Lawrence et al. 2008, p. 23; Whelan, 2011 p. 233.

⁶¹ Baker 2001, p. 709; Whelan 2011 p. 233.

⁶² Whelan 2011 p. 233; Wils 2007, p. 30.

⁶³ Furse 2012 p. 124.

of the OFT's Competition Enforcement has noted that if it is determined that the case merits criminal prosecution, from the beginning the collection of evidence will observe the criminal law standards. Therefore the decision whether to pursue the civil or criminal route should be made quickly. While initially the civil and criminal cases could be pursued side by side, eventually the criminal cases will have to be concluded prior to the civil case, so as to avoid undermining the criminal trial. Bloom however argued that what is lost in time is gained in deterrence.⁶⁴

While in Scotland the Lord Advocate is charged with the task of prosecuting, the cartel offence prosecutions under s 188 are started in England, Wales and Northern Ireland by the Serious Fraud Office or the OFT as per s190(2).⁶⁵

The Territorial Requirement

By way of introduction one may pay attention to the territorial requirement enshrined in s190(3) of the Enterprise Act of 2002 which must be met to launch investigations:

s190(3): 'No proceedings may be brought for an offence under section 188 in respect of an agreement unless it has been implemented in whole or in part in the United Kingdom.'

The Explanatory notes accompanying the Enterprise Act indicate that a cartel agreement may be implemented by way of an email or a phone call from abroad.⁶⁶ In any event foreign individuals are caught by the offence, where it is implemented in the UK.⁶⁷ As Furse notes the European Arrest Warrant, which is convenient for extradition purposes, does not seem to cover the cartel offences.⁶⁸

However it seems since the introduction of the cartel offence that the dual criminality requirement has been met and individuals could be extradited to the US.⁶⁹

8.3.2 The Requisite level of Evidence in criminal cases

A prosecutor must provide a certain amount of evidence to show that the law has been violated. It has been argued by the detractors of a criminal

⁶⁴ Bloom Margaret, 'Key Challenges in Public Enforcement' A speech to the British Institute of International and Comparative Law, 17 May 2002. p. 8; See also Furse 2012 p. 127

⁶⁵ Furse 2012 p. 132

⁶⁶ See the Explanatory Notes to the Enterprise Act of 2002, at para 412

⁶⁷ Furse 2012 p. 130

⁶⁸ Furse 2012 p. 130

⁶⁹ Furse 2012 p. 131

anti-cartel regime that the standard of proof would be more difficult to satisfy and thus securing convictions would be undermined. Under the administrative regime the antitrust authority must prove its case as per the standards of administrative law and escapes the more burdensome standards of criminal law. Whether this is sensible from a resource point of view is a pertinent question, since allocating the resources exclusively to administrative enforcement could be viewed to be more cost-effective –Whelan illuminates the underpinning of the argument in the following fashion: ‘a criminal conviction may become so difficult to obtain in comparison to a civil/administrative ruling that in allocating resources to the criminal efforts one sacrifices in effect successes under a civil/administrative regime in favour of failures under a criminal one.’⁷⁰

The Swedish 2004 committee pointed to difficulties regarding higher standards of proof under a criminal trial which might mean that the deterrent effect would not materialize.⁷¹ Similar conclusions were drawn by a Finnish committee that never proposed any individual sanctions.⁷² Also a Swedish commentator Nils Wahl argued that under a criminal anti-cartel regime the authorities would find it harder to detect cartels due to higher standards of proof that need to be met in order to secure convictions.⁷³ Wagner-von Papp has on the other hand pointed out in the German context that criminal law standard of proof is observed in the administrative antitrust proceedings.⁷⁴ In Ireland with its criminalized anti-cartel regime the required legal standard in terms of evidence is ‘beyond reasonable doubt.’⁷⁵

Reindl has pointed out that the costs emanating from a criminal regime do not necessarily derive from incarceration only, but perhaps more importantly from the fact that courts would have to decide the cases – the prosecutor would have to satisfy higher standards of proof to send people to prison as opposed to a situation under an administrative regime where possibly only one authority could investigate and adjudicate and finally also impose the sanctions.⁷⁶

Under an administrative regime the required standard of proof is ‘proof on the balance of probabilities’. Under a criminal regime a reasonable person must have no reasonable doubt that the person is responsible for the alleged act to secure a conviction. However Whelan had advanced the argument that with regard to antitrust proceedings the difference between the required proof in a criminal case and an administrative one may possibly not be

⁷⁰ Whelan 2011 pp. 221-222

⁷¹ SOU 2004:131 p. 252-253

⁷² Kilpailulaki 2010, Työ- ja elinkeinoministeriön julkaisu 2009. p. 51

⁷³ Nils Wahl’s view on the committee proposal, see SOU 2004:131 p. 271

⁷⁴ Wagner-Von Papp 2011, under the heading ‘Summary and Conclusions’, at para. 3.

⁷⁵ Whelan 2012a p. 4.

⁷⁶ Reindl 2006 p. 121.

considerable.⁷⁷ This was for example noted by the British Competition Appeal Tribunal in the Napp case. The Tribunal opined that despite the applied standard of proof, whether criminal or administrative, in practice the outcome of the case is likely to be the same. The Tribunal reasoned that it is difficult to conceive the awarding of a condemning judgment if there is a reasonable doubt left.⁷⁸

Reindl however notes that even if the difference between criminal and civil standards of proofs was not great, judges could draw a distinction between cases involving either an individual or a firm, and in case of individuals they could be more rigorous. Therefore if condemning judgments under a civil regime were more often obtained it might induce greater compliance than more infrequent judgments under a criminal regime.⁷⁹ Also the New Zealand Government contemplation argued that under the higher standards of proof of a criminal anti-cartel regime, getting condemning judgments could be hard.⁸⁰

It may be noted that according to the General Court the European Commission does not have to cite evidence ‘beyond reasonable doubt’ for a finding of an infringement and the following imposition of substantial fines.⁸¹ The ECJ has said that the Commission should provide ‘sufficiently precise and coherent proof.’⁸² Thus it could be presumed that the standards of evidence are more robust in jurisdictions when criminal sanctions are enforced.⁸³

However it has been suggested that as the EU competition law is of a penal nature the standard of proof could be likened to the one pertaining to a criminal case. Article 6(2) ECHR does not shed light on the matter nor does the case law of the European Court of Human Rights. It seems that a case depends on the dictates of the national law. Thus as Whelan has pointed out the strength of the standard of proof argument to oppose a criminal regime is eroded when the difference between the criminal and administrative standards is not significant. Uncertainty in this respect obtains in the UK and is perhaps present at the EU level as well.⁸⁴ In light of the foregoing, it

⁷⁷ Whelan 2011 p. 222

⁷⁸ Napp Pharmaceutical Holdings 2002, The UK Competition Appeal Tribunal, paragraph 108.

⁷⁹ Reindl 2006 p. 123.

⁸⁰ Ministry of Economic Development, *Cartel Criminalisation: Discussion Document*, January 2010 p. 32; See also Reindl 2006 p. 124.

⁸¹ British Plasterboard plc v Commission of the European Communities, Case T-53/03, at para 64

⁸² *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities* 28 March 1984, Joined cases 29/83 and 30/83 at para 20

⁸³ Whelan 2012a, p. 4.

⁸⁴ Whelan, 2011 p. 224

seems that the standards of proof argument alone should not obstruct a criminalization project.

8.3.3 *The Right Against Self-Incrimination*

The European Court of Human Rights has recognized in its case law the right against self-incrimination and the right to silence despite the lack of express wording in Article 6 ECHR.⁸⁵ The Court has further put forward that both of these rights are acknowledged by the international standards and are at the core of a fair procedure as per article 6.⁸⁶ They protect the defendant from the inappropriate compulsion that authorities might exercise and aid to prevent injustices.⁸⁷ Yet it must be born in mind that this does not affect the compulsory powers of the authorities and the evidence acquired through such means.⁸⁸

However the case law of the European Court of Justice is inconsistent in this regard as it decided in 1989 in the case *Orkem v. Commission* that ECHR article 6 does not prevent the commission from requiring an undertaking to supply all information and documents despite the fact that they may lead to the recognition of antitrust activities. The Commission is not entitled though to require the undertaking to supply it with answers that include the admission of the violation, which is the obligation of the commission to prove.⁸⁹

Curiously this approach has been further confirmed by the General Court of EU (the former Court of First Instance) in 2001 – the approach is contrary to the ECHR case law.⁹⁰ After the *Funke* judgment article 6 ECHR has definitely been determined to include the right against self-incrimination. Moreover it has been pointed out that under the *Saunders* case the privilege against self-incrimination is wider than under the *Orkem* case. Under *Saunders* one may refuse to give directly incriminating information or even exculpatory comments or factual information.⁹¹

⁸⁵ This was decided by the European Court of Human Rights in the Case of *Funke v. France*. Strasbourg 25 February 1993. See paragraph 44; Whelan, 2011 p. 224

⁸⁶ See Case of *John Murray v. The United Kingdom*, Strasbourg 8 February 1996, paragraph 45; Whelan, 2011 p. 224

⁸⁷ Case of *Saunders v. United Kingdom*, Strasbourg 17 December 1996, paragraph 68; Whelan, 2011 p. 224

⁸⁸ For example incriminating documents may be found through a warrant. See *Saunders v. United Kingdom* Strasbourg 8 February 1996, paragraph 69; Whelan, 2011 p. 224

⁸⁹ Case C-374/87 *Orkem v. Commission of the European Communities* (1989). Paragraphs 34 and 35.

⁹⁰ See Case T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities*. Paras 66-67.; Whelan 2011 p. 225

⁹¹ Whelan, 2011 p. 225

It has been pointed out however that the distinct difference between the ECHR case law and that of the ECJ is that the former concentrates on natural persons, whereas the latter operates with cases that are of administrative nature, tackling undertakings.⁹²

If custodial sanctions were introduced for example in Finland for competition law violations the interpretation of the European Court of Human Rights under Saunders concerning the right against self-incrimination would have to be observed under criminal antitrust proceedings. Under the current administrative proceedings the right against self-incrimination is already observed, but the extent to which it applies needs more clarification.⁹³

Under a twin-track model, where administrative and criminal antitrust enforcement exist in parallel a wider interpretation of the right against self-incrimination under the criminal regime could hinder the investigation under the administrative regime if natural persons would in fear of personal criminal proceedings not communicate all the information that they possess against an undertaking.⁹⁴ This problem is tackled by the Enterprise Act of 2002.⁹⁵ The Enterprise Act provides amendments to the Competition Act of 1998 so that evidence acquired under the civil regime may not be used by the criminal prosecution, as the defence rights under the civil regime are not as robust. Section 198 of the Enterprise Act inserts s 30 into the Competition Act of 1998,⁹⁶ which seeks to prevent self-incrimination, which could take place as a result of the compelled oral statements as per the Competition Act of 1998, in the following fashion:

A statement made by a person in response to a requirement imposed by virtue of any of sections 26 to 28 may not be used in evidence against him on a prosecution for an offence under section 188 of the Enterprise Act 2002 unless, in the proceedings-

- (a) *in giving evidence, he makes a statement inconsistent with it, and*
- (b) *evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf'*

Thus the possibilities of the authorities to acquire information from the suspect under a criminal regime are limited, although the compulsory investigative powers under criminal law are available.⁹⁷

⁹² Wils 2003b, p. 13.

⁹³ The Memorandum by the Finnish Ministry of Employment and the Economy for a New Competition Act. (2010). p. 40.

⁹⁴ Whelan, 2011, p. 225.

⁹⁵ See Enterprise Act of 2002. Section 198; Competition Act of 1998 Sections 26-28.

⁹⁶ Furse 2012, p. 128.

⁹⁷ Whelan 2011, p. 226.

In contrast in Sweden the 2004 committee said that information gathered prior to the suspicion of a criminal offence may be fully used in subsequent criminal proceedings while not infringing Article 6 ECHR. According to the committee information that has been acquired through compulsion could be used as evidence in criminal proceedings if it's not the only or main evidence – however when the Competition Authority took measures in parallel with the criminal proceedings, it should in particular observe the right against self-incrimination.⁹⁸

The Norwegian Government Bill noted that if the Authority has come into possession of incriminating evidence against individuals in the course of a corporate investigation, the protection of the right against self-incrimination could be questioned and may not have been observed and therefore the obtained evidence could not be used in criminal proceedings against the individual.⁹⁹

Whelan has noted that the criminalization of cartel conduct in the EU member states where the right against self-incrimination is more keenly observed under a criminal regime (than under the administrative regime), could also hamper administrative investigations, since natural persons might be reluctant to provide evidence against firms, if the same evidence is potentially subsequently employed in a criminal prosecution where the natural persons are defendants. As Whelan notes, in order to avoid the apparent negative impact on the administrative regime one possibility is to guarantee the natural person that such evidence obtained from them, by the exercise of compulsion, under the administrative regime will not be used against them in a criminal case. As a result the criminal investigation has more limited means to acquire information from the defendant.¹⁰⁰ In light of the foregoing it seems that Swedish envisaged approach would have been inferior to the UK one since the administrative proceedings could have been compromised if individuals would not provide any information to evade problems in relation to a potential subsequent criminal case against them.

To sum it up, if lawmakers were to consider a parallel civil and criminal anti-cartel enforcement regime in Finland for example, the contemplation should take heed of the UK approach that provides protection regarding statements obtained under the civil regime.

⁹⁸ SOU 2004:131 p. 245

⁹⁹ Norwegian Government Bill at para 4.4.2

¹⁰⁰ Whelan 2011 pp. 225-226

8.3.4 *The Availability of Robust Investigatory Methods*

The intrusive surveillance powers have been hailed as one of the hallmarks of a successful criminal anti-cartel enforcement regime.¹⁰¹ Wils has set five conditions that must be met before a criminal anti-cartel regime can presumably be successful – one of those conditions was that sufficient investigatory powers must be available.¹⁰² Whelan has pointed out that the robust investigatory powers under a criminal regime could also potentially compensate for the potential problems that the increased defense rights pose.¹⁰³

For example wire-tapping and covert surveillance could produce crucial evidence that would not have been obtained if the criminal investigatory powers were not available. However these rights are limited by the protection of privacy, as is set out in Article 8 ECHR.¹⁰⁴ Spagnolo and Buccirossi, who have sought to underline the benefits of rewarding whistle-blowers rather than introducing a criminalization of cartels, have acknowledged the improved detection that would occur as a result of stronger investigatory powers.¹⁰⁵ Further in the United States it has been recognized that partly the US enforcement success owes to the application of traditional criminal law investigatory techniques in the field of antitrust by the US department of Justice (DOJ) and the Federal Bureau of Investigation (FBI).¹⁰⁶

With respect to Ireland, Massey has indicated that previously, before the adoption of the Competition Act 2002 the competition authority suffered from ‘limited investigation capacity.’ The prosecutions were hampered and while the Gardai launched investigations the Gardai was met with people who were very unwilling to cooperate. The introduction of a custodial sanction up to 5 years provided the possibility of arresting persons for interrogation.¹⁰⁷

Incidentally, regarding Ireland Furse noted that despite more robust investigatory methods since 2002 in 2012 it appeared that prosecutions had been launched against six cartels, and yet the initial goal was to prosecute one case per year.¹⁰⁸

The Danish 2012 committee noted that the investigatory tools play an important role. The investigatory tools available to the authorities in cartel cases had not been on par with investigatory tools available for investigating

¹⁰¹ Wils 2005a p. 149.

¹⁰² Wils 2005a p. 149.

¹⁰³ Whelan 2011 p. 234.

¹⁰⁴ Whelan 2011 p. 234.

¹⁰⁵ Buccirossi and Spagnolo 2005, p. 23, 48.

¹⁰⁶ Baker 2001, p. 693.

¹⁰⁷ Massey and Cooke 2011, under the heading ‘Conclusion’ at para 3 and footnote 96; See also Furse 2012 p. 175.

¹⁰⁸ Furse 2012 p. 176

other white collar offences that may attract prison sentences. For instance wire tapping, had not been available. It was said that the lack of more robust investigatory tools could severely impede the detection of cartels, since cartels are secretive and the agreements are entered verbally. The advantage of adopting prison sentences against cartelists is that thereby more robust investigatory tools would become available which in turn could increase the detection rate.¹⁰⁹

Arguably the more robust investigatory methods in turn would enhance the deterrent effect and would improve the risk of detection.¹¹⁰ The committee assessed the various sorts of investigative powers that would be particularly fitting in the anti-cartel enforcement context.¹¹¹

It was noted that the cartelists possibly seek to leave nothing in writing that would indicate the existence of an agreement. Instead they could exchange details regarding the cartel on phone – if however the offenders were subject to prison sentences up to 6 years wiretapping would be available. It was noted that the availability of the custodial sanctions of such length would provide the police with the possibility to secretly listen in on conversations carried out by the suspects in restaurants or conference rooms.¹¹² The prison sentences would also make it possible for the police to monitor people, for instance by taking photos of them while they meet for lunch, whereby the police will have the evidence that the given individuals have communicated.¹¹³ Further, the prison sentences up to 6 years or more would allow the installation of programs on computers that enable data reading, thus providing the police with the contents of a computer, for instance email exchange and other documents on the computer.¹¹⁴

In the UK the cartel offence may also be investigated with the help of techniques that are usually used to unravel serious crime. Such investigative techniques are not available in the UK when infringements of administrative nature are examined under the Competition Act 1998.¹¹⁵

The Enterprise Act, which amended the s 32 of the Regulation of Investigatory Powers Act 2000, defines substantial powers that the now replaced OFT had available to investigate cartels, prescribed in the ss 193–199 – these powers have not been used to the extent that was originally predicted: while the British Airways case was brought to daylight by whistle-blowing, in the Marine Hose cartel it was the US authorities that benefited

¹⁰⁹ 'Rapport fra udvalget om Konkurrence Lovgivningen' March 2012, p. 37.

¹¹⁰ 'Rapport fra udvalget om Konkurrence Lovgivningen' March 2012, p. 41.

¹¹¹ *ibid.* p. 199

¹¹² *ibid.* p. 200

¹¹³ *ibid.* p. 201

¹¹⁴ *ibid.* p. 201

¹¹⁵ Whelan, 2011 pp. 234-235

from the covert measures.¹¹⁶ The powers may be exercised if the conditions in s 192 are fulfilled, s 192 reads as follows:

'1 The OFT may conduct an investigation if there are reasonable grounds for suspecting that an offence under section 188 has been committed.

2 The powers of the OFT under sections 193 and 194 are exercisable, but only for the purposes of an investigation under subsection (1), in any case where it appears to the OFT that there is good reason to exercise them for the purpose of investigating the affairs, or any aspect of the affairs, of any person ("the person under investigation")'

Based on the cited academic opinion and the positions taken by Governments and committees this Author tends to view the availability of robust investigatory tools essential and under a criminal regime they could substantially facilitate the cartel cracking pursuit of the Competition Authorities in Finland and Sweden.

8.3.5 The Marine Hose Cartel

The only case that thus far has attracted prison sentences in the UK is the Marine hose cartel – it is a curious case, not only because it involved a US plea bargaining agreement, but also due to the argumentation used by the UK Appellate Court.¹¹⁷

The Background

In short, the defendants accepted offers of plea agreements in the US and appealed the case in the UK in order to seek reductions in the sentences. The Appellate Court in the UK gave a ruling, which may be problematic. As the defendants were bound by their US plea bargaining agreements, which meant that while the defendants sought reductions, the reductions could not exceed a certain threshold due to the US plea bargaining agreement – this baffled the UK Appellate court which was critical of the plea agreements, questioning the appropriateness of the situation where the plea agreements constrained the argumentation of the defence counselors,

¹¹⁶ Furse 2012 p. 129

¹¹⁷ It may be noted that if the defendant is found guilty the following terms apply as set out by §190(1) of the Enterprise Act

- (a) *conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both;*
- (b) *on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or both.*

but the Appellate Court refrained from giving a ‘concluded view’ in the absence of argumentation by the defence counselors.¹¹⁸

The Implications of the Ruling

Furse paid attention to the fact that while the Appellate Court touched upon the question of mitigating the sentences it referred to the good character of the defendants, and that guilt was without hesitation acknowledged – moreover the court noted that the defendants had sought to assist the authorities, at once entered guilty pleas, lost incomes, and the financial implications faced by the defendants would be felt by their families.¹¹⁹

Further the court said that ‘we were much pressed with the argument that this case could not conceivably be one of the worst cases of its kind’. The Appellate Court believed that the trial judge must have used as a basis the sentence close to the maximum allowed by law, and since it should be employed only with regard to the most egregious offences, the Appellate Court took the position that the trial court was mistaken.¹²⁰ The Appellate Court had also pointed out that defendants did not directly benefit from the cartel profits.¹²¹ The Appellate Court acknowledged that it could have possibly further reduced the sentences, beyond the reductions that were made, if the submissions were not as restricted as they were.¹²²

In Furse’s view the position of the Appellate Court is problematic, as the court obviously viewed the graveness of the offence such that it did not merit the employment of the harsher sentences available, and as a result the deterrent effect could be impaired. The references by the Appellate Court to the fine character of the defendants and the assistance they offered to the authorities seem unwarranted, especially since the cartel which had been deliberately maintained at least for 8 years, sought to purposefully escape the eyes of the authorities which may be deemed as a conspicuous sign regarding the awareness of the defendants that the activities were unlawful. On the other hand the cooperation between the defendants and the authorities may, more than anything, be indebted to the looming penalties and indisputable evidence that the prosecution had against them.

Moreover, it is not probable that high-ranking executives would have anything but a clean previous record and a fine character. Such executives

¹¹⁸ 2008 EWCA Crim 2560 2009 UKCLR 247 at para. 28; For further treatment regarding the plea agreement see Furse 2012 pp. 208-210; See also Case H-07-487-03, United States of America v. Peter Whittle, District Court, Southern District of Texas Houston Division.

¹¹⁹ *ibid* at para. 29; Furse 2012 p. 133.

¹²⁰ *ibid* at para. 30.

¹²¹ *ibid* at para. 21; Furse 2012 p. 133.

¹²² *ibid* at para. 31; Furse 2012 p. 133.

are likely to assist the authorities as they have the advantage of receiving good legal counseling.¹²³

Wils has argued that the judges and juries must be inclined to convict as one of the essential conditions of a successful fight against cartels.¹²⁴ The abovementioned question regarding the willingness of the judges and prosecutors to convict and pursue cartel offenders respectively has been raised in the debate of criminalizing cartels.¹²⁵ The Irish and US experience seems to confirm that courts do not readily impose prison sentences, especially since the white collars' outward appearance varies from that of the average street criminal.¹²⁶ The Marine Hose Cartel may be deemed a further indication of such judicial attitudes in Europe.

Reindl too argues that the support of judges and prosecutors is vital. He draws on the Norwegian experience, where the Competition Authority has in earnest pursued cartels for a significant period but in vain, arguably due to a lack of support from the prosecutors.¹²⁷ In Taiwan the staff's lack of support at the Competition Authority itself was so powerful that only after two years had passed since the introduction of the criminal regime its operation was called to a halt.¹²⁸

Reindl has pointed out that the US Antitrust Divisions long-lasting commitment during the second half of the 20th century to rigorous antitrust enforcement occurred simulatenously with a surfacing social consensus that the answer to high crime rates should be the increasing use of prison – thereby Reindl argues that not only the campaign launched by the US Antitrust Division was sufficient for the alleged success of the US regime, but even a more widespread support was needed. Where such support is absent the building of an effective criminal regime against cartels would arguably take longer.¹²⁹

Based on the above it seems that a favorable prosecutorial and judicial opinion is an important part of a successful introduction of a criminal anti-cartel regime. It too should be considered in Finland and Sweden if the adoption of individual criminal sanctions was contemplated.

¹²³ Furse 2012 pp. 134-135

¹²⁴ Wils 2005a p. 150

¹²⁵ Beaton Wells and Ezrachi, 2011 p. 21; Whelan 2007, p. 38; Jenny 2011, p. vii; OECD, *Cartel Sanctions against Individuals* DAF/COMP(2004)39. p. 112; Wils, Wouter. 'Is Criminalization of EU Competition Law the Answer?' Presented Amsterdamissa 17-18. February 2005. p. 42; See also Beaton Wells and Ezrachi 2011, p. 21; Reindl 2006, p. 127; Kovacic 2006, p. 54.

¹²⁶ Calvani and Calvani 2009, p. 137.

¹²⁷ It may be noted that another Wils' condition was that there must be 'a dedicated investigator and prosecutor'. See Wils 2005a p. 148

¹²⁸ Reindl 2006, p. 119; see OECD *Hard Core Cartels. Third Report on the Implementation of the 1998 Recommendation*, 2005. s. 28

¹²⁹ Reindl 2006 p. 120; See also Kovacic 2011, p. 68.

8.3.6 *Prosecution in Ireland*

In contrast to the UK experience Massey and Cooke reported in 2011 that the number of convictions for cartel conduct in Ireland amounted to 33. They noted that while the level of fines imposed was modest ‘the ratio of guilty pleas to full defences would suggest that the seriousness with which the offences will be regarded by the courts and their potential for punitive jail terms is getting through to the business community and may be having a deterrent effect.’¹³⁰ Massey has said that ‘(g)iven the ratio of convictions secured to acquittals the criminalization initiative would appear to have been successful.’¹³¹ It seems that the level of condemnation concerning cartel conduct that has appeared in the Irish case law is noteworthy especially when considering the Appellate Court’s reasoning in the Marine Hose cartel case that was discussed in the section immediately above.

The Case of Duffy

One important case in Irish anti-cartel enforcement is the price-fixing case of Duffy.¹³² McNally has pointed out that the case reflects the severe position the Court took regarding cartel conduct, and featured the comments of the Judge indicating that from now on individuals could look for time in prison in similar cases and set out guidelines that could be observed in the future sentencing of white-collars. For the first time one individual also went behind the bars for 28 days as a result of not paying a fine of €80,000 that was prompted by the cartel.¹³³ The case involved the Citroën Dealers Association (hereinafter CDA), while the individuals and companies subject to proceedings were its members.¹³⁴ The CDA, which was formed in 1995, operated a scheme that through ‘mystery shoppers’ had monitored the members of the cartel in an attempt to prevent any deviations from the fixed prices, and if such deviations were found a fine would be imposed upon the infringing member.¹³⁵

With a view to judicial attitudes the advocates of a criminalized regime against cartels may consider the elaboration of Mr Justice McKechnie and find it encouraging that Mr Justice McKechnie in the case *DPP v Duffy and Duffy Motors* said the following: ‘...this type of activity, of which price fixing is probably one of the more heinous examples,’ and ‘I warned that, because of the activity’s harmful effects on the public, those involved would have

¹³⁰ Massey and Cooke 2011 under the title ‘Conclusion’ at para 1.

¹³¹ Massey 2012 p. 167.

¹³² Director of Public Prosecutions v Patrick Duffy and Duffy Motors (Newsbridge) Limited [2009] IECH 208.

¹³³ McNally 2010, p. 116; Furse 2012 p. 181

¹³⁴ Furse 2012 p. 181

¹³⁵ See Furse 2012 p. 182; D.P.P. –v- Duffy & Anor [2009] IECH 208, at para 6, 9

to take note that any lead in period for leniency could not be prolonged. I anticipated that the serving of a custodial sentence was near at hand. Two years on, I say once more that if the first generation of carteliers have escaped prison, the second and present generation almost certainly will not.¹³⁶

As Furse Noted, Judge McKechnie said cartels entail ‘odious practices’ and are ‘“hard-core” infringements of competition law’.¹³⁷ Judge McKechnie also said that he had put forward regarding cartels in a previous case the following: ‘(t)his type of crime is a crime against all consumers and is not simply against one or more individuals. To that extent it is different from other types of crime: And while society has an interest in preventing, detecting and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect, every individual who wished to purchase, for cash, a vehicle from these dealers over the period which I have mentioned were liable to be de-frauded, and many surely were by the scheme and by the practices which unashamedly this cartel operated. These activities in my view have done a shocking disservice to the public at large.’¹³⁸ In order to reinforce his arguments the judge also cited other scholarly literature.¹³⁹

While it was advanced as a mitigating factor regarding the defendant that he had ‘[t]he unblemished reputation’,¹⁴⁰ the judge noted that ‘the ongoing and continuous nature of the cartel crimes would tend to suggest that the acts complained of were not, in fact, out of character. The accused was not a man of generally good character who committed an unfortunate, foolish or impulsive act. Whatever his public persona, which I have no doubt was a positive one, he was, in private, deliberately engaging in wanton criminal conspiracy against the greater public with the intention of defrauding them for financial gain. For five years, being the period of the indictment (in fact the Association operated for almost nine), he involved himself in the significant ongoing efforts which are required by the operators of criminal cartels. Operating a cartel is not a once off criminal act. It is not done on the spur of the moment. It is continuous and requires high levels of planning and organisation. A person seeking to successfully implement a price fixing agreement decides every day to go into work and therein to commit and conceal a criminal conspiracy. That person, typically will be well educated, businessly astute, either owns the business or has risen to senior management, and almost certainly will have done a value benefit/

¹³⁶ See Director of Public Prosecutions v Patrick Duffy and Duffy Motors (Newbridge) Limited [2009] IEHC 208 at para 67

¹³⁷ Furse 2012 p. 182; D.P.P. –v- Duffy & Anor [2009] IECH 208, at para 22

¹³⁸ The previous judgment that the judge was quoting was DPP v Manning, February 9, 2007, High Court, unreported; D.P.P. –v- Duffy & Anor [2009] IECH 208, at para 23; Furse 2012 p. 182

¹³⁹ D.P.P. –v- Duffy & Anor [2009] IECH 208, at paras 24, 25, 26;

¹⁴⁰ D.P.P. –v- Duffy & Anor [2009] IECH 208, at para 45

detection appraisal. He then proceeds, indefinite as to duration, ceasing only when confronted. For that person whose persona is representative of carteliers, it is very difficult to say that such behavior is out of character.¹⁴¹ Indeed as Furse pointed out '[t]he judge took a firmer position than that adopted by the English Court of Appeal, Criminal Division, in *R v Whittle, Allison and Brammar*.'¹⁴²

McNally noted regarding the outcome of the Duffy case however that it was regrettable that once again an individual engaged in cartel conduct escaped the unsuspended custodial sanction.¹⁴³

It may be mentioned that in the case *DPP v Manning*, Manning was subject to charges holding that 'he aided and abetted the Irish Ford Dealers Association and its members in the implementation of agreements to fix the selling prices of Ford motor vehicles...'.¹⁴⁴ The sentence received by Mr. Manning has been regarded as too lenient.¹⁴⁵

In another price-fixing case, the defendant Michael Flanagan, had not pleaded guilty and was subsequently subject to a jury verdict which unanimously found the defendant guilty. While the defendant was subject to a fine of €3,500, judge Groarke said '(t)hose engaged in cartels and involved in the fixing of prices are doing so only with the motivation of greed, and with nothing to be gained but financial profit. That is why the legislature takes such a serious view of it... I could well see circumstances where persons convicted by a jury could be subjected to terms of imprisonment'.¹⁴⁶

One defendant, J.P. Lamber entered a guilty plea and received a sentence of a 12-month suspended prison term and a fine of € 15,000. Judge Delahunty pointed out that '(w)ithout your talent, acumen and knowledge of this business, the kind of distortion before the court today could not have functioned to any sort of significant level'.¹⁴⁷

Finally, also the attitudes of the jury are important for the attainment of convictions. Whelan points out that juries have shown a willingness to pronounce defendants guilty in Ireland, thereby exposing them to possible custodial sanctions. Whelan particularly refers to a case, where a 2-year prison sentence was imposed on Mr. Hegarty, as a result of a jury conviction, whereas most convictions in Ireland are obtained via

¹⁴¹ D.P.P. -v- Duffy & Anor [2009] IECH 208, at para 47; Furse 2012 p. 184.

¹⁴² Furse 2012 p. 184.

¹⁴³ McNally 2010, p. 141; Furse 2012 p. 186

¹⁴⁴ See to this effect Competition Authority, *Annual Report* 2006 p. 12.

¹⁴⁵ See Curtis 2007, p. 47; See also Furse 2012 p. 181.

¹⁴⁶ See to this effect Competition Authority, *Annual Report* 2006 p. 8; See Also Furse 2012 p. 179.

¹⁴⁷ See to this effect Competition Authority, *Annual Report* 2006 p. 9; See also Furse 2012 p. 179.

guilty pleas.¹⁴⁸ Subsequently Whelan pointed out that the argument that juries would not convict individuals in the context of a criminalized cartel regime is weakened. In addition Whelan said that the case showed that the jury members accepted the moral wrongfulness of cartels or alternatively that despite criminal penalties being at stake they did not regard moral wrongfulness of the conduct as a prerequisite.¹⁴⁹

To sum it up, it seems that the Irish experience of a criminal anti-cartel regime has been a more positive one than the UK experience. The judicial attitudes seem to be more favourable in Ireland in terms of criminal anti-cartel enforcement.

Ireland and Regulation 1/2003

Incidentally, one may note a possible conundrum in the Irish context: Massey and Cooke have identified a possible problem with art 3 of Regulation 1/2003 in the Irish context: art. 3 sets out that: ‘where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States, they shall also apply Article 81 of the Treaty...’. The same duty applies with regard to art. 102 TFEU (prior to the last renumbering art. 82). Since the Irish regime criminalizes infringements of national law and EU competition law, Massey and Cooke say that in cases where indeed all the cartel members are based in Ireland, but nonetheless possibly the large-scale cartel could have an effect on the trade between Member States, a situation would be brought about where two criminal prosecutions would be launched, under both the national and EU provisions. Also Furse acknowledges this as a potential problem with the Irish criminalization model.¹⁵⁰ Indeed it appears that this possible problem could support the UK position of keeping the cartel offence separate from the national competition law.

8.3.7 The Disclosure of Evidence and its Effect on potential Civil Leniency Applicants

One pertinent question is to what extent the evidence provided in the leniency applications should be subject to disclosure. The disclosure may

¹⁴⁸ See Whelan 2012d p. 179; See also <http://www.tca.ie/en/Enforcing-Competition-Law/Criminal-Court-Cases/Home-Heating-Oil.aspx>, last visited on the 31st of January, 2014.

¹⁴⁹ See Whelan 2012d, p. 179.

¹⁵⁰ Massey and Cooke 2011 under the heading ‘Conclusion’ at para 6; Also Furse 2012 p. 187

have a bearing on the incentives of the potential future leniency applicants to come forward. While the matter may be relevant to the defence rights in a criminal trial, where the defendants should have the access to any material in the hands of the prosecution that could exculpate them, another compelling question is whether this could further allow the private claimants the access to the leniency applications, thus perhaps seriously damaging the attractiveness of the civil leniency programs in the eyes of the potential leniency applicants.

The UK Criminal Procedure and Investigations Act 1996 as revised by the Criminal Justice Act 2003 and the linked Code of Practice require that the ‘used and relevant unused’ material is fully disclosed to the defendants. Unavoidably such material contains information obtained from the leniency applicant, normally statements made in the leniency application when such statements may be relevant to the criminal case in question. Where witness statements have been made by individuals who have received the no-action letter, it will normally be required that the issuance of the letters is disclosed. However the protection of identities of the recipients is pursued ‘for public interest immunity where necessary.’¹⁵¹

Both Furse and Purnell et al. have paid attention to the implications that the disclosure obligation of the criminal prosecution may have on the potential civil leniency applicants.¹⁵² Since leniency is an important detection tool, the concern expressed by several commentators should not be overlooked.

Furse has pointed out that the perception seems to be after the Airlines (British Airways) case that the information in the civil leniency application is something that the defence of an impending criminal case must have the access to.¹⁵³

The matter of disclosure is essential since leniency programs are effective detection tools and in connection to that one important aspect of leniency is that the information is kept undisclosed as much as possible – the leniency applicants may for instance have been extensively questioned by the competition authority.¹⁵⁴

Also in light of the obligations derived from the Human Rights Conventions the disclosure of certain information in the hands of a prosecutor or third parties may be important for defence purposes (see ECHR art. 6, the right to a fair trial). This is a matter that arose in the UK in relation to the unreported case *R v George, Crawley and Others* 7 December 2009 (the Airlines case), where the obligation of the OFT to

¹⁵¹ OFT, *Applications for leniency and no-action in cartel cases, OFT’s detailed guidance on the principles and process*, OFT1495, July 2013 at para 7.11

¹⁵² See Furse 2012 p. 135ff; Purnell et al. 2010. P. 319ff.

¹⁵³ Furse 2012 p. 148

¹⁵⁴ Furse 2012 p. 138

disclose and acquire information in the hands of certain companies not parties to the criminal trial was touched upon.¹⁵⁵

The Criminal Procedure and Investigations Act of 1996 provides in s23, where the production of a code of practice is required to the effect ‘that where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued.’ The Code of practice stated subsequently the following: ‘In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.’¹⁵⁶

In addition the Attorney General’s Guidelines on Disclosure state that ‘*where the investigator... believes that a third party... has material... which might reasonably be capable of undermining the prosecution case or of assisting the case for the accused, the prosecutor should take what steps they regard as appropriate... to obtain the material.*

*If... the third party declines or refuses to allow access to it, the matter should not be left... if... appropriate, then the prosecutor... should apply for a witness summons causing a representative of the third party to produce the material to the Courts.*¹⁵⁷

The abovementioned was relevant in the case R v George, Crawley and Others, and the court had ruled in favor of disclosure, requiring the OFT to disclose the material in question and obliging the OFT to acquire information from third parties.¹⁵⁸

Disclosure and Private Litigation

The matter of disclosure has arisen also in relation to private litigation, in a way that is linked to the present discussion regarding the rights of the defence, especially in the United States, where the private claimants may be awarded treble damages.¹⁵⁹

In one case the US district Court considered the disclosure of documents that were in the possession of the European Commission, but rejected the disclosure. The US Court reasoned that by maintaining secrecy future potential leniency applicants are better induced to come forward. The unbroken secrecy also incentivizes the openness of those subject to investigative measures, thus contributing to the goal of the European Commission to bust cartels – the US Court noted that the cartel cracking

¹⁵⁵ For citations from the unreported case R v George, Crawley and Others 7 December 2009, see Purnell et al. 2010 p. 319; Furse 2012 p. 135ff;

¹⁵⁶ Criminal Procedure and Investigations Act 1996, Code of Practice. At para 3.5

¹⁵⁷ Purnell et al. 2010, pp. 318-319; Furse 2012 p. 135; Attorney General’s Guidelines on Disclosure 2005, at paras 51-52;

¹⁵⁸ Purnell et al. 2010, p. 320.

¹⁵⁹ Furse 2012 p. 139

ability of the European Commission could suffer if the foregoing was ignored by the US courts.¹⁶⁰

Along the same lines the Director-General for Competition at the European Commission has stated, in relation to the National grid case, where private litigators sought compensation and wanted the disclosure of leniency related information, that strong confidentiality relates to the information provided by the leniency applicants, as the information acquired is very important to the Commission. The information protected from disclosure in the Commission's view includes information that particularly was made ready by the leniency applicants to be handed to the Commission with a view to the cooperation requirements of the leniency program. In contrast documents outside the mentioned scope, can be disclosed in the Commission's view, for instance any prior information that the leniency applicants had, is not protected on this view.¹⁶¹

As Furse notes in the *Pfleiderer* case the Court paid attention to the possibility that potential leniency applicants may not come forward in the fear of exchange of information between the Commission and the national Competition Authorities as per articles 11 and 12 of Regulation 1/2003.¹⁶² For instance the defendants could seek to obtain such exchanged information that has ended up in the hands of the OFT, which could undermine not only the UK anti-cartel regime, but also that of European Commission and other Member States' anti-cartel regimes.¹⁶³

Inter alia the ECN model leniency programme provides that 'the exchange of statements (oral or written) between CAs is limited to cases where the protections afforded to such records by the receiving CA are equivalent to those afforded by the transmitting CA.'¹⁶⁴

In the *Pfleiderer* case¹⁶⁵ information that had been produced by the leniency applicants was sought by the private claimant *Pfleiderer*. The

¹⁶⁰ *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, US District Court, Eastern District of New York, August 27, 2010. At paras 29-30. P. 9; See Furse 2012 p. 140

¹⁶¹ *National Grid Electricity Transmission plc v ABB Ltd and others* 2011 EWHC 1717. At para 16.; See Furse 2012 p. 141

¹⁶² *Case C-360/09 Pfleiderer AG v Bundeskartellamt* at para 27; In this regard see also the more recent case, *C-536-11 – Bundeswettbewerbsbehörde v Donau Chemie AG and others* and Commission Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union, Strasbourg, 11.6.2013, COM(2013) 404 final. See also the discussion under section 10.2 in this work.

¹⁶³ Furse 2012 p. 141

¹⁶⁴ CA stands for competition authority, see ECN Model Leniency Programme as revised in November 2012. para 52; Furse 2012 p. 141

¹⁶⁵ *Case C-360/09 Pfleiderer AG v Bundeskartellamt*, 14 June 2011.

German Court had asked the ECJ whether such information should be disclosed to the victims of the cartel to bring private damages claims.¹⁶⁶

The Court tackled Article 12 of Regulation 1/2003 which provides that

'1 For the purpose of applying Articles 81 EC and 82 EC the Commission and the competition authorities of the Member States shall have the power to provide one another with, and use in evidence, any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 EC or Article 82 EC and in respect of the subject-matter for which it was collected by the transmitting authority. However where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.'

While Article 35 of Regulation 1/2003 requires that the terms of the Regulation are effectively observed,¹⁶⁷ the ECJ pointed out that, despite Guidelines that had been produced, no binding EU law existed regarding the disclosure to private claimants and therefore the member states get to decide themselves as per national law whether the victims of cartels should have the access to the leniency information, while simultaneously observing the EU law, whose application must not become 'impossible or excessively difficult' and in particular the effective application of art. 101 TFEU and 102 TFEU must not be impaired by national rules.¹⁶⁸ The leniency programmes, according to the court, could suffer if private claimants gained the access to the leniency documents, arguing that it is realistic to assume that the leniency applicants may not come forward if they fear that leniency information will be disclosed or exchanged as provided by art. 11 and art. 12 of Regulation 1/2003.¹⁶⁹ The Court acknowledged however also the right of the victims of cartels to seek redress, which bolsters the EU competition law.¹⁷⁰ The court said that the advantages of disclosure need to be compared with the interest of the victims to get compensation, and that such weighing of the interests should take place in each individual case separately as per the national law.¹⁷¹

Finally the Court said that the EU law, including Regulation 1/2003, does not prevent the victim of a competition law infringement getting access

¹⁶⁶ Ibid at para 18

¹⁶⁷ See the discussion in Furse 2012 p. 142

¹⁶⁸ Case C-360-09 at para 23-24

¹⁶⁹ ibid at para 26-27

¹⁷⁰ ibid at para 28-29

¹⁷¹ ibid at para 30-31

to leniency documents, while seeking redress, but the national courts must strike a fair balance between the abovementioned contradicting interests.¹⁷²

As Furse notes, since national courts have the right to balance the interests between private damage claimants and the interest of the leniency programs when considering disclosure, it seems that when the balance has to be struck between the interests of the leniency program and the defence rights, the balance must be even more in favor of the defence as the defendants could face prison sentences.¹⁷³ To tackle this problem, Furse proposes that the cartel offence could be prosecuted by one authority, while the maintenance of the civil leniency was taken care of by another body separately. Furse points out that the access of the defendants to leniency information could legitimately be denied only when such information has not been used to launch the criminal proceedings, yet the possibility lingers that the information protected is germane from the point of view of the defence. Alternatively a law could be passed to the effect that the leniency information is protected, which however could be challenged.¹⁷⁴

It may be noted that certain material that has been disclosed during the criminal proceedings to defendants does not mean in the OFT's opinion that the material could be further disclosed to the public. The OFT refers to the prohibition in the Enterprise Act which provides in part 9 section 241(2) that certain information that is disclosed without making it public 'must not be further disclosed by the person to whom it is so disclosed.'¹⁷⁵

Yet, as pointed out by Furse, the disclosure for the purposes of a criminal trial itself, may not be central,¹⁷⁶ but what is problematic is as Purnell et al. point out that if the material is disclosed during a criminal case, it is not easy to argue why the private claimants should not get the access to the information as well, notwithstanding part 9 of the Enterprise Act of 2002, which restricts disclosure.¹⁷⁷

8.3.8 *The Institutional Structure*

As the Hammond and Penrose report, hailed as prescient by Purnell et al.,¹⁷⁸ recognized it is of importance to pick carefully the body that is to prosecute criminal cartels under a criminal anti-cartel regime. Should the prosecution be carried out by the OFT without the assistance from an

¹⁷² *ibid* at para 32

¹⁷³ Furse 2012 pp. 144-145

¹⁷⁴ Furse 2012 p. 145

¹⁷⁵ OFT, *Applications for leniency and no-action in cartel cases, OFT's detailed guidance on the principles and process*, OFT1495, July 2013at para 7.13; Furse 2012 p. 151

¹⁷⁶ Furse 2012 p. 145

¹⁷⁷ Purnell et al. 2010, p. 322.

¹⁷⁸ Purnell et al. 2010, p. 314.

outside organization ('the in-house option') or should some other body be entrusted with the task?¹⁷⁹ The Government White Paper had taken the view that the OFT should be the chief criminal prosecutor due to its experience in busting cartels.¹⁸⁰

The Hammond and Penrose report listed the merits and demerits of an in-house option. The merits of the in-house option included the fact that the OFT could be in charge of the prosecution and that managing the newly found criminal leniency could be smoother. Further the OFT could straight away draw on its experience in competition law matters. The inner assignment of tasks could be such that the investigators of the case are isolated from the ones having the power to alternatively prosecute or drop the case.¹⁸¹

Yet the Hammond and Penrose report identified significant demerits with the in-house option that emanate first and foremost from the point of view of efficiency, but also relate to openness, accountability and fairness.¹⁸² The report paid attention to the concern that while the OFT was experienced in competition law, it lacked experience in criminal prosecution, and a criminal law team would have to be built from the very beginning. It was predicted that the number of prosecutions would not exceed 10 annually, and therefore it would not be effective in terms of the costs to build such a team focusing purely on a few cases.¹⁸³ The team would have to consist of prosecutors who are very skilled and knowledgeable especially about questions related to disclosure, whistle blowing, covert surveillance and evidence, which could be relevant with regard to immunity. In light of the foregoing, it could be difficult to enlist lawyers with sufficient proficiency.¹⁸⁴

Another demerit of the in-house approach in the view of the Hammond and Penrose report is that the prosecutors in a small team may have the propensity to become detached from the mainstream developments of criminal law, despite perhaps having a keen knowledge of a given field of criminal law. But even a more compelling problem could be if the lawyers were inclined to become attentive to the policy pressures of the agency, developing a sort of solicitor –client relationship, instead of exercising an independent role. Even if the agency welcomed the foregoing, the Hammond and Penrose report points out that the policy aims of the agency would not be well served if the misuse of the prosecution establishment brings about

¹⁷⁹ Hammond and Penrose report 2001 at para 3.1.

¹⁸⁰ Department of Trade and Industry, 'Productivity and Enterprise, A world Class Competition Regime' July 2001, at para 7.38

¹⁸¹ Hammond and Penrose report 2001 at para 3.4.

¹⁸² *ibid.* at para 3.5.

¹⁸³ Hammond and Penrose report 2001 at para 3.6.

¹⁸⁴ *ibid.* at para. 3.7.

failures and therefore a bad reputation.¹⁸⁵ Such fears received support from the criminal enforcement officials.¹⁸⁶

The option of entrusting instead the Serious Fraud Office (SFO) with the task of prosecuting cartels found favor with the Hammond and Penrose report.¹⁸⁷ The reasons that spoke against the in-house option speak in turn in favor of the Serious Fraud Office undertaking the prosecution. The Serious Fraud Office has a considerable team of experienced prosecutors who have participated in significant criminal cases, and have a history of operating disclosure and issues related to the misuse of process. The SFO is answerable to the Attorney General and has prior experience of performing in conjunction with other regulators. Furthermore from the perspective of fairness, openness and accountability, according to the Hammond and Penrose report, this would be a sound option.¹⁸⁸

The previous responsibilities of bringing fraud cases of the Serious Fraud Office would suit cartel prosecutions. The Serious Fraud Office is comfortable overseeing teams comprising people of various disciplines, such as lawyers and police officers - such experience could prove very valuable in cartel prosecutions that may involve economists, investigators, lawyers and accountants.¹⁸⁹

The Serious Fraud Office, the Hammond Penrose report noted, has also the benefit of having the power to compel answers to questions presented while investigations are being pursued.¹⁹⁰ While the Director of the Serious Fraud Office would under this option be assigned the task of determining whether to prosecute, it could be done in cooperation with the OFT.¹⁹¹ The Hammond and Penrose report also pointed out that the relationship between criminal immunity, that would be granted by the prosecution, and the civil leniency policy of the OFT would have to be resolved, but was

¹⁸⁵ *ibid* at para 3.8.

¹⁸⁶ *ibid.* at para. 3.9.

¹⁸⁷ Compare with Sweden where a committee envisaged that the Economic Crime Authority (the Authority charged with white-collar prosecution) should undertake the criminal prosecution of cartels – this however, it was deemed, could undermine the position of the Swedish Competition Authority. SOU 2004:131 *Konkurrensbrott - En lagstiftningsmodell* p. 254

¹⁸⁸ Hammond and Penrose report 2001 at para 3.14.

¹⁸⁹ The Serious Fraud Office contemplated also the possibility that the OFT personnel well versed in competition matters could join the team under the Serious Fraud Office if criminal investigations were launched and that such OFT personnel could be temporarily transferred to the Serious Fraud Office – the OFT personnel could ensure in cooperation with the Serious Fraud Office that the criminal prosecution is not compromised. *ibid* at para. 3.15.

¹⁹⁰ *ibid* at para. 3.16

¹⁹¹ *ibid* at para. 3.17.

persuaded by talks with the OFT and the Serious Fraud Office that matters related to this are not insurmountable.¹⁹²

The option including the Serious Fraud Office would mean additional costs if it has to handle cartel cases with the needed primacy. However the costs would not be significant, as the teams to prosecute and other means are already available. The Hammond and Penrose report therefore argued that this would be a less costly option than the one that would have a new prosecution team developed within the OFT.¹⁹³ While the Serious Fraud Office viewed the cartel offences such that it could prosecute them, the Hammond and Penrose report, suggested this should be made explicit in the legislation to ensure adequate resources and primacy.¹⁹⁴

Below the exploration of the Airlines case and its collapse will demonstrate how the institutional structure has fared in the context of the criminal cartel prosecution in the UK.

8.3.9 *The Airlines (British Airways) Case*

The collapse of the case *R v Burns* (Airlines case) has seemingly had unwelcome consequences – the possible root causes of the debacle and how the scenario played out will need to be touched upon in more detail below.

Purnell et al. pointed out that the collapse shows that the points made by Hammond and Penrose, concerning the risk that a small number of prosecutors at the OFT could become cut off from the mainstream developments of the criminal law were predictive: the OFT did not observe the duty of disclosure - not disclosing witness interviews was a mistake that according to Purnell et al. would probably not have been made by an experienced prosecutor.¹⁹⁵ The Condor report by the OFT acknowledged the criticism it had received, singling out effects on reputation and a heavy burden on the taxpayers in terms of costs.¹⁹⁶

The defendants in the case were subject to prosecution due to a suspicion that in relation to transatlantic flights the defendants had fixed fuel surcharges.¹⁹⁷ The specifics relating to the case were the following:

¹⁹² *ibid* at para. 3.18; Compare with Sweden where it was argued that the relationship between the Competition Authority and the Economic Crime Authority Authority should be institutionalized in order to avoid any misconceptions, to this effect see SOU 2006:99 p. 566.

¹⁹³ *ibid* at para. 3.19

¹⁹⁴ Further it was argued that it should also be made explicit in the Bill that the OFT could also prosecute cartels, for instance due to an occurrence of a heavy caseload see *ibid.* at paras. 3.20-3.21.

¹⁹⁵ Purnell et al. 2010, p. 325.

¹⁹⁶ Regarding the findings of the Condor Report see below, OFT, Project Condor Board Review, OFT 2010 p. 9; see also Furse 2012 p. 153; Joshua 2011 p. 129.

¹⁹⁷ See *R v George* 2010 EWCA Crim 1148 at para 4; Joshua 2011 at para. 140

*Martin George, Andrew Crawley, Alan Burnett and Iain Burns, between 1st July 2004 and 20th April 2006 dishonestly agreed with each other and with Paul Moore, William Boulter and Steven Ridgway to make or implement arrangements relating to at least two undertakings, namely British Airways and Virgin Atlantic Airways, which directly or indirectly fixed the price for the supply by British Airways and Virgin Atlantic Airways in the United Kingdom of passenger air transport services.*¹⁹⁸

The charges were brought in 2008.

Firstly, it may be mentioned that the selection of the cases for prosecution by the OFT has also been subject to criticism. For example in a bid-rigging case that had come to the awareness of the OFT no individuals were singled-out for prosecution despite the prior intention of prioritizing the construction industry as an object of enforcement.¹⁹⁹

Stephan has argued that the British Airways was not a good case to select for the purposes of showing dishonesty.²⁰⁰ The defendants fiercely challenged the charges, and the British Airways even promoted one of the executives who was the target of the OFT prosecution.²⁰¹

The Virgin Atlantic Airlines, which had made a leniency application, initiated the whole scenario – its employees got no-action letters.²⁰² The criminal case however against the British Airways employees was dropped by the OFT in May 2010. In the press release announcing the collapse of the case, the OFT said that it had recently gotten a significant amount of electronic material that had not before been available to the OFT or the defence, and considering that the trial was underway and a significant amount of the newly-found material was obtained, the OFT acknowledged that from the perspective of the defendants it could be unjust to proceed with the trial. The OFT said that while the Virgin Atlantic had handed electronic evidence to the OFT early on, the Virgin Atlantic had failed to hand over a large part of the material, and the OFT had become aware of the omission only once the trial had commenced. The OFT was confident that in the absence of such a delay, it would have been highly likely that the trial proceedings could have continued. The OFT acknowledged carelessness, but pointed out that the criminal regime was comparatively new and that the technique of dealing with leniency applications against a backdrop of parallel criminal and civil enforcement was still in progress.²⁰³ The material that the Virgin produced only after the trial had begun, contained roughly

¹⁹⁸ See *R v George* 2010 EWCA Crim 1148 at para 4

¹⁹⁹ Joshua 2011 p. 141

²⁰⁰ Stephan 2011b, p. 10

²⁰¹ Stephan 2011b p. 10; Financial Times, BA sales chief on price-fixing charge to join board, November 28, 2008; Furse 2012 p. 155

²⁰² Furse 2012 p. 154

²⁰³ 'OFT withdraws criminal proceedings against current and former BA executives', OFT Press releases 47/10, 10 May 2010.

some 70000 emails, which were previously deemed permanently corrupted files.²⁰⁴

The course of events leading to the collapse of the case may be explained differently than what the OFT has:²⁰⁵ Joshua has pointed out that after the OFT having upsettingly failed to live up to the required standards of disclosure and being accused of yielding to the Virgin's counsels, the judge doubted the possibility that the defendants could get a fair trial. It may be noted that the OFT had prepared its case for four years and subsequently the case collapsed prior to any witness hearings - the suspects simply were acquitted.²⁰⁶

Purnell et al. point out that the cartel activity in the airlines case was of such value that the Serious Fraud Office could have undertaken it as the case would have fulfilled the criteria of acceptance of the Serious Fraud Office. In the Enforcement regime contemplated by the Hammond and Penrose report and which later got its material form to some extent in the division of tasks between the OFT and the Serious Fraud Office, the former was supposed to undertake preliminary investigations and to handle criminal immunity, whereas the latter would investigate and prosecute cases that fulfill its acceptance criteria.²⁰⁷

The OFT itself stated in its *Guidance on Powers of investigating criminal cartels* that the Serious Fraud Office would prosecute cases where the nature of the fraud is serious or complicated. To fulfill such conditions the case in question should be worth at least £1 million, and liable to be publicized, while the combined skills related to investigation, accountancy and the legal perspective would be needed.²⁰⁸ The Hammond and Penrose report had argued that the sum of £1 million or more is a good indicator as to the seriousness of the case.²⁰⁹ If the OFT singles out a case meeting the aforementioned criteria it will forward the information to the Serious Fraud Office who makes the decision whether to pursue the case, the Hammond and Penrose report envisaged.²¹⁰

In light of the above it seems that the division of tasks between the competition authority and another authority entrusted with the criminal prosecutions may be crucial to the success of criminal prosecutions and should be seriously considered.

²⁰⁴ Purnell 2010, p. 318.

²⁰⁵ Joshua 2011, p. 129; Furse 2012, p. 155.

²⁰⁶ Joshua 2011, p. 129; Furse 2012, p. 155.

²⁰⁷ Purnell et al 2010, p. 315, 317; Hammond and Penrose Report 2001 p. 45.

²⁰⁸ OFT, 'Powers for investigating criminal cartels' OFT515, January 2004. At para 3.18.

²⁰⁹ Hammond and Penrose report 2001, p. 45.

²¹⁰ OFT, 'Powers for investigating criminal cartels' OFT515, January 2004, at para. 3.19.

The Civil Enforcement of the Airlines Case

The Airlines case was pursued both through the criminal and the civil track.²¹¹

Those who are concerned that civil enforcement could suffer once the criminal anti-cartel regime is introduced may consider the following: In a Press release issued in 2007, the OFT told that the British Airways had agreed to pay a fine of £121.5m. The British Airways acknowledged that it had engaged in collusion with the Virgin Atlantic, which determined the fuel surcharges of long-haul passenger flights. As a result the surcharges peaked at £60 for each ticket while initially the price of the ticket was at £5. The British Airways said that the collusion took place from August 2004 until January 2006. The OFT had recognized that the Virgin Atlantic met the criteria for full immunity. The British Airways had admitted that not less than six times the firms had communicated with each other regarding the surcharges.²¹² In 2011 the OFT announced its statement of objections concerning the civil investigation into the matter. It was sent out both to the British Airways and the Virgin Atlantic. After the collapse of the criminal prosecution the OFT had scrutinized the leniency position of the Virgin Atlantic, but stated that the immunity would not be cancelled, as absent was the ‘non co-operation’ of the Virgin Atlantic which would have justified such a move.²¹³

Finally, in April 2012 it was reported in the press that a fine of £58.5m against the British Airways was secured as a result of a settlement. The original fine of £121.5m had been adjusted after the collapse of the criminal prosecution.²¹⁴

All in all it may be concluded that the UK experience with the criminal anti-cartel prosecution has not been a positive one thus far.

²¹¹ Furse 2012 p. 153

²¹² OFT press release 113/07, August 1, 2007.

²¹³ OFT Press release 120/11, November 8, 2011. ; Furse 2012 p. 156

²¹⁴ OFT Press releases, ‘British Airways to pay £58.5 million penalty in OFT fuel surcharge decision,’ April 19, 2012. See Chan Szu Ping 2012.

8.3.10 Project Condor Board Review – the OFT’s account of the Collapse of the Airlines case

The OFT has produced a board-led enquiry into the matters relating to the failure of the airlines case, whose findings will be briefly recounted below. The Review by the OFT board had the task of assessing the conditions that ended in the OFT making the decision of not presenting evidence at trial in the case *R v Burns and others* and in light of such a review to produce proposals regarding the criminal anti-cartel regime.

One of the findings of the review was that the test provided in the Code for Crown Prosecutors was satisfied from the evidential and public interest perspective and before 7 May 2010 no proof was found regarding an omission in this respect and the resolution not to give evidence 10 May 2010 was right. Further the review took the view that the case was not suitable for the Serious Fraud Office.²¹⁵

The failure in the case emanated according to the review from ‘a highly unusual combination of factors’ and it was argued that the OFT ‘had made mistakes’. No proof was found as to the negligence on part of anyone or as to the competence of the OFT to undertake criminal cases of a complicated nature. The review took the position that the shortcomings concerned the processes and it was pointed out that even in the absence of such inadequacies the possibility of a failure persists since prosecuting criminal cartel cases is challenging and unavoidably a certain amount of the cases collapse. It was recognized that the case was not the best possible to be selected as the first challenged criminal case and involved a ‘steep learning curve.’ One problem identified from the perspective of the prosecution was the trustworthiness of the witnesses who themselves were involved in the suspected violation and were granted immunity in relation to a cartel whose membership consisted of only two parties.²¹⁶

A further obscurity was singled-out in respect of the responsibility of the OFT to disclose and obtain documents that the defence might need, and further the extent of such a responsibility regarding the legally privileged documents. In this particular case a farther-reaching disclosure was required at trial than had been predicted.²¹⁷ The report said that separate persons

²¹⁵ See OFT, *Project Condor Board Review*, OFT 2010 p. 1

²¹⁶ *ibid.* p. 1-2

²¹⁷ It was pointed out that the leniency applicants’ awareness as to the possibility of disclosing witness material, including legally privileged information, in the course of criminal proceedings should be ensured. It was said that while this could deter would-be leniency applicants from coming forward, on the other hand the leniency applicants benefit a great deal, especially financially from leniency. The board review called for more senior management involvement at the OFT regarding cases of similar caliber as the Airlines case, and moreover there should be an evaluation of the risks involved on a continuing basis – the handling of the case ‘often appeared to lie

should have exercised the functions of the investigator and the disclosure official and the electronic evidence should have been scanned or taken hold of in the very beginning.²¹⁸

With regard to the above, a number of commentators have alluded to the problems related to immunized witnesses in terms of reliability in a case where there are only two parties. As Furse notes, the leniency applicant under its cooperation obligations has to provide the OFT with the evidence incriminating its fellow cartel member. It is likely that the defence in the Airlines case would have contested the reliability of the immunized witnesses who had also admitted to having been dishonest (a requirement to obtain immunity), it could be questioned whether dishonesty was admitted only to secure immunity – the criminal prosecution of the OFT depended upon such a witness. Furthermore as Furse notes, in the Airlines case the party not benefitting from leniency was an important competitor of the immunized witness – it is then understandable that the jury might be doubtful in such circumstances as to the trustworthiness of the witnesses.²¹⁹

Furse has drawn a compelling parallel between the airlines case and a US case *United States v Stolt-Nielsen SA et al.*, where the DOJ relied heavily on evidence produced by a leniency applicant whose report of the events was incongruous, and who in exchange got immunity and had a motive to seek revenge against a competitor, that had incriminated the leniency applicant previously (the DOJ, which according to Furse had never before cancelled a corporate leniency application did it in this particular case). The employer of the leniency applicant (the witness) had attested that the witness would ‘say whatever he needed to get his own release, his own immunity.’²²⁰ These events partially led to the collapse of the case pursued by the DOJ.²²¹

All this proves is the precarious position of a criminal prosecutor who relies on immunized witnesses in its prosecution. Therefore it seems to be of utmost importance to have a body well-versed in criminal law to undertake cases of similar magnitude as the Airlines case – the board review itself acknowledged as described above that the extent of disclosure obligation was not predicted. Furthermore the OFT’s board led review identified ‘a steep learning curve’ for the OFT since the introduction of the criminal. Indeed also Reindl has pointed out that arguably before the benefits of criminal cartel enforcement are likely to occur, the costs of such a system may take place.²²² Thus patience may be one of the virtues required of anyone undertaking the criminalization project.

some way down the organization. A vagueness of management obligations was also recognized, see *ibid* p. 2,3,5

²¹⁸ *ibid* p. 3

²¹⁹ Furse 2012 p. ,148, 158; Joshua 2010. p. 1; Crowther 2011.

²²⁰ *United States v Stolt-Nielsen SA*, NO. 06-cr-466, November 29, 2007. p. 25

²²¹ Furse 2012 p. 159

²²² Reindl 2006, p. 126.

8.4 CONCLUSION

The OFT in the UK has the exceptional position of being able to grant immunity against criminal cartel prosecution to the whistle-blower – the underlying rationale is that protecting consumers from cartels weighs heavier than punishing the perpetrators who enter into cooperation with the authorities. In this author's view such reasoning is persuasive, especially with regard to hard-core cartels.

After the collapse of the Airlines case the OFT perhaps tellingly revised its Guidance on its leniency policy, which expressly stated that the leniency applicants should provide both incriminating and exculpatory material whenever available – the inclusion of this requirement may owe to the airlines case that had faltered specifically due to a failure to disclose evidence to the defendants.

The cartel investigations may be pursued both through the civil and criminal track in the UK. The OFT has expressly acknowledged the inherent difficulties of maintaining the parallel criminal and civil routes, which should be carefully considered by any jurisdiction considering the introduction of a criminal anti-cartel regime.

Worries have mounted that the defence could claim access to the civil leniency applications, which could pave the way for the private claimants seeking disclosure of the leniency applications, thus ultimately damaging significantly the attractiveness of the civil leniency program. This particular matter arose in the Airlines case, where the OFT should have obtained and handed over to the defence certain evidence - it may be argued that due to the lack of experience of criminal prosecution, the OFT failed to discharge its disclosure obligation.

If either Finland or Sweden were to adopt parallel criminal and civil cartel enforcement regimes the implications of the possible disclosure of the leniency material needs to be contemplated.

It has been proposed in the literature that one possible solution could be the management of the civil leniency by a body separate from the one carrying out the criminal prosecution – subsequently the latter could not have availed of the leniency information to launch criminal proceedings, and therefore giving some grounds to refuse the disclosure – this however requires further enquiry.

Another lesson learned from the UK experience is that of the institutional structure of the criminal anti-cartel regime. The Hammond and Penrose report had rejected the 'in-house' option, (the building of a criminal prosecution team within the OFT), inter alia due to the possibility that the prosecutors could become detached from the mainstream developments in criminal law – an accurate remark when considering the OFT's failure to

disclose relevant material. In the Finnish and Swedish contexts this implies that the Competition Authority should not be exclusively entrusted with the criminal prosecution.

The OFT-led Condor Review into the collapse of the airlines case acknowledged that mistakes had been made along the way. The Review *inter alia* noted the problems related to the trustworthiness of immunized witnesses in a cartel consisting of two members only, the defence particularly, might challenge the reliability of the witnesses that have admitted to dishonesty as part of the leniency program. The Condor review further acknowledged a ‘steep learning curve’ on part of the OFT regarding criminal enforcement. Certainly this indicates that if a criminal cartel regime was to be introduced in Finland or Sweden, enforcement success overnight should not be expected.

Another important discussion that has been undertaken in the UK is the usefulness of the plea bargaining agreements in the disposal of the cartels cases, the UK does not employ a system of plea bargaining similar to the one in the US. It has been observed that most criminal cartel cases in the US are disposed of by means of plea-bargaining, while amnesty is reserved for the first informant.

It seems that it is vital that a criminalization project is not undermined by a lack of prosecutorial or judicial support. It would be problematic if courts were reluctant to convict white-collar whose appearance tends to be more favorable than that of an average street criminal. In the UK the Appellate Court in the Marine Hose cartel case cited the good character of the defendants, which may reflect problematic judicial attitudes. The Irish experience appears to offer a more successful story in terms of a criminalized anti-cartel regime – something, which could be explained in part by judges who seem to view cartel offences severely – a fierce judicial perception was exhibited for instance in the case of Duffy. Admittedly a string of suspended sentences have been handed out by the Irish Courts. Yet based on the number of guilty pleas in Ireland it may be argued that business people acknowledge that Courts’ have harsh attitudes towards cartels.

The only case in the UK to attract prison sentences, the Marine Hose cartel, was actually the result of a US plea bargaining agreement. Considering the level of difficulty of acquiring sufficient evidence in a criminal case, it seems that plea-bargaining could ameliorate the situation by engaging the runners-up to leniency.

All in all, the UK lessons provide some valuable insights into the operation of a parallel civil and criminal anti-cartel regime – perhaps above all it may be noted that the UK has explicitly refused to forsake the thus far unfortunate endeavor.

9 *Criminalizing Cartel Conduct and the Lack of a Crown witness system: A Nordic Perspective*

In the US context an official of the Swedish competition authority Claes Norgren recognized the value of ‘a crown witness system whereby the suspected company representative may get amnesty if sufficient information and cooperation is provided, not only about own involvement in the alleged cartel but also about the other cartel members.’ According to him such an arrangement in Sweden would be unacceptable ‘on legal and moral grounds.’¹ Amnesty means that immunity against criminal prosecution is granted to the first cartel member that reports the cartel.² Norgren further went on to say that under a parallel criminal and civil regime especially the functioning of the leniency program is a matter of concern – if leniency is impaired the net result according to him might be on the negative side.³

While this chapter touches upon leniency programs in the Nordic context, it will also have a look at plea-bargaining. Plea-bargaining could offer a way to upset the stability of cartels beyond leniency, as it makes the chances of a penalty greater. The cartel members would face the possibility that a fellow cartel member cooperates with the officials providing additional information even after the immunity recipient has disclosed the principal ingredients of the cartel. Thus plea-bargaining could be seen to be relevant in terms of deterrence.⁴ It may be mentioned however that while the primary aim of leniency programs appears to be the detection of cartels and the production of evidence, the chief purpose of plea-bargaining would seem to be the facilitation of prosecution.⁵ Both a crownwitness system and plea-bargaining are foreign to the Nordic legal context and contradict for instance the principle of mandatory prosecution, as they would either

¹ Norgren 2006.

² Amnesty refers to the Leniency Program Operated by the DOJ, and the terms ‘amnesty’ and ‘leniency’ will be used interchangeably hereinafter, see Lawrence et al. 2008, p. 17, see footnote 2.

³ Norgren 2006.

⁴ Lawrence et al. 2008 pp. 23-24; see also Furse 2012 pp. 151-152.

⁵ Lawrence et al. 2008 p. 22.

result in immunity against prosecution or a sentence reduction following whistle-blowing or a guilty plea.⁶

Whelan also acknowledged that some jurisdictions, such as Sweden, face problems in relation to the principle of mandatory prosecution, which does not allow much prosecutorial discretion, which means that introducing criminal antitrust sanctions are liable to impair the operation of the administrative leniency programs.⁷

A Finnish committee that prepared the most recent Finnish Competition Act noted in its memorandum that the leniency program would be most likely impaired if the natural persons would not be granted immunity against criminal prosecution, because firms would be reluctant to apply for leniency if their executives are exposed to criminal prosecution thereby.⁸ In the German and Swedish contexts the same matter has been discussed.⁹

Especially the principle of mandatory prosecution seems to be contradicted if the immunity provisions are introduced.¹⁰ Also the positions of the principles of legality and equal treatment could be perceived difficult if the whistle-blower gets immunity against criminal prosecution.¹¹ As per the Nordic tradition, in the context of penal sanctions, expressing disapproval is more important than the confession by the perpetrator.¹² Indeed the Swedish Government explicitly rejected to weigh the possibility of introducing a crown witness system in the context of a proposed criminalization of the cartel conduct.¹³ Andersson and Legnerfält have pointed out however that while a prison sentence is a more serious sanction than a director disqualification order, it may be questioned from a principled perspective why immunity is available against director disqualification orders, but could not be introduced in terms of prison sentences.¹⁴

⁶ See SOU 2006: 99 pp. 530-533; Kuoppamäki 2012 pp. 73-74; Oikarinen 2012 p. 744; Incidentally, according to Wagner-von Papp the German arguments against granting immunity are '(1) that they infringe the rule of law, because they prevent imposing the sanction that justice requires; (2) that they infringe the principle of equality; (3) that they infringe the principle of mandatory prosecution; (4) that they destabilize the public trust in a just legal order; (5) that deals with criminals are immoral; and (6) that such provisions foster unreliable evidence.' See Wagner-von Papp 2011, under the heading 'iii. Mandatory Prosecution v Principle of Expediency – Leniency and Immunity.'

⁷ Whelan 2013b, p. 148.

⁸ *Kilpailulaki 2010*, Työ- ja elinkeinoministeriön julkaisuja 2009. p. 51

⁹ *Regeringens proposition 2007/08:135* p.146; SOU 2004:131 *Konkurrensbrott - En lagstiftningsmodell* p. 253; Wagner-Von Papp 2011, p. 175, see also footnote 123.

¹⁰ Vollmer 2006, p. 259.

¹¹ See Wagner-Von Papp 2011, p. 176.

¹² See Kuoppamäki 2006, p. 66; *Regeringens proposition 2007/08:135*. p. 151; See also HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaiksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' p. 4.

¹³ *Regeringens proposition 2007/08:135*. p. 151.

¹⁴ Andersson and Legnerfält 2008 p. 617.

Notably, the 2004 committee was instructed not to propose a crown witness system in combination with a criminal regime – thus no countervailing benefits would be available under a criminal regime according to the committee.¹⁵

While the 2004 committee was in favor of retaining the leniency program, it was stated that its value as a cartel detection tool would be impaired if a criminal prohibition was introduced.¹⁶ One of the most important factors for a successful leniency program is its transparency – the potential leniency applicant needs to know beforehand what are the advantages of applying for leniency and he must be able to rely on obtaining such a lenient treatment. Transparency according to the committee is best achieved in the North American fashion that grants complete immunity against sanctions.¹⁷

The committee further noted that one possibility would be that the decision to prosecute the cartel offence would depend on the consent of the Competition Authority. In this way the individuals could evade criminal sanctions if their employer, the firm, has also obtained leniency. However the committee acknowledged that this would closely resemble a crown witness system and would not conform well to the instructions that the committee itself was given. Moreover, it would be problematic from the perspective of the principle of mandatory prosecution.¹⁸

Wahl pointed out that it is common to countries which employ an effective criminal anti-cartel regime that in conjunction a crown witness system is operated which draws on the conflicting interests of the cartel members.¹⁹ In Wahl's view where such rules are absent a criminal anti-cartel regime is not effective. Wahl argued that no positive international experiences were to be found of the sort of a proposal that the 2004 committee had brought forward.²⁰

Wahl further took the position that the leniency program is the single most effective tool available to the competition authorities and the 2004 committee proposal would effectively deprive the Swedish Competition Authority of this mechanism.²¹

In contrast recently in Denmark the revised leniency rules observed the preceding committee contemplation, granting immunity against criminal

¹⁵ SOU 2004:131 p. 253.

¹⁶ SOU 2004:131 p. 245; In Slovenia too, the leniency program concerned at first only the administrative regime, while a criminal regime existed in parallel but as Jager explains the problem was acknowledged and a proposal regarding the introduction of leniency related to the criminal sanctions was proposed see Jager 2011, p. 287.

¹⁷ SOU 2004:131 p. 247.

¹⁸ SOU 2004:131 p. 248.

¹⁹ This environment has been described by Baker, see See Baker 2001, p. 709.

²⁰ Nils Wahl's view of the committee proposal, SOU 2004:131 p. 271.

²¹ SOU 2004:131 pp. 272-273.

prosecution only to the first applicant while the runners-up would be subject to the rules of the Penal Code regarding settlements.²² A majority view (10 members) in the Danish committee was that immunity against custodial sanctions should automatically be granted to the first leniency applicant.²³

The Danish Committee noted that in contrast to a number of other countries there had been an absence of leniency applications in Denmark. It surmised that this state of affairs could owe to the fear of the potential leniency applicants of being marginalized in the business community or to a difficulty of investigating violations. On the other hand the committee acknowledged the possibility that the sanctions, which were available were not adequate in terms of deterrence. The committee acknowledged that the lack of leniency applications may also be explained by a low number of cartels in Denmark, but pointed out also that it is improbable however that there would be less cartels in Denmark than elsewhere.²⁴ Most of the Danish committee members were of the opinion that custodial sanctions would reinforce the leniency program. That individuals would risk going to jail, would make the incentive to blow the whistle more compelling.²⁵

The Danish committee noted that in the absence of a revision the leniency provision would have concerned only the imposition of criminal fines and the normal sentence reduction rules in the Penal Code would concern the custodial sanctions. Subsequently the leniency applicant could not have ascertained in advance whether he would be subject to custodial sanctions or fines. Such an omission to modify the rules concerning leniency would in the committee's view have undermined the leniency program since there would not have been the needed foreseeability for the potential leniency applicant.²⁶

Thus the Danish committee envisaged a leniency program that would grant immunity against custodial sanction only to the first leniency applicant, while the runners-up to leniency would not be covered: it would

²² See Forslag til Lov om ændring af konkurrenceloven og straffeloven, October 26th, 2012 p. 11; The immunity against criminal prosecution takes the following shape in the Danish Competition Act, provision 23 a. –(1): *‘Anyone who acts in breach of Section 6 of this Act or Article 101(1) TFEU by entering into a cartel agreement shall upon application be granted withdrawal of the charge that would otherwise have led to a fine or imprisonment being imposed for participating in the cartel, in case the applicant, as the first one, approaches the authorities about the cartel, submitting information that was not in the possession of the authorities at the time of the application...’* Further the subparagraph 11 of the same provision spells out that *‘[a]n application from an undertaking or an association shall automatically cover current and former board members, senior managers and other employees provided that each person satisfies the requirements...’* See the Danish Competition Act, Consolidation Act No. 23 of 17 January 2013.

²³ ‘Rapport fra udvalget om Konkurrencelovgivning’ March 2012, p. 47.

²⁴ ‘Rapport fra udvalget om Konkurrencelovgivning’ March 2012, p. 36.

²⁵ *ibid.* p. 40.

²⁶ *ibid.* p. 211.

be outside the prosecutor's discretion in exchange for cooperation to grant the runners-up to leniency more lenient treatment. While the prosecutor may take into account the cooperation, it is up to the court to decide whether a sentence discount should be granted. This model would give an incentive to be the winner of the leniency prize. However the lack of foreseeability for the runners-up to leniency was regarded as a drawback. Yet others may be induced to cooperate in the face of punishments.²⁷ Moreover such a design of the leniency program would follow the models employed in the UK and US in the sense that the leniency prize is granted to the first applicant only.²⁸

The recent Norwegian Government Bill on amending competition laws²⁹ was preceded by a committee elaboration. It had noted that the employee who on behalf of the company had applied for leniency may in the process provide information that exposes himself to a custodial sanction up to 6 years. The committee pointed out that the number of leniency applications in Norway had not been great and said that the effectiveness of leniency may be affected depending on the risk that the individuals run.³⁰ The Norwegian committee suggested that in order to boost predictability the leniency program should cover also the employees of a firm that obtains immunity against prosecution.³¹

The Norwegian committee observed that the Competition Authority had given out a communication in an attempt to corroborate the predictability of leniency – the committee however took the position that this was an inadequate response since the individuals were still left exposed to prosecution. The Norwegian committee envisaged that either the prosecution would only take on a case if asked by the Competition Authority or alternatively that individuals would be immunized if employed by the company qualifying for leniency.³² The committee ended up favouring the latter option due the greater predictability that it would provide.³³

²⁷ *ibid.* p. 213.

²⁸ *ibid.* p. 214.

²⁹ See the Norwegian Government Bill under para 4.2.1.

³⁰ See the Norwegian Committee Report under para 6.3.2.; The Ministry dismissed the claims regarding a small number of leniency applications in Norway. See Government Bill at para 4.4.3.

³¹ See Government Bill at para 4.2.2.; Committee Report at para 6.3.3.1.

³² Government Bill at para 4.2.5.; Committee Report at para 6.3.3.4.; The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (*ØKOKRIM*) noted that while the four years leading to 2008 had brought two leniency applications, in contrast once the Competition Authority had produced the communication the number of leniency applications was higher between 2008 and 2011. See Government Bill at para 4.3.

³³ Government Bill at para 4.2.5.; Committee Report at para 6.3.3.4; What is more this way the Competition Authority as an administrative body would not have to exercise prosecutorial discretion, but instead the outcome would be determined by a statutory provision. Also former employees would gain immunity under the

The Ministry however rejected the committee proposal on grounds that it would allow the white-collars to escape punishment when they have committed serious violations and would not observe the tenets of the Norwegian criminal policy and criminal law. The Ministry favoured a model that would make the criminal prosecution of an individual dependent on the Competition Authority's request or alternatively would be prompted by a strong public interest. The Ministry's position reflected the division of tasks between the Competition Authority and the Prosecutor already observed.³⁴ Under such a model the prosecutor could independently of the Competition Authority bring charges if this is called for by a strong public interest. The Ministry said that the notion of a compelling public interest however refers to a high bar for prosecutors to take action.³⁵

The Ministry argued that the committee's proposal sought to boost the effectiveness of leniency while it overlooked the objective of deterrence.³⁶ The committee had *inter alia* referred to a Norwegian survey of lawyers who ranked individual liability as a top measure against competition law infringements and supported the notion of increased deterrence as a result of an improved leniency program in conjunction with individual liability.³⁷

While the Ministry recognized the importance of the leniency program, it said that it sought to increase the employment of custodial sanctions in an attempt to create deterrence and noted that custodial sanctions had not been used. In particular the Ministry wanted to step up the investigation of responsible individuals.³⁸

This would represent an exception to the rule of mandatory prosecution.³⁹ It was noted however that since in practice this model had already been adopted there would be grounds to depart from the rule of mandatory prosecution. Such grounds could be derived also from the predictability that is called for from the perspective of individual liability in the context of leniency the Ministry argued.⁴⁰

committee proposal, since also former employees can boost the fight against cartels and if they may be exposed to sanctions they are less likely to cooperate. Further, it would not make sense if the current employees who are likely to be more culpable escape penalties while former employees would not, it would neither make sense that by sacking employees the company could effectively determine who is covered by leniency. See Government Bill at para 4.2.5.

³⁴ Government Bill at para 4.4.

³⁵ Government Bill at para 4.4.2.

³⁶ Government Bill at para 4.4.2.

³⁷ Government Bill at para 4.4.3.

³⁸ Government Bill at para 4.4.3.

³⁹ Government Bill at para 4.4.2.

⁴⁰ Government Bill at para 4.4.2.

All in all, the conventional wisdom seems to be that the whistle-blower should receive automatic immunity.⁴¹ It would seem to be tolerable to introduce immunity provisions in relation to the cartel whistle-blower who played a key role in cracking the cartel.⁴² This author and it seems that all the discussed jurisdictions acknowledged that individual criminal liability in the anti-cartel context should be introduced only in conjunction with whistle-blower immunity. It appears that the Danish and Norwegian attitudes concerning whistle-blower immunity against criminal prosecution in the anti-cartel context have become more accommodating.

9.1 THE INTRODUCTION OF A SYSTEM OF PLEA BARGAINING

Matikkala has previously predicted that it is possible that in time the negative attitudes regarding a crown witness system may soften.⁴³ One indication of such a general tendency may be that the 2011 Programme of Prime Minister Jyrki Katainen's Government suggested that adopting a system of plea bargaining should be considered. Indeed the Bill regarding a system of plea bargaining in Finland, which will be discussed below was passed into law on May 1st, 2014.⁴⁴

The European Court of Human Rights (ECtHR) has several times convicted Finland of protracted proceedings – especially the proceedings related to white-collar offences have been time-consuming in Finland.⁴⁵ Plea bargaining seems to have its primary catalyst in the ever more complex and time-consuming criminal proceedings. Furthermore, the more complex and costly the criminal proceedings are in a country, the more commonly, it appears, plea bargaining is being employed.⁴⁶ Prior to the twentieth

⁴¹ See Wagner- von Papp 2011, under the heading 'iii. Mandatory Prosecution v Principle of Expediency – Leniency and Immunity,' at para 4.

⁴² Ibid. at paras 5-6.

⁴³ Matikkala 2009, p. 287.

⁴⁴ Programme of Prime Minister Jyrki Katainen's Government, 22 June 2011. p. 40; A consultation exercise by the Finnish Ministry of Justice regarding the introduction of plea bargaining in Finland revealed that roughly 1/5th of the respondents were in favor of some form of limited plea bargaining, another 1/5th of the respondents were neither in favor nor against and the rest of the respondents rejected the idea. The number of responses amounted to 29. See Oikeusministeriö, Arviomuistio syyteestä sopimisesta (plea bargain) Lausuntotiivistelmä, 2010 p. 11; Regarding the Finnish Bill on plea bargaining see HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' P. 4

⁴⁵ HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' p. 9.

⁴⁶ Combs 2002, p. 8.

century the great majority of the criminal cases within the common law jurisdictions faced jury trials instead of guilty pleas. Before the mid 19th century plea bargaining was actually a seldom-occurring event. Guilty pleas were regarded to be insufficient. It was only the first decades of the twentieth century that plea bargaining agreements became widely used in the US. A drastic increase in their employment had taken place during the decades ensuing the American Civil War.⁴⁷ In 1908 roughly 50 per cent of the cases were disposed of through plea bargaining and already by 1925 90 per cent, a figure which has remained static until this day.⁴⁸

The Finnish Government Bill recognized the US origins of plea bargaining and that characteristically ultimately the Court reviews the plea bargaining agreements and gives the sentences. Also other common law countries and notably more recently several civil law countries such as France, Germany and Estonia have adopted systems of plea bargaining. The Government Bill noted that also Denmark and Norway employ their own kinds of systems of plea bargaining.⁴⁹

The Finnish Government Bill pointed out that until now the guilty plea by the perpetrator has not provided much grounds for a reduction of the sentence.⁵⁰

Arguably the plea bargaining agreements bear resemblance to the civil settlements that seem increasingly popular in the UK and in Europe – for example the European Commission employs a procedure settling cartels.⁵¹ Wils has pointed out that the leniency reductions and settlements operated by the European Commission are closely linked to the US plea bargaining agreements, since both mechanisms facilitate simultaneously the investigation and the disposal of the cases.⁵²

It may be noted, that more specifically plea bargaining refers to the compromise reached between the prosecution and the defendants, who admit guilt in order to gain a reduction in the sanction (simple plea bargaining). Other forms of plea bargaining include charge bargaining where for instance as a trade-off one charge (of many) is discarded where the defendant enters a guilty plea. Fact bargaining refers on the other hand to the discriminatory introduction of facts in exchange for admitting guilt.⁵³

⁴⁷ Combs, 2002 p. 12.

⁴⁸ Combs, 2002 p. 13 footnote 32.

⁴⁹ HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' P. 4

⁵⁰ HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' P. 5

⁵¹ Lawrence et al 2008. p. 18; Furse 2012 p. 152; See also Commission Regulation (EC No 622/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases.

⁵² Wils 2008b, p. 9.

⁵³ Lawrence et al 2008 pp. 19-20.

More recently a Working group in Finland in an unprecedented move proposed adopting a system of plea bargaining.⁵⁴ The previous debate concerning plea bargaining had laid much weight on the legal principles in a way that perhaps was not helpful for a discussion regarding the criminal policy.⁵⁵ The negative attitude concerning plea bargaining in Finland according to Oikarinen was prompted especially by the principles of mandatory prosecution and *ex proprio motu*, the latter meaning that the Court should on its own initiative protect the rights of the parties, a duty which is independent of the preferences of the parties.⁵⁶

The aforementioned Finnish Government Bill suggests that the Criminal Investigations Act and the Act on Court Proceedings in criminal cases should be amended in order to introduce rules concerning plea bargaining.⁵⁷ Due to the significant shift in attitudes that have also hindered the introduction of a crown witness system in the antitrust context, it seems appropriate to outline some of the changes brought about by the Government Bill concerning plea bargaining and the possible implications.

An amendment to the criminal investigations act would in Chapter 3 section 10a provide *inter alia* that the Prosecutor could decide upon the recommendation of the leading investigating police officer⁵⁸ that the preliminary investigation would not concern all the offences committed when it is suspected that the perpetrator has committed several offences if the perpetrator has entered a guilty plea and thus contributed to the investigation and no public or private interest requires that the preliminary investigation should be conducted.⁵⁹ The prosecutor could subsequently demand a sanction according to a more lenient penalty scale. Importantly the foregoing would only apply to offences that carry a maximum custodial sentence of 6 years, except for offences that target life and health, children or sexual offences.⁶⁰

⁵⁴ Oikarinen 2012 p. 742; Finnish Ministry of Justice, 'Syyteneuvottelu ja syyttämättä jättäminen' 26/2012.

⁵⁵ Oikarinen 2021 p. 746.

⁵⁶ Oikarinen 2012 p. 744.

⁵⁷ It may be noted that there is no accurate Finnish expression for the concept of plea bargaining, see HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' p. 4.

⁵⁸ Oikarinen has pointed out that possibly due to the introduction of plea bargaining the prosecutor should instead of the senior police officer assume the leading role in the investigations especially when it comes to white-collar offences. Oikarinen 2012 p. 760-761.

⁵⁹ See also Oikarinen 2012 p. 748.

⁶⁰ HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' p. 1.

9.2 POSSIBLE DEMERITS OF PLEA BARGAINING

The system of plea bargaining has been subject to criticism due to the possible impairing effect on the defendant's legal protections.⁶¹ Linna and Oikarinen have said that the one crucial question is whether the defendant can give up his right to a fair trial and under what conditions.⁶² The defendant would need to consent to the summary court proceedings that involve his guilty plea.⁶³

Linna, who has viewed plea bargaining almost inherently problematic from a due process perspective, has underlined the importance of the defendant entering the plea bargaining negotiations voluntarily and knowingly. Further, the plea bargaining agreement itself should have its basis in the factual evidence available to the prosecutor, based on which the defendant is able to make an informed decision on whether to enter the guilty plea.⁶⁴

Lawrence et al. note that the problems arising from plea bargaining are related to the independence of the judiciary and the rights of the defendants.⁶⁵

Detractors may also argue that as a result of such a system innocent individuals are persuaded to enter guilty pleas. Lawrence et al. point out that the budgetary constraints may guide the prosecutors so that plea bargaining agreements are offered only once the likelihood of a condemning judgment is heightened. The inclination of an innocent individual to enter guilty pleas could be decreased by preventing the prosecutors from offering unfettered reductions in the penalty.⁶⁶ The critics could also say that as a result of the availability of long prison sentences, the system could produce distorted plea bargaining agreements when compared to civil settlements: The unpredictability regarding the length of the prison sentence could incentivize the defendant to enter an agreement with the prosecution.⁶⁷

A further worry is that the doubt as to the standard sentence may induce the defendant to reveal too much. However setting predetermined public reductions could offset concerns regarding the uncertainty as to the extent of the penalty.⁶⁸

⁶¹ Oikarinen 2012 p. 754.

⁶² Linna 2010 p. 260; Oikarinen 2012 p. 755.

⁶³ HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' p. 14.

⁶⁴ Linna 2010 p. 227; Oikarinen 2012 p. 754.

⁶⁵ Lawrence et al 2008, p. 18.

⁶⁶ Lawrence et al. 2008 p. 26; Linna 2010, p. 207.

⁶⁷ Lawrence et al. 2008 p. 26.

⁶⁸ Lawrence et al. 2008 p. 26.

One downside to plea bargaining is also that as a witness the defendant's integrity could be questioned.⁶⁹ Further, the practice could be likened to bargaining between the state and the offenders, and it could be problematic from the perspective of the principles of equality and legality.⁷⁰

Lawrence et al. note that while there may be an attempt on the side of the defence to exploit the system to their own advantage by strategically choosing the time when to enter the plea bargaining agreement, it must also be recognized that strategic planning on the side of prosecution and defence, permeates the whole judicial system even in the absence of plea bargaining.⁷¹

An important aspect of the defendant's legal protections is the right against self-incrimination in the context of plea bargaining. Linna argues that despite efforts to observe the right against self-incrimination, at the end of the day one may always ask whether the offer by the prosecutor is such that it leaves little choice but to enter a guilty plea. The most notable risk would be that an innocent person would have to choose between a guilty plea and a fully-fledged trial and would be persuaded to enter the guilty plea. This situation could be avoided by determining the culpability in advance in a similar fashion as is done at trial. Linna says that the infringement of Article 6 ECHR in terms of inappropriate pressure may only be escaped if prior to concluding the plea bargaining negotiations the prosecutor is already in possession of evidence sufficient for a conviction.⁷² The gap between the outcomes depending on whether the defendant opts for a trial or a guilty plea, should not be so huge that in reality one cannot speak of a voluntary decision.⁷³ It may be noted that the amendment (as per the Government Bill) to the Finnish Criminal Code in Chapter 6, section 8a provides that the court must announce what the sentence would have been in the absence of the guilty plea.⁷⁴

As Oikarinen points out, the Finnish Working Group proposal on plea bargaining (and along the same lines the Government Bill that followed it) sought to alleviate the due process concerns associated with plea bargaining by ensuring that the prosecutor does not merely rely on the guilty plea of the defendant, but has evidence beyond that as well. Oikarinen notes that if the prosecutor does not have sufficient evidence to prosecute the case, the defendant should not be induced to enter the guilty plea.⁷⁵ The Working

⁶⁹ Lawrence et al 2008 p. 24; Linna 2010, p. 261.

⁷⁰ Matikkala 2009. p. 287; See also Wagner-Von Papp 2011, p. 176.

⁷¹ Lawrence et al. 2008 p. 27.

⁷² Linna 2010 p. 253-254; Linna questions whether any resources would be saved after all as a result of introducing a system of plea bargaining. See Linna 2010 p. 253-254.

⁷³ Linna 2010 pp. 253-254, 260, 261.

⁷⁴ See Oikarinen 2012 p. 757.

⁷⁵ Oikarinen 2012 p. 755-756; HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien

Group had also proposed that as a starting point the defendant should always have legal assistance available and the prosecutor would have to observe also evidence that is favourable to the defendant.⁷⁶

As was observed in the Government Bill,⁷⁷ the European Court of Human Rights has also addressed the due process questions in the context of plea bargaining: the ECtHR has said that plea bargaining agreements are not in violation of the ECHR and indisputably benefit the defendant, the injured party and the ‘administration of justice.’⁷⁸ In another decision the ECtHR has said that while plea bargaining is more frequently used in the US, the European legal systems provide for reductions in sentences in exchange for a ‘guilty plea’, which may necessitate the existence of an understanding between the defendant and the prosecutor as to the content of the guilty plea – the Court said that it may not be viewed as ‘oppressive conduct’ and thus in violation of art. 6 ECHR that the judge or the prosecutor lets the defendant know beforehand what the sentence would be in the case that the defendant entered the guilty plea or alternatively if the defendant did not enter the ‘guilty plea’. Article 6 ECHR could be violated, the Court said, when the sentence following the guilty plea would be so different from the sentence that would follow if the defendant did not enter a guilty plea that it could be regarded as putting inappropriate pressure on the defendant to enter a guilty plea, while the defendant is innocent – in such circumstances the right against self-incrimination could be impaired or Article 3 could be violated (the ban on torture and inhuman or degrading treatment or punishment) if the defendant perceives the guilty plea as the sole means to escape the penalty.⁷⁹ The ECtHR noted that it is up to the defendants to

säännösten uudistamiseksi.’ p. 45.

⁷⁶ Finnish Ministry of Justice, ‘Syyteneuvottelu ja syyttämättä jättäminen’ 26/2012. p. 52; The prosecutor must explain the contents of the sentence proposal and other related matters as per Chapter 5 b, section 3. As per section 4 the Court would have to observe the tenets of the proposal regarding the sentence if it agrees with the sentence proposal, provided that the defendant has entered the guilty plea and there is no reasonable doubt left regarding the accuracy of the guilty plea and that the defendant voluntarily entered it. Oikarinen 2012 p. 757.

⁷⁷ Government Bill, HE 58/ 2013 vp s. 10

⁷⁸ HE 58/2013 vp, ‘Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.’ P 10; see the European Court of Human Rights, Fifth section decision as to the admissibility of Application no. 39672/03 by Nikolay Milanov Nikolov against Bulgaria 28 September 2010, under the title ‘The Law’ at para 11.

⁷⁹ HE 58/2013 vp, ‘Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.’ P 10; ECHR, Fourth section, partial decision as to the admissibility of application nos. 24027/07, 11949/08 and 36742/08 by Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan and Mustafa Kamal Mustafa (Abu Hamza) against the United Kingdom, 6 July 2010. At para 168.

enter plea bargaining agreements and judges in the US seek to ensure that the defendants enter such agreements of their own free will.⁸⁰

As a curiosity it may be mentioned that due to the time-consuming proceeding the Council of Europe suggested already in 1987 that its member states should widen the scope of prosecutorial discretion whenever possible. It referred to the requirements of article 6 of the European Convention on Human Rights. The Council of Europe specifically mentioned that countries with the tradition of mandatory prosecutions should note the recommendation.⁸¹ This was reiterated in an explanatory memorandum of the Council of Europe in the year 2000.⁸²

It may also be feared that procedural safeguards of the defendants suffer as a result of a plea bargaining agreement, the plea bargaining agreement may require that the defendant agrees to refrain from claiming his rights. In order to alleviate such worries, the court could have a look at the plea bargaining agreement and at least ascertain that the defendant with full knowledge agreed to the terms of the agreement.⁸³

Linna has viewed the Working Group proposal in a rather positive light.⁸⁴ Linna has noted that the proposal by the Working Group did not suggest that the agreement between the prosecutor and the defendant would accurately prescribe the sentence that the Court will impose – thus while the Court would have to adopt a more lenient scale of penalties with a view to its sentence consideration⁸⁵, it would not be bound by the plea bargaining agreement. The Government Bill indicated that the defendant must be informed that the Court is not bound by the sentence proposal made by the prosecutor. Yet the sentence proposal should indicate the kind of sentence that the prosecutor proposes and the severity of the sentence, something that may be indicative of the future practice Linna says.⁸⁶ The Court is however bound by the type of offence prescribed in the plea bargaining agreement.⁸⁷

⁸⁰ The Court found in this particular case that it was not inappropriate for the prosecutor to talk about the potential sentences with the defendant beforehand, see ECHR, Fourth section, partial decision as to the admissibility of application nos. 24027/07, 11949/08 and 36742/08 by Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan and Mustafa Kamal Mustafa (Abu Hamza) against the United Kingdom, 6 July 2010, at para 169.

⁸¹ Council of Europe, RECOMMENDATION No. R (87) 18 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING THE SIMPLIFICATION OF CRIMINAL JUSTICE 1987 p. 3

⁸² Council of Europe. *Explanatory Memorandum 2000*. Retrieved 04 14, 2011, from <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1465390&SecMode=1&DocId=838058&Usage=2>. See paragraph 3.; Wils 2007, pp. 36-37.

⁸³ Lawrence et al 2008, p. 26.

⁸⁴ Linna 2012 p. 129.

⁸⁵ The imposed sentence may not exceed $\frac{3}{4}$ of the ordinary sentence.

⁸⁶ Linna 2012 p. 129; See also HE 58/2013 vp p. 25.

⁸⁷ HE 58/2013 p. 32; Linna 2012 p. 129.

On the other hand the fact that the Court needs to indicate the sentence that would have been handed down in the absence of the guilty plea, in Linna's view prevents the possibility that the sentence imposed within the framework of the more lenient penalty scale would not differ from the sentence that would be given in the absence of a plea bargaining agreement.⁸⁸

Importantly the Government Bill sets out that if plea bargaining fails or if the Court would not hand down a decision in accordance with the sentence proposal, the statements given in the course of plea bargaining or the Court proceedings by the defendant may not be employed as evidence.⁸⁹ Despite the foregoing Linna points out that the fact that the defendant had entered plea bargaining negotiations, that were never concluded, could be perceived to reflect culpability.⁹⁰

9.3 THE MERITS OF INTRODUCING A SYSTEM OF PLEA BARGAINING

Arguments have in the UK context been put forward that besides granting full immunity to the leniency applicant, introducing a system of plea bargaining could be beneficial in anti-cartel enforcement. Plea bargaining agreements could be offered to cartel members who do not qualify for full immunity.⁹¹ Currently such a system is absent in England and Wales.⁹²

Furse pointed out that US style plea bargaining is not available in Ireland either and quoted a report which said that while 'charge bargaining' may be entered by the defendant it 'will not result in certainty about a particular sentence, except insofar as the charges pleaded to define the outer limits of range of sentence that may be imposed.'⁹³ While Ireland has a Cartel Immunity Programme, with respect to the cooperative second and third leniency applicants leniency in terms of custodial sanctions or fines may not be granted. While the courts have it in their discretion to take note of the cooperation provided by applicants who do not qualify for immunity,

⁸⁸ Linna 2012, p. 129.

⁸⁹ HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' p. 15.

⁹⁰ Linna 2012 p. 130; See also Lawrence et al. 2008 p. 25; See also Stephan 2008b, p. 23.

⁹¹ Furse 2012 p. 151; Wardhaugh 2012a, p. 588.

⁹² Lawrence Jon et al., 'Hardcore Bargains: What Could Plea Bargaining Offer in UK Criminal Cartel Cases?' *Competition Law Journal*, 2008. p. 17.

⁹³ Galbreath 2010, p. 8; Furse 2012 p. 172.

the degree of reduction in the sentence is not predictable and as Furse notes that it is regrettable.⁹⁴

Scott Hammond has said in the US context that despite the fact that plea bargaining is occasionally portrayed in a less flattering light, in cartel cases it is rarely criticized. Among the beneficiaries of plea bargaining are, according to Hammond, the government, the parties to the case, the judiciary, the injured parties and the public at large as the defendants cooperate promptly.⁹⁵

In the US in most cartel cases the defendants who do not qualify for amnesty enter plea bargaining agreements.⁹⁶ Beaton-Wells pointed out that US antitrust enforcement owes to the system of plea bargaining and sentencing guidelines that give a good idea to the defendants and the prosecutors how things will turn out if a guilty plea is entered. Indeed the cases where the DOJ has been forced to proceed to a trial, it has been successful in less than half of the cases. This negative outcome of the trial cases, Beaton-Wells points out, is a result of the dependence on the evidence provided by the immunized witness (the first runner up to the leniency prize), whose testimony may not be perceived as the most reliable one.⁹⁷

The defendants are normally offered either type B or type C agreements. The former may be altered by the Court while the defendant cannot pull out from the agreement irrespective of the changes made by the court. In contrast the type C is binding on the Court.⁹⁸ Hammond has noted that 90 percent of the defendants accused of antitrust violations during the past two decades have agreed to plea bargaining arrangements.⁹⁹

Stephan said that the US enforcement is greatly facilitated by the plea bargaining agreements. While informal settlements are available in the UK, they cannot be compared with the definitive direct settlement in the US¹⁰⁰ – subsequently every case in the UK will be disposed of by means of a trial.¹⁰¹

Stephan argues that the appeal of the plea bargaining agreements is reflected in the foreigners who have on their own accord returned to the US only to be imprisoned in accordance with the plea bargaining agreement.¹⁰² Reindl has pointed out that the grand jury investigation

⁹⁴ Furse 2012 p. 175; Galbreath 2010, p. 7.

⁹⁵ Hammond 2006, p. 2; Furse 2012 p. 152

⁹⁶ Lawrence et al. 2008, p. 17.

⁹⁷ Beaton-Wells 2011. Under the heading 'E. Uncertain Outcomes' at para 1.

⁹⁸ Lawrence et al. 2008 p. 28.

⁹⁹ Hammond 2006, at para 1.

¹⁰⁰ Stephan takes the position however that a sustained success of the UK criminal cartel regime may at the end of the day depend on the competition authority's impact on the general public's awareness regarding the harmful nature of cartels, as such awareness would induce compliance and corroborate prosecutorial efforts, see Stephan 2008 p. 33

¹⁰¹ Stephan 2008 p. 4.

¹⁰² Stephan 2008 p. 24.

benefits the prosecution and makes it ‘relatively easy to obtain indictments against a defendant’. This in turn induces the defendants to enter plea bargaining agreements. As a result the prosecution rarely has to meet the ‘beyond reasonable doubt’ threshold.¹⁰³ The Hammond and Penrose report had also noted that the US enforcement record owed to the system of plea bargaining that the UK lacked.¹⁰⁴

According to Stephan a further incentive for the defendants to enter plea bargaining agreements, considering the possibility of private actions, is that the amount of information that is subject to publicity may be limited as per the plea bargaining agreement. Plea bargaining agreements allow also the concurrent settlements of ‘corporate and individual liabilities’. Having entered the plea bargaining agreement the defendants also give up the right to contest the case. The plea bargaining agreements may even entail specifics that relate to the location of the prison and available facilities, which may include luxuries such as tennis courts.¹⁰⁵

From the point of view of defence it may be appreciated that as a result of a plea bargaining agreement the case could be speedily resolved, while there is a discount in the sentence, and the terms of imprisonment may even be subject to negotiation. As Lawrence et. al point out the foregoing may be equally important to certain defendants as the duration of the sentence.¹⁰⁶

In consequence the DOJ is able to ensure the regular enforcement of the offence, since the laborious trials and appeals are avoided – this leaves vacant resources for further use. Stephan has pointed out however that while the plea bargaining agreements secure a certain level of enforcement in the US, a system of plea bargaining with the US characteristics is not what he advances in the UK context with respect to all cartel cases. He notes that the system in the US has been accused of being unfair, and is the product of a long evolution and is infused with idiosyncrasies that originate in the US legal culture.¹⁰⁷

On a more general note Reindl argues that the US system cannot easily be transplanted in Europe. Subsequently the expected benefits of a criminal anti-cartel regime might not materialize in Reindl’s view.¹⁰⁸

Stephan notes that since the apparent US success in pursuing cartels may be attributed to the system of plea bargaining, it is possible that the UK lacking such a system will not be able to bring many criminal cartel

¹⁰³ In addition Reindl notes the uniquely strong investigatory powers in the US, namely, ‘grand jury subpoenas, grand jury investigations and indictments,’ and a competition authority that prosecutes and does not have to depend upon public prosecutors, Reindl 2006, p. 118.

¹⁰⁴ Hammond and Penrose 2001 p. 30.

¹⁰⁵ Stephan 2008 pp. 23-24.

¹⁰⁶ Lawrence et al. 2008 p. 25; See also Stephan 2008b, p. 23.

¹⁰⁷ Stephan 2008b, p. 25.

¹⁰⁸ Reindl 2006, p. 119.

cases.¹⁰⁹ It may be mentioned that defendants, who were UK nationals, entered plea bargain agreements in the US also in the Marine Hose cartel.¹¹⁰

Furse takes the view that while the courts do not embrace plea bargaining in the UK, the overall approach is nowadays more accommodating. In the case *R v Goodyear*¹¹¹ the judge pointed out that the judge himself should not be included in plea bargaining.¹¹² The UK Government however recently rejected plea bargaining in the context of anti-cartel enforcement arguing that implications for the criminal justice system should be cautiously examined.¹¹³ It may be noted that the Serious Organised Crime and Police Act 2005 s 73 provided the possibility of reducing the sentence of the defendant in return for assisting the prosecution.

According to Lawrence et al. the meager use of plea bargaining in the UK owes in part to the absence of predictability regarding the penalty that the Court will impose on the defendant - in contrast the US Sentencing Guidelines arguably offer such predictability.¹¹⁴ Lawrence et al. argue that while the system of plea bargaining in the US is affected by factors that do not apply in the UK, a system of plea bargaining could offer notable advantages in the UK context.¹¹⁵

As Lawrence et al. point out that by empowering the OFT to grant criminal immunity to the first leniency applicant to come forward, as the first prosecutorial body to have this power in the UK, it seems that it was acknowledged that this measure is needed in the fight against cartels.¹¹⁶ Following that line of thought it may be argued, especially in the long term, that from a deterrence perspective plea bargaining could be desirable: cartels are intrinsically unstable and introducing plea bargaining could further capitalize on that feature: arguably under a system of plea bargaining the possibility of a conviction becomes greater, even if full immunity cannot be obtained and the cartel has been detected, because the probability remains that a fellow cartel member cooperates with the authorities.¹¹⁷

The prosecution could benefit from plea bargaining since it could more easily access evidence and dispose of cases. Proving a case 'beyond reasonable doubt' is challenging and the risk of failure if the case proceeds to court trial is remarkable. As a result of plea bargaining the defendant might even be incentivized to cooperate with regard to an ongoing investigation in

¹⁰⁹ Stephan 2008b, pp. 25-26.

¹¹⁰ See the discussion in Stephan 2008b.

¹¹¹ 2005 EWCA Crim 888 at para 67ple.

¹¹² See Furse 2012 p. 152.

¹¹³ BIS, *Growth, Competition and The Competition Regime, Government Response to Consultation*, March 2012. at para 7.40

¹¹⁴ Lawrence et al. 2008 p. 32-33.

¹¹⁵ *ibid.* p. 38

¹¹⁶ Lawrence et al. 2008, p. 18.

¹¹⁷ Lawrence et al. 2008, p. 23-24; Furse 2012 p. 152.

exchange for further reward.¹¹⁸ Considering the noteworthy collapse of the *Airlines* case the importance of the foregoing from the point of view of the prosecution is arguably compelling.

In the Finnish context Jaakko Rautio of the Ministry of Justice has in a memorandum listed some advantages of plea bargaining including the facilitation of obtaining evidence.¹¹⁹ Oikarinen however predicts that the prosecutor continues to carry a heavy burden of proof especially with regard to the accuracy of the defendant's guilty plea.¹²⁰

Lawrence et al. argued as well that allowing bargaining in criminal cartel cases is useful *inter alia* because it would diminish the costs related to enforcement, something that could be desirable from the perspective of the limited resources available.¹²¹

Similarly the Finnish Government Bill noted that resources would be saved in terms of the preliminary investigation, the workload of the prosecutor and the court proceedings: the Government Bill pointed out that due to scarce resources cases could actually be treated discriminatorily, meaning that where one case is investigated another one is not.¹²²

Especially the investigation of serious white-collar offences is resource-intensive the Government Bill noted.¹²³ It was argued that due to the complexity of the white-collar offences, adopting plea bargaining would be advantageous.¹²⁴

As a result of the proposal it was argued that more resources would be left to detect offences that otherwise could go unnoticed, which in turn would benefit deterrence, presumably even more so than the severity of the sanctions.¹²⁵ The defendant would be incentivized to enter a guilty plea since the proceedings would be expedited and he would get a reduction in the sentence. If the prosecutor may commit to a reduced sentence, the

¹¹⁸ Lawrence et al. 2008, p. 24.

¹¹⁹ Rautio, Jaakko, 'Resurssija säästävä menettely, jossa rikoksen varhainen tunnustaminen voisi läpinäkyvässä menettelyssä johtaa rikoksesta muutoin seuraavaa rangaistusta lievempään rangaistukseen' OM 20/41/2009, 15.1.2010. p. 13-14.

¹²⁰ Oikarinen 2012 p. 760.

¹²¹ Lawrence et al. 2008, p. 18.

¹²² HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' p. 11.

¹²³ HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' P. 12

¹²⁴ HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' P. 14

¹²⁵ While the proposal would reflect the concept of sentence bargaining and count bargaining, it does not cover charge bargaining or fact bargaining, see HE 58/2013 vp, 'Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.' P. 13

defendants would subsequently be induced to enter the guilty pleas and the improved predictability would benefit the defendants.¹²⁶

In contrast Oikarinen has noted that it may be doubtful whether the white-collars are sufficiently incentivized to enter guilty pleas. For instance in terms of the tax fraud offences, most of the prison sentences were suspended. Subsequently the appeal of entering plea bargaining negotiations for the white-collars lies essentially in the less-time consuming proceedings. It is possible, as Oikarinen says, that only the availability and enforcement of harsher penalties, especially unsuspended custodial sanctions could make plea bargaining more attractive for the white-collars in Finland.¹²⁷

Linna on the other hand has questioned the potential of a system of plea bargaining to influence the white-collars who seek to retain the illegal profits – entering the guilty plea would mean that such profits would be lost by the perpetrator.¹²⁸

Furthermore, it is possible to argue that as a result of reducing the penalty by way of a plea bargain the deterrent effect is impaired. As a counterargument a larger amount of prosecutions could offset such a problem. Further it is not obvious that the deterrence generally is impaired as a result of plea bargaining as at the end of the day much turns on the given content of the plea bargaining agreement: As Lawrence et al. note the European Commission Decision in relation to the *gas Insulated Switchgear* cartel recognized that ‘Japanese and European providers of GIS coordinated the allocation of GIS projects worldwide, with the exception of notably the USA and Canada’ and the US is land where plea bargaining is particularly used – thus such an observation may alleviate fears of a weakening deterrent effect.¹²⁹

Vuorenpää has pointed out that the general preventive effect *inter alia* depends on the certainty that sanctions are imposed and the legitimacy of the criminal justice system.¹³⁰ On a more critical note Oikarinen says that while plea bargaining may reinforce the former, the legitimacy of the system could also suffer if the public perception is that the white-collars receive

¹²⁶ HE 58/2013 vp, ’Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi.’ p. 11.

¹²⁷ Oikarinen 2012 p. 761

¹²⁸ Linna 2012 p. 130.

¹²⁹ See Summary for publication of Commission Decision of 24 January 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement, Case COMP/38.899 – Gas Insulated Switchgear. Official Journal of the European Union C 5/7.; For more anecdotal evidence, made known by a DOJ official, that seems to indicate that cartels have specifically avoided operations in the US see Hammond Scott, ’Cornerstones of an effective leniency program, ICN Workshop on Leniency Programs, Sydney Australia. p. 8; Lawrence et al. 2008 p. 25-26; See also Baker 2001, p. 709.

¹³⁰ See Vuorenpää 2007, p. 26; Oikarinen 2012 p. 761-762 footnote 54.

special treatment and that everyone is not treated equally.¹³¹ Lawrence et al. point out that while concerns may be expressed that perpetrators do not get their 'just deserts' by way of plea bargaining as they get more lenient treatment as a result, it is also true that the condemned conduct may not have even been uncovered in the absence of plea bargaining. Further rather than the duration of the prison sentence, it appears that it is the actual imposition of one that counts to many.¹³²

It seems in light of the above that there are good grounds to introduce a system of plea bargaining in Finland, a system that could potentially also enhance the fight against cartels and perhaps more importantly it may reflect a shift in attitudes that hindered the introduction of a crownwitness system, whose absence was previously a strong argument against the a criminal anti-cartel regime in Finland.

By way of conclusion, despite its demerits, on balance, this author would add a system of plea bargaining to Wils' list that seeks to present the criteria of a successful criminal anti-cartel regime.¹³³

¹³¹ Oikarinen further notes that for certain offences such as the drink-driving offences, the creation of the deterrent effect is not categorically dependent on the kind of penalty that is available – imposing a driving ban may be much more effective than a fine or even a suspended prison sentence, see Oikarinen 2012 p. 762.

¹³² Lawrence et al. 2008 p. 26.

¹³³ For the list see Wils 2005a p. 148ff.

10 Some Considerations regarding Private Actions as an Enforcement Tool

A study by Deloitte and commissioned by the Office of Fair Trading sought to identify the factors that make companies comply with competition law. The surveyed 202 UK companies ranked private damages actions as least important, behind inter alia corporate fines and prison sentences.¹ Ironically perhaps, the European Commission has especially sought to revamp the sanctioning system by making private damages actions more readily available and increasing the level of fines.² The aforementioned ranking of perceived deterrence by the companies casts a shadow on the approach of the Commission to lay emphasis on private damages actions.

As Wils has pointed out the Commission White Paper on damages actions separates the tasks assigned to public enforcement on the one hand and the task assigned to private enforcement on the other hand. The White Paper advocated improved possibilities for private claimants to pursue damages when EU competition law rules were infringed. In contrast the Commission also stated the need to '(...)preserve strong public enforcement of Articles 81 and 82(...)'³ In Wils' view public enforcement is better from the perspective of penal justice and deterrence, but cannot take the place of private enforcement when it comes to reparation.⁴ This approach, Wils argues, is supported by the case law of the ECJ and the general court of the EU.⁵ One may also point to economic principles, such as the Tinbergen

¹ Office of Fair Trading, 'The deterrent effect of competition enforcement by the OFT, A report prepared for the OFT by Deloitte,' November 2007 OFT 962. p. 5, 72.

² See Khan Aaron 2012 p. 78; Also the ECJ said regarding the right to damages that '[t]he existence of such a right strengthens the working of the Community Competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition.' See to this effect *Pfleiderer AG v Bundeskartellamt* case C-360/09 At para 29.; In Finland a court recently awarded record damages in relation to the so-called asphalt cartel, in a judgment handed down on 28th of November 2013. See to this effect Helsinki District Court, 3rd division, L 09/49467. For further discussion see Kalliokoski and Virtanen 2014.

³ COM(2008) 165 final, Brussels, 2.4.2008. p. 3.

⁴ Wils 2009 p. 15.

⁵ Wils 2009 p. 16.

rule, which postulates the use of separate instruments for separate objectives, to validate such an approach.⁶

The acceptance of treble damages and not allowing the passing-on defence when cases are brought by direct purchasers arguably reflects the deterrent approach by the US antitrust law.⁷ The passing-on defence concerns a situation where a party buys products at a cartel price, subsequently passes the cartel price on to its customers, and whether such a buyer could still claim damages in the absence of harm to himself or whether the cartelist can invoke the passing-on defence.⁸ Historically instead of public enforcement, treble damages have played a major role in the US, and still today outside the hard-core cartel area they serve a deterrent function.⁹ Such a model of multiple damages and denial of passing-on defence, as it could unjustly enrich buyers was rejected by the White Paper in the EU.¹⁰

Wils, Calvani and Whelan have argued that the private actions alone are not sufficient to deter hard-core cartels. Arguably the private actions are plagued by the firms' inability to pay sums that would be sufficient from a deterrence perspective, which in essence means that they share the same insolvency cap problem associated with the optimal Beckerian fines. Wils further underlined that private actions do not introduce individual accountability, which is beneficial for the operation of leniency.¹¹

10.1 COULD PRIVATE ACTIONS DETER MORE THAN CRIMINAL PENALTIES?

While it has been said that the DOJ's criminal enforcement rarely is scrutinized in the US, and mostly is acclaimed for its efforts,¹² US commentators Lande and Davis, however, argued that private actions in the US context have substantial benefits and have argued that their deterrent effect is greater than that of the criminal sanctions – they point out for example that the DOJ has not been particularly eager to litigate cases where the law or evidence is not completely clear.¹³

Lande and Davis referred to their own study of 40 cases, where 13 of the cases concerned cartels, suggesting that 25% of private actions were indebted to DOJ enforcement. Moreover Lande and Davis pointed out that

⁶ Wils 2009 p. 17.

⁷ Wils 2009 p. 17.

⁸ Whish and Bailey 2012 pp. 310-311.

⁹ Wils 2009 p. 18.

¹⁰ COM(2008) 165 final, Brussels 2.4.2008. pp. 7-8; Wils 2009 p. 19.

¹¹ Wils 2005a, p. 148; Calvani and Calvani 2011, p. 197; Whelan 2007 p. 36.

¹² Beaton-Wells and Fisse 2011b, p. 278.

¹³ Lande and Davis 2010, pp. 31-32, footnote 104.

inducement to leniency may be increased by the fact the plaintiffs can only seek limited damages from the successful leniency applicant.¹⁴

Lande and Davis wanted their methodology of determining deterrence to be conservative and used USD 2 million as the value of deterrence for one year spent in prison (which they actually thought is too high) and then further trebled it to \$6 million due to the possible greater deterrent effect of individual penalties. They sought to direct attention to the fact that ‘valuing a year’s worth of life at \$6 million would mean that a 20 year prison sentence would be valued at \$120 million, a figure far in excess of the amount that society places on an individual’s life.’¹⁵ They acknowledged the possibility that the time might be valued differently by an average person than a price-fixer.

In their rebuttal regarding the argued superior deterrence value of private actions, Werden et al. pointed out that USD 5,6–7,0 billion were obtained in damages in the aforementioned 13 cartel cases, with a sum of USD 3,9–5,3 billion being recoveries from the vitamins cartel alone, which according to the DOJ officials was first investigated by the DOJ.¹⁶

Werden et al. referred to the powerful investigative tools that are available under the criminal regime. They asserted that the criminal investigative tools make the Antitrust Division much better positioned to detect a cartel than the plaintiffs. They further argued that civil suits may rely on the liability established by the criminal conviction and the cooperating whistle-blowers, making the case easier for plaintiffs seeking damages and that the sanction is more likely to be imposed with the help of leniency, as leniency destabilizes the cartel due to the knowledge that only the first to blow the whistle will be granted leniency. The whistle-blower may also provide the prosecution with evidence that would have otherwise been unattainable.¹⁷

The success of the leniency policy, according to Werden, Hammond and Barnett, gets support from the fact that ‘over ninety percent of fines imposed for Sherman Act violations since 1996 can be traced to investigations assisted by leniency applicants.’¹⁸

Coffee’s article in 1983 suggested that private actions have not greatly increased detection rates in light of empirical evidence and are therefore not such an important complement to public enforcement. Coffee wrote: ‘a recurring pattern is evident under which the private attorney general

¹⁴ Lande and Davis 2012, p. 5.

¹⁵ Lande and Davis 2010, p. 20, see also footnotes 70, 71 and 73.

¹⁶ Werden et al. 2011, p. 228, 232.

¹⁷ Werden et al. 2011, p. 207, 225, 233, 234; As has been discussed elsewhere in this thesis it seems that the introduction of criminal penalties could positively affect the operation of leniency programs as the individuals within a corporation may have an increased incentive to apply for leniency when they risk jail sentences, see to this effect the discussion under section 8.2.2 .

¹⁸ Calvani and Calvani 2011, p. 197; Werden et al. 2011, p. 224.

simply piggybacks on the efforts of public agencies – such as the SEC, the FTC, and the Antitrust Division of the Department of Justice – in order to reap the gains from the investigative work undertaken by these agencies.¹⁹

Werden et al. claimed that the defendants have paid more in an effort to escape jail than what was estimated by Lande and Davis to be the dollar equivalent of disutility of one year locked up in jail and further argued that Lande and Davis did not take into account the stigmatizing effect of criminal sanctions nor the loss of future income.²⁰ In response Lande and Davis said that Hammond, Werden and Barnett did not provide data on the possible stigmatizing effect of prison and the loss of future salary.²¹

When either fines or private actions do not create sufficient deterrence, it can be the individuals employed by the corporations that decide to abstain from cartel activity due to the risk of getting jailed. Consequently an accurate picture of deterrence cannot be obtained through a mere look at the figures that Lande and Davis presented the aforementioned DOJ officials asserted.²² Both sides to the debate however were in favour of the availability of an array of methods to tackle cartels.²³

The author of this thesis subscribes to the view that collapsing prison sentences to monetary equivalents for the purposes of comparing the deterrent effects of private actions and prison sentences is not convincing and tends to think that private actions cannot replace individual sanctions as a method of creating deterrence – not considering the stigmatizing effects of criminal sanctions would seem to be problematic. Further, more powerful investigatory tools are available under the criminal regime and the private claimants may benefit from criminal convictions that establish liability and also from the cooperation of the whistle-blowers.

10.2 THE COMPLEX INTERACTION BETWEEN PRIVATE AND PUBLIC ENFORCEMENT

Whish and Bailey pointed out that at the EU level the Commission with its more robust investigative powers has better opportunities than the private parties to uncover competition law violations. In addition the experience

¹⁹ Coffee 1983, pp. 220-223.

²⁰ Werden et al. 2011, pp. 228-229.

²¹ Lande and Davis 2012, pp. 3-4; See Bauer 2004, p. 307; Wils 2005a, p. 143.

²² Werden et al. 2011, pp. 228-229.

²³ See Werden et al. 2011, p. 207; Lande and Davis 2010, pp. 9-10 footnote 49.

gained thus far and available resources make the Commission better placed, as does the leniency program as a detection tool.²⁴

As a result of public enforcement efforts, findings of antitrust violations emerge, which then support follow-on actions. Stand-alone private actions on the other hand do not benefit from the results of public enforcement.²⁵

The European Commission has sought to improve private enforcement, but in the meantime one should bear in mind that for example inundating decisions with information to improve the conditions for follow-on actions, thus empowering private claimants regarding a given violation or allowing third parties access to information beyond the decision, could hamper the functionality of the leniency program, if potential leniency applicants refrain from cooperation due to a possible disclosure of the leniency applications. Further provisions regarding the business secrets could be infringed if access was granted.²⁶ The ECJ has elaborated on the difficulty of attaining a balance between the two objectives, in the *Pfleiderer AG v Bundeskartellamt* case.²⁷

Wils has also argued that claimants should not have the access to the public enforcement files during the course of the investigation by the authority to prevent undesirable disclosure, such as information on a forthcoming inspection.²⁸

The Commission White Paper suggested that private claimants should never have the access to the corporate statements.²⁹ Cartelists submit corporate statements that contain their information in relation to the cartel when they apply for leniency. As Wils notes, the corporate statement is the voluntary production of the cartel member, which serves anti-cartel enforcement, in the form of detection and conviction and subsequent private actions. If it were not for such an optional act by the cartel member, the corporate statement would never have materialized. On such grounds it seems reasonable to argue that the claimants should not have the access to the corporate statements, as this in turn could make the incentive to apply for leniency stronger, and arguably enhances public enforcement.³⁰

The more recent Commission Proposal characterized the leniency programs as 'key instruments in detecting cartels.' In an attempt to protect the appeal of leniency programs both at the EU level and at the national one the Commission handed down a proposal suggesting that the leniency prize winner's joint and several liability should be restricted to damages caused to

²⁴ Whish and Bailey 2012 p. 305.

²⁵ Wils 2009 p. 19.

²⁶ Whish and Bailey 2012 p. 305.

²⁷ See Case C-360/09 see especially para. 31, where the ECJ points out that the national courts are left with the 'weighing exercise'.

²⁸ Wils 2009 p. 23.

²⁹ See European Commission, 'White Paper on damages actions for breach of the EC antitrust rules' COM/2008/0165 final p. 10; Wils 2009 p. 23.

³⁰ Wils 2009 p. 24.

his direct or indirect purchasers or in the instance of a buying cartel to his direct or indirect suppliers. There is a qualification however: ‘the immunity recipient remains fully liable as a last-resort debtor if the injured parties are unable to obtain full compensation from the other infringers.’³¹

One way to induce compensation by the perpetrator is to reduce the amount of fines when compensation is provided on a voluntarily basis or to grant immunity on the condition that redress is made within the bounds of possibility, as is done in the United States. This could however undermine the deterrent or retributive value of the sanction if the amount of reduction is on par with the amount of the compensation. Therefore arguably the reduction should be less than the amount of the compensation.³²

Wils has pointed out that the private litigants’ interest and the public interest may vary from each other and due to better resources public enforcement should bear the responsibility regarding the substantive antitrust law and its formation.³³ In this regard Richard Posner has argued in the US context that the private actions have not been beneficial for the ‘antitrust doctrine’ and that private claimants have been successful in a way that has dismayed the scholarly observers of the antitrust laws. The kinds of cases brought by private parties would arguably not have been brought by the public agency.³⁴

Wils has argued that leniency should not shield from follow-on actions, as it would be unfair – the victims of the infringement should still have the right to compensation. While granting leniency applicants protection against damages actions might further increase the number of the leniency applications, it seems the preferable approach would be to incentivize the potential leniency applicants by way of higher sanctions that the leniency applicants could then escape.³⁵

Wils further noted that compensation with a penal aim, such as the treble damages, is problematic from the perspective of the *ne bis in idem* principle, which is a principle of the EU law, and may not allow damages that exceed the amount of full compensation.³⁶

³¹ European Commission Proposal for a directive of the European Parliament and of the Council, Strasbourg, 11.6.2013, COM(2013) 404 final, 2013/0185 (COD), Explanatory Memorandum, pp. 16-17.

³² Wils 2009 p. 24-26.

³³ Wils 2009 p. 28.

³⁴ Posner 2001. p. 275.

³⁵ Wils 2009 pp. 30-31.

³⁶ Wils 2009 p. 26.

10.3 THE EU INITIATIVES ON PRIVATE ENFORCEMENT

The EU commission has tried to step up anti-cartel enforcement via private enforcement.³⁷ The resources to prevent minor competition law violations are not abundant, and private actions against them could boost enforcement.³⁸ Private enforcement was deemed underdeveloped in 2004 by a comparative study commissioned by the European Commission, as only some 60 damages actions had been brought at the time.³⁹ Wish and Bailey contended that such a figure is misleading due to frequent out of court settlements that take place privately.⁴⁰

In 2008 the Commission published a White Paper⁴¹ on the matter, which was accompanied by a *commission staff working paper*⁴² and an *impact assessment*⁴³ which estimated that each year cartels may cost the victims from 5,7 billion euros to 23,3 billion euros.

Historically private enforcement in Europe has been lackluster. The Commission has much desired to step up private enforcement.⁴⁴ According to the Commission Green Paper private enforcement served deterrent purposes.⁴⁵ While the Green Paper emphasized such a deterrent function the White Paper seemed to lay more emphasis on the compensatory nature of private enforcement.⁴⁶

The Commission White Paper inter alia pointed out the need to compensate the injured parties, but rejected multiple compensation,⁴⁷ proposed collective redress brought about for example by a consumer association⁴⁸, the interests of the leniency applicant should be protected

³⁷ See Commission of the European Communities, Green Paper, 'Damages actions for breach of EC antitrust rules', Brussels, 19.12.2005

³⁸ Kanniainen and Määttä 2011. p. 59.

³⁹ Ashurst,, 'Study on the conditions of claims for damages in case of infringements of EC competition law', 31 August 2004. p. 1.

⁴⁰ Whish and Bailey p. 296.

⁴¹ See European Commission, ' White Paper on damages actions for breach of the EC antitrust rules' COM/2008/0165 final.

⁴² SEC(2008) 404.

⁴³ SEC(2008) 405 para. 45; See also Whish and Bailey 2012 p. 327.

⁴⁴ Whish and Bailey 2012 p. 295.

⁴⁵ Commission of the European Communities, Green Paper, 'Damages actions for breach of the EC antitrust rules, COM(2005) 672 final. p. 3.

⁴⁶ This is the perception of Wils, see Wils 2009, p. 15; See also Whish and Bailey 2012, p. 297.

⁴⁷ COM(2008) 165 final, p. 7-8; Whish and Bailey have specifically singled out the mentioned points in the White Paper, see Whish and Bailey 2012 p. 327.

⁴⁸ *ibid.* p. 4.

viz-a-viz the fellow cartelists⁴⁹ and that EU-wide disclosure rules regarding evidence should be introduced⁵⁰.

The White Paper further proposed that private parties should be able to rely on the decision by the National Competition Authority as proof in their follow-on actions for damages in other EU member states. As Wils pointed out it would not be sensible to litigate the same infringement again for the purposes of damages, as there is already a finding of its existence.⁵¹

The Commission issued a consultation document in 2011 on the matters concerning collective redress. It singled out some relevant principles that should be observed while designing the EU scheme for redress.⁵² The document underlined the need for effective redress: such a regime should produce certain and fair results in a reasonably timely fashion and simultaneously keeping an eye on the rights of the litigants.⁵³

The victims of the violation should get adequate information regarding the opportunity to collectively seek for redress and of the representative bodies that should advance their interests.⁵⁴

The consultation document also underlined the need to prevent ‘abusive litigation’, that perhaps plagues the US regime where class actions are brought in circumstances where the case might be unmeritorious. The Commission argued that the reasons for the unmeritorious cases lie in the multiple damages that may be sought in the US, the possibility for almost anyone to act on behalf of a group of victims, the availability of contingency fees (the remuneration the attorney gets in the event of a successful pleading)⁵⁵ for lawyers and generous discovery rules.⁵⁶ Accordingly the Commission argues that there should be no economic inducement towards unmeritorious litigation. For example the loser pays principle could provide protection against such cases.⁵⁷

⁴⁹ *ibid.* p. 10.

⁵⁰ *ibid.* p. 5.

⁵¹ *ibid.* p. 5; Wils 2009 pp. 20-21.

⁵² See SEC(2011) 173 final, ‘Towards a Coherent European Approach to Collective Redress’ Brussels, 4 February 2011.

⁵³ *Ibid.* p. 7.

⁵⁴ *ibid.* p. 8.

⁵⁵ See “contingency fee.” *The Oxford English Dictionary*. 2nd Edition revised, 2005.

⁵⁶ See SEC(2011) 173 final. p. 9.

⁵⁷ *ibid.* p. 9.

10.4 PRIVATE ACTIONS AS A METHOD OF ENFORCEMENT: A COMPARATIVE ANALYSIS

10.4.1 *Sweden*

The Swedish Competition Act (2008:579) provides in Chapter 3, art. 25 that when the substantive provisions of the act in Chapter 2 (art. 1 or 7) or Articles 81 or 82 (now art. 101 and 102 TFEU) are infringed intentionally or negligently, the undertaking responsible must reimburse the damage that was brought about by the infringement. The right to damages must be invoked within 10 years from the occurrence of the damage.

Both businesses and consumers that have been the victims of a cartel may claim damages in Sweden. There should be an adequate link between the damage and the violation of the Competition Act – the plaintiff bears the burden of proof in this regard.⁵⁸ A class action may possibly be invoked under the Swedish Group Proceedings Act (2002:599).⁵⁹ In the Swedish case law competition damages actions have been very rare.⁶⁰ The general rule in Sweden is that the financial state of the victim should be restored to a level equivalent to the one that would have existed in the absence of the infringement.⁶¹ Such an approach may be taken to exclude the possibility of multiple damages.

It has been suggested in the Swedish context by Levinsohn and Lidgard that increasing the number of private actions is unlikely to solve the problem with cartels. The American style private enforcement of competition law infringements would require fundamental changes in the Swedish law. Private actions in Sweden have their basis as a legal tool for individuals, but are not an actual tool for the general public they argued in 2002. Public enforcement, which adopts sanctions in accordance with the overall aims of competition law against competition law infringements was deemed better placed to serve the public interest in effective competition. It follows that the fight against cartels should be corroborated with sufficient resources that tackle the grave competition law violations and with more effective sanctions.⁶²

With regard to the Swedish context Nils Wahl argued on the other hand that in order to increase the risk of detection private parties should have improved possibilities to claims damages. In Wahl's view too the stepped up private enforcement should take place in conjunction with monitoring by

⁵⁸ Wetter Carl et al., *konkurrensrätt*, 4. Ed. Thomson Reuters, 2009. p. 865.

⁵⁹ Lag om gruppåtgång (2002:599); Wetter et al, 2009. p. 866.

⁶⁰ Wetter et al. 2009. p. 867.

⁶¹ Wetter et al. 2009. p. 871.

⁶² Levinsohn and Lidgard 2002, p. 85; See also Lidgard 2009, p. 47.

the public authorities. Wahl further added that the sanctions should reflect the harm in order to create a deterrent effect and that the level of sanctions was not sufficient in Sweden for the leniency program to function properly.⁶³

Finally, the Swedish 2006 committee said regarding the new Competition Act that damages claims corroborate public enforcement, but the foremost function of private actions is to compensate the private parties.⁶⁴

10.4.2 The UK

In the UK the government White Paper on the World class competition regime, argued that private actions are necessary. The injured private parties should be able to raise charges against the offenders to get compensated. Moreover the private resources will support enforcement.⁶⁵ Before the relevant ECJ case law, the right to claim damages in case of a violation of the EU competition law rules, was recognized in the UK.⁶⁶

The UK white paper pointed out that in the US the authorities may focus their resources on the pivotal cases, as private claimants relieve the enforcement burden of less critical cases.⁶⁷

Under the UK law, however for instance the US style multiple damages are not available as follows from a High Court decision, which stated that they would run counter to the *ne bis in idem* principle.⁶⁸

In 2007 the OFT published a discussion paper regarding private actions.⁶⁹ It suggested *inter alia* that representative bodies should be able to pursue the interest of consumers in the form of standalone actions, contemporaneously however follow-on actions on behalf of consumers were allowed under the Competition Act of 1998.⁷⁰

⁶³ Wahl Nils, *Optimala sanktioner inom svensk konkurrensrätt*, Konkurrensverket, Stockholm 2006. p. 6-7.

⁶⁴ SOU 2006:99 pp. 462-463.

⁶⁵ Department of Trade and Industry, 'A World Class Competition Regime', July 2001. p. 47.

⁶⁶ As Wish and Bailey said, under the Competition Act damages are available although this is not manifestly mentioned: section 60(2) sets out the obligation to observe the consistency with the EU case law (Crehan and Manfredi) and the possibility for a follow-on action under section 47A (inserted by section 18 of the Enterprise Act) and 58A (inserted by section 20 of the Enterprise Act) based on a finding of a violation. See Wish and Bailey 2012 pp. 306-307

⁶⁷ Department of Trade and Industry, 'A World Class Competition Regime', July 2001. p. 47.

⁶⁸ See *Devenish Nutrition Ltd v Sanofi-Aventis etc.* [2007] EWHC 2394, 19 October 2007. para. 52; Wish and Bailey 2012. p. 312.

⁶⁹ OFT discussion paper on damages, 'Private actions in competition law: effective redress for consumers and business', Discussion paper, April 2007. OFT916.

⁷⁰ *Ibid.* p. 4, 9.

After the discussion paper, a recommendation by the OFT was issued, which sought to improve conditions for redress for instance by allowing standalone and follow-on actions by representative bodies⁷¹, but also to prevent a culture of litigation – fears during the public consultation were expressed that cases without merit are brought by representative bodies, and that damages would gain a punitive nature.⁷²

Improvements of private enforcement in the UK have been recently elaborated on in a governmental consultation document, '*A Competition Regime for Growth: A Consultation on Options for Reform*'.⁷³ The emphasis was however on public enforcement. The aspects regarding the interaction between private actions and public enforcement were ignored.⁷⁴ In a subsequent public consultation paper '*Private Actions in Competition Law: A Consultation on Option for Reform*' private enforcement was characterized as complementary to public enforcement, and it was argued that this function will materialize in limited situations.⁷⁵ The Consultation paper however acknowledged that: 'In some circumstances, private actors may be better placed to know where anticompetitive behaviour is causing them harm and are best placed to weigh up the relative costs and rewards to them of pursuing an action'.⁷⁶ Consequently the Government emphasised the need for improved conditions for private actors to pursue damages cases.⁷⁷

In January 2013 the Government issued its response to the consultation paper, '*Private Actions in Competition Law: A consultation on options for reform – government response*'. The Government had decided amongst other things that representative bodies should be allowed to bring cases. Such representative bodies would be the consumer or trade associations, but for instance law firms would not be allowed to be the representative bodies.⁷⁸ The government decided to introduce measures acting against unmeritorious damage claims, rejecting the multiple damages. The contingency fees would not be allowed, and the loser would have to bear the costs (loser pays rule).⁷⁹

⁷¹ OFT, Private actions in competition law: effective redress for consumers and business,' Recommendation from Furse 2012 Office of Fair Trading, November 2007, OFT916resp p. 2.

⁷² OFT, Private actions in competition law: effective redress for consumers and business,' Recommendation from Furse 2012 Office of Fair Trading, November 2007, OFT916resp. p. 12, 21.

⁷³ BIS, *A Competition Regime for Growth: A Consultation on Options for Reform*, March 2011. P. 57, Para 5.49 ff.;

⁷⁴ See the criticism of this omission by Wardhaugh 2012a, p. 576.

⁷⁵ BIS, 'Private Actions in Competition Law: A Consultation on Option for Reform' April 2012. para. 3.5. p. 9

⁷⁶ *ibid.* p. 10.

⁷⁷ *ibid.* p. 10.

⁷⁸ BIS, 'Private Actions in Competition Law: A consultation on options for reform – government response' January 2013 p. 34.

⁷⁹ BIS, 'Private Actions in Competition Law: A consultation on options for reform – government response' January 2013. p. 40, 63.

In sum, all this is in line with the European approach that most importantly seems to reject the punitive US style damages, and emphasizes the compensatory nature of damages.

10.4.3 Ireland

In Ireland the Competition and Mergers Review Group contemplated the US treble damages, which have a deterrent purpose and further induce private claimants to pursue cases. No such provisions were suggested in Ireland however. They were seen as foreign in the Irish regulation environment, where damages actions' central aim is to compensate, and it was thought that damages actions could bring about 'wasteful litigation'.⁸⁰

Now the section 8 of the Irish Competition Act 2012 explicitly states that where the domestic competition rules in section 4 or 5 or art. 101 or 102 TFEU were infringed, a ruling on the violation by a court will be *res judicata* for the purposes of subsequent proceedings, which may then concern actions by private parties.⁸¹ As a result the private parties may be better induced to seek damages, as the causal relation between the damage and violation has been already proved, while merely the actual damage needs to be established. The violation of the competition law itself does not need to be shown by the private party, as the finding of court provided such proof. Whelan argues that the amendments may improve private enforcement, and if further deterrence is created, the public enforcement benefits from the private actions as well.⁸²

10.4.4 Finland

The Finnish Competition Act sets out in section 20(1) that where firms intentionally or negligently infringe the relevant prohibition in the act, they must reimburse the victims. The Tort Liability Act applies to damage cases, concerning inter alia the settlement of damage cases and the joint several liability.⁸³ Prior to the Competition Act of 2011, only businesses could seek for damages, whereas now importantly also other stakeholders,

⁸⁰ The Competition and Mergers Review Group, 2000. p. 79.

⁸¹ See Competition (amendment) Act 2012, An act to amend the Competition Act 2002; to amend the companies act 1990, and to provide for matters connected therewith, 20th June, 2012.; Whelan 2012d, p. 175, 178.

⁸² Whelan 2012d. pp. 180-181; See also Calvani and Carl 2013, p. 23.

⁸³ Kanniainen and Määttä 2011 p. 94; As per the Competition Act, section 20(3). The claimants must raise charges before ten years have elapsed since the occurrence of the violation.

such as consumers explicitly have the right to compensation.⁸⁴ The cartel members are responsible on a joint-and-several basis for the damage, bar the cases where a given cartel member under the court ruling is not liable for full damages.⁸⁵

The *Courage* and *Manfredi* rulings by the ECJ may further corroborate the case for damages where the EU competition law rules have been infringed.⁸⁶

In Finland few private actions have been brought. Reasons contributing to this tendency include the dispersed nature of the damages among a large number of people, the costs of legal proceedings and the evaluation of the damage. Allowing class actions could possibly alleviate the problem associated with the dispersed nature of damage. Further, evidentiary problems exist as usually the defendant holds the relevant information regarding the occurrence of the infringement.⁸⁷

Kuoppamäki notes that private actions serve both a reparative and preventive purpose in Finland.⁸⁸ As a general rule the compensation should cover the damages, but no more (ban on enrichment), and the passing-on defense is accepted. The claimant may be reimbursed for both direct and indirect damages, while he bears the burden of showing the extent of damages.⁸⁹

⁸⁴ Kuoppamäki Petri 2012 p. 96; While the damages may have their legal basis in art. 20 of the Finnish Competition Act or in Tort Liability Act art. 5(1), damages may also be awarded where there is an explicit contractual relationship between the victim and the cartel member. A breach of contract may arise where the customer is the victim of a cartel, which then has determined the amount of payment dictated in the contract, which would violate the principle of loyalty, which requires the observance of the interests of the contracting party. Moreover a contract is void as per art. 8 of the Competition Act, when it violates the substantive provisions of the Act. See Kuoppamäki 2012 p. 98; Due to considerations of reasonableness the amount of the damages may be adjusted as per the Tort Liability Act (412/1974) Chapter 2, section 1(2). When the damage is the result of a deliberate act, however, the damages should be fully compensated, unless special circumstances should otherwise dictate. See Kuoppamäki 2012 p. 99.

⁸⁵ Kuoppamäki 2012, pp. 99-100.

⁸⁶ Kuoppamäki 2012, p. 95; See Judgment of the Court of 20 September 2001. *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Other*, C-453/99.; See also *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* Joined cases C-295/04 to C298/04, 13 July 2006. Paragraph 61: 'It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC'.

⁸⁷ Kanniainen and Määttä 2011. p. 94.

⁸⁸ Kuoppamäki 2012 p. 97.

⁸⁹ Kanniainen and Määttä 2011 p. 94, 96; Kuoppamäki 2012 p. 97; Kuoppamäki has pointed out *inter alia* that there must be an adequate causal connection between the damage and the violation of Competition Act. Generally the plaintiff should establish both liability and the amount of damages. Kuoppamäki notes however that follow-on actions are based on the condemning judgment. See Kuoppamäki Petri 2012 p. 95, 97.

As Kuoppamäki points out, for one to effectively exercise his or her right to compensation, the required level of proof with regard to damages and liability should be such that it is viable to lodge damages claims.⁹⁰

10.5 CONCLUSION

Based on the Deloitte survey study in the UK companies view private enforcement as the least important measure to induce compliance with antitrust rules. The scholarly opinion on the deterrent effect of the private actions is divided. Several commentators have however argued based on the economic notion of deterrence that private actions as a tool of deterrence are plagued by the same compelling problem as corporate fines, namely the insolvency cap.

Moreover in the European context damages awarded have traditionally more of a compensatory rather than punitive nature, and multiple damages have been widely rejected in Europe both at the EU level and at the Member State level – multiple damages may run counter to the principle of *ne bis in idem*.

Therefore based on the foregoing, it seems that private actions do not present a viable alternative to individual sanctions. The private actions should be facilitated to the extent that they do not unreasonably prejudice public enforcement, which seems to play a key role in the detection of cartels. The approach of increasing the role of the representative bodies appears commendable for many reasons. Most importantly it reinforces the right to compensation.

The Irish law considers findings of a competition law infringement as *res judicata* for the purposes of follow-on actions. The author subscribes to the view that while abusive litigation should be avoided the standard of proof for establishing the infringement should be such, that one can viably pursue damages.

⁹⁰ Kuoppamäki 2012 p. 98.

11 Conclusion

As was stated in the introductory Chapter of this thesis the author attempted to assess in the European setting by way of a comparison the relevant arguments either for or against the introduction of individual criminal liability in the anti-cartel context. At one end of the spectrum was Finland, which lacked all individual accountability, whereas the rest of the countries subject to comparison held individuals accountable to varying extent. In Sweden however natural persons were not subject to custodial sanctions.

It followed from the comparative approach employed in this study, that the emphasis of the discussion shifted to a certain extent depending on the jurisdiction in question, thus reflecting the points of problems that had specifically been singled-out as particularly compelling at the national level. Indeed the comparative nature was the fundamental underpinning of this study and influenced the overall treatment of the subject-matter.

In this final Chapter the author will walk the reader through the arguments identified as crucial to a criminalization project in Europe and presents the results of the study.

11.1 THE OPTIMAL DETERRENCE ARGUMENT

The optimal deterrence theory has been advanced as a robust argument in favour of introducing criminal sanctions against individuals who have engaged in cartel conduct – this reasoning is derived from the fact that it appears to be infeasible to impose the optimal fine on the infringing company. However the underpinning of the optimal deterrence theory, namely that the actors are rational profit-maximisers, has not been proven, which makes it difficult to rely on this argument alone to justify criminal sanctions against cartel conduct.

Beaton-Wells and Parker noted that ‘the strongest predictor of knowledge and perceived likelihood of detection and enforcement was agreement with criminalization.’¹ Subsequently deterrence may hinge on the individual’s ‘normative appraisal of the law and its enforcement,’ which appears to undermine the optimal deterrence argument with its rational profit-maximizing individuals.

One may point out that the assumption made of rational actors does not take into account the influence of informal norms. It is equally true however that the available evidence cannot flatly reject the optimal deterrence theory

¹ Beaton-Wells and Parker 2012, pp. 12-13.

and the assumption of rational actors. Whelan has pointed out that cartelists may have multiple intentions that may include an attempt to avoid layoffs, which would not materialize without the extraction of the overcharge. It boils down to the question whether the *actus reus* was intended.

Measuring the deterrent effect appears to be beyond reach. Yet it does not warrant the conclusion that such an effect is absent. Indeed several jurisdictions have recognized that introducing individual accountability could be beneficial in terms of deterrence.

11.2 THE MORAL CONTENT OF CARTELS

The principle of *ultima ratio* dictates that only the most reprehensible conduct merits criminal prohibition. One argument concerning cartel conduct holds that due to the moral value of such behavior that by some accounts amounts to theft, which arguably is a *mala in se* offence, criminal sanctions are called for. Moreover the delinquency of cartels relates to the fact that they defy the whole market economy.

It seems that price-fixing could *inter alia* infringe the moral norms against cheating, deceiving and stealing, but the viability of the aforementioned concepts in the context of cartel activity is not beyond criticism. If rationality in the sense assumed by the optimal deterrence theory was proven, it would theoretically support a case to argue that the persons engaging in cartel activity intentionally infringe the said moral norms and subsequently would support the idea that from the perspective of retribution criminal sanctions are called for.

On the other hand there are those who view cartels as *mala prohibita* crimes, which would suggest that the legitimacy of criminal law could suffer if cartels were subject to criminal penalties. However one should not ignore the possible educative function of criminal law, which could shape public perceptions of the prohibited conduct. Criminalizing cartel conduct would send a distinct signal and could attach a stigmatizing label to the conduct, which in turn could induce compliance.

It has also been suggested that cartels share the penal value of tax fraud and insider trading which are subject to criminal penalties, thus inviting the argument that the coherence of the criminal justice system calls for a criminal ban against cartels. This argument was acknowledged for example in the Danish and Swedish contemplations.

Criminal measures should particularly target very harmful conduct, while the moral wrongfulness of a given conduct is not absolutely necessary for the introduction of a criminal prohibition. Regarding the harmfulness of the cartel conduct it was noted that cartels clearly bring the sort of harm that could justify criminal sanctions. According to one conservative estimate

harm brought about is in the billions of dollars annually. Consumer products tend to be subject to at least a 10% markup.

Moral wrongfulness however remains important in terms of the legitimacy of criminal law. It is crucial how the public, after having become aware of the nature of cartel conduct, sees it. It may be noted that the Australian and UK public surveys showed that in the minds of the public cartels had a heavier link to the moral aspects than the economic ones.

11.2.1 Judicial Attitudes

Another point that may make a criminalization project a shaky endeavor is the lack of prosecutorial and judicial support, which may be crucial to the success of a criminal anti-cartel regime. Courts may not be willing to convict the cartelists who tend to look more sophisticated than your average street criminal. Such judicial attitudes were witnessed in the UK trial of the Marine Hose cartel where the Appellate Court referred *inter alia* to the good character of the defendants, and would have been willing to reduce the sentences, but was prevented from doing so due to a US plea bargaining agreement.

As opposed to the UK experience, in Ireland several convictions have been reported and it has been suggested that the number of guilty pleas indicates that the business people acknowledge that cartels are treated severely by courts.

In the case of Duffy the judge severely condemned cartel conduct. The judge *inter alia* appeared to ignore the previously untarnished reputation of the defendant. However the defendant was handed a suspended prison sentence in that case – the Irish courts have frequently awarded suspended sentences, and there remains to be a case where an individual is actually sent to prison. An individual who failed to pay a fine went to prison for 28 days. Yet the Irish experience thus far appears to be a more positive one than the UK one.

Ireland has recently increased the maximum prison term to 10 years.² This move has been criticized, since it could be argued that relatively short prison sentences would bring about an adequate deterrent effect against white-collars and that more emphasis should be laid on enforcement rather than the severity of sanctions. However it has also been said that the higher sanctions could send the message to the judges to award unsuspended sentences – this author tends to find such reasoning convincing, where the judicial attitudes are problematic.

² It may be mentioned that this increase followed an IMF bailout package that required the strengthening of competition law enforcement.

11.3 EU ANTI-CARTEL ENFORCEMENT

In light of the principle of coherence it may be noted that while the EU has sought to introduce an EU-wide criminal ban on market abuse, there is no indication of a similar prohibition in terms of cartels. This may cast into doubt the commitment to the idea of a ‘consistent and coherent’ EU criminal policy. Disregarding the principle of coherence may undermine the moral message sent by criminal law and could subsequently dilute the potency of criminal law.

The European Commission argued that the lack of coordination among the EU Member States with regard to minimum rules on market abuse was problematic – by analogy one could argue that precisely the lack of coordination of cartel regulation across Member States is a source of difficulties.

It could be beneficial to introduce criminal measures against cartels across the EU member states and also at the EU level since in the absence of such rules for instance the information exchange between the EU Member States and the Commission could be undermined. Moreover if cartels were not criminalized at the EU level, it could inter alia undermine the leading role of the Commission as the enforcer of the cartel laws if cartel detection fared better at the national level.

Art. 12(3) of the Regulation provides for information exchange between the national competition authorities in the enforcement of Article 101 TFEU. The Swedish committee argued that the Swedish participation in the information exchange could be hampered if a criminalized regime was introduced in Sweden. The exchanged information may also be used in the enforcement of the national competition laws. However the information received may not be used as evidence if the sending state does not have sanctions similar to the receiving state or if the evidence has not been collected in a way that this on par with the standards in the receiving state. While the transmitted information may not be used as evidence, it could be employed as intelligence. Such intelligence received from states with administrative regimes could prompt cartel investigations in states that have criminalized regimes – individuals and companies in the former jurisdictions could then be more reluctant to cooperate unless if they qualify for leniency. The *Commission Notice on cooperation within the Network of Competition Authorities* provides protection for the leniency applicants against the employment of exchanged intelligence, and the OFT for instance has said that due to the spirit of the aforementioned Commission Notice intelligence received would not prompt criminal investigations. Yet the foregoing specifically appears to support the argument that an EU-wide approximation of the sanctions and leniency programs is called for, which

would then facilitate the information exchange between the EU member states.

For the time being, it appears that cartel conduct could not be criminalized at the level of the EU institutions: the introduction of the Lisbon Treaty made Article 83(2) TFEU the apparent legitimate legal basis for criminal measures and it provides only for the adoption of directives. Art. 83(2) TFEU may be deemed the most legitimate option due to the availability of the so-called emergency brake, which allows a member state to opt out if ‘fundamental aspects’ of its criminal justice system could be affected. In this respect the doubts regarding the EU’s criminal law competences relate to the requirement in Article 83(2) TFEU that there should be a sufficient level of prior harmonization in the relevant field. However it appears to be possible to argue that any prior non criminal-measure may be adopted virtually immediately prior to the criminal measure to satisfy the requirement of Article 83(2) TFEU.

At the end of the day the Treaty could be amended in an attempt to criminalize cartel conduct both at the EU level and at the Member State level.

Under the current framework criminalizing cartels at the EU level would be problematic: Art. 6 ECHR provides that anyone, who is subject to a criminal charge should be tried ‘by an independent and impartial tribunal’. The Commission which exercises investigatory, prosecutorial and adjudicatory functions would not seem to fulfill the aforementioned requirement set out in art. 6 ECHR. The decisions of the Commission are however subject to a review by the General Court which may be deemed an ‘independent and impartial tribunal’. While that may suffice under an administrative regime, it would not if custodial sanctions were imposed, since art. 6 ECHR would require that already the first instance to tackle the case would be an ‘independent and impartial tribunal’. Subsequently if cartels were subject to a criminal prohibition at the EU level, the Commission could no longer exercise the adjudicatory function – thus warranting the argument that for the foreseeable future a criminalization project may be more appropriate at the Member State level.

Moreover, if an EU-wide criminal cartel prohibition was adopted, it has been pointed out that the consistent application of competition law across EU Member States could become impaired. This problem could arise if the criminal offence was enforced at the Member State courts, which in turn would make it difficult for the Commission to see to the consistent application of the cartel laws, as the Commission does not have a standing in national courts. Alternatively, it has been proposed that a possible European Public Prosecutor could be entrusted with the task of prosecuting in Member State Courts.

If the EU does not move to criminalize cartel conduct, there is the possibility that individual Member States could introduce criminal prohibitions against cartels. Arguably the decentralization of anti-cartel enforcement has provided the Member States with sufficient experience to adopt criminal regimes. In light of the thus far failed UK criminal anti-cartel enforcement, the argument that the cartel criminalization project should be left to the resourceful member states is however undermined since firstly the member states lacking a criminal regime might be more reluctant to adopt one after the UK debacle and secondly since the UK problems could partly be blamed on the absence of an EU harmonization.

While contemplating a criminalization of cartel conduct at the EU level one should bear in mind that the EU competition policy targets actions that have an effect on Member State Trade. Thus cartels of lesser significance would not attract criminal liability at the EU level. In such a context if the national mode of enforcement was administrative individuals would escape criminal liability. Arguably a criminal anti-cartel regime at the EU level in connection to Article 101 TFEU would be feasible only if Member States had criminalized regimes as well.³

Vice versa, it would be impracticable if national rules provided for criminal liability and individuals would be subject to custodial sanctions whereas larger cross-border cartels would only be subject to corporate fines in the absence of criminal liability at the EU level. This could hardly be the objective of a 'coherent and consistent' EU criminal policy.

From a cost point of view, the policy makers and public would do well to bear in mind that the results of a criminal anti-cartel regime may not become visible in the early stages of such a regime. The competition authorities across Europe would have to have sufficient resources to recruit competent staff members. As the Union law does not determine the required resources, the Member States themselves have to undertake this evaluation. There may be added costs brought about by art. 6 ECHR, which requires that 'everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands...' – Individuals might find themselves subject to prosecution in Member States whose language they do not speak. Moreover legal assistance free of charge should be provided.

While it has been argued that more robust investigatory powers under a criminal regime could contribute to the reduction of needed resources, it is also true that one cost of a less material form is the possibility that once introduced the criminalized regime would not take momentum, perhaps because cartel conduct would remain unaffected or the criminal rules would

³ For the purposes of a criminalization of cartel conduct across Member States art. 103 TFEU as a legal basis seems problematic, since it concerns art. 101 TFEU.

not be applied – the result could be the weakening of the legitimacy of the criminal sanctions.

Moreover, due to the seeming democratic deficit of the EU, there is some merit to the argument that introducing criminal measures would more appropriately be an undertaking for the EU member states alone, without the interference of the Union. This approach could support the legitimacy of criminal law, since elected national bodies are at the core of legislating laws at the national level.

While one should prevent the excessive use of the EU criminal law measures by giving due regard to the essentiality requirement in Article 83(2) TFEU, this authors tends to subscribe to the view that an EU led harmonized criminal regime against cartels would appear to be necessary. One could argue that the experience of the current administrative anti-cartel regime may suggest that more robust measures are called for.

In the foreseeable future the criminalization project may remain something for individual member states at least due to practical reasons. In the longer run it appears however that the cartel criminalization project should be one for the whole Union, as criminal measures may be the last resort tool that are required to address cartels.

11.4 DIRECTOR DISQUALIFICATION ORDERS AND PRIVATE ACTIONS

While the OECD has recommended that its member countries step up their enforcement against cartels the European Competition Commissioner has rejected such a move at the EU level fairly recently. One school of thought has suggested that in order to instill individual accountability in the European antitrust landscape, perhaps instead of adopting criminal sanctions, one should consider the possibility of introducing DDOs. It might be argued that avoiding the more seismic shift to criminal sanctions, one is giving due respect to the ultima ratio principle, namely using criminal law only as a last resort. In that sense an approach favouring DDOs as a method of introducing individual accountability could be commendable.

For instance Sweden explicitly rejected a criminal anti-cartel regime, while it adopted DDOs. In contrast in the UK the Government was of the view that the DDOs could not take the place of the cartel offence. Arguably criminal sanctions carry a stronger deterrent effect than DDOs, for instance the DDO may be just a way to retire while the company could reimburse the individual for any loss of salary. Moreover DDOs could only target directors, but not other perpetrators. One concern is that DDOs would disproportionately apply to the directors of small companies. A study of

surveyed businesses by Deloitte also indicated that companies considered criminal sanctions as weightier than the DDOs. It has been suggested in the literature that for the companies DDOs are more of a 'cost' than a penalty.

What is more, if DDOs are viewed as a criminal sanction under ECHR law, individuals could still have recourse to the full array of legal protections in a similar fashion as under a criminalized regime, thus making it harder for the authorities to obtain information from individuals (due to art. 6 ECHR and the right against self-incrimination) – thus making it questionable whether from a practical point of view one should favour DDOs over individual criminal sanctions. DDOs could also affect the information exchange between MS authorities due to the restriction set out in art. 12 in Regulation 1/2003.

On the other hand there are those, such as this author, who see the DDOs as a valuable complement to criminal sanctions, but not the panacea for the absence of individual liability. While directors, whose conduct has amounted to negligence (i.e. failing to instill compliance), may not be caught by a criminal prohibition, they could become subject to a DDO. However various sources in the UK, Finland and Sweden have noted the difficulty of monitoring the individuals subject to DDOs. If individual Member States chose to adopt DDOs, one should bear in mind also that, since the EU law does not recognize DDOs, the imposition of a DDO in one Member State would not prevent the director in question from assuming a managerial role in another Member State that lacks similar sanctions.

Regarding private actions as a cartel cracking tool, it was noted that a UK survey study viewed them as least important. Further they appear to be beset by the insolvency cap in a similar fashion as the corporate fines. It also seems that multiple damages would be inappropriate in Europe, they could conflict with the principle of *ne bis in idem*. Thus it appears that while private actions are important especially from a compensatory point of view, they are not a viable alternative to individual criminal sanctions.

11.5 THE DESIGN OF THE CARTEL OFFENCE

The UK Enterprise Act criminally prohibited cartel conduct in an attempt to increase deterrence. The Penrose and Hammond report had noted that competition law experts favoured a criminal prohibition of horizontal cartels, but would exclude vertical agreements from the scope of the offence. Basically the Act, which has been already amended, prohibited individuals from dishonestly entering into arrangements with each other, including

price-fixing, output restriction, market sharing or bid-rigging. Thus the Act targeted the so-called hard-core cartels.

Similarly, regarding the scope of the envisaged criminal cartel offence, the perception of the Swedish 2004 committee (which produced a green paper) was that the criminal measures should target only the most serious violations, such as price-fixing, market sharing and output restrictions. The committee further argued that the normal offence should attract a prison sentence. The majority of the Danish committee on whose proposal the revision of the Danish Committee Act was modeled on also took the view that custodial sanctions should be introduced against hard-core cartelists. The Danish committee argued that vertical agreements should be excluded from the scope of the offence. It also noted that white-collar offences generally incorporate the mental element of intentionality.

The Swedish 2004 committee noted that criminalizing all-inclusively conduct that is liable to cause damage is problematic since the criminal prohibition should also observe foreseeability and legal certainty. While it would be possible to criminalize only bid-rigging cartels, the 2004 committee suggested that also other types of hard-core cartels should be covered. In contrast to the aforementioned Nordic policy choices or contemplations, Ireland has ended up criminally prohibiting also the abuse of a dominant position. In the meantime bid-rigging cartels are not subject to custodial sanctions in Ireland.⁴ The aforementioned difference concerning the abuse of a dominant position invites the question whether a possible criminal prohibition should cover them. An underlying distinction that can be made is that while cartels conspire, dominant firms exercise a unilateral act, thus warranting the argument that cartels more appropriately merit criminal sanctions. Moreover in terms of an abuse of a dominant position, there is a thin line between legitimate and illicit conduct, which leaves it open for the defence to argue the former. A criminal prohibition against the abuse of a dominant position would not be likely to meet the requirements of legal certainty, since it would be difficult for firms to determine in advance whether their conduct falls within the scope of the prohibition. Moreover the implications of erroneous impositions of custodial sanctions would be costly. Furthermore, a criminal prohibition could have a chilling effect on legitimate conduct. Indeed it seems reasonable to argue that the criminal prohibition should cover only the so-called hard-core cartels.

Whether vertical agreements should be subject to Article 101 TFEU prohibition has been subject to debate. While hard-core cartels resort to the combination of market power, vertical agreements do not. Moreover vertical agreements may for instance improve the quality of services. Various

⁴ A further distinction is that Irish defendants get to resort to a provision similar to art. 101(3) TFEU as a defence.

commentators have thus taken the position that vertical agreements should remain outside the scope of a criminal prohibition. In Ireland however vertical agreements are subject to a criminal prohibition. In the UK and Sweden committee contemplations noted the possible pro-competitive effects of vertical agreements. The Swedish committee noted that singling-out the vertical agreements that should fall within the scope of the criminal prohibition would be difficult. The Swedish committee rejected the idea of criminalizing vertical agreements due the possibility that economic analysis is required – something which would not make it feasible to criminalize even very serious cases of vertical restrictions. Thus it appears that a criminal cartel offence is better off excluding vertical agreements.

The Swedish committee envisaged that the possible criminal offence should also cover the violations of art. 101 TFEU, after all Sweden should apply the same sanctions to enforce both the EU and national competition laws. The committee assumed that Regulation 1/2003 would not apply when natural persons are targeted for criminal prosecution, since firms are already subject to fines.⁵

In contrast, one important point of discussion in the UK has been whether the cartel offence is national competition law for the purposes of Regulation 1/2003. If answered in the affirmative, simultaneous EU proceedings would halt national criminal proceedings.⁶ For instance a British Court has adhered to the perception that the cartel offence is not national competition law for the purposes of Regulation 1/2003: Whelan explained that the Court ‘held that the Cartel offence is outside of the scope of Regulation 1/2003 as it is not a “national competition law” within the meaning of that piece of EU legislation: the Cartel offence does not involve a decision whether a given agreement is valid or rendered invalid for infringement of Article 101 TFEU.’⁷ The recital 8 of Regulation 1/2003 says that ‘... , this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings

⁵ In this respect in Ireland in the context of regulation 1/2003 worries have mounted that a cartel whose members are exclusively based in Ireland, but which could have an effect on Member State Trade, could attract prosecutions as per the national and EU provisions, since the Irish regime criminally bans the infringements of both national and EU competition law. In this sense one could argue that the UK way of separating the cartel offence from the national competition law appears sensible.

⁶ The Swedish 2006 committee noted that since the European Commission took the position that the Economic Crime Authority would fall within the scope of Regulation 1/2003, the competence of the Economic Crime Authority would be dependent on the Commission assuming proceedings as is set out in art. 11(6) of Regulation 1/2003 – this would mean that the national competition authority could no longer proceed with the case.

⁷ Whelan 2012b, p. 599 footnote 52; see *IB v The Queen* 2009 EWCA Crim 2575 at para 34.

are enforced,' which may support the UK position. However art. 3(3) of Regulation 1/2003 says that it does not 'preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.' It has been put forward that the aforementioned recital 8 only gives further details regarding art. 3 of Regulation 1/2003 and subsequently that art. 3 is applicable to national laws that for the most part do not have a differing objective from Articles 101 and 102 TFEU. It appears to be somewhat implausible to argue that the UK cartel offence has a predominantly different objective from Article 101 TFEU. Indeed the UK cartel offence sought to improve deterrence due to the perceived inadequacy of corporate fines. Wils argued that the cartel offence is 'a means whereby competition rule applying to undertakings are enforced.'⁸ However at the end of the day it is the European Court of Justice, which may ultimately settle the question. It seems that the foregoing further reflects the need for an EU-led action and that for the time being the UK may have chosen the sensible path.

The Swedish 2004 committee argued that it could be subject to an examination whether a criminal cartel offence should cover concerted practices. The committee pointed out that the difference between an agreement and concerted practices is vague and argued that also the latter should be subject to a criminal ban lest the preventive effect be impaired. The Danish criminal prohibition covered also concerted practices as does Article 101 TFEU. As opposed to that the UK cartel offence does not cover concerted practices due to reasons related to legal certainty. The UK Government took the position that concerted practices should be excluded from the scope of the offence, since there should be a meeting of minds, beyond what the notion of concerted practices implies. Indeed the UK approach may be favoured since it is preferable that cases where doubt remains as to their unlawfulness stay outside the scope of the criminal offence.⁹

Another question is what the mental element should be like in the cartel offence. It has been pointed out that the dishonesty requirement became a part of the UK cartel offence to display the moral wrongfulness of the offence. In the UK the dishonesty element was dropped while the requirement of intention to enter the cartel agreement was retained. While one could argue that the cartel offence should incorporate an element that goes beyond merely the intention to enter the cartel agreement, the argument

⁸ Wils 2005a p. 133; See also Department of Trade and Industry, *A World Class Competition Regime* July 2001. In particular at para 7.2.

⁹ Whether the cartel offence should be accompanied by inchoate liability for attempt was rather convincingly rejected by the Swedish 2004 committee which pointed out that as the cartel offence involves the entering into an agreement or its implementation, the point of completion of the offence lies early, thus criminalizing only the completed offences would suffice.

that the greatest delinquency resides in the cartel agreement itself which is known to be harmful and unlawful seems reasonable, both in relation to the mens rea and actus reus elements. The secretive nature of the cartel seems to add to the reprehensibility of the cartel conduct. This author takes the view that while the word ‘agreement’ could capture the delinquency, adding the word ‘intentionally’ would speak for the awareness and determination and should subsequently be incorporated in the definition of the cartel offence. This reasoning seems to be in line with the Swedish 2004 committee contemplation and the revised UK cartel offence.

The recent amendment to the Enterprise Act dropped the dishonesty requirement from the cartel offence.¹⁰ While the dishonesty requirement may have sought to reflect the blameworthiness of the cartel offence, the problem is that there was no consensus among the public regarding the blameworthiness of cartel conduct, thus leaving room for the defendants to argue that their conduct was not reprehensible. The Government argued that dropping the dishonesty requirement will make prosecution easier and will improve deterrence. The Government pointed out that the prosecution will still need to establish intention (mental element) after the revision of the offence in conjunction with the physical element¹¹ and acknowledged the need of an explicit mental element in the offence, but argued that even without the dishonesty element the harm caused by cartels, which is internationally recognized, warrants custodial sanctions up to 5 years.

The UK Government opted for a choice which included not only the removal of the dishonesty requirement, but also excluded from the scope of the offence agreements that were made openly.¹² The advantage of that approach is that it would not require the assessment of the economic effects to obtain convictions¹³ – when the dishonesty requirement was a part of the offence, the defendant could put forward the argument that he believed that Article 101(3) TFEU exemption would apply, which in turn could have affected the jury’s assessment of dishonesty. From the perspective of art. 101(3) TFEU, the Government chosen option could be favorably viewed since if the exemption under the aforementioned provision is pursued while

¹⁰ Prior to the amendment the dishonesty requirement had barely been tackled in the case law.

¹¹ It appears that the Irish offence lacks a description of a mens rea element.

¹² In order to avoid the dilution of criminal law and unfair labeling, it has been argued with regard to the UK cartel offence that it could be associated with immoral conduct such as deception. This association is facilitated by the nature of cartels as something hidden, which exacerbates the false supposition of the customers that unrestrained competition obtains.

¹³ The *British Airways* case implied that the dishonesty requirement opened the gateway for the introduction of economic evidence, allowing defendants to say that they thought the conduct was not harmful and therefore not dishonest. It may be noted that the Irish regime allows the introduction of economic evidence during court proceedings.

attempting to avoid also criminal sanctions, one should make the agreement public prior to implementation.

The *actus reus* (the objective element) in the criminal offence refers to the harm brought about by the offender.¹⁴ One may ask whether the definition of the cartel offence should draw on the harmful effects of the offence. This Author subscribes to the view that designing an offence that draws on the harm brought about may not be favoured since linking the lack of competition to damages would be difficult in practice. The harmful effects of cartels may usually be presumed. It would not be sensible to require that in order to establish criminal liability the harm would have to be proven. In a way this boils down to the question whether the prohibition should target the conduct or the results. It appears for instance that the UK follows a model that prohibits the conduct. Indeed prohibiting conduct seems to call for more naturally criminal sanctions due to the moral evaluation involved whereas assessing the market effects is more appropriately dealt with under the civil regime. With respect to a criminal offence, it appears that prohibiting conduct is beneficial also in terms of legal certainty.

11.6 CRIMINAL ENFORCEMENT AND THE ROLE OF THE COMPETITION AUTHORITY

The criminalization of cartel conduct could also have a bearing on the role of the Competition Authority – indeed the cartel criminalization project is a demanding endeavor and one should not narrowly focus on the possible benefits, such as increased investigatory powers or a strengthened leniency program, since the determination of the role of the competition authority may be fraught with difficulty. The collapse of the prosecution of the *British Airways* case appears to highlight this point.

The performance of the Competition Authority will be important under a criminal anti-cartel regime. The reputation of the Authority is valuable: whether business people consider the competition authority fair is also important as attitudes towards compliance may depend on procedural justice. In Germany worries have mounted regarding the possibility that the effective role of the German competition Authority would suffer in the event that public prosecutors took on criminal cases.¹⁵ Indeed public prosecutors elsewhere have been reluctant to take on cartel cases.

¹⁴ Alternatively the cartel offence could draw on the cartel profits. The Swedish 2004 committee noted that it usually is the case that cartels go after profits, which would make it redundant to incorporate a requirement of profits in the definition of the cartel offence.

¹⁵ Wagner-Von Papp 2011, under the heading 'ii. The Division of Competences: Efficient Bundeskartellamt v Inefficient Prosecutors' at paras 1-2.

In the UK the Hammond and Penrose report had acknowledged early on that it is important to carefully pick the body that is going to undertake criminal prosecution of cartels. The report noted that the OFT alone could be entrusted with the task or alternatively another body could be designated with the task of prosecution. The advantage of the former option is according to the report that the OFT could draw on its competition law experience. However, problematically the OFT lacks criminal law experience. Another problem identified by the report was that the prosecutors inside the OFT could become detached from the mainstream developments of criminal law or could bend in face of the policy pressures of the agency instead of having an independent role. The report favoured the option that would entrust the Serious Fraud Office with the task of prosecuting cartels, since it had a considerable team of experienced prosecutors that have criminal law experience. While the option entailed additional costs since the SFO would have to treat the cases with the needed primacy, the costs would not be considerable as the prosecution teams are already available. Therefore this would be a less costly option than building a new team within the OFT.

It seems that the risk of prosecutors becoming detached from the mainstream developments of criminal law was borne out by the British Airways case as the OFT did not observe the duty of disclosure – not disclosing witness interviews was a mistake that an experienced prosecutor may not have made. This prompted the judge to doubt whether the defendants could get a fair trial. Remarkably the OFT had prepared its case for four years and yet the case collapsed prior to any witness hearings. The value of the case was such the SFO could have undertaken it. This appears to signify the importance of clearly defining the respective roles of the bodies that take part in the investigation and prosecution of cartels. Indeed, the Swedish 2006 committee especially underlined the importance of formalizing the relations between the Competition Authority and the Economic Crime Authority in the event that a criminalized regime against cartels was introduced.¹⁶ The downside is however that the independence of the Competition Authority would be undermined. On the other hand there may be some synergy benefits involved.

All in all, the outcome of the British Airways case was not encouraging for those who favour the criminalization of cartel conduct. The OFT prepared a report which assessed the prosecution in the aforementioned case and acknowledged that mistakes took place while a number of uncommon factors were involved. It was noted that the trustworthiness of the witnesses may come into question when the witnesses themselves had taken part in the infringement and obtained immunity in a cartel where there were only

¹⁶ Incidentally, it may be noted that in the US a model has been adopted where one agency (the DOJ) undertakes both the investigation and prosecution.

two members – and the precarious position of the prosecutor who relies on the evidence produced by the leniency applicant. It seems to confirm the need for a body, which has experience in criminal law. The Condor Board Review noted that the OFT had ‘a steep learning curve’ with the criminal prosecution. The Condor Board Review acknowledged that the extent of the disclosure obligation was not predicted. Despite the hardships encountered in the UK cartel prosecution, the UK has expressly rejected discarding the cartel offence.

Instead of entrusting the public prosecutors with the criminal prosecution the 2004 committee suggested that the Swedish Economic Crime Authority should take on the task. The Swedish committee pointed out that the investigations would require the participation of the Prosecutor from the very beginning. Experts from other authorities, such as the tax administration are on secondment to the Economic Crime Authority. To an extent this approach resembles the UK one, where a specialized authority (the Serious Fraud Office) undertakes the prosecution instead of the public prosecutors. Yet one should note that crucially the enforcement task in the UK is a shared endeavor between the OFT and the Serious Fraud Office. To sum it up, in light of the UK experience one may commend the Swedish proposal to entrust the Economic Crime Authority exclusively with the enforcement of the cartel offence.

11.6.1 Parallel Administrative and Criminal Regimes

The current Author tends to think that due to reasons related to effectiveness it is unlikely that the administrative anti-cartel sanctions against companies would be dropped in Finland or Sweden in favour of a regime that would exclusively rely on criminal enforcement. Rather it seems that corporate fines would exist in the foreseeable future alongside any envisaged individual criminal penalties.¹⁷

Since administrative enforcement has been the chosen mode of anti-cartel enforcement in Finland and Sweden it seemed appropriate to examine the rationale behind the administrative enforcement to see if any lessons can be derived therefrom. It may be noted that while Germany has a more systematic approach, Finland and Sweden have a patchy collection of administrative sanctions. It seems that such a lack of coherence is not desirable. Due to the absence of a coherent system in Finland, the introduction of the administrative anti-cartel enforcement was not preceded by a thorough evaluation of the pros and cons of criminal enforcement as an alternative. Minor offences, attracting on-the-spot fines, remain under the

¹⁷ See Whelan 2013b, p. 147; See also OFT, *An Assessment of Discretionary Penalties Regimes*, OFT 1132, 2009 at para. 1.4

criminal justice system, which arguably reflects the need for an overhaul of the Finnish system of sanctions – such an overhaul should include rethinking concerning anti-cartel enforcement.

It seems that administrative anti-cartel enforcement has been spurred by effectiveness considerations prompted partly by enforcement at the EU level, which is administrative in name at least. Indeed Finnish and Swedish commentators have argued that the EU which lacked explicit criminal law competence prior to the Lisbon Treaty, prompted to some extent the adoption of administrative sanctions at the national level due to their perceived effectiveness and the idea that they would live up to the EU requirement of effective, proportionate and dissuasive sanctions in the implementation of EU measures at the Member State level. It seems that while the legislators valued the supposed effectiveness, they failed to appreciate the demands of proportionality and coherence as the patchy collection of sanctions appears to demonstrate. Indeed Furse argued in the UK context that precisely the absence of an EU harmonization was to some extent to be blamed for the difficulties in the UK criminal anti-cartel prosecution¹⁸ – the argument is notably strengthened by aforementioned Finnish and Swedish discussion regarding a patchy collection of sanctions.

Regarding the appeal of the administrative regime, it may be said that it appears to be less resource-intensive. Furthermore, one rationale has been the attempt to curb the inflation of criminal law. High punitive antitrust fines could however at least to some extent defeat the purpose of the last resort principle, which dictates that criminal sanctions should be the ultimate measure.¹⁹

There was for instance the fear for higher standards of proof under a criminal justice system: indeed it could be argued that from a resource point of view allocating resources exclusively to administrative enforcement might make more sense, since due to the presumably higher standards of proof under the criminal regime, securing a conviction would be more resource-intensive than under the administrative regime. Whether the possible higher standards of proof under a criminal regime should impede the introduction of a criminalized anti-cartel regime has been discussed both in the Swedish and UK contexts. A plausible point was made by the British Competition Appeal Tribunal, which said that irrespective of the applied standard of proof (criminal or civil), the outcome of the case might not be dramatically affected. Ultimately however the standards of proof may depend on the dictates of the national law. It appears that the argument of higher standards

¹⁸ Furse 2012, p. 223.

¹⁹ The problem of presumably low cartel detection rates could possibly be addressed by introducing increasingly punitive antitrust fines, which may however conflict with the principle of proportionality.

does not present one with grounds that would warrant the rejection of a criminal anti-cartel regime.

Furthermore, the Swedish committee predicted that the criminal investigation would be need to be prioritized, subsequently delaying the administrative inquiry which would be put on hold pending the criminal preliminary investigation. If the case attracts criminal prosecution, in the UK context it has been noted that the collection of evidence would observe criminal law standards from the beginning. The argument has been made however that the deterrence gain would be worth the delay. Furthermore, in the Swedish context provided that the Economic Crime Authority was primarily responsible for the investigation, the Competition Authority could not conduct meanwhile dawn raids.

Another argument that has been used to dilute the attractiveness of criminalizing cartel conduct is the possibly wider notion of the right against self-incrimination under a criminalized regime. Under the Finnish regime the right against self-incrimination is already observed, but the extent of the protection needs to be clarified. One important point of comparison between the Swedish committee deliberation and the UK design of the offence in this respect was that while the Swedish committee envisaged that evidence obtained prior to a criminal suspicion could be used in subsequent criminal proceedings, the UK provides that evidence acquired under the civil regime will not be available for the criminal prosecution due to the less robust protections under the civil regime. This way the administrative investigations would not be compromised either, since natural persons who may be interviewed by the competition authority, do not have to fear that their statements could be used against them in possible subsequent criminal proceedings. The UK approach preserves the integrity of the civil leniency program and may therefore be preferred.

It has been argued that the aforementioned possible strengthening of the defense rights could be counterbalanced by more robust investigatory powers available under a criminalized regime. Indeed several commentators and jurisdictions appear to have acknowledged the practicability of such powers in the fight against cartels. For instance the recent Danish committee argued that the investigatory tools in the cartel context were not on par with those available for the investigation of other white-collar offences. It seems that the more robust investigatory tools that depend on the introduction of custodial sanctions provide a fairly strong argument in favour of criminalizing cartel conduct.

The total costs of a criminal anti-cartel regime were estimated to amount to some 44 million Swedish Crowns per annum (approx. 4,5 million euros). The 2006 committee however took the position that assigning resources to criminal enforcement would not be warranted since they could be also allocated to the already existing administrative regime.

Indeed in Ireland it appears that in the early 2000s the Competition Authority had not been able to launch timeous investigations due to a lack of resources. The cartel cases tend to be resource-intensive due to the time-consuming nature of the trials. In Sweden it was noted that the Economic Crime Authority would need more resources to tackle cartel cases. Also in the UK it was argued that the *British Airways* case revealed that the investigative authority may need more resources, and that this question was not tackled by the reform of the cartel offence. The Hammond and Penrose report acknowledged the costs if the Serious Fraud Office was included in the enforcement endeavor, but estimated that the costs would not be considerable as the prosecution teams were already in place.

Despite the resources needed, it seems that the case has been made in favour of individual criminal sanctions.

On a different note, one possible difficulty is that parallel enforcement could produce disparate case law since both general courts and the Market Court would deal with the cases, the Swedish committee noted. In the UK context too it has been argued that more attention should have been paid to the underlying problems related to parallel criminal and civil enforcement. The Swedish committee also highlighted the poor track record of parallel enforcement in Sweden. Actually, it has been suggested that arguably the Irish criminal anti-cartel enforcement regime has been more successful than its UK counterpart due to the lack of parallel enforcement. Also in the US civil and criminal proceedings are not pursued in parallel. The OFT itself has acknowledged that parallel enforcement involves difficulties.

In the UK discussion another point of importance has arisen, namely to what extent evidence provided by the leniency applicants should be subject to disclosure – this question is relevant especially in terms of the leniency applications produced under the administrative regime, as disclosure may affect the attractiveness of becoming a whistle-blower. Leniency being an important cartel detection tool has prompted commentators to identify the foregoing as a source of concern: The *British Airways* case implied that information provided in civil leniency applications must be available to defendants in a criminal case. Yet one important aspect of the leniency program is that the information provided by the leniency applicant is kept undisclosed as far as possible. The question may become even more compelling if private claimants attempt to gain access to information provided by the leniency applicants. A balance should be struck between the interests of private claimants and the interests of the leniency program by the national courts – while the weighing of the competing interests is conducted in terms of the defendants and the leniency program, it seems that the balance must be in favour of the defendants who could be subject to custodial sanctions. If the defendants get the access to such information it may not be easy to deny the private claimants the access. One possibility,

as was raised in the literature, could be that a separate body took care of civil leniency, to prevent the criminal prosecutor making use of such evidence and thus giving possibly grounds to reject a disclosure.

While acknowledging that if the criminalization bandwagon is jumped on without carefully considering all the aspect of such an endeavor the existence of parallel administrative and criminal regimes could become the Achilles heel of a criminalization project, one may also note the Swedish contemplation on insider trading: the contemplation rejected the decriminalization of insider trading. It was explicitly said that the swiftness of the administrative proceedings does not serve as a reason to tilt in favor of the administrative mode of enforcement. It was argued that criminal law should shape the society's perceptions in relation to the prohibited conduct and that it is preferable to adopt a definition of the criminal offence that requires a lesser degree of negligence than to lower the standards of proof by introducing administrative sanctions instead. By analogy, one might rethink anti-cartel enforcement in a similar fashion. The incoherence of the current system of sanctions is manifested in the complete lack of individual accountability in terms of hard-core cartels. Moreover it seems that the administrative corporate fines are already of a penal nature. At the end of the day the justification for an exclusively administrative mode of enforcement against cartels seems vague. With respect to individuals it appears that administrative sanctions should be properly adopted only against minor offences. Cartels as an egregious violation of competition law do not seem to fall within that category.

11.6.2 The Ne bis in idem Principle

Regarding the principle of ne bis in idem the Swedish 2001 committee put forward that it is a counterargument against a criminalization of cartel conduct. Once a verdict has been given by a court, it would infringe the ne bis in idem principle to continue pursuing a case. The Swedish 2004 committee noted that since the competition law fines may be considered a penal sanction under the ECHR law (which appears to have been confirmed recently by the ECtHR), it means that Article 4 of the protocol no. 7 of the ECHR could be infringed if a firm is subject to competition law fines while the owner of the company is subject to a criminal sanction. The 2004 committee acknowledged however that such a situation is likely to arise rarely, since the close relationship between the company and the individual in a way that would prompt the ne bis in idem principle would be exceptional.

It seems appropriate to separate the conduct of the firm and the natural person: thus punishing both the individual and the company would not

infringe the *ne bis in idem* principle. This appears to be the prevailing approach. As opposed to that a sole proprietorship is run by the individual who would be subject to both the competition law fine and the criminal penalty. Due to the broad interpretation of the word ‘undertaking’ an individual may constitute an undertaking for the purposes of the EU law and thus be subject to both fines and a criminal punishment which would bring about the infringement of the *ne bis in idem* principle. In Finland a related discussion has concerned the imposition of a tax surcharge and the prosecution of tax fraud. As opposed to the previous case law of the Finnish Supreme Court, now the defendants are not protected merely against successive proceedings, but also against parallel proceedings regarding the same matter – this approach was prompted by the recent case law of the ECtHR, which dictates that if the facts are identical or to a great extent the same, the second violation may not be prosecuted. More recently the Finnish Supreme Court has changed its position in a way that is consistent with the ECtHR case law. Indeed all this means is that the facts of the case need to be carefully assessed to determine whether the *ne bis in idem* principle is operative and if answered in the affirmative and if the administrative proceedings were first assumed, the criminal proceedings have to be dropped. In the aforementioned scenario the individual who constitutes the undertaking would merely be subject to the administrative proceedings. In sum it seems the possible criminalization of cartel conduct would not be severely hampered by the *ne bis in idem* principle, since conflicts would be rare and could be solved by dropping the latter prosecution.

11.7 THE LENIENCY PROGRAM

One important cartel detection tool is the leniency program. Both Finland and Sweden have spurned a leniency program that would provide immunity against criminal sanctions, which served as a major reason to reject the whole criminalization project.

Indeed one of strongest arguments against a criminalization of cartels in Finland, Sweden and Germany has been the mandatory prosecution principle and thus the absence of a crown witness system. Both from a moral and legal perspective, it appears that such a system has not been given the green light. Thus while these countries currently operate a civil leniency program, it could be severely impaired if the employees of the company which is benefitting from leniency could face custodial sanctions. It has been argued that criminalizing cartels in the aforementioned countries could only take place if individuals were given immunity against criminal prosecution, where the company enjoys immunity against corporate fines. However the Swedish Government for instance explicitly rejected the idea

of contemplating the introduction of a crown witness system in connection with the anti-cartel context alone.

In Denmark in contrast however the recently revised anti-cartel regime introduced immunity against criminal sanctions for natural persons. The Danish committee members were of the opinion that this would also boost the leniency program, since individuals risking custodial sanctions would have an increased incentive to blow the whistle: in the absence of individual accountability employees of the firm may be less inclined to cooperate. The situation may be upended if individuals themselves run the risk of custodial sanctions: the interests of the firm and the individuals would collide. For instance under the UK regime the type A immunity is offered to an individual who applies for it, but neither his fellow-workers nor the firm will benefit from it. Thus individuals could provide the authorities with the needed evidence, and the evidentiary problems associated with a criminalized regime could be alleviated. While some civil law countries may be wary of granting immunity against criminal prosecution, also in the UK the OFT has been in an exceptional position in the sense that it has had the powers to grant immunity against criminal prosecution. The OFT has argued that the interests of the economy justify such an arrangement: it is more important to detect the cartels than to punish the individuals who inform the authority of the existence of the cartel – this is the sort of reasoning that the current author finds convincing.

11.7.1 A System of Plea Bargaining

Recently a system of plea bargaining was introduced in Finland, something which may previously have been unthinkable. This may reflect the possibility that in the Finnish context attitudes in relation to a crown witness system may be more approving these days.

In the anti-cartel context the advantages of introducing a system of plea bargaining have been discussed, since it could be desirable to provide the cartel members who do not benefit from immunity the opportunity to enter plea bargaining agreements. For instance in the US defendants frequently enter plea bargaining agreements – when the DOJ has been compelled to take a case to trial it has succeeded in less than half of the cases. Arguments in favour of a system of plea bargaining have been presented especially in the UK. This would help the prosecution to evade a situation where it would have to meet the ‘beyond reasonable doubt’ standard, which makes the criminal prosecutions challenging. In the UK the Government acknowledged that plea agreements could induce defendants to guilty pleas, but argued that it could have an adverse effect on the criminal justice system and would require a thorough consideration.

The concerns related to plea bargaining may touch upon the rights of the defendant and his or her chances of getting a fair trial and whether innocent individuals are persuaded to enter guilty pleas. The European Court of Human Rights has however said that plea bargaining agreements do not violate the ECHR and may benefit the defendant. The Council of Europe had already in 1987 suggested that its member states should widen the scope of prosecutorial discretion where possible.

Arguably while the leniency program destabilized the secretive cartels, a system of plea bargaining could further capitalize on the destabilizing effect thus possibly increasing the deterrent effect. The UK British Airways case demonstrated the challenging nature of criminal prosecutions, and perhaps underlined the point that plea bargaining could be beneficial in the fight against cartels where the cooperation of the defendants could significantly facilitate the prosecution. Thus a system of plea bargaining may be an integral part of a successful criminal regime against cartels, something that crucially should be considered prior to the introduction of a criminalized anti-cartel regime.

11.8 CONCLUDING REMARKS

All things considered, criminalizing hard-core cartel conduct and introducing custodial sanctions remains a project that should eventually be on the agenda for all modern economies, including Finland and Sweden – this reasoning is warranted *inter alia* by the integrity of the criminal justice system. One should not however rashly proceed with such a vast project without carefully considering all the components of a regime lest the project become an asset turned into a liability. Crucially a failure regarding one or a few components may undermine the whole project, as the UK experience may confirm.

It is central from the perspective of the *ultima ratio* principle to show the seriousness of the violation. In the gravest cases criminal law alone could communicate adequately the blameworthiness of a given conduct: the benefits of free trade are obliterated by cartels. Cartels impair one of the core pillars of our society, the market economy on which individuals depend in an attempt to ensure their own welfare. Indeed bold disobedience to the whole system appears to be at the core of what is delinquent about cartels.

Overcriminalization critique concerning a possible criminalization of cartel conduct seems to ignore the educative function of criminal law. The public may come to denounce behavior that was previously perceived to be neutral in moral terms – one may think of the environmental offences for instance. Indeed public opinion could be shaped by experts' views in complex fields of law.

A 'consistent and coherent' EU criminal policy and a national one for that matter, with regard to cartels should promote uniformity: the credibility of the criminal justice system is supported by criminally banning violations of a similar penal value. Arguably the relative penal value of cartels calls for a criminalization of such conduct. While a criminal prohibition should stand the test of the ultima ratio principle, it seems that cartels warrant the ultimate condemnation provided only by criminal law. What is more, it appears that other measures would not produce the stigmatizing label on a par with criminal measures. While the optimal deterrence theory cannot be relied upon alone to back a cartel criminalization project, it may remain a point of continued interest in the cartel criminalization debate due to its theoretical appeal. Proving conclusively the deterrent effect of criminal penalties may be beyond reach, but both anecdotal evidence and various efforts to estimate the deterrent effect suggest that one may favor the introduction of a criminalized anti-cartel regime in an attempt to introduce individual accountability which is currently completely absent in Finland. All in all, there are several commentators and jurisdictions that rightly acknowledge the value of a mixture of measures being available in the fight against cartels, including director disqualification orders, fines and also custodial sanctions.

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