

Cartels – The Case for Criminalisation in the European Union

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A cartel is a horizontal agreement to fix prices, allocate customers or territories, restrict output or rig bids and is considered as the most pernicious and egregious form of violation of competition law. It is unlawful market manipulation for financial gain and has been labelled the “supreme evil of antitrust”¹. When one considers the definition of competition as;

The relationship between a number of undertakings which sell goods or services of the same kind at the same time to an identifiable group of customers. Each undertaking having made a commercial decision to place its goods or services on the market, utilizing its production and distribution facilities, will by that act necessarily bring itself into a relationship of potential contention and rivalry with the other undertakings in the same geographical market, whose limits may be a single shopping precinct, a city, a region, a country, a group of countries, the entire European Community, or even the whole world²

it is easy to identify how a combination of agreements and concerted practices, which often provide the basis of a cartel, cut to the core of competition and the benefits it yields for consumers.

It is imperative during times of economic distress that the European Union does not lose sight of its competition-enforcement regime. Markets become more vulnerable to anti-competitive behaviour during economic crises³ and the temptation for undertakings to collude is heightened within firms who continue to set unrealistic profit targets for their managers⁴. Since the effects of competition are felt much more acutely in times of economic distress, there is a distinct risk of “crisis-cartels” and it is submitted the European Union needs to have a well-functioning and strong competition enforcement policy in place. Despite commitments from European officials that there would be “no trade-off between competition policy and financial stability” and that competition policy was a tool to be used “to manage orderly the return to normal market functioning”⁵, there has been no action taken to strengthen competition policy in relation to cartels. While the current economic climate may add a sense of urgency, it is the opinion of the author that, even absent this factor, there is a credible case to be made in favour of strengthening the current European Union competition enforcement regime.

Evidence adduced from the Vitamins cartel investigation indicated that jurisdictions with weaker enforcement mechanisms were targeted and suffered more

¹ Verizon Communications v. Curtis V Trinko LLP 540 US 398 (2004) .

² D.G.Goyder, *Goyder's EC Competition Law* (5th Ed, Oxford University Press Ch 2) pg 8.

³ Varney, C.A. (2009), “Vigorous antitrust enforcement in this challenging era”, Remarks as Prepared for the United States Chamber of Commerce (accessed 4th Feb).

⁴ Andreas Stephan, "See no evil: cartels and the limits of antitrust compliance programs" (2010) 31(8) *Comp. Law*. 239 at 241.

⁵ Former European Commissioner for competition policy Neelie Kroes, Kroes, N. “Competition law in an economic crisis”, (2009) paper presented at 13th Annual Competition Conference of the International Bar Association, Fiesole, 11 September, Speech/09/385, p. 3.

from the cartel's overcharges estimated at \$2,700 million worldwide⁶. Effective competition regimes can act as a deterrent in two ways, firstly to individuals considering engaging in anti-competitive conduct and secondly to those already engaged to refrain from operating in perceived 'stronger' jurisdictions.

A view that is held by the author and reinforced by Stefan is that the European Commission civil enforcement regime is not as effective as the large fines issued by would suggest as many are purely on the back of a United States Department of Justice conviction⁷. Furthermore he highlights the ineffectiveness of the leniency programme in Europe with many applications for leniency only being received once the cartel has failed as opposed to in fear of prosecution, as was envisaged by the Commission⁸.

Based on the foregoing there is a strong case in favour of strengthening the European Union competition enforcement regime. This article will argue that it should come in the form of criminalising individuals and corporations who engage in hard-core cartel behaviour prohibited by Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) such as agreements, concerted practices, bid rigging and market allocation. Such agreements are presumed to produce anti-competitive effects, a view which has been reinforced most recently in Case C-226/11 *Expedia*;

“the Court has emphasised that the distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”⁹.

Therefore, it will argue the case in favour of criminalising such conduct across all Member States of the European Union.

The first part will examine which agreements should be criminalised, in what manner and whether or not they are criminal in character. Second, it will examine the effectiveness of the current civil fine regime in comparison with the proposed criminal enforcement regime with particular regard to its deterrence value and the operation of leniency programs. The final part of this article will address briefly the political and cultural changes necessary for such a proposition to be a worthwhile endeavour.

The Proposed Criminalisation Regime

Breaches of Article 101 (1) TFEU, which precludes restrictive agreements between independent market operators, should be criminalised by way of criminal corporate fines, individual fines and individual imprisonment. The objective would be to protect competition on the market, enhance consumer welfare and ensure an efficient allocation of resources. Competition and market integration can achieve

⁶ Divakara Babu Chennupati and Rajasekhara Mouly Potluri, “A viewpoint on cartels: an Indian perspective” (2011) *Int. J.L.M* 252.

⁷ Stephan *op. cit* p .1 at 241.

⁸ Andreas Stephan, “An Empirical Assessment of the European Leniency Notice” (2009) *Journal of Competition Law and Economics* 5(3) 537 at 543.

⁹ Judgement 13th December 2012 at 36.

these aims since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

Three conditions must be satisfied to find a breach of Article 101(1). First, there must be an effect on trade between Member States. Second, the challenged activity must be an “agreement” or “concerted practice” by firms or a decision by an association of firms. Third, the agreement must have the “object or effect” of restricting competition. It was established in Cases 56 & 58/64, *Etablissements Consten SA & Grundig-Verkaufs-GmbH v Commission*, that an agreement deemed to have the ‘object’ of restricting competition infringes Article 101(1) without having to establish its effects¹⁰. If an anticompetitive object is absent, then an agreement infringes Article 101(1) only if it has anticompetitive effects. This effects test requires an examination *in concerto* of the economic conditions prevailing on the market concerned and of the effects the agreement had on competition¹¹.

It is submitted that hardcore restrictions of competition as defined by the European Commission ‘de minimis’ notice be criminalised by way of corporate fines, individual fines and imprisonment. The Commission notice states that the quantitative thresholds below which it deems agreements to lack an appreciable impact...;

do not apply to agreements containing any of the following hardcore restrictions:

...as regards agreements between competitors...restriction which directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the fixing of prices when selling the products to third parties;
- (b) the limitation of output or sales;
- (c) the allocation of markets of customers¹².

This indicates that the European Union (EU) appreciability test does not apply to horizontal agreements that have the objective purpose of fixing price or output or dividing markets. This parallels US law which make those same agreements (with the addition of boycotts¹³) ‘per se’ illegal regardless of how small the firms are that engage in them. The U.S Supreme court has held that certain agreements are so likely to be anti-competitive, and so unlikely to have pro-competitive effects, that they are condemned “per se” and the court will not engage in a case-by-case inquiry as to their net effect¹⁴. This is a reflection of the presumed economic and consumer harm such agreements cause. It is submitted that there should be no need for economic evidence for the harm caused by such hard-core infringements as to do so would lead to a frivolous exercise of having competing economists give differing and confusing economic evidence as to the effect an action had on the market.

¹⁰ “...there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition” 342.

¹¹ *Case 56/65 Société Technique c. Maschinenbau Ulm*, [1966] E.C.r. 337.

¹² Commission Notice on agreements of minor importance, O.J. 2001, C 368/13 at 11.

¹³ *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

¹⁴ *Northern Pacific R. Co. V United State* 356 U.S 1, 5 (1958).

The proposed regime envisaged is similar in the author's opinion to the highly effective United States Anti-Trust enforcement regime. Criminal penalties under the Sherman Act provide for punishment "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"¹⁵. The Sherman Act requires proof of criminal intent such that the conduct was "undertaken with knowledge of its probably consequences" or had "the purpose of producing anticompetitive effects....even if such effects did not come to pass"¹⁶. While the Supreme Court has held that the Department of Justice may bring criminal prosecutions against defendants for 'rule of reason' offences,¹⁷ that aspect of the US regime will not be proposed in this article as in the author's opinion it risks over-detering pro-competitive conduct lying close to the border of impermissible conduct. However, since the General Court has been clear that Article 101(1) TFEU does not embody a rule of reason inquiry that balances anticompetitive effects against pro-competitive justifications¹⁸, preferring them to be considered under Article 101(3) TFEU, this issue would not arise in the event of criminalising infringements of Article 101(1).

There is currently fierce debate surrounding the EU's criminal competency. With regard to the European Commission's proposal of a European Public Prosecutor (EPP), nineteen Member States expressed their critical concerns that it does not respect the principle of subsidiary and issued a yellow card¹⁹. In the authors opinion it is regrettable that there is such resistance toward the proposed EPP since it would have been a perfect avenue through which the criminalisation of hard-core infringements could have been implemented on a EU level. It would have acted as a single centralised body to deal with infringements of competition law and make applications to national courts for criminal sanctions to be imposed on behalf of the EU (since the ECJ does not have criminal competency nor jails to place those infringers in). The most plausible alternative appears to be criminalisation through Article 83(2) TFEU through harmonisation at the level of Member States. Since competition law is an area which has been subject to harmonisation measures (Regulation 1/2003), it would satisfy the first condition but it would have to be proven that criminal law measures are essential to ensure the effective implementation of the Union's competition law policy. The second part of this article will argue that criminalisation is necessary in detail.

The scope for the EU to impose on Member States the obligation to create criminal penalties including imprisonment based on the TFEU provisions outlined above has been significantly strengthened on account of the European Parliament's recent passing of the Directive on Criminal Sanctions for Market Abuse²⁰.

Assuming that Article 83(2) is a sufficient legal basis to criminalise, the European Competition Network would then have a significant role to play in the

¹⁵ Sherman Act, 15 U.S.C 1-2

¹⁶ *United States v United States Gypsum* 438 U.S 422, 44 & n.21 (1978).

¹⁷ *Nash v United States*, 229 U.S 373, 376-78 (1913).

¹⁸ Case T-328/03, *O2 (Germany), GmbH & Co. OHG v. Commission*, [2006] E.C.R 11-1231.

¹⁹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-013913+0+DOC+XML+V0//EN> accessed on 4th Feb 2014.

²⁰ Press Release 4th Feb 2014 [http://europa.eu/rapid/press-release MEMO-14-78_en.htm](http://europa.eu/rapid/press-release_MEMO-14-78_en.htm)

collection and sharing of evidence to prosecute. Since there already exists a practice of assigning cases to each National Authority in the case of a cartel with more than one member state involved, cartel behaviour on a European scale which would typically be dealt with exclusively by the Commission and the ECJ in a civil context would not be problematic for national courts to criminally prosecute. Furthermore, it is submitted that in order to ensure the most effective criminal sanctions throughout the EU, each Member State should include a clause in their national legislation that identifies with infringements of Competition law at a European Union level. For example, section 6(1) of the Irish Competition Act 2002 links the offence of collusion, agreements and concerted practices to what is now 101(1) TFEU with the phrase “that is prohibited by section 4(1) of Article 81(1) of the Treaty shall be guilty of an offence”. In theory therefore, this allows the Irish Competition Authority, upon the ECJ finding a breach of Article 101(1) and absent any ‘harm’ or link with Ireland, to take the case and criminally prosecute. In practice this would be a farce as the European competition regime would be overly reliant on Ireland and other countries with individual criminal fines and imprisonment to impose them on ‘all-European’ cartels.

Since the proposed criminalisation of cartels and the resulting imprisonment of individuals is a much more onerous punishment than fines, it is imperative that it only be available for clear-cut violations of competition law. It is important to acknowledge the risk of unjustified punishment of lawful, pro-competitive behaviour if such sanctions were introduced. It is also significantly easier to justify the criminalisation and imprisonment of individuals who had knowledge that their conduct was illegal and acted in flagrant disregard for the law. On the basis of both criteria, Wills has argued in favour of criminalising horizontal, naked price fixing, bid rigging and market allocation schemes, a view that the author shares. The force of the criminal law would therefore only be available for so called ‘hard-core infringements’ of competition law.

The two justifications typically accompanying proposals to criminalise hard-core cartel conduct are the morally reprehensible nature of the conduct and the harm it causes. Cartel conduct is widely considered to be an ‘anathema to the public interest²¹’ and as is highlighted in the second part of this article, capable of causing significant economic harm. Furthermore, it is submitted the clandestine nature of cartels heightens their reprehensibility since it creates a sense that perpetrators both knew of their wrongdoing yet were confident that they could avoid detection *and* punishment.

For example, in the *Hasbro* and *Sevenoaks Survey* cases in the United Kingdom emails were signed off with “never put anything in writing, its highly illegal and it could bite you in the arse!!!” and “Confidential please, so we aren’t accused of being a cartel”²². Similarly in the *Graphite Electrodes* case, cartel members went to great lengths to avoid detection by devising a complex system of code names such as ‘COLD’ and ‘Artemis’ to hide their identities. Furthermore, and in the author’s view the true ‘straw that broke the camel’s back’ in terms of wrongdoing, the cartel

²¹ Samuel, G. “Cartel reform and compliance with the trade practices act” (2009) *Australian Corporate Lawyers Association National Conference, Melbourne, 13 November 1*.

²² Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games CA98/2/2003 [2003] UKCLR 553 at 53.

members continued the collusive agreement even after the European Commission had launched its investigation²³. It is submitted that such a conscious and blatant disregard for the law goes against the fundamental moral basis of the law and is more than just mere illegality. It is this sense of indignation that makes grandiose statements condemning cartel activity popular²⁴.

Whelan has highlighted that cartel activity “aims to undermine and destroy a fundamental economic and political philosophy of Western democracies, i.e. free market capitalism and thus arguably violates prevailing mores²⁵”.

However, it is important to note that this indignation at the obvious disregard cartelists show for competition is not an appropriate justification for criminalisation alone. Such an approach presupposes that there is an accepted rationale underpinning criminal law. As highlighted by Clarke, beyond the basic principle that in order to attribute blame to an individual’s act and inflict punishment it must breach some type of norm or standard, there does not appear to be consensus as to what is deemed criminal. As criminal laws are not confined to conduct which inflicts direct harm but also extend to conduct including regulatory offences acting as a means to control, deter or punish antisocial behaviour. Consequently, Clarke concludes that “at best, identification of conduct as immoral may help to garner public support for criminalisation of new forms of conduct, but it does not, by itself provide a justification for criminalization”²⁶.

Since criminal law is “society’s strongest form of official punishment and censure²⁷” and the leap from fines to imprisonment is considerable, it is clear that some other element should be present to justify the criminalisation of cartels. Many academics have sought to achieve this by pointing to the economic harm caused by cartel behaviour and by comparing it to that of a property crime.

Cartel conduct re-allocates money from consumers either directly or indirectly to cartelists by depriving consumers of the benefits of price competition they would otherwise enjoy. In the absence of such activity, consumers would benefit from the competition-generated consumer surplus which would be normal in a free market economy. Free and natural market conditions determine that consumers should be entitled to the benefits generated through free market competition. The distortion of natural market conditions or market failure caused by cartel conduct and the distributional consequences it causes for some constitutes an unfair “taking of consumer property”²⁸. Cartel conduct not only produces such distributional harm but causes financial harm in the form of deadweight loss resulting from the impact cartels

²³ C-308/04 SGL Carbon AG v Commission [2006] E.C.R. I-5977 at [64].

²⁴ Whelan has highlighted that cartel activity “aims to undermine and destroy a fundamental economic and political philosophy of Western democracies, i.e. free market capitalism and thus arguably violates prevailing mores” Whelan “A Principal Argument for Personal Criminal Sanctions as Punishment under E.C Cartel Law” (2007) 4 Competition Law Review 7, at 29.

²⁶ Julie Clarke “The increasing criminalization of economic law – a competition law perspective” (2012) 19(1) J.F.C 84.

²⁷ Ashworth, A. *Principles of Criminal Law* 2nd ed. (Clarendon Press, Oxford 1995) p. 16.

²⁸ Lande, R.H. “Wealth transfers as the original and primary concern of antitrust: the efficiency interpretation challenged” (1982) 34 *Hastings Law Journal* 65.

have on the natural competitive process which affects supply and demand causing “buyers and sellers to misallocate their spending”²⁹.

It is submitted that it is appropriate to view cartel behaviour as a property crime such as theft. As was artfully characterised by Samuel “they may carry a briefcase rather than a gun, but if a business executive steals millions from consumers, he or she will be exposed to the same prospect of time behind bars”³⁰. Therefore proportionality with other property crimes is a further justification for the criminalisation of cartels.

The issue of characterising cartel conduct as a criminal offence was addressed in Ireland³¹ by examining whether hard-core cartel conduct has the indicia of a criminal offence. This method of analysis was employed by McKenchie J in *DPP v Patrick Duffy & Duffy Motors (Newbridge) Limited*³² in which he elaborated on how the act of membership of a cartel has the indicia of a criminal offence.

McKenchie explains how operating a cartel is not a once off criminal act completed in the spur of the moment. It is continuous and requires high levels of planning and organisation. He uses the example that 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 and suggests that such a person will typically be well educated, businessly astute, either owner of the business or has risen to senior management, and almost certainly will have done a value benefit / detection appraisal. Such an individual then, according to McKenchie, proceeds indefinite as to duration, ceasing only when confronted. It is therefore obvious to the author that such conduct should be deterred and punished criminally.

Despite the harms outlined *supra*, it could be argued that cartel conduct in fact produces no more harm than some other lawful forms of business conduct such as price exploitation by companies with sufficient market power. However, it is submitted that this view fails to see there is a crucial distinction to be made between conduct which is employed within the free market economy which drives companies to seek out a competitive edge (ultimately to the benefit of consumers) and that same advantage being acquired through no use of innovation or success but instead coordination between competitors.

The justifications that hard-core cartel conduct be criminalised are therefore moral, economic, based on proportionality in relation to property crimes and that the conduct possess the indicia of a criminal offence. Wills has argued in favour of a further justification based on the inherent deterrent value criminalisation and imprisonment possesses. He observes that in criminal law there appears to be a less strict relationship between the size of the penalty and the size of the harm caused than with civil sanctions and believes this to be reflective of the idea that criminal law does not seek to price certain behaviour but rather prohibit it unconditionally, irrespective

²⁹ Scott, P. “Go directly to jail” (2008) 11(10) *Global Competition Review* 6.

³⁰ Samuel *op.cit.* p. 5 at 1.

³¹ Although there remains to be a jail sentence served, Ireland criminalizes cartel involvement under article 6(2) of the 2002 Competition Act.

³² *DPP v Patrick Duffy & Duffy Motors (Newbridge) Limited* 2009 IEHC 208.

of the actual size of the external cost³³. It is therefore appropriate to examine the effectiveness of the current enforcement regime in comparison to the proposed criminal regime.

Effectiveness: Deterrence & Leniency

There are two recognised forms of deterrence in criminal jurisprudence; specific and general. General deterrence aims to dissuade potential offenders through severe penalties. It is general deterrence that provides one of the main arguments for criminalising cartels as it is submitted that criminal penalties will provide a more effective deterrent than civil penalties for first time offenders. While some argue³⁴ the seriousness of the penalty does little to increase deterrence, white collar crime, according to the author and as reinforced by Clarke, appears to be the exception to the rule since it is in the context of white-collar offences that “the offender has the time, inclination and resources to do a cost-benefit analysis” of his or her actions³⁵.

Since it is difficult to place a monetary price on freedom, a conventional risk-benefit analysis breaks down when the possibility of imprisonment or other criminal sanctions are introduced. This threat of imprisonment is likely to affect a businessman much more than it would a ‘common thief’ as was artfully put by Arthur Lindman;

For the purse-snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations³⁶.

This is not a common view however, the OECD have suggested that “there is no systematic evidence available to prove the deterrent effects of criminal sanctions³⁷.” Deterrence will only work if there is a credible threat of detection followed up by punishment. However, it is submitted that the following U.S Department of Justice example does prove convincing as to the merits of criminal sanctions as a general deterrent for prospective cartelists:

We [the US Department of Justice] are observing firsthand in some of our investigations how the threat of criminal prosecution in the United States has deterred a significant number of global cartels from extending their conspiracy into the United States. We have uncovered cartels that operated profitably and illegally in Europe, Asia, and elsewhere around the world, but did not expand their cartel activity to the United States solely because it was not worth the risk of U.S. sanctions. I am referring to cartels that had every opportunity to

³³ Wouter P.J. Wills “ Is Criminalisation of EU Competition Law the Answer?” in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.) *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, Oxford/Portland, Oregon).

³⁴ Clarke, J. and Bagaric, M. “The desirability of criminal penalties for breaches of part IV of the trade practices act”(2003) *Australian Business Law Review*, Vol. 31 3 pp. 192-209.

³⁵ Clarke *op.cit.* p.7 at 86.

³⁶ Arthur Liman “The Paper Label Sentences: Critique” (1977) 86 *The Yale Law Journal* 619.

³⁷ OECD “*Third Report by the Competition Committee on the Implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels*” (2005) available at: www.oecd.org/dataoecd/58/1/35863307.pdf accessed 4th Feb 2014.

target U.S. consumers, because they sold in the U.S. market. Indeed, in some cases, the U.S. market was the largest and potentially most profitable but the collusive conduct still ceased at the border. Why? The answer, from the mouth of the cartel members and verified by our investigators, is that the executives did not want to get caught and go to jail in the United States³⁸.

On the other hand, advocates of civil fines have highlighted three arguments in favour of them; (1) they reflect the seriousness of the conduct punished in distorting competition; (2) they aim to achieve an effective level of deterrence in the face of unknown numbers of cartel infringements going undetected (3) they enhance the efficiency of leniency programmes by making the difference between the immunity prize (available to the first firm only), and the consequences for firms who fail to co-operate sufficiently stark to induce self-reporting--this helps to increase the number of cartel cases that come to light³⁹. Each argument will be tackled in turn.

(1) They reflect the seriousness of the conduct punished in distorting competition

Harding has observed that the ranking of ‘seriousness’ in the European Commission Guidelines⁴⁰ on the method of setting fines focuses on the element of market impact preserving the higher level of seriousness for the cartels that impacted on the function of the single market. He suggests that the European offence is one of outcome since it focuses mainly on the market impact as opposed to the *mala fides* elements of organised collusive activity, furtiveness and secrecy and knowledge of wrong-doing which are prominent in the American rules⁴¹. However it should be highlighted that the European Courts have since held that in assessing the gravity of the infringement, “factors relating to the intentional aspect, and thus the object of a course of conduct, may be more significant than those relating to its effect [...] particularly where they relate to infringements which are intrinsically serious, such as price-fixing⁴²”. Does this necessarily mean that fines are *the* most effective means of punishing cartel behaviour? Surely, if it is the conduct and its anti-competitive conduct as opposed to its economic effects that is used to impose the fine in the first place (on a serious infringement of 101(1)) it is strange to base the severity of fine imposed on market effects with the case-law loophole of cases where conduct *may* be more significant than its effect.

In a study of the 2006 Guidelines on sentencing and the severity of punishment, Connor concluded that the average fine under the 2006 guidelines was 141 per cent higher than the average fine per cartel for a large sample of cartels fined

³⁸ Hammond S. “Cornerstones of an Effective Leniency Program”, (2004) paper presented before the ICN Workshop on Leniency Programs (Sydney, 22-23 November 2004), available at <http://www.usdoj.gov/atr/public/speeches/206611.htm>, (accessed 4th Feb 204) at 12-14.

³⁹ Stephan *op.cit.* p1 at 237.

⁴⁰ Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 9 [1998]; these guidelines remain valid under Regulation No. 1/2003; see Article 43(3) of Regulation No. 1/2003. The ECSC Treaty expired on 23 July 2002.

⁴¹ Harding C. (2002): “Business Cartels as a Criminal Activity: Reconciling North American and European Models of Regulation“, 4 *Maastricht Journal of European and Comparative Law* 393, at p. 412.

⁴² Judgment of the Court of First Instance of 13 December 2001 in Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai Speciali Terni v Commission* [2001] ECR II-3823, paragraph 199.

during 1999-2009 under the EC's 1998 Guidelines⁴³. He also found, based on his own measure of severity⁴⁴, that the new guidelines produced hard-core cartel fines that were more than six times as severe as comparable fines imposed under the 1998 Guidelines⁴⁵.

While the above evidence may seem a triumph for the Commission, the economic reality is that for a financial penalty to provide an effective deterrent, the expected gain from the cartel conduct must exceed the gain from the violation. On this measure, as affirmed by the OECD, the current penalty regime in most jurisdictions would appear to fall far short⁴⁶.

(2) They aim to achieve an effective level of deterrence in the face of unknown numbers of cartel infringements going undetected

Wills has skillfully highlighted how any economic fine in the case of corporations could never act as an effective deterrent since it would have to be impossibly high, would breach the statutory ceiling and exceed the firm's ability to pay. He asserts that the minimum level of fines required generally to deter price cartels (and other anti-trust offences of comparable profitability and ease of concealment) would need to be 150% of the annual turnover in products concerned by the violation. This finding is based on Wills taking the figure of 10% of the selling price as an estimate of the average price increase from price fixing since, in the absence of any European studies, it had been relied upon by the US Sentencing Commission when drafting its Sentencing Guidelines and appeared (according to Wills) generally accepted in American literature. As the price increase caused by the cartel will normally depress demand for the cartel members' products, he assumed conservatively that a price increase of 10% would lead to an increase in profits of 5% of turnover. On the basis of the findings of duration in a number of cartel decisions of the European Commission, and of estimates in the American literature, he assumed, again conservatively, a cartel duration of 5 years. Finally, he assumed a probability of detection and punishment of 16%, which he considered again to be a conservative estimate, given that the single existing study in American literature⁴⁷, had produced an estimate of between 13 and 17%, and given that European competition authorities have weaker investigative powers than their American counterparts. Assuming a 10% price increase, and a resulting increase in profits of 5% of turnover, a 5-year duration and a 16% probability of detection and punishment, he concluded the floor below which fines will generally not deter price fixing would be on the order of 150% of the annual turnover in the products concerned by the violation⁴⁸.

⁴³ John M. Connor "Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines" (2011) *E.C.L.R* 27 at 7.

⁴⁴ Severity was measured by the ratio of the fine to the affected commerce of the cartel or its participants.

⁴⁵ Connor *op.cit.* p.11 at 9.

⁴⁶ OECD (2002b), *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, OECD Directorate for Financial, Fiscal and Enterprise Affairs - Competition Committee, OECD, Paris, p. 2.

⁴⁷ P.G. Bryant and E.W. Eckhard, 'Price Fixing: The Probability of Getting Caught' (1991) *Review of Economics and Statistics* 531.

⁴⁸ Wouter P.J. Wils "Is Criminalisation of EU Competition Law the Answer?" in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.) *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, Oxford/Portland, Oregon) at 33.

It is submitted fines are also an ineffective deterrent for individuals in corporations. The underlying logic of corporate fines is that if the threat is high enough, it will shift the enforcement function from the authorities to the company as the company will want to deter its agents from breaching the law. While this policy may be practical for certain forms of corporate misdemeanours, Wills argues that in some contexts, corporations may not be able to adequately control the behaviour of its agents and as such exclusive reliance on corporate sanctions will not lead to effective deterrence⁴⁹.

In addition, fines solely on corporations are an ineffective deterrent as it is the corporation, not the individuals, who bear the risk of the fine. In this sense it is argued that corporate fines are very unfair as in Europe it is typically years after the conduct occurred that a fine is imposed. For example in the *Car Glass*⁵⁰ cartel case, it was more than a decade after the anti-competitive conduct was first instigated and nine years after the infringement ceased that a fine was imposed. With such a time lapse, many of the perpetrators of the crime had left the company and, unjustly, it was current employees and shareholders, the majority of whom would not have benefited from the illegal profits accrued, which felt the full force of the fine.

The proposal outlined in this article would involve criminal fines on individuals as well as corporations and therefore it is acknowledged that it would to some extent suffer from the criticism highlighted above. However, as reinforced by Wills, the crucial advantage of imprisonment is that it is impossible to shift the penalty *ex post*, and it is more difficult to arrange for a premium to compensate the risk in advance⁵¹.

(3) They enhance the efficiency of leniency programmes by making the difference between the immunity prize (available to the first firm only), and the consequences for firms who fail to co-operate sufficiently stark to induce self-reporting--this helps to increase the number of cartel cases that come to light;

The logic of the above argument in favour of fines could be viewed as supporting criminal corporate and individual fines as well as imprisonment since the introduction of such measure would make the difference between the immunity prize and the consequences for firms who fail to cooperate even more stark and, presumably, induce even more self-reporting.

It would appear that the US has the most successful form of leniency which works in tandem with the threat of criminal prosecutions. The mixture of corporate fines and individual prison sentences coupled with effective corporate and individual leniency programmes has been very successful in detecting and deterring cartels securing the conviction of 19 individuals in the fiscal year ending September 30 2006 alone⁵². Fines on individuals totalled \$473 million and prison sentences served totalled over five years. Furthermore, there is evidence that some cartels purposefully

⁴⁹ Wills *op.cit.* p.8 at 29.

⁵⁰ IP/08/1685 DG Competition Press Release, "Antitrust: Commission fines car glass producers over 1.3 billion for market sharing cartel" (November 12, 2008).

⁵¹ Wills *op.cit.* p.8 at 33.

⁵² Stephan *op.cit.* p.1 at 238.

did not enter the U.S market because of the custodial sentences regularly secured there by the Department of Justice⁵³.

Hammond has explained the true genius of the individual leniency programme in the US is not in the number of individual applications it receives but instead in the number of corporate applications it generates. The programme has the effect of putting the company in a race for leniency against its own employees if it does not report the conduct for its own protection⁵⁴. Baker has also attributed incentives for whistle blowing based not only on fear but also on a desire for revenge by disgruntled current or fired employees, former trade association officials and even ex-spouses and ex-lovers⁵⁵.

The Department of Justice numbers speak for themselves. It is evident that a regime of criminal enforcement of competition policy through fines and individual imprisonment would be a more effective deterrent against cartel conduct than the civil fine scheme exclusively for corporations currently in place. The introduction of an individual leniency scheme to supplement the corporate leniency programme already established by the European Commission⁵⁶ compliment, and increase the effectiveness of, the criminal enforcement regime proposed in this article.

Political and Cultural Change Necessary for implementation of a criminal competition enforcement regime

It is clear that the key difference between the European Union and U.S competition enforcement regimes appears to be that the EU prefers proportional sanctions for those engaged in the operation of hard-core cartels as opposed to the US's aggressive approach towards deterring them. It is submitted that it is time for the European Union to leave behind its traditional ordo-liberal thinking and reluctance to criminalise in order to achieve the economic efficiency and consumer welfare envisaged at the heart of its competition policy. Furthermore, the OECD on two occasions has recommended criminal sanctions for such hard-core cartel conduct⁵⁷. An international mandate for governments and the EU may also be inferred from such organisational recognition of the seriousness of cartel conduct on national economies and should be acted upon.

In the author's view the political resistance toward criminalising cartel behaviour may stem from a more serious cultural problem which does not view cartels as serious crimes. Clarke has suggested that, despite economic harm being acknowledged, the indirect nature of the harm caused to individual members of the public does not elicit the same emotional response and the moral condemnation as more traditional property crimes such as theft⁵⁸. Experience from the financial sector -

⁵³ Kolasky "Antitrust Compliance Programs: The Government Perspective", Speech given to Corporate Compliance 2002 Conference, Practising Law Institute, July 12, 2002, San Francisco.

⁵⁴ Hammond *op.cit* p.10.

⁵⁵ Baker D. (2001): "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging", 69 *George Washington Law Review* 693, at 708.

⁵⁶ 2006 Guidelines on the method of setting fines OJ C210. 1.09.2006, p.2-5.

⁵⁷ In 1998 the OECD issued its Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, adopted by the Council at its 921st Session on 25th March 1998 [C/M(98)7/PROV] and in the 2003 report *Hard Core Cartels: Recent Progress and Challenges Ahead*, OECD, Paris.

⁵⁸ Clarke *op. cit* p.7 at 78.

most recently in an Irish context with respect to the Anglo Irish Bank executives responsible for the mismanagement of that bank which contributed to the Irish economic crisis in 2007- suggests that, in order for public perception to be changed and garner support for criminalisation, such cases of fraud and the economic and social harm caused by them should be condemned publicly. Clarke furthermore suggests that the ‘current cognitive dissonance’ displayed by some members of the public when viewing hard-core cartel conduct differently in terms of harm and moral culpability from fraud, should be overcome before any normative change occurs resulting in the wider public equating these forms of conduct⁵⁹.

Conclusion

This article has as its ‘object’ to make the case for Article 38(2) TFEU be used to impose a requirement that Member States implement criminal corporate fines, individual criminal fines and imprisonment for hard-core cartel conduct such as bid-rigging, market division and price fixing at a European Union level. Whereas there may be political and cultural obstacles to overcome before such a proposition is implemented, it is the author’s wish that (in the context of this article) the ‘effect’ of highlighting how effective such a regime would be in terms of deterring hard-core cartel conduct and increasing cartel detection through bolstered leniency programmes for individuals as well as corporations has successfully proven the case for criminalisation of hard-core cartel conduct across the European Union.

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⁵⁹ *Ibid* at 85.

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