
‘COMPETITION LAW AND CRIMINAL JUSTICE’

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Abstract

A global trend towards the criminalisation of cartel activity can be detected at present. What was once primarily a US phenomenon has become an international one, with countries as diverse as Israel, Brazil, and Australia pursuing a policy of cartel criminalization. The existence of criminal cartel sanctions in such countries is invariably justified as a necessity to ensure an effective competition policy. This paper aims to explain the primary (theoretical) justification for the use of criminal cartel sanctions (namely, economic deterrence) and to evaluate some of the inherent, challenging problems associated with such sanctions when used to achieve the aim of deterrence of anticompetitive behaviour in practice. In doing so it seeks to provide some insights into how best to ensure that cartel criminalisation improves the effectiveness of a criminalised regime’s competition policy. The paper is divided into two substantive sections. The first part outlines in detail the deterrence-based theoretical justification for criminal cartel sanctions, thereby providing essential context to the discussion that follows it. The second part of the paper critically analyses two important inherent problems that arise when criminal sanctions (i.e., custodial sentences) are used in order to deter cartel activity: the difficulty of securing efficient competition law enforcement when criminal cartel sanctions are employed; and the need for connecting the criminalised cartel activity to morally wrongful behaviour. Following the analysis of these problems, some concise observations are offered on the intersection of competition law and criminal justice.

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A. Introduction

Cartel activity implies the existence of an anticompetitive agreement, concerted practice or arrangement between competitors to fix prices, restrict output, divide markets or make rigged bids.¹ Such collusion represents the ‘supreme evil of antitrust’² and strikes ‘a killer blow at the heart of healthy economic activity’.³ Its potential negative effects include increased prices for consumers, a reduction in output, a reduction in the incentive to innovate, and the existence of ‘deadweight loss’ (which occurs when consumers who would have purchased at the competitive price do not have their demand met).⁴ As opposed to other types of market arrangements or conduct (such as, e.g., vertical distribution agreements or the unilateral use of market power), cartels are widely perceived by followers of modern economic thought to have little to redeem themselves. In fact, according to the International Competition Network (‘ICN’), there exists a ‘consensus’ that cartel activity ‘is devoid of pro-competitive benefits’.⁵ In the vast majority of jurisdictions around the world, therefore, cartels are simply not tolerated under competition law.⁶ It would be no exaggeration to state that, in recent years, one can clearly detect a firm commitment from antitrust enforcers around the globe to pursue rigorously the investigation, detection and prosecution of cartel activity.⁷ Aligned with this development is a growing tendency in a wide variety of jurisdictions to hold individuals accountable for the creation and implementation of cartels, including through use of the criminal law.⁸ Given this

¹ See OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, C(98)35/final, 25 March 1998, [2(a)].

² *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 US 398, 408.

³ Kroes, N., ‘Delivering on the Crackdown: Recent Developments in the European Commission’s Campaign Against Cartels’, SPEECH/06/595, Florence, 13 October 2006.

⁴ See generally: Carlton, D. and Perloff, M., *Modern Industrial Organization*, 4th edn, Pearson, Boston., 2005, Chapter 4; and Scherer, F. and Ross, D., *Industrial Market Structure and Economic Performance*, 3rd edn, Houghton Mifflin, Boston, 1990, Chapter 18.

⁵ ICN, *Defining Hard Core Cartel Conduct—Effective Institutions, Effective Penalties*, Report Prepared by the ICN Working Group on Cartels, ICN 4th Annual Conference, Bonn, 6–8 June 2005, 14.

⁶ See generally Dabbah, M. and Hawk, B. (Eds), *Anti-Cartel Enforcement Worldwide*, Cambridge University Press, 2009.

⁷ Barnett, T., ‘Global Antitrust Enforcement’, Georgetown Law Global Antitrust Enforcement Symposium, 26 September 2007, 1.

⁸ See, e.g., Shaffer, G. and Nesbitt, N., ‘Criminalising Cartels: A Global Trend?’ (2011) 12 *Sedona Conference Journal* 313.

particular context, it should be no surprise that the most common intersection between competition law and criminal justice occurs when a jurisdiction's cartel prohibition is enforced through the imposition of custodial sentences upon convicted cartelists.

Arguably, the recent trend towards the creation of criminal cartel regimes across the globe is due in large part to the advocacy efforts of the Antitrust Division of the US Department of Justice ('DoJ'). Indeed, the officials of that particular enforcement agency have publicly espoused a consistent message concerning its role of enforcing Section 1 of the Sherman Act 1890:⁹ for them, 'the most effective deterrent for hard-core cartel activity, such as price fixing, bid rigging, and allocation agreements, is stiff prison sentences'.¹⁰ The DoJ has been supported in this advocacy drive by the Competition Committee of the OECD. For example, with its 'Second Cartel Report', the Competition Committee has formally advised its Member States to consider: (i) introducing and imposing antitrust sanctions against natural persons; and (ii) introducing criminal sanctions in cartel cases in jurisdictions where it would be consistent with social and legal norms.¹¹ Taking on board this advice, some of the Member States of the European Union have not been immune from the cartel criminalisation trend. Indeed, a number of countries in Europe (including, for example, Ireland, the UK, Estonia, Germany, and Denmark) have in place individual criminal sanctions (i.e., custodial sentences) for (some forms of) cartel activity. What was once primarily a US phenomenon has become an international one, with countries as diverse as Israel, Brazil, and Australia pursuing a policy of cartel criminalization. In 2016 South Africa became the latest country to take on the challenge that cartel criminalisation poses in this context, when its President officially brought into force (via Section 12 of the Competition Amendment Act 2009) Sections 73A(1) to (4) of the Competition Act 1998.

Unfortunately, the employment of criminal cartel sanctions is not without its problems; as has been analysed elsewhere by the author, cartel criminalisation presents significant theoretical, legal and practical challenges that need to be overcome in order to ensure its effectiveness,

⁹ 15 USC §§ 1–7 (2000 & Supp IV, 2004).

¹⁰ Barnett, B., 'Criminalization of Cartel Conduct—The Changing Landscape', Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop, Adelaide, 3 April 2009, 2.

¹¹ OECD, *Second Report on Effective Action against Hard Core Cartels*, OECD Competition Committee, 2003, 46.

efficacy and legitimacy.¹² For some jurisdictions (most recently New Zealand¹³) these challenges have been deemed to be too great to overcome, with the result that cartel criminalisation has been rejected as an enforcement tool.

Against this background, the current paper focuses on a specific interaction between competition law and another discipline: the intersection between competition law and criminal justice. Specifically, it aims to explain the primary (theoretical) justification for the use of criminal cartel sanctions (namely, deterrence) and to evaluate some inherent problems associated with such sanctions when used to achieve the aim of deterrence of anticompetitive behaviour in practice. Consequently, the paper is divided into two substantive sections. Section B outlines in detail the deterrence-based theoretical justification for criminal cartel sanctions, thereby providing essential context to the section that follows it. Section C critically analyses two important inherent problems that arise when criminal sanctions (i.e., custodial sentences) are used in order to deter cartel activity: the difficulty of securing efficient competition law enforcement when criminal cartel sanctions are employed; and the need for connecting the criminalised cartel activity to morally wrongful behaviour. Following the analysis of these problems, some concise observations are offered on the intersection of competition law and criminal justice; these observations are pertinent to new criminalised regimes (such as South Africa) as well as other mature competition law jurisdictions that may consider cartel criminalisation in future.

B. The Primary Rationale for Criminal Cartel Sanctions: Deterrence

The primary rationale for the existence of criminal cartel sanctions is clearly (economic) deterrence.¹⁴ In essence, the theory of deterrence holds that punishment can only be justified if

¹² Whelan, P. *The Criminalization of European Cartel Enforcement: Theoretical, Legal and Practical Challenges*, Oxford University Press, 2014.

¹³ See: ‘Amendments to Cartels Bill’, New Zealand Government Press Release, 8 December 2015; and Rutherford, H., ‘Price-Fixing Executives Will Not Be Subject to Jail Terms after Government U-Turn’, *Manawatu Standard*, 8 December 2015.

¹⁴ See, e.g.: Baker, D., ‘The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging’ (2001) 69 *George Washington Law Review* 693; Calvani, T., ‘Enforcement of Cartel Law in Ireland’, in Hawk, B. (ed.), *Annual Proceedings of the Fordham Corporate Law Institute 2003*, Juris Publishing Inc., New York; Ginsburg, D. and Wright, J., ‘Antitrust Sanctions’ (2010) 6(2) *Competition Policy International* 3; Werden, G. and Simon,

it leads to the prevention or reduction of future crime.¹⁵ Deterrence is thus consequentialist; ‘it looks to the preventive consequences of sentences’.¹⁶ Unlike retribution, deterrence does not concern itself with punishment for punishment’s sake. By contrast, it views criminal punishment as a method of maximizing utility, to be employed only when the disutility of its imposition is less than the utility to society secured by its deterrent effect. *Economic* deterrence theory is a form of deterrence theory that attempts to achieve economic efficiency in order to maximise the total welfare of society. Conduct is seen as efficient, and therefore should be encouraged, if its welfare benefits to society are greater than its costs (including the cost of law enforcement); by contrast, inefficient conduct, where costs outweigh benefits, should be prohibited.¹⁷ Economists will usually look to the margins in order to determine the efficient amount of crime enforcement. Efficiency is obtained, and welfare maximized, where the marginal benefit of punishment is equal to its marginal cost.¹⁸ Two additional variants of deterrence exist: the general (detering others by punishing a given law-breaker) and the specific (detering the law-breaker from committing the crime again). With cartel criminalisation, general deterrence is far more relevant than specific deterrence.¹⁹

The (economic) deterrence-based cartel criminalisation argument is essentially a two-step argument.²⁰ With the first step, one demonstrates that an (administrative or criminal) fine on a company is unlikely to deter that company from engaging in cartel activity (or from encouraging its employees to engage in such activity). Central to this is the calculation of the size of an optimally-deterrent fine that aims to neutralise the expected gains from cartel activity. The second step involves demonstrating that the deterrence gap can only be overcome by imposing individual criminal sanctions (i.e. custodial sentences) upon convicted cartelists.

M., ‘Why Price Fixers Should Go to Prison’ (1987) 32(4) *Antitrust Bulletin* 917; and Wils, W., ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28(2) *World Competition* 17.

¹⁵ Walker, N., *Punishment, Danger and Stigma: The Morality of Criminal Justice*, Barnes & Noble, Totowa, NJ, 1980, 26.

¹⁶ Ashworth, A., *Sentencing and Criminal Justice*, Cambridge University Press, 2005, 75.

¹⁷ See, e.g., Block, M. and Sidak, J., ‘The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Every Now and Then?’ (1980) 68 *Georgetown Law Journal* 1131, 1131.

¹⁸ See, e.g., Cooter, R. and Ulen, T., *Law and Economics*, Pearson Addison Wesley, US, 2004, 25 *et seq.*

¹⁹ Werden, G., ‘Sanctioning Cartel Activity: Let the Punishment Fit the Crime’ (2009) 5(1) *European Competition Journal* 19, 24.

²⁰ See Whelan, P., ‘A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law’ (2007) 4(1) *Competition Law Review* 7.

For the first step, one can assume that criminal cartel sanctions do not exist and that the only official sanction for cartel activity is an administrative fine that is imposed upon the infringing company.²¹ In this situation, following economic deterrence theory, the antitrust authority must ensure that the level of the fine imposed for cartel activity is such that there will be a disincentive to engage in such activity. More specifically, given that cartel activity will rarely produce efficiencies, the authorities would be advised to focus on the expected gain from the cartel and, accordingly, to set the fine at least equal to the expected financial benefit obtained from cartel activity divided by the probability of getting caught and prosecuted.²² So if, for example, the expected benefit of a cartel were to be one hundred pounds profit and the chances of getting caught were one in five, then the deterrent fine would be five hundred pounds:

$$\text{Expected benefit (£100)} / \text{probability of detection and prosecution (1/5)} = \text{£500.}$$

The problem with this situation is that, when the relevant variables are placed into the equation, the size of the fine required in order to deter the company from cartel activity is far too large.²³ It is undeniable that the relevant variables can change depending on, *inter alia*, the market at issue, the extent to which the antitrust authorities are proactive in detecting cartels, the peculiar features of the relevant consumer demand for the product etc. The point, however, is that in

²¹ This is the situation at EU level when the EU cartel prohibition is enforced through an administrative proceeding conducted by the European Commission. Under such a proceeding the Commission may by decision impose fines on undertakings and associations of undertakings where they intentionally or negligently infringe the cartel prohibition in Article 101 TFEU: *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* [2003] OJ L1/1 ('Regulation 1/2003'), Article 23(2). It is expressly stated that decisions under Article 23(2) of Regulation 1/2003 'shall not be of a criminal law nature': *ibid.*, Article 23(5).

²² The unlawful gains variant of (economic) deterrence theory applies to behaviour that is never beneficial to society, and for which the costs outweigh the benefits. It holds that for a given (expected) punishment to have a deterrent effect it must be set at least equal to the expected gain of the offender. This model does not foresee any problem with over-deterrence, as no potential benefits are lost through the elimination of the relevant behaviour. See Yeung, K., 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23 *Melbourne University Law Review* 440, 447-449.

²³ See Calvani (n. 14); Wils, W., 'Is Criminalization of EU Competition Law the Answer?', in Cseres, K., Schinkel, M. P., and Vogelaar, F. (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Edward Elgar Publishing, Cheltenham, 2006; and Werden (n. 19).

using reliable statistics for the average cartel mark-ups (of detected cartels), their average length, along with conservative estimates of the probability of detection and prosecution,²⁴ one can demonstrate that the optimal fine should be in the region of 150% of annual turnover (according to Wils²⁵), if not more (such as 200% of annual turnover, according to Werden²⁶). Wils's calculation provides a supportable illustrative example of just how high the optimal fine can be. For Wils, the following inputs are relevant: an average mark-up of 20% (which is reduced to a gain of 10% of turnover in a given year, for each year of the cartel, when translated into an actual benefit received by the company); an average length of five years; and a rate of successful prosecution of one in three. The optimal fine would therefore be 150% of annual turnover in the cartelised product market as:

$$\begin{aligned} & \text{Benefit (10\% of annual turnover x 5 years) / probability of detection and prosecution (1/3)} \\ & = 150\% \text{ of annual turnover.} \end{aligned}$$

If this figure is an accurate (or at least a minimum) value of the optimal fine,²⁷ then there is indeed a problem with relying upon sanctions against companies to deter cartel activity: the fine to be levied in a given cartel case should not reach the deterrent-level, as it would in most cases exceed the company's ability to pay. In order to take account of the fact that not all cartels will be detected and prosecuted the optimal fine will be a multiple of the actual benefit received from a cartel. The company, in other words, will not have earned sufficient revenue from the cartel activity to cover the fine. In addition, any money earned due to cartel activity may have been already been paid out to others in form of taxes, dividends, salaries and/or wages.²⁸ It is therefore argued that only large, diversified companies with very high assets to sales ratios

²⁴ For some (representative) empirical literature on the relevant inputs, see, e.g.: Connor, J. and Lande, R., 'How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines' (2005) 80 *Tulane Law Review* 513; Connor, J., 'Overcharges: Legal and Economic Evidence' (2007) 22 *Research in Law and Economics* 59; Combe, E. and Monnier, C., 'Fines Against Hard Core Cartels in Europe: The Myth of Over-Enforcement' (2011) 56(2) *Antitrust Bulletin* 235; Combe, E., Monnier, C., and Legal, R. (2008), 'Cartels: The Probability of Getting Caught', *Bruges European Economic Research Papers*, Paper 12, March 2008, <http://www.coleurope.eu/sites/default/files/research-paper/beer12.pdf>; and Smuda, F., 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2014) 10(1) *Journal of Competition Law and Economics* 63.

²⁵ Wils (n. 23).

²⁶ Werden (n. 19).

²⁷ On this, see Whelan (n. 12), 59-63.

²⁸ Werden and Simon (n. 14).

would be able to pay a fine in the region of 150% of annual turnover in the cartelised product market.²⁹ In fact, the available literature presents a figure of 18% as the percentage of companies convicted of cartel activity that would have sufficient resources to be able to pay the optimal fine.³⁰ Putting a firm into liquidation as punishment for cartel activity is not advisable. First of all the market will become more concentrated (at least in the short term),³¹ thereby increasing the possibility of further cartel activity in that market going forward.³² In addition, liquidation inevitably brings with it negative social costs that will be imposed upon those innocent of the cartel activity (such as employees, customers, creditors, suppliers, not to mention the taxpayer).³³ This situation therefore ensures that the level of a fine imposed on a company for cartel activity should fall below the optimal fine. Consequently, a cartel fine can be understood as a mere ‘tax’ on (detected) cartel activity imposed on the company responsible for that activity. This leads one to the second step in the argument: that custodial sentences imposed upon individuals can rectify the deterrence gap which is left when a sub-optimal fine is imposed.

The second step in the argument focuses on individuals that engage in cartel activity and tries to push their cost benefit analyses in favour of compliance when considering whether to cartelise a market. Focusing on individuals makes sense from an enforcement perspective. To use the words of the OECD: ‘[a]s agents of corporations commit violations of competition law, it makes sense to prevent them from engaging in unlawful conduct by threatening them directly with sanctions and to impose such sanctions if they violate the law’.³⁴ The point with the second step in the cartel criminalisation argument, however, is that such individual sanctions should not be mere monetary (i.e., financial) sanctions, such as fines. The reason for this is that the corporation (which ultimately benefits from cartel activity) may wish to incentivise such

²⁹ See *ibid.*, 929.

³⁰ See Craycraft, C., Craycraft, J., and Gallo J., ‘Antitrust Sanctions and a Firm’s Ability to Pay’ (1997) 12 *Review of Industrial Organisation* 171.

³¹ Jacobs, L., ‘Criminal Enforcement of Antitrust Laws—Problems with the US Model’, in Hawk, B. (ed.), *International Antitrust Law & Policy: Fordham Corporate Law 2006*, Juris Publishing, New York, 2007, 34.

³² On the link between concentration and the likelihood of collusion, see Motta, M., *Competition Policy – Theory and Practice*, Cambridge University Press, 2004, 142-144.

³³ Kraakman, R., ‘Corporate Liability Strategies and the Cost of Legal Controls’ (1984) 93 *Yale Law Journal* 857, 882.

³⁴ OECD, *Cartels: Sanctions against Individuals*, OECD Competition Committee., 2003, 2.

activity among its staff and may simply indemnify any sanctioned individual by paying the financial sanction for that individual.³⁵ Indeed, according to one commentator, ‘there is a significant, virtually unavoidable risk that corporations will pay individuals’ fines’.³⁶ As long as the money paid out by the firm does not reach the optimal fine (i.e., at least 150% of its annual turnover in the cartelised market) it would be incentivised to indemnify its staff in such a manner. What needs to be found, then, so the argument runs, is a *non-indemnifiable* sanction that would clearly push the potential individual cartelists’ cost-benefit analysis in favour of compliance and away from cartel activity. This is where custodial sentences come in: they are widely seen by pro-criminalisation advocates as non-indemnifiable sanctions that are capable of pushing rational business executives away from cartel activity.³⁷

The non-indemnificatory aspect of custodial sentences in the context of anti-cartel enforcement is explained eloquently by Wils:

Fines on individuals would not appear to be an equally effective alternative to imprisonment. The main reason is that companies can relatively easily indemnify their agents for any threat of fines or any fines effectively imposed, thus taking away the deterrent effect of the penalty on the individuals concerned. Companies can relatively easily compensate their agents in advance for taking the risk of being fined and/or indemnify them *ex post* when they have to pay the fine. The crucial advantage of imprisonment is that it is impossible to shift the penalty *ex post*, and also more difficult to arrange for a premium to compensate the risk in advance.

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Underpinning this assessment is the assumption that for business people, as opposed to hardened criminals, serving time in prison is to be avoided at all costs. As Liman explains, while ‘[f]or the pursue-snatcher, a term of imprisonment may be little more unsettling than basic training in the army’, for those contemplating cartel activity, ‘prison is the inferno, and

³⁵ See, e.g.: ICN (n. 5), 65; and OECD, ‘Cartels: Sanctions Against Individuals’ (2007) 9(3) OECD Journal of Competition Law and Policy 7, 19-20.

³⁶ King, D., ‘Criminalisation of Cartel Behaviour’, Ministry of Economic Development Occasional Paper 10/01, New Zealand, January 2010, 17.

³⁷ See, e.g., Chemtob, S., ‘Antitrust Deterrence in the United States and Japan’, Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union, Washington DC, 23 June 2000, 19.

³⁸ Wils (n. 23), 85-86 (footnotes omitted).

conventional risk-reward analysis breaks down when the risk is jail'.³⁹ It is for this reason that, in addition to their being non-indemnifiable, criminal cartel sanctions are also viewed by advocates as being a crucial input into the cost-benefit analyses of potential individual cartelists, and that, consequently, the threat of imprisonment 'remains the most meaningful deterrent to antitrust violations'.⁴⁰ These particular views naturally find expression in various governmental reports emanating from those countries which have introduced personal criminal antitrust sanctions. The report prepared for the UK Office of Fair Trading ('OFT') by Sir Anthony Hammond and Roy Penrose, for example, maintains that for potential cartelists 'the threat of custodial sentences should act as a significant deterrent',⁴¹ while the (then) Department of Trade and Industry ('DTI') claimed that 83 per cent of the competition experts it interviewed believed that criminal penalties would improve the effectiveness of the UK regime, by increasing its deterrent effect.⁴² Likewise, and among others, the Trade Practices Act Review Committee ('TPARC') in Australia was 'persuaded, in the light of the submissions made to it and growing overseas experience, that criminal sanctions deter serious cartel behaviour and should be introduced'.⁴³ This position, while understandable, is not without its inherent limitations, as will be explained below.

C. Problematic Issues with the Deterrence-Based Criminalisation Argument

This section focuses on two important problematic issues with the deterrence-based pro-criminalisation argument presented above. Specifically, it deals with the difficulty of securing efficient competition law enforcement when criminal cartel sanctions are employed (Section C(a)); and the need for connecting the criminalised cartel activity to morally wrongful behaviour (Section C(b)).⁴⁴

³⁹ Liman, A. (1977), 'The Paper Label Sentences: A Critique' (1977) 86 Yale Law Journal 619, 630-631.

⁴⁰ *Ibid.*

⁴¹ OFT, *The 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*, OFT 365, November 2001, [6.3].

⁴² DTI, *Peer Review of the UK Competition Policy Regime*, prepared for DTI by PricewaterhouseCoopers, 18 April 2001, <<http://www.berr.gov.uk/files/file32812.pdf>>, 25.

⁴³ TPARC, *Review of the Competition Provisions of the Trade Practices Act*, Trade Practice Act Review Committee, Australia, January 2003, 163.

⁴⁴ These are by no means the only problems associated with cartel criminalisation. For a comprehensive treatment of the challenges inherent in criminalising cartel activity (particularly in Europe), see Whelan (n. 12).

(a) The Achievement of *Efficient* Competition Law Enforcement

One of the most difficult challenges in rationalising the introduction of criminal cartel sanctions concerns the demonstration that in employing custodial sentences for cartels a jurisdiction would be engaging in efficient law enforcement. It was noted above that the primary justification for criminal cartel sanctions is deterrence. This is true. However, due to the nature of the relevant objectionable quality of cartel activity (i.e., its potential negative impact on economic efficiency in a given economy), the particular form of deterrence theory that is employed in that context is *economic* deterrence theory (i.e., the punishment theory that attempts to achieve economic efficiency through criminal sanctions in order to maximise the total welfare of society). That particular form of deterrence theory requires one to consider, in addition to the ability of a criminal sanction to deter, the actual costs of enforcement when deciding whether to criminalise a particular behaviour. Essentially efficiency is obtained, and welfare maximized, where the marginal benefit of criminal punishment is equal to its marginal cost.

Interestingly, the main focus of those who wish to advocate criminal cartel sanctions for (economic) deterrence purposes has been on the effectiveness *per se* of a custodial sentence in achieving deterrence.⁴⁵ Such an inquiry is clearly essential in analysing an (economic) deterrence-based criminalisation argument: if individual criminal cartel sanctions cannot have a deterrent effect then they will not be capable of filling the deterrence gap that results when an optimally-deterrent fine cannot be imposed upon a company. But this inquiry is only one aspect of the analysis: given that the use of criminal sanctions also involves costs, and that costs have a bearing on the efficiency of enforcement, such costs also need to be considered in order to determine whether economic deterrence theory can justify in principle the introduction and maintenance of criminal cartel sanctions. Even if criminal cartel sanctions represent an effective deterrent that is not indemnifiable by the company, it does not necessarily follow that such sanctions secure efficient enforcement. This is because the cost of imposing criminal cartel sanctions (e.g., costs involved in detecting, prosecuting and incarcerating individual

⁴⁵ See, e.g., Calvani (n. 14). *Cf.*, however, Reindl, A., 'How Strong is the Case for Criminal Sanctions in Cartel Cases?', in Cseres, K., Schinkel, M. P., and Vogelaar, F. (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Edward Elgar Publishing, Cheltenham, 2006.

cartelists) could be of such a magnitude as to negative the gains to social welfare that criminalisation seeks to achieve. For most, cartel criminalisation is a normative response to an economic problem (the reduction of welfare through collusion) rather than, say, a moral one (the regulation of morally wrongful behaviour);⁴⁶ therefore, the criminalisation of cartel activity would be an unsupportable policy if, by pursuing it, the authorities were expending more of society's resources (i.e., welfare) than they were actually saving through the use of deterrent cartel sanctions.

Given this context, what needs to be demonstrated is that criminal cartel sanctions can be imposed where the marginal benefit is equal to its margin cost. This is an extremely difficult, if not impossible, inquiry on which to come to a firm conclusion. The reason for this is that cartels are inherently secret and, thus, one cannot take accurate measurements of the number of cartels in existence in a given jurisdiction both 'before and after' the introduction of criminal cartel sanctions. Indeed, even in non-criminalised jurisdictions cartelists have developed sophisticated methods of concealment in order to avoid (administrative) punishment or any negative impact on their respective companies' reputations and their relationships with their customers.⁴⁷ The OECD has recognised this fact and has acknowledged the difficulty inherent in accurately measuring the exact costs and benefits of criminal cartel sanctions:

Anecdotal evidence exists that criminal sanctions against individuals can have deterrent effects. There is, however, no systematic empirical evidence available to prove such effects, and to assess whether the marginal benefit of introducing sanctions against individuals (in the form of less harm from cartel activity) exceeds the additional costs that in particular a system of criminal sanctions entails (including the costs of prosecution as well as of administering a prison system). There appears to be agreement that it would be virtually impossible to generate the relevant data.⁴⁸

⁴⁶ See, e.g., Simonsson, I., *Legitimacy in EU Cartel Control*, Hart Publishing, Oxford, 2010, 69.

⁴⁷ An excellent EU example of a cartel involving sophisticated methods of concealment is *Gas Insulated Switchgear* (Case COMP/F/38.899), Commission Decision, 24 January 2007, [2008] OJ C5/7. For an additional and interesting example of how those involved in an international cartel try to conceal their activities, see First, H., 'The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law' (2001) 68 *Antitrust Law Journal* 711, 714–715.

⁴⁸ OECD (n. 34), 7.

The best one can hope to do in this situation is to consider the arguments that underpin the assertion that custodial sentences for cartel activity are at least *capable* of generating more benefits than costs. In doing so, one can gain considerable insight into the desirability of introducing criminal cartel sanctions for the purposes of improving economic welfare in an economy, without proving beyond doubt that criminalisation is the most efficient response to the problem.

What needs to be considered here, then, is first the extent of the inefficiency avoided if custodial sentences do indeed deter. The empirical literature demonstrates that cartels can last quite a long time and that they can involve large mark-ups in the prices of cartelised products and services. For example, the average price increase due to cartel activity in Europe has been estimated to be between 28 and 54 per cent.⁴⁹ Likewise, Smuda in 2014 found that the mean and median overcharge rates are respectively 20.7 and 18.37 of the selling price.⁵⁰ These price rises tend to last for a long time (at least in detected cartels). Combe and Monnier, in their study looking at 64 cartel decisions adopted by the European Commission, calculate an average duration of seven years, with a median of 5.6 years.⁵¹ Smuda has come to an even higher figure.⁵² Notwithstanding this context, the increase in prices paid by consumers due to cartel activity does not really represent an inefficiency in a market; the increased prices are merely wealth transfers from producers to consumers and are efficiency neutral.⁵³ The real inefficiency that results from the arrangement is the deadweight loss (allocative inefficiency). Fortunately for advocates of antitrust criminalisation, allocative inefficiency in the context of cartels is not trivial either. It has been assumed to be around 50% of the mark-up by some,⁵⁴ with others estimating it to be somewhere between 3 and 20% of the overcharge.⁵⁵ With this mind it is not too difficult to accept the claim of the OECD that, while accurate quantification of the exact harm from cartels is not currently possible, there is no doubt that it is quite large, amounting to

⁴⁹ Connor and Lande (n. 24).

⁵⁰ Smuda (n. 24).

⁵¹ Combe and Monnier (n. 24), 240.

⁵² Smuda (n. 24).

⁵³ See, e.g., Pittman, R., 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' (2007) 3(2) *Competition Policy International* 205.

⁵⁴ Easterbrook, F., 'Detrebling Antitrust Damages' (1985) 28 *Journal of Law and Economics* 445.

⁵⁵ Connor, J. and Lande, R., 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 *Cardozo Law Review* 427, 457-461.

the equivalent of many billions of US dollars annually.⁵⁶ For this reason, Ramage believes that ‘the biggest global financial fraud above other financial crimes’ is due to international cartels.⁵⁷ The point here is that if cartels (or at least the most serious and harmful cartels) are deterred through the use of custodial sentences then the positive impact on efficiency could be immense.

The costs of criminalisation encompass the costs involved in investigating, prosecuting and incarcerating individual cartelists, including the cost of taking otherwise productive individuals out of the economy. These costs too may be immense. Fortunately, there are a number of techniques that can be used to try to keep such costs at a minimum. First, one can reduce the costs involved in incarceration by ensuring that only short terms of imprisonment are imposed. If cartelists are like other white-collar criminals, and therefore ‘unprepared for the emotional and physical trauma of prison’,⁵⁸ relatively short terms of imprisonment may be sufficient to secure deterrence of cartel activity. Second, prosecutors could focus on only the most serious of cartels in order to send out the deterrent message to the most destructive elements in the economy without incurring unnecessary and frivolous costs.⁵⁹ Third, the successful use of plea-bargaining, leniency/immunity programmes and bounties has potential to reduce significantly the costs involved in investigating cartels to a criminal standard. Fourth, a criminalised jurisdiction, assuming that it would be possible under its constitutional arrangements, could impose cost orders upon convicted cartelists. Recently, in Ireland, this particular technique was given a legal basis in order to reduce the costs involved in the public enforcement of competition law.⁶⁰ Specifically, Section 2(h) of the Competition (Amendment) Act 2012 stipulates that when a person is convicted of a criminal offence under Irish competition law, the court shall order the offender to pay to the relevant authority the costs incurred in the investigation, detection and prosecution of the offence ‘unless the court is satisfied that there are special and substantial reasons for not so doing’. Provided that the cost order would not be

⁵⁶ OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Competition Committee, 2002, 90.

⁵⁷ Ramage, S., ‘Criminal Cartels’ [2008] *Criminal Lawyer* 5.

⁵⁸ Szockyj, E., ‘Imprisoning White-Collar Criminals?’ (1998–99) 23 *Southern Illinois University Law Journal* 485, 490.

⁵⁹ See Bloom, M., ‘Key Challenges in Public Enforcement’, *British Institute of International and Comparative Law*, London, 17 May 2002, 9.

⁶⁰ See Whelan, P., ‘Strengthening Competition Law Enforcement in Ireland: The Competition (Amendment) Act 2012’ (2013) 4(2) *Journal of European Competition Law & Practice* 175.

a disproportionate punishment on the offender, this mechanism can go some way towards recouping the costs involved in pursuing a criminal conviction.

The trouble, however, is that the above-identified mechanisms for reducing costs in the context of cartel criminalisation suffer from a number of drawbacks. First, the use of short sentences to keep the costs of criminal antitrust enforcement low runs counter to efforts to create and maintain a moral norm against cartel activity. The morality of cartel activity will be commented on below. The point here is that once criminalisation occurs, it would be in the interests of the authorities to attempt to build a moral norm against cartel activity: if such a norm is widely fostered in society, then internalisation of the norm can occur within potential cartelists and self-enforcement of the law will become more likely, itself to the benefit of a cost reduction in enforcement efforts. The problem is that by having low terms of imprisonment, the authorities send out the message that cartel activity is not a serious activity warranting significant terms of imprisonment; that message can in turn undermine efforts to convince society that cartel activity is inherently wrong and is against the accepted norms of society. Second, the use of plea-bargaining in the criminal law context is a controversial cost-saving mechanism for many jurisdictions. While the US is very happy to rely upon plea-bargaining to secure efficiency in the realm of criminal justice⁶¹ (in that over 90 per cent of criminal cases are resolved in the US through plea-bargains⁶²), other jurisdictions may not have that enforcement culture. In fact, it would be naïve in the extreme to expect jurisdictions without the US legal culture to adopt such a culture, just to ensure that cartel criminalisation is as efficient as desired by its advocates.⁶³ With plea-bargaining, there is the risk that, when there is a ‘flagrant disproportion’ between the two alternatives facing an accused, innocent individuals will be placed under pressure to admit guilt.⁶⁴ Such pressure will risk violating the dictates of human rights law.⁶⁵ Third, some of the methods identified are already employed in administrative regimes (e.g., leniency programmes and bounties). To operate as a mechanism for further reductions in costs, they

⁶¹ Vamos, N., ‘Please Don’t Call It “Plea Bargaining”’ [2009] *Criminal Law Review* 617, 621.

⁶² Gazal-Ayal, O. (2006), ‘Partial Ban on Plea Bargains’ (2006) 27(5) *Cardozo Law Review* 2295, 2311.

⁶³ See Beaton-Wells, C. and Ezrachi, A., ‘Criminalising Cartels: Why Critical Studies?’, in Beaton-Wells, C. and Ezrachi, A. (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement*, Hart Publishing, Oxford, 2011, 20.

⁶⁴ Wils, W. , ‘The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles’, 13th Annual EU Competition Law and Policy Workshop, European University Institute, Florence, 6–7 June 2008, 20.

⁶⁵ For a European example, see, e.g., *Deweert v. Belgium* (1979-80) 2 EHHR 439.

must therefore demonstrate additional advantages in the context of the employment of criminal punishment. It is questionable whether such is the case with bounties. With leniency programmes, by contrast, such additional advantages can be found. When only administrative (corporate) sanctions are available, individuals working for a company that has cartelised a market may not be motivated to provide useful information to the antitrust authorities. Indeed, the absence of personal criminal sanctions ensures that the ‘involved individuals have little incentive to work hard to recall awkward facts about meetings and understandings’, hoping instead for an unpleasant situation to blow over.⁶⁶ By contrast, when the individual personally faces not only a hefty fine, but also possible time in a prison cell, there will be an obvious incentive both to come forward quickly in order to secure immunity (assuming, crucially, that criminal immunity would be available) and to ensure that whatever information is provided is as robust as possible. Under a criminal regime, then, there will tend to be witnesses ‘who, with the proper incentives, might be persuaded to come forward with additional evidence . . . if they can *secure a better deal for themselves*’.⁶⁷ Criminal sanctions (with criminal immunity) can be used, in other words, to create a conflict between corporate and private interests. This conflict will not only produce effects in terms of *individual* immunity applications; the number of *corporate* leniency applications is also likely to rise: ‘[u]ndertakings understand that if they don’t make a leniency application, then for fear of personal fines and a jail sentence one or more of their executives will make an individual leniency application’.⁶⁸ Imprisonment, then, ‘could improve the operation of public antitrust leniency programmes because, by shifting corporate officers’ expectations toward high personal penalties, top executives of cartel participants are more likely to seek the immunity from prosecution that accompanies awards of corporate amnesty’.⁶⁹ This argument may explain why there was a reported increase in administrative leniency/immunity applications in Australia following that particular jurisdiction’s adoption of a criminal cartel law in 2009.⁷⁰ Interestingly, some commentators

⁶⁶ Baker (n. 14), 709.

⁶⁷ Lawrence, J., O’Kane, M., Rab, S., and Nakhwal, J., ‘Hardcore Bargains: What Could Plea Bargaining Offer in UK Criminal Cartel Cases?’ (2008) 7(1) Competition Law Journal 17, 23 (emphasis added).

⁶⁸ Riley, A., ‘The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?’ (2010) 31(5) European Competition Law Review 191, 205.

⁶⁹ Connor and Lande (n. 55), 436.

⁷⁰ See Ministry of Economic Development, ‘Cartel Criminalisation’, Discussion Document, Wellington, New Zealand, January 2010, [23], relying upon Ludlow, M., ‘Cartel Crackdown Sparks Whistleblowers’ Chorus’, *Australian Financial Review*, 1–2 August 2009.

believe that the impact of criminalization upon the operation of (administrative) leniency is so positive that it provides an instrumental justification for the very existence of criminal cartel sanctions; accordingly, ‘criminal punishment against managers is sought not as an instrument to penalize these individuals for a fault committed, but as a strong incentive to whistle-blow regarding an involvement of their companies in a cartel’.⁷¹

The above analysis should demonstrate that the answer as to whether a jurisdiction should introduce criminal cartel sanctions cannot be a scientific one and that the debate on the optimal anti-cartel strategy is unlikely to cease. This is reflected in the growing number of academic conferences and research dedicated to the topic of cartel criminalisation.⁷² What is clear is that any jurisdiction contemplating cartel criminalisation should be aware that such a project is ‘a long-term, front-end loaded investment’⁷³ which may require a wide range of criminal prosecutions to ‘give birth to a new culture’.⁷⁴ Lawmakers, then, need to be cognizant from the outset that there will be a time lapse between the cost and the benefit to be achieved. Without such an understanding, antitrust prosecutors could ‘find that the patience of lawmakers might be tested if the greater powers and resources they were willing to confer on a competition authority showed no immediate result’.⁷⁵

(b) The Issue of Morality

The cartel criminalisation debate has, for the most part, focused on the potential deterrent effect of antitrust criminalisation. Indeed, it is clear that deterrence ‘is the generally accepted rationale

⁷¹ Lewisch, P., ‘Enforcement of Antitrust Law: The Way from Criminal Individual Punishment to Semi-Penal Sanctions in Austria’, in Cseres, K., Schinkel, M. P., and Vogelaar, F. (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Edward Elgar Publishing, Cheltenham, 302.

⁷² The latest academic contributions include: Whelan (n. 12); Wardhaugh, B., *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion*, Cambridge University Press, 2014; and Harding, C. and Edwards, J., *Cartel Criminality – The Mythology and Pathology of Business Collusion*, Ashgate, 2015.

⁷³ Reindl (n. 45), 115.

⁷⁴ Fingleton, J., Girard, M.B., and Williams, S., ‘The Fight against Cartels: Is a “Mixed” Approach to Enforcement the Answer?’, in Hawk, B. (ed.), *International Antitrust Law & Policy: Fordham Corporate Law 2006*, Juris Publishing, New York, 23.

⁷⁵ Reindl (n. 45), 115.

for public antitrust sanctions⁷⁶ and that there ‘has been only a limited amount of work analysing the relationship between morality and competition law specifically’,⁷⁷ including in the context of antitrust criminalisation.⁷⁸ Although some academics disagree,⁷⁹ this lack of engagement with moral theory should be understood as being problematic. It is true that a finding of ‘moral wrongfulness’ is not required in order to create a deterrence-based criminalisation argument, and that, consequently, depending on the definition of ‘cartel activity’ chosen for its substance, deterrence theory can in fact be used to create a morally-neutral criminal cartel offence. However, even if criminal cartel sanctions are pursued for the purposes of deterrence (as opposed to, say, retribution), it does not follow that the link between criminalised cartel activity and morally wrongful activity remains irrelevant: establishing a link between the criminalised cartel activity and morally wrongful behaviour is in fact very important.⁸⁰ Indeed, for some commentators demonstrating such a link is crucial; according to Castel and Writer, for example:

[w]ithout general community consensus that egregious anti-competitive conduct is criminal and ought to be punished rather than deterred, it may be appropriate that such commercial contraventions continue to be penalised civilly ... rather than introduce a regime of criminal sanctions.⁸¹

Underpinning these sorts of arguments is the claim that if the criminal law is applied to morally-neutral (cartel) activity then it may be perceived as being unjust. This is an argument that has been with us for many years. In the 1930s, Sayre argued that

⁷⁶ Calvani, T. and Calvani, T.H., ‘Cartel Sanctions and Deterrence’ (2011) 56(2) *Antitrust Bulletin* 185, 186.

⁷⁷ Furse, M., *The Criminal Law of Competition in the UK and in the US: Failure and Success*, Edward Elgar, Cheltenham, UK and Northampton, MA, 14.

⁷⁸ See, however, Whelan, P., ‘Cartel Criminalization and the Challenge of “Moral Wrongfulness”’ (2013) 33(3) *Oxford Journal of Legal Studies* 535.

⁷⁹ See, e.g., Stephan, A., ‘Why Morality Should be Excluded from the Cartel Criminalisation Debate’ (2012) 3(2) *New Journal of European Criminal Law* 126.

⁸⁰ See generally Williams, R., ‘Cartels in the Criminal Law Landscape’, in Beaton-Wells, C. and Ezrachi, A. (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement*, Hart Publishing, Oxford, 2011.

⁸¹ Castle, L. and Writer, S. (2002), ‘More Than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia’ (2002) 10 *Competition and Consumer Law Journal* 1, 23-24.

[w]hen the law begins to permit convictions for serious offences of men who are morally innocent and free from fault, who may even be respected and useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted, the vitality of the criminal law has been sapped.⁸²

Accordingly, the criminal law should not be understood merely as ‘a device for promoting particular economic and social ends’ but rather as a law ‘directed to moral standards of society’.⁸³ There is no doubt that since these arguments were originally presented there has been a significant growth in Western society in the number of criminal offences that lack a clear link with immoral behaviour.⁸⁴ That said, the argument still has relevance. Indeed, the Law Commission in the UK as recently as 2010 was keen to stress the importance of maintaining a link between criminal activity and wrongdoing; for it, ‘criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct’.⁸⁵ In the absence of such a restraint, so the argument runs, the moral authority of the law can be undermined, the meaning of criminality may change, and the criminal law may begin to lose its legitimacy.⁸⁶

In response, those who are unperturbed by a lack of a link between the criminalised behaviour and current perceptions of morally wrongful behaviour may wish to highlight the educative function of the criminal law. In doing so, they would explain that the criminal law is not solely used to reflect the morality of a given society, but that it can be used to *create* a moral reaction to behaviour deemed by the lawmaker to be objectionable. Admittedly, it cannot be denied that there is some reciprocal relationship between the substance of the criminal law and the perception in society of the morality of the conduct that is regulated by the criminal law. As

⁸² Sayre, F., ‘Public Welfare Offenses’ (1933) 33 *Columbia Law Review* 55, 79-80.

⁸³ Burns, J., *A Study of the Antitrust Laws, Their Administration, Interpretation and Effect*, Central Book Company, New York., 1958, 112.

⁸⁴ See, e.g., Green, S., ‘Moral Ambiguity in White Collar Criminal Law’ (2004) 18 *Notre Dame Journal of Law, Ethics and Public Policy* 501; Green, S., ‘Why It’s a Crime to Tear a Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences’ (1997) 46 *Emory Law Journal* 1535; Luna, E., ‘The Overcriminalization Phenomenon’ (2005) 54 *American University Law Review* 703.

⁸⁵ Law Commission, *Criminal Liability in Regulatory Contexts: A Consultation Paper*, Consultation Paper No. 195, London, 2010, [1.28]. See also Ashworth, A., ‘Conceptions of Overcriminalization’ (2008) 5 *Ohio State Journal of Criminal Law* 407, 408-409.

⁸⁶ See, e.g., Galligan, D., *Law in Modern Society*, Oxford University Press, Oxford, 2007, 228.

noted by Coffee, society in fact learns a lot of its morality from what is punished under the criminal law.⁸⁷ This argument, while valid, is not determinative of the issue. For a start, the educative function of the criminal law should not be unrestrained. If the educative function of the criminal law is overused, then it will become ineffective, with the resultant loss in the stigma associated with criminal law to the detriment of deterrence. Second, the problem of ‘sticky norms’ may exist, whereby the general (or indeed business) population remain hesitant to change their perceptions of the legitimacy of behaviour irrespective of the fact that the criminal law is attempting to persuade them otherwise.⁸⁸ Third, in countries where trial by jury is present, efforts to change perceptions may become unstuck if initially juries are unwilling to convict simply because they fear that the resultant punishment would be unfair. In other words, jury nullification has the potential to undermine efforts to create a moral norm against cartel activity through custodial sentences.

To avoid these potential problems one would be advised to ensure that the criminalised conduct lines up generally (if crudely) with general perceptions of morally wrongful behaviour. There is an additional advantage to this approach: if the criminal cartel offence is perceived to be legitimate (due to the fact that it reflects society’s view of the moral wrongfulness of cartel activity) then it is likely that compliance with that law will be more pronounced.⁸⁹ This positive effect would have a clear impact in terms of the costs associated with criminal cartel sanctions. If an individual’s own morality is reflected in the criminal cartel offence then she is more likely to internalise the norm inherent in the criminal offence and self-enforce the criminal law against cartel activity, thereby reducing the need for the expenditure of resources by the state in enforcing the criminal cartel offence through the criminal courts.

The difficulty, however, lies in creating a criminal cartel offence that inevitably captures the ‘criminality’ of cartel activity.⁹⁰ The current literature has relied upon the criminological literature developed by Green in order to attempt to understand the inherent moral

⁸⁷ Coffee, J., ‘Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/ Crime Distinction in American Law’ (1991) 71 *Boston University Law Review* 193, 200.

⁸⁸ Kahan, D., ‘Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem’ (2000) 67 *University of Chicago Law Review* 607.

⁸⁹ See generally Tyler, T., *Why People Obey the Law*, Princeton University Press, Princeton, NJ, 2006.

⁹⁰ See Beaton-Wells, C., ‘Capturing the Criminality of Hard Core Cartels: The Australian Proposal’ (2007) 31(3) *Melbourne University Law Review* 675.

wrongfulness of cartel activity.⁹¹ Green provides three norms against which the moral wrongfulness of cartel activity can be judged: the norms against stealing, deception and cheating.⁹² Under certain circumstances and/or in the presence of facilitating features (such as the adoption of a consumer welfare standard under competition law to judge the lawfulness of anticompetitive behaviour), cartel activity can be understood to be in violation of one or more of these norms.⁹³ It is submitted that the least difficult ‘fit’ to engineer between criminalised cartel activity and moral wrongfulness of cartel activity involves the moral norm against deception.⁹⁴

Deception occurs where: (i) a message is communicated, with (ii) an intent to cause a person to believe something that is untrue, and (iii) a person is thereby caused to believe something that is not true.⁹⁵ With cartel activity, three different scenarios are relevant in the assessment whether it amounts to deception. These are: (a) where the cartelist lies to customers about the existence of the cartel; (b) where the cartelist says nothing about the cartel to customers; and (c) where the cartelist reveals the existence of the cartel to customers prior to sale. Arguably there is a rough fit between the moral norm against deception and situations (a) and (b). In situation (a), the cartelist effectively lies to customers, and assuming that she has not forgotten about the cartel, is clearly deceptive. With situation (b) the link with deception is less obvious; nonetheless one can argue that it can be present. To do so one can use the words of Lever and Pike when discussing the application of the common law offence of conspiracy to defraud to cartel activity:

in many situations today third parties who deal with undertakings that are in fact parties to cartel agreements will proceed on the *assumption* that they are dealing with undertakings that are lawfully engaged in normal competition with each other; and the cartelists will know that

⁹¹ See, e.g., Stucke, M., ‘Morality and Antitrust’ [2006] 3 Columbia Business Law Review 443.

⁹² Green, S., *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*, Oxford University Press, Oxford, 2006.

⁹³ Whelan (n. 78).

⁹⁴ See, e.g., Whelan, P., ‘Improving Criminal Cartel Enforcement in the UK: The Case for the Adoption of BIS’s “Option 4”’ (2012) 8(3) European Competition Journal 589.

⁹⁵ Adler, J., ‘Lying, Deceiving or Falsely Implicating’ (1997) 94 Journal of Philosophy 435, 437.

that is so and will, in effect, act in a dishonest and therefore criminal manner, if the existence of the cartel is kept secret.⁹⁶

Central to this argument is the claim that consumers assume that business people do not unlawfully engage in anticompetitive practices.⁹⁷ Fortunately for advocates of cartel criminalisation, there is some (limited) empirical support for this claim.⁹⁸ By contrast, where there is clearly no link with deception is situation (c). Here, unlike with the other situations, one cannot logically argue that there is an intention to mislead a customer about the existence of a cartel when the cartelist informs the customer about the cartel prior to entering into any sales contract with that customer. This fact alone has an impact on how one designs, on the basis of the moral norm against deception, a criminal cartel offence such that it provides a rough fit with immoral behaviour: the criminal cartel offence should only apply to situations (a) and (b), but not to situation (c).

This insight has recently been relied upon in the UK. Section 188 of the Enterprise Act 2002 (as amended) provides a number of carve-outs from the UK criminal cartel offence in what can be understood as an attempt to line the criminalised cartel activity up with deceptive behaviour.⁹⁹ Accordingly the follow represent circumstances in which the UK criminal cartel offence cannot be committed:

- (a) in a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected,
- (b) in the case of bid-rigging arrangements, the person requesting bids would be given relevant information about them at or before the time when a bid is made, or

⁹⁶ Lever, J. and Pike, J., 'Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence": Parts I & II' (2005) 26(2) *European Competition Law Review* 90, 95.

⁹⁷ On the acceptability of this assumption, see Whelan (n. 78), 553-554.

⁹⁸ See Stephan, A., 'Survey of Public Attitudes to Price-Fixing in the UK, Germany, Italy and the USA', CCP Working Paper 15-8, July 2015.

⁹⁹ Whelan, P., 'Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence' (2015) 78(3) *Modern Law Review* 493.

(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.¹⁰⁰

The ‘relevant information’ at issue means the names of the undertakings involved, a description of the nature of the arrangement which would explain why they might be arrangements subject to the cartel offence, the products or services in question, and other information as may be specified in an order made by the Secretary of State.¹⁰¹ This approach is useful. Not only does it help to ensure that a criminal cartel offence captures the criminality of cartel activity (i.e., its deceptive nature) but it also provides an effective way of dealing with so-called ‘legitimate’ cartel activity (for example, that very rare cartel activity that would be tolerated under EU law due to its fulfilment of the exception criteria in Article 101(3) TFEU¹⁰²). Regarding ‘legitimate’ cartels: the ‘carve outs’ indirectly provide immunity from criminal sanctions for those who conclude agreements that would benefit from an exception under Article 101(3) TFEU. If cartelists genuinely believe that their cartel agreement would benefit from a (civil/administrative) exception (as it would fulfil the relevant legal criteria), all they have to do to avoid criminal sanctions is to publish publicly the agreement prior to its implementation or to notify the customers prior to their entry into the relevant contracts. Accordingly, and importantly, no (confusing) economic evidence needs to be presented to a jury for an Article 101(3) type exception to be operationalised. It is submitted therefore that the UK approach should be seriously considered by other jurisdictions that wish to pursue criminal cartel sanctions without adding to the phenomenon of overcriminalisation.

D. Conclusion

This paper analysed the intersection of competition law enforcement and criminal justice. In doing so, it set out the primary theoretical justification for criminal cartel sanctions: (economic) deterrence. Specifically, it explained that those in favour of antitrust criminalisation usually

¹⁰⁰ Section 47(5) of the Enterprise and Regulatory Reform Act 2013 (which creates Section 188A of the Enterprise Act 2002, as amended).

¹⁰¹ *Ibid.*

¹⁰² Technically the cartel prohibition in Article 101(1) TFEU can be avoided if the cartel at issue fulfils the requirements of Article 101(3) TFEU; see Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595. Various non-European jurisdictions have adopted a similar approach in this regard to that of the EU.

argue that the optimally-deterrent cartel fine is too large to be imposed and that, in order to avoid a deterrence gap, individual cartelists should face the prospect of a custodial sentence: such a sanction avoids the negative effects involved in attempting to impose an optimally-deterrent fine, while securing a non-indemnifiable sanction that cartelists are not prepared to risk in order to further the interests of their firms through cartel activity. This theoretical argument, while strong, contains inherent problematic issues in its practical implementation. Two of these issues were considered above: ensuring efficient competition law enforcement and ensuring that the criminalised cartel activity inevitably captures a form of moral wrongfulness.

It was argued above that, even if criminal sanctions are capable of having a deterrent effect on individuals, it does not necessarily follow that they should be introduced for the purposes of deterrence. Due to the nature of cartel activity, the variant of deterrence theory applied to justify cartel criminalisation is invariably economic deterrence theory, a justificatory theory for criminal punishment that attempts to achieve economic efficiency in order to maximise the total welfare of society. As criminal sanctions have costs, these costs must be taken into consideration before a decision on criminalisation is taken. One cannot demonstrate beyond question that criminal cartel sanctions can be imposed where the marginal cost of such sanctions is equal to their marginal cost. This is due to the inherently secret nature of cartels and to the lack of certain data on the incidence of cartels before and after criminalisation. That said, given the empirical data available, cartels can clearly be very harmful for social welfare and, if the most serious of such cartels are avoided through criminalisation, there is potential for significant benefits to accrue. In addition, there are useful methods of keeping costs to a minimum (such as criminal immunity programmes, plea-bargaining and the imposition of cost orders on convicted cartelists). While these programmes are not without their own issues, their successful use could tip the balance in favour of cartel criminalisation when all the potential benefits and costs are considered. In any case, any jurisdiction contemplating cartel criminalisation should be aware that any given cartel criminalisation project is a long-term investment with considerable upfront investment which may require a wide range of criminal prosecutions to engender a new culture.

Criminalising cartels for reasons of economic deterrence alone runs the risk that the authorities will engender, or more likely add to, the phenomenon of overcriminalisation. It is likely that within the European Union public feelings towards cartel activity are ambiguous; cartel activity

may not be widely perceived as morally wrongful. This could be problematic when it comes to criminal enforcement: when criminal law is largely delinked from morality, potential is created for a change in the meaning of criminality, a drop in respect for the criminal law and/or the unfair labelling of convicted individuals. That said, the educative function of the law could nonetheless be used to overcome an objection to cartel criminalisation based on the absence of an identifiable perception in society that cartels are morally wrong. While that argument has merit, it should be remembered that overuse of the educative function is counter-productive. Moreover, if criminalised cartel conduct lined up closely with immoral behaviour there is potential for enforcement cost savings: business people may internalise the norm against cartel activity and self-enforce the cartel prohibition. Consequently, lawmakers would be advised to attempt to create a criminal cartel offence that (roughly) captures the criminality of cartel activity. In doing so, they could attempt to ensure that the criminalised cartel activity inevitably involves violation of any of the moral norms against cheating, stealing or deception. Above focus was placed on the moral norm against deception. It was argued that, in order to ensure a 'rough cut' between criminalised cartel conduct and a violation of the moral norm against deception, the criminal offence should not apply to cartel activity the existence of which is revealed to the public prior to implementation. In doing so, one can provide scope for (very rare) 'legitimate' cartels to escape criminalisation while (approximately) lining up the criminalised conduct with morally wrongful conduct, thereby avoiding the problems associated with the phenomenon of overcriminalisation.