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Keywords

non-monetary, financial, penalties, law, prosecution

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Abstract

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I Introduction

On 25 March 1998, the Council of the Organisation for Economic Co-operation and Development ('OECD') adopted several non-binding recommendations concerning effective actions against hard core cartels.¹ The Council condemned hard core cartels' conduct as 'the most egregious violations of competition law' and called upon its member countries to ensure that their competition laws effectively prohibit such cartels, particularly by providing effective sanctions, enforcement procedures and institutions.²

Indeed, the choice of sanctions for violations of the law forms a crucial element in designing *any* legal system.³ As of now, over 110 countries have established national competition laws, and various

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¹ See Organisation for Economic Co-operation and Development Council, 'Recommendation of the Council Concerning Effective Action Against Hard Core Cartels' (Recommendation No C(98)35/FINAL, Organisation for Economic Co-operation and Development, 14 May 1998) <<http://www.oecd.org/daf/competition/2350130.pdf>>.

² Ibid 2–3.

³ See William E Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from US Experience' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 45, 45.

multinational or supranational organisations (such as the Caribbean Community and the European Union) have created systems of competition law.⁴ An increasing number of jurisdictions — currently more than 30 — have criminalised cartel activity in some form.⁵ Many have initiated prosecutions, some have secured convictions, a few have introduced custodial sentences and others have significantly increased the amount of fines.⁶

Generally, the personal risks for cartelists are growing.⁷ As recent developments in Canada and the United States demonstrate, individuals are likely to face even tougher prison sentences in the future.⁸ The Canadian competition legislation was amended in 2009 in order to increase prison terms for cartel executives to up to 14 years.⁹ In the United States, the Department of Justice ('DOJ') has consistently emphasised that it will ensure that not only American citizens, but also foreigners who are participating in cartels impacting the US economy, face severe jail sentences.¹⁰ According to the Antitrust Division of the DOJ, an average of 29 individuals a year have been sentenced to imprisonment for breaches of antitrust legislation since 2010.¹¹ In addition, the average length of jail terms is continuing to increase, with the average prison sentence reaching 25 months between 2010 and 2014.¹² In the United Kingdom, Nigel Snee, director of Franklin Hodge Industries, was charged on 14 September 2015 with the criminal cartel offence set out in s 188 of the *Enterprise Act 2002*.¹³ He received a six-month prison sentence and 120 hours of community service for 'dishonestly agreeing with others to fix prices, divide up customers and rig bids'.¹⁴ Although a suspended prison sentence was imposed, the

⁴ Ibid.

⁵ Christopher Harding, Caron Beaton-Wells and Jennifer Edwards, 'Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?' in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015) 233, 233.

⁶ Gregory C Shaffer and Nathaniel H Nesbitt, 'Criminalizing Cartels: A Global Trend?' (2011) 12 *Sedona Conference Journal* 313, 315.

⁷ Heather Irvine, *Cartels Face Hefty Fines and Prison Sentences Worldwide* (February 2013) Norton Rose Fulbright <<http://www.nortonrosefulbright.com/knowledge/publications/75240/cartels-face-hefty-fines-and-prison-sentences-worldwide>>.

⁸ Ibid.

⁹ *Competition Act*, RSC 1985, c C-34, ss 45(2), 47(2).

¹⁰ Irvine, above n 7.

¹¹ See Antitrust Division, The United States Department of Justice, *Criminal Program Update Spring 2015* (2015) <<http://www.justice.gov/atr/division-update/2015/criminal-program-update>>.

¹² Ibid.

¹³ *Enterprise Act 2002* (UK) c 40.

¹⁴ King & Wood Mallesons, *Director Sentenced to 6 Months Imprisonment for Engaging in Prohibited Cartel Activity* (18 September 2015) <<http://www.kwm.com/en/uk/knowledge/in-sights/director-sentenced-for-prohibited-cartel-activity-20150918>>.

sentencing judge noted that, due to the severity of cartel activity, prison sentences ought to be expected as a result of cartelisation.¹⁵

The aforementioned examples indicate that individuals who engage in price fixing, bid rigging, market division or customer allocation,¹⁶ must expect prison sentences in a number of jurisdictions around the world.¹⁷ Although there is a trend of accepting that imprisonment can be a useful part of effective anti-cartel enforcement, the vast majority of countries still do not use it as a sanction.¹⁸

This article argues that the threat of imprisonment is an effective tool in combating cartel conduct. Taking into account the experience in the United States, in particular, the article offers arguments for the introduction of prison sanctions for individuals responsible for antitrust violations. The article contends that there is no more effective deterrent for cartel conduct than the knowledge of being imprisoned if caught. However, the article also acknowledges that the introduction of custodial sentences for antitrust conduct is a formidable task that requires complex modifications not only to society's legal framework, but to its culture as well.

The structure of the article is as follows: Part II primarily investigates the criminalisation process of cartel formation around the world. This Part briefly outlines the three main types of enforcement regimes and analyses the nature of cartel activity. The main body of the article, Part III, then offers arguments in favour of punishing cartel conduct with imprisonment. In Part IV, various objections and concerns regarding the utility of imprisonment are discussed and their validity assessed. Part V concludes.

II Criminalising Cartel Activity

A *Three Categories of Enforcement Regime*

In general, jurisdictions around the world can be divided into three categories of enforcement regime with regard to hard core cartels.¹⁹ The first, and most common, are the administrative/civil systems, which adhere to a single model under which infringement decisions relate to

¹⁵ Ibid.

¹⁶ Cf the description in Organisation for Economic Co-operation and Development Council, 'Recommendation of the Council Concerning Effective Action against Hard Core Cartels', above n 1, 3, as well as the definition of cartel conduct in *Competition and Consumer Act 2010* (Cth) s 44ZZRD.

¹⁷ See also Irvine, above n 7.

¹⁸ Competition Committee, 'Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation' (Report, Organisation for Economic Co-operation and Development, 2005) 26 <<http://www.oecd.org/competition/cartels/35863307.pdf>>; Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals' (2009) 9(3) *OECD Journal: Competition Law and Policy* 7, 10.

¹⁹ Andreas Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' (2014) 2(2) *Journal of Antitrust Enforcement* 333, 334.

corporations only and result in monetary sanctions.²⁰ While some of these regimes (such as the Netherlands) have debated criminalisation, others (such as Sweden) have distinctly rejected it.²¹ The second category, a dual model, stipulates criminal and/or administrative/civil liability for companies and individuals with either monetary or non-monetary sanctions.²² Examples include the systems of Canada, the United States, New Zealand and Australia.²³ The final category is that of the United Kingdom, a hybrid regime which provides for administrative/civil liability for companies but criminal liability for individuals.²⁴

B Analytical Basis for Treating Cartel Formation as a Crime

Cartel formation can be viewed as a property crime, similar to burglary or larceny, since it robs consumers and other market participants of the opportunity to benefit from the competition of a free market system.²⁵ As it appears to be as harmful as common forms of theft, it is appropriate to address serious cartel infringements through criminal sanctions.²⁶ The primary difference between cartel conduct and other forms of property crime lies in the purpose of the sanctions: while rehabilitation and incapacitation are the essential functions for the majority of criminal sanctions, deterrence is the most significant one for cartel behaviour.²⁷ Given these circumstances, at least from an analytical point, the basis for treating hard core cartel activity as a serious crime seems sound and logical.²⁸

C The Reality Across the Globe

Overall, in recent years, there has been a greater focus on criminalising cartels around the world in countries such as Brazil, Mexico, Canada,

²⁰ Ibid.

²¹ See Antitrust Encyclopedia, *Are There Criminal Sanctions? What are These? What are the Relevant Provisions?*, Concurrences Review <<http://www.concurrences.com/Droit-de-la-concurrence/Antitrust-Encyclopedia/?questions=644#ancre217>>.

²² Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011) 199. But see Stephan, 'Four Key Challenges', above n 19, 334, who appears to use the term of a 'fully criminalized regime' in this context.

²³ Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 22, 199; Stephan, 'Four Key Challenges', above n 19, 334.

²⁴ Stephan, 'Four Key Challenges', above n 19, 334.

²⁵ Gregory J Werden, 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime' (2009) 19 *European Competition Journal* 19, 23.

²⁶ See Kush Makkar, 'Combatting Cartels in India: Justifying Criminalization' (Research Report, Competition Commission of India, June 2013) 4–5. See also Werden, above n 25, 23.

²⁷ Werden, above n 25, 24.

²⁸ Ibid.

Australia, Israel and India.²⁹ A number of jurisdictions are increasingly using criminal enforcement tools, even if not with the same force and conviction as the United States, where such tools have been used with ‘zeal and confidence’ since the enactment of the *Sherman Antitrust Act*³⁰ in 1890.³¹ Approximately half of the 35 OECD member countries currently punish cartel violations with imprisonment, although actual criminal sentences have been rare outside the United States, where imprisonment is sought frequently.³² At any rate, OECD countries clearly accept that imprisonment provides an efficient sanction tool.³³ Perhaps all that is now needed is a ‘trigger event’, such as the famous Electrical Equipment indictments in the United States,³⁴ to encourage these countries to utilise their entire cache of available penalties.³⁵

US competition culture took almost a century to evolve to the point at which cartel participation was viewed as sufficiently serious to warrant imprisonment for culpable individuals.³⁶ In Europe in the early 20th century, cartels were not only common, but also tolerated or even supported by some public authorities.³⁷ Nevertheless, criminalisation of cartel activity in some European countries has evolved much faster than in the United States.³⁸ Ireland, for example, criminalised cartelisation in 1996,³⁹ and the current law allows prison sentences of up to five years.⁴⁰

²⁹ Keith Jones and Farin Harrison, ‘Criminal Sanctions: An Overview of EU and National Case Law’ (National Competition Laws Bulletin Report No 64713, e-Competitions, March 2014) 3 <http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf>.

³⁰ 15 USC § 1 (1890).

³¹ Jones and Harrison, above n 29, 7.

³² Competition Committee, ‘Promoting Compliance with Competition Law’ (Issues Paper No DAF/COMP(2011)20, Organisation for Economic Co-operation and Development, 30 August 2012) 32 <www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>; Douglas H Ginsburg and Joshua D Wright, ‘Antitrust Sanctions’ (2010) 6 *Competition Policy International* 3, 13. In 2015, at least a small number of jail sentences were imposed outside of the US, for instance, in the United Kingdom, Japan and South Korea. See Allen & Overy, *Global Cartel Enforcement: 2015 Year in Review* (2016) 6–10 <http://www.allenoverly.com/publications/en-gb/Documents/Global_Cartel_Enforcement_2015_Year_in_Review.PDF>.

³³ John M Connor, ‘Problems with Prison in International Cartel Cases’ (2011) 56(2) *Antitrust Bulletin* 311, 324–5.

³⁴ See generally Myron W Watkins, ‘Electrical Equipment Antitrust Cases: Their Implications for Government and for Business’ (1961) 29(1) *University of Chicago Law Review* 97.

³⁵ Jones and Harrison, above n 29, 7.

³⁶ *Ibid* 1; Werden, above n 25, 25. See also Donald I Baker, ‘The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging’ (2001) 69(5–6) *George Washington Law Review* 693, 694–6, 705.

³⁷ Jones and Harrison, above n 29, 2. By way of illustration, the international steel cartel agreement of 1926 signed by major steel producers in Belgium, France, Germany and Luxembourg can be mentioned in this context. See Daniel Barbezat, ‘Cooperation and Rivalry in the International Steel Cartel, 1926–1933’ (1989) 49(2) *The Journal of Economic History* 435, 435–47.

³⁸ See generally Barbezat, above n 37, 435–47; Werden, above n 25, 25.

³⁹ See *Competition (Amendment) Act 1996* (Ireland) s 3.

⁴⁰ See *Competition Act 2002* (Ireland) ss 4, 6, 8. Cf Terry Calvani and Torello H Calvani, ‘Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?’ (2009) 17(2) *Competition & Consumer Law Journal* 119, 121.

In *DPP v Manning*,⁴¹ a 2007 case relating to a breach of the price-fixing provisions of the Irish competition legislation, the sentencing judge delivered a judgment favouring custodial sentences.⁴² In the United Kingdom, cartel activity was criminalised with the enactment of the *Enterprise Act 2002*, which punishes cartelists with imprisonment for a maximum term of five years.⁴³ The first cartel-related imprisonments under the *Enterprise Act* of 2002 came in the *Marine Hose Case*, in which three British businessmen were sentenced to terms of imprisonment of between 30 and 36 months. These terms were subsequently reduced slightly on appeal to the Court of Appeal.⁴⁴ The criminalisation process in Israel also developed faster than in the US.⁴⁵ Cartel participation was criminalised in 1988, authorising general prison sentences of up to three years with the possibility of extending them to five years in the presence of aggravating circumstances,⁴⁶ with the first cartel-related imprisonments occurring in 2002.⁴⁷

Australia has also joined the small group of nations that characterise hard core participation as criminal and provide for custodial sentences.⁴⁸ In April 2003, the Dawson Committee (chaired by Sir Daryl Dawson), which was reviewing the competition provisions of the *Trade Practices Act 1974* (Cth) ('*TPA*'), recommended that Australia criminalise cartel behaviour.⁴⁹ In 2009, the Australian Parliament enacted new laws making cartel conduct an indictable offence.⁵⁰ The current *Competition and Consumer Act 2010* (Cth) (which replaced the *TPA*), criminalises making a contract or arrangement, or arriving at an understanding that contains a cartel provision,⁵¹ and giving effect to a contract, arrangement or understanding that contains a cartel provision.⁵² The law makes cartel conduct a criminal offence and provides for imprisonment for up to 10

⁴¹ (Unreported, Central Criminal Court of Ireland, McKechnie J, 9 February 2007).

⁴² See Mary Elizabeth Curtis and John McNally, 'The Classic Cartel — Hatchback Sentence?' (2007) 4(1) *Competition Law Review* 41.

⁴³ See *Enterprise Act 2002* (UK) c 40, ss 188–90. See also Michael O'Kane, 'Cartel Enforcement: A Product of Globalisation' in Valsamis Mitsilegas, Peter Alldridge and Leonidas Cheliotis (eds), *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives* (Hart Publishing, 2015) 219, 227.

⁴⁴ See generally *R v Whittle* [2008] EWCA Crim 2560 (11 June 2008). See also O'Kane, 'Cartel Enforcement', above n 43, 227, 233; Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 8th ed, 2015) 462.

⁴⁵ Werden, above n 25, 25.

⁴⁶ See *Restrictive Trade Practices Law 5748 1988* (Israel) ss 2, 4, 47, 47A. Cf Calvani and Calvani, above n 40, 122.

⁴⁷ Werden, above n 25, 25.

⁴⁸ Calvani and Calvani, above n 40, 123.

⁴⁹ See Trade Practices Review Committee, 'Review of the Competition Provisions of the Trade Practices Act' (Trade Practices Act Review, Australian Department of Treasury, 31 January 2003) ch 11 <<http://tpareview.treasury.gov.au/content/report.asp>>.

⁵⁰ The new law was introduced pursuant to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth). See also Calvani and Calvani, above n 40, 123.

⁵¹ *Competition and Consumer Act 2010* (Cth) s 44ZZRF.

⁵² *Ibid* s 44ZZRG.

years,⁵³ which places Australia at the high end of the spectrum for custodial sentences for cartel behaviour around the globe.⁵⁴ The action taken to criminalise cartel behaviour as well as the nature of the prescribed sanctions — in particular imprisonment — should send a clear signal to Australian courts (and, of course, would-be offenders) about the seriousness of the conduct.⁵⁵ However, if criminal sanctions are to prove effective judges must also be willing to apply those sanctions. In Australia, the theory behind the introduction of criminal sanctions has certainly not been matched in practice by any regularity and/or severity in their application as of yet.⁵⁶

On the other hand, many countries hold the view that criminalisation is not necessarily a clear-cut enforcement tool in preventing hard core cartels, and contend that monetary sanctions are sufficient.⁵⁷ In a few jurisdictions (for example, Greece and Romania), cartel behaviour is only criminalised in a tenuous manner insofar as its conduct amounts to fraud.⁵⁸ In Germany and Poland, criminal penalties only apply to bid-rigging offences.⁵⁹ In the context of the European Union, art 23 of *Regulation No 1/2003*⁶⁰ — imposing fines on undertakings for violations of arts 101 and 102 of the *Treaty on the Functioning of the European Union*⁶¹ (formerly arts 81 and 82 of the *Treaty Establishing the European Community*)⁶² — explicitly states that decisions by the European

⁵³ Ibid s 79. Apart from the sanction of custodial sentences, the law also provides an individual fine of maximum 2,000 penalty units (currently AUD340,000) as well as a corporate fine not exceeding AUD10,000,000 or three times the total value of the benefits from the conduct if that can be determined or, if that gain cannot be determined, 10% of the corporation's annual turnover. See Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 22, 424; Calvani and Calvani, above n 40, 123. Under the *Crimes Act 1914* (Cth) pt IB and the sentencing schemes of the states and territories, there is a significant number of additional sentencing options available, either as alternatives to or in combination with the options provided under the *Competition and Consumer Act 2010* (Cth). See Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 22, 501. In addition to these criminal sanction tools, equivalent civil penalty provisions can be found in ss 44ZZRJ and 44ZZRK of the *Competition and Consumer Act 2010* (Cth). The civil remedies available for contraventions include not only pecuniary penalties, but also a range of other orders such as non-punitive orders (s 86C), punitive adverse publicity orders (s 86D) and disqualification orders from directorship (s 86E). The arrangement of both criminal and civil sanctions allows a 'proportionate' response depending on the seriousness of cartel behaviour: criminal prosecution for serious cartel conduct, and civil enforcement for minor conduct. See also Calvani and Calvani, above n 40, 138.

⁵⁴ Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 22, 480.

⁵⁵ Ibid.

⁵⁶ See also below Part III(B)(3).

⁵⁷ Competition Committee, 'Promoting Compliance with Competition Law', above n 32, 12; Jones and Harrison, above n 29, 3.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ *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 L 46/1.

⁶¹ Opened for Signature 7 February 1992, [2009] OJ C 115/119 (entered into force 1 November 1993).

⁶² Opened for Signature 7 February 1992, [2009] OJ C 224/6 (entered into force 1 November 1993).

Commission ‘shall not be of a criminal law nature.’ At present, there does not appear to be any political intention to introduce criminal sanctions for violations of European Union competition law.⁶³

III Rationales in Favour of Imprisonment

A General Comments

Some economists and economically-oriented lawyers opine that fines are the ‘optimal’ penalties for hard core cartels and that only corporations should be punished.⁶⁴ This view adheres to Professor Gary Becker’s model of crime and punishment,⁶⁵ and extensions of the Becker framework made by his peer Richard Posner.⁶⁶ Accordingly, it has been contended that imprisonment should be the last resort, used only when a corporation is unable to pay an ‘optimal’ fine and culpable individuals are insolvent.⁶⁷ However, one must bear in mind that these seminal works were written when individual sanctions for hard core cartel activity were insignificant.⁶⁸ As described above,⁶⁹ contemporary views have changed significantly.⁷⁰

Criminal sanctions against individuals can indeed also play an important role in antitrust enforcement.⁷¹ Proponents have concluded that the threat of individual sanctions is the most effective element in the arsenal of enforcement tools for combating hard core cartels.⁷² The threat of imprisonment in particular has been described as having an unparalleled power to deter hard core cartels and to realign individuals’ incentives in a way that fines cannot.⁷³ One thing that corporations cannot give back to their culpable executives is the time spent in jail.⁷⁴

Another question is whether the sanction of imprisonment is desirable for all types of cartel formations. An in-depth response would be beyond

⁶³ Jones and Harrison, above n 29, 4. But see Wouter P J Wils, ‘Is Criminalization of EU Competition Law the Answer?’ 2005 25(2) *World Competition* 117, 122.

⁶⁴ Connor, above n 33, 315; Gregory J Werden and Marilyn J Simon, ‘Why Price Fixers Should go to Prison’ (1987) 32(4) *Antitrust Bulletin* 917, 918.

⁶⁵ See Gary S Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76(2) *Journal of Political Economy* 169.

⁶⁶ Connor, above n 33, 315. For Posner’s contributions, see Richard A Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press 1976); Richard A Posner, ‘Optimal Sentences for White-Collar Crime’ (1980) 17(4) *American Criminal Law Review* 409, 409–18.

⁶⁷ Cf Becker, above n 65, 208; Posner, *Antitrust Law*, above n 66, 271; Posner, ‘Optimal Sentences’, above n 66, 415.

⁶⁸ Connor, above n 33, 315.

⁶⁹ See above Part II(C).

⁷⁰ See also Connor, above n 33, 315–16.

⁷¹ Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 18.

⁷² *Ibid.*

⁷³ Competition Committee, ‘Promoting Compliance with Competition Law’, above n 32, 12.

⁷⁴ *Ibid.* 30.

the scope of this article. However, broadly speaking, whenever hard core cartels are concerned, the use of prison sanctions appears to be justified, provided it is a case of clear-cut violation.⁷⁵ Yet, for those types of infringements which are not very profitable for enterprises or which are difficult to hide, less severe sanctions (such as fines and director disqualification) might already be sufficient.⁷⁶

In the subsequent paragraphs,⁷⁷ arguments in favour of imprisonment are presented in more detail. The debate in the United States in the '70s and '80s has already highlighted various benefits of sentencing hard core cartelists to prison.⁷⁸ The *most important* arguments can be summarised as follows: (1) The use of imprisonment can strengthen the disincentive for executives to engage in unlawful activity;⁷⁹ (2) incarceration increases the effectiveness of leniency programs as the risk of tougher sanctions enhances the incentives for individuals to reveal information regarding existing cartels and to cooperate in investigations in exchange for lesser sanctions against themselves;⁸⁰ (3) prison sentences can have a particularly strong psychological effect, as they communicate the message that cartel participation is not only undesirable, but also immoral;⁸¹ (4) the imprisonment of culpable individuals avoids the possibility that corporations will reimburse officers for any financial penalties, since corporations cannot simply pay their executives out of jail;⁸² and (5) jail sentences are a proportionate response to cartel conduct, given that other comparable crimes (such as fraud) are also treated as serious felonies with the possibility of multi-year prison sentences.⁸³

B Deterrent Effect

1 Sanctions must be severe to be effective

Serious sanctions are a pre-requisite to deterring hard core cartel activity.⁸⁴ The sanctions imposed on cartelists must produce sufficient disutility to outweigh what they expect to gain from cartel conduct.⁸⁵ For

⁷⁵ Wils, above n 63, 145–6.

⁷⁶ Ibid.

⁷⁷ See below Part III(B)–(F) in particular.

⁷⁸ Paolo Buccirossi and Giancarlo Spagnolo, 'Optimal Fines in the Era of Whistleblowers — Should Price Fixers Still Go to Prison?' in Vivek Ghosal and Johan Stennek (eds), *The Political Economy of Antitrust* (Emerald Group Publishing Limited, 2007) 81, 98.

⁷⁹ Cf Competition Committee, 'Hard Core Cartels', above n 18, 26. See in more detail below Part III(B).

⁸⁰ See, eg, Giancarlo Spagnolo, 'Divide et Impera: Optimal Leniency Programs' (CEPR Discussion Paper No 4840, University of Rome Tor Vergata, 12 January 2005) <<ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo.pdf>>. See in more detail below Part III(C).

⁸¹ Buccirossi and Spagnolo, above n 78, 99. See in more detail below Part III(D).

⁸² Ibid. See in more detail below Part III(E).

⁸³ Connor, above n 33, 318. See in more detail below Part III(F).

⁸⁴ Werden, above n 25, 28.

⁸⁵ Ibid.

the reasons that follow, fines on corporations and/or culpable business managers alone appear unlikely to guarantee effective deterrence.⁸⁶ On the other hand, there is ample evidence that the threat of a prison sentence is a highly effective deterrent against cartel participation.⁸⁷

2 *Deficits of imposing monetary sanctions only*

The case for imprisonment of executives would be much weaker if corporate sanctions were sufficient to (indirectly) prevent individuals from violating competition law.⁸⁸ Were this so, one might conclude that imposing monetary sanctions on enterprises engaging in cartel conduct should be sufficient to incentivise them to supervise their agents and prevent them from participating unlawfully in cartels.⁸⁹ In reality, however — and for reasons explained more fully below — corporate fines would have to be impossibly high in order to incentivise corporations to supervise their management.⁹⁰ This would be unacceptable for a variety of reasons,⁹¹ on which more shortly. Furthermore, insofar as public companies with widely dispersed shares are concerned, it is questionable whether shareholders would be willing to control their executives, since the financial impact on individual shareholders might not provide enough of an incentive to more effectively control the agents.⁹² Further, from a practical point of view, corporations may not possess the means to deter managers from unlawful cartel participation at all.⁹³

Similar problems may arise with regard to monetary sanctions against individuals.⁹⁴ First, it might be impossible to impose fines that are sufficiently high to deter individuals from acting in cartels.⁹⁵ Second, determining the parameters of an ‘optimal’ fine is even more challenging than in the case of corporations, as it will typically be impossible to determine precisely how much the individual gained from cartel behaviour.⁹⁶ Lastly, the effectiveness of individual fines is contingent upon business executives being unable to be reimbursed by the

⁸⁶ Claus-Dieter Ehlermann and Isabela Atanasiu, *European Competition Law Annual: 2001 Effective Private Enforcement of EC Antitrust Law* (Hart Publishing, 2003) 437.

⁸⁷ *Ibid.*

⁸⁸ Cf Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 18.

⁸⁹ *Ibid.*

⁹⁰ Ehlermann and Atanasiu, above n 86, 437; Wils, above n 63, 140.

⁹¹ *Ibid.*

⁹² Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 19.

⁹³ See the example in Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 19.

⁹⁴ Ehlermann and Atanasiu, above n 86, 437–8.

⁹⁵ Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 19.

⁹⁶ *Ibid.* 19, 23.

company.⁹⁷ All these considerations can negatively influence the deterrent effect of antitrust violations.

As to the level of fines in particular, many theorists have argued that high fines have not always had the desired deterrent effect.⁹⁸ Some argue that the majority of corporations would simply not be able to pay such high fines.⁹⁹ Although a company that has engaged in a cartel is likely to have profited financially from its wrongdoing, there is no guarantee at all that it is in the position to pay the required fines entirely.¹⁰⁰ Rather, the profits accrued from anti-competitive practices are likely to have been paid out in the form of dividends, salaries or taxes.¹⁰¹ Even the liquidation of assets of the undertakings might not generate sufficient revenues to pay the level of fine that is required for effective deterrence, since the annual turnover of many enterprises exceeds their net assets.¹⁰² Hence, the strict imposition of an 'optimal' fine would force a high number of companies into bankruptcy.¹⁰³ Bankruptcy, on the other hand, would create many other social costs, such as loss of employment and a reduction in stakeholders' wealth.¹⁰⁴ Even if the level of fines were affordable, their imposition is likely to have several undesirable side effects.¹⁰⁵ Most importantly, there would be a tendency for financial corporate penalties to fall most heavily on the least culpable involved parties — namely employees who received no benefit from the earlier cartel activity and consumers who may need to pay higher prices.¹⁰⁶ And in cases where the level of fines is too low, they will provide less deterrence since the deterrent effect of a fine is strongly influenced by a company's ability to cope with the penalty.¹⁰⁷

Besides these problems in assessing an appropriate level for fines, the imposition of 'optimal' fines may violate the statutory ceiling of the maximal level of fines that can legally be imposed in jurisdictions where such a cap exists.¹⁰⁸ Article 23(2) of the European Union *Regulation No*

⁹⁷ This point will be developed in greater detail below in Part III(E).

⁹⁸ Makkar, above n 26, 8.

⁹⁹ Wils, above n 63, 140.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* 140–1.

¹⁰³ For an empirical study based on a sample of 386 firms convicted of price fixing in the US between 1955 and 1993, see Catherine Craycraft, Joseph L Craycraft and Joseph C Gallo, 'Antitrust Sanctions and a Firm's Ability to Pay' (1997) 12(2) *Review of Industrial Organization* 171, 180.

¹⁰⁴ *Ibid.* 175; Reinier H Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93(5) *Yale Law Journal* 857, 882.

¹⁰⁵ Wils, above n 63, 141.

¹⁰⁶ See generally John C Coffee, 'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386, 401–2.

¹⁰⁷ Craycraft, Craycraft and Gallo, above n 103, 175.

¹⁰⁸ Wils, above n 63, 140.

1/2003,¹⁰⁹ for example, states that for each cartel member, ‘the fine shall not exceed 10% of its total turnover in the preceding business year.’ Admittedly, this is not too great a hurdle to reform as amendments could abolish the existing law.¹¹⁰ At the very least, however, it demonstrates that raising the level of fines can also induce other problems.

3 *The threat of imprisonment as a very effective deterrent*

The aforementioned shortcomings support the inference that corporate and individual fines alone can only provide a limited deterrent to cartel conduct.¹¹¹ As pointed out earlier, the problem of cartelisation can hardly be solved simply by making pecuniary liabilities more severe.¹¹² It follows that some alternative, non-monetary sanction is needed, and for the reasons that follow, it is argued that the threat of imprisonment is the most suitable sanction to this end.

The experience in the United States provides ample evidence that the apprehension of imprisonment is a very effective deterrent for potential cartelists.¹¹³ As the American lawyer Arthur Liman wrote, in a frequently quoted passage:

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 violations.¹¹⁴

This opinion was shared 30 years later by the Former Deputy Assistant Attorney General of the DOJ, Scott Hammond, who declared in a public speech in 2006 that:

It is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them. ... Hard-core cartel offenses are premeditated offenses committed by highly educated executives. ... When an executive believes that incarceration is a possible consequence of engaging in cartel activity, he is far more likely to be deterred from committing the violation than if there is no individual exposure. This conclusion is not simply based on theories of human behavior or common sense. We have first-hand accounts from cartel members of how the presence

¹⁰⁹ *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 L 46/1.

¹¹⁰ See also Wils, above n 63, 140.

¹¹¹ Makkar, above n 26, 9.

¹¹² *Ibid.*

¹¹³ William Kolasky, ‘Criminalizing Cartel Activity: Lessons from the U.S. Experience’ (Speech delivered at the 5th Lunch Talk of the Global Competition Law Centre, Brussels, 29 September 2004); Wils, above n 63, 143.

¹¹⁴ Arthur L Liman, ‘The Paper Label Sentences: Critiques’ (1977) 86(4) *Yale Law Journal* 630, 630–1.

or absence of individual sanctions has directly resulted in actual deterrence ...¹¹⁵

Professor Joseph Bauer further emphasized the point with reference to a specific case:

The sight of A. Alfred Taubman, the extremely wealthy chairman of the board of Sotheby's, the world famous auction house, convicted and sentenced, at the age of 78, to a one-year term of imprisonment and a substantial fine for participating in a price-fixing conspiracy, doubtless sent a message to other business executives about the risks and penalties for this kind of behaviour.¹¹⁶

Since the United States has long been an enthusiastic proponent of using imprisonment as a deterrent for cartel activity,¹¹⁷ it is not surprising that the preceding statements were all made by Americans. Further, the current system of criminal antitrust enforcement in the US is predominantly successful.¹¹⁸ One could therefore infer that the threat of imprisonment is an efficient deterrent of cartel activity, at least in the US.¹¹⁹

Although it has not been possible to develop convincing empirical data to support the argument that prison sentences sufficiently increase deterrence to offset any additional costs (as there is no way to determine the causes of things which have not happened), there is anecdotal evidence of the effectiveness of individual sanctions.¹²⁰ For instance, in describing the situation in the United States, Terry Calvani, a former member of the governing board of the Competition Authority of Ireland, stated that 'there is much less domestic cartel activity today than before.'¹²¹ On a more global level, the US experience in recent years has shown that cartelists avoided meetings in North America — although operating profitably around the world — as they (erroneously) believed that by doing so they could avoid any possible prosecutions in the US.¹²² Such behaviour indicates that cartel members are fully aware of the harsh

¹¹⁵ Scott D Hammond, 'Charting New Waters in International Cartel Prosecutions' (Speech delivered at the Twentieth Annual National Institute on White Collar Crime, San Francisco, California, 2 March 2006) <<http://www.justice.gov/atr/speech/charting-new-waters-international-cartel-prosecutions>>.

¹¹⁶ Joseph P Bauer, 'Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?' (2004) 16(4) *Loyola Consumer Law Review* 303, 307.

¹¹⁷ See Competition Committee, 'Promoting Compliance with Competition Law', above n 32, 30.

¹¹⁸ Wils, above n 63, 143.

¹¹⁹ Andreas Stephan, 'Why Morality Should be Excluded from the Cartel Criminalisation Debate' (2012) 3(1) *New Journal of European Criminal Law* 127, 134.

¹²⁰ Competition Committee, 'Hard Core Cartels', above n 18, 26; Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 36.

¹²¹ Terry Calvani, 'Enforcement of Cartel Law in Ireland' in Barry E Hawk (ed), *2003 Annual Proceedings of the Fordham Competition Law Institute: International Antitrust Law & Policy* (Juris Publishing, 2004) 1, 6.

¹²² See Scott D Hammond, 'Cornerstones of an Effective Leniency Program' (Speech delivered at the ICN Workshop on Leniency Programs, Sydney, Australia, 22–23 November 2004) <<http://www.justice.gov/atr/speech/cornerstones-effective-leniency-program>>; Kolasky, above 113.

criminal sanctions in the United States and that the pecuniary benefits of cartel conduct are not sufficient to risk the criminal consequences of such actions.¹²³ Moreover, a large number of defendants, once prosecuted by the DOJ, have offered to pay higher fines in return for a non-custodial sentence.¹²⁴ But conversely, no defendant has ever made an offer to the DOJ to spend a longer time in prison in order to reduce an imposed fine.¹²⁵

Not all advocates for imprisonment as a response to cartel conduct come from the United States. For example, a report by London Economics affirms that jail time is ‘widely regarded as a very strong means of deterring antitrust infringements’ in the United Kingdom.¹²⁶ The report further states that ‘even a relatively low probability of facing a jail term may prove significantly deterrent’.¹²⁷ Another UK study from 2007, which gauged business attitudes to enforcement, suggested that competition regimes with the sanction of imprisonment are highly effective at achieving deterrence.¹²⁸ Businesspeople were asked to rank the factors that motivate compliance with competition law in the United Kingdom. The study found that criminal penalties were ranked higher than any other type of sanction.¹²⁹ Fines, on the other hand, were ranked at the bottom.¹³⁰

In Australia, too, the view that imprisonment might be an appropriate sentencing response to white collar crimes is becoming more widely-accepted.¹³¹ Although s 17A of the *Crimes Act 1914* (Cth) states that imprisonment should be a sentencing option of last resort, which ought only to be applied when a court is satisfied that no other sentence is appropriate in all the circumstances of the case, sentencing courts are becoming more willing to impose custodial sentences for reasons of general deterrence.¹³² In a case heard before the Supreme Court of Victoria (regarding the offence of giving a secret commission), it was noted that white collar crimes are hard to detect.¹³³ According to Young CJ, the imposition of a jail sentence seems to be adequate and the most

¹²³ Ibid.

¹²⁴ Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 36. See also Michael O’Kane, ‘Does Prison Work for Cartelists? — The View from Behind Bars’ (2011) 56 *Antitrust Bulletin* 483, 495, interviewing Brian Allison, a former managing director of Dunlop Oil and Marine, who stated that he would much rather have paid a higher fine in order to avoid going to prison.

¹²⁵ Ibid.

¹²⁶ London Economics, ‘An Assessment of Discretionary Penalties Regimes’ (Final Report No 1132, Office of Fair Trading, United Kingdom, October 2009) 10.

¹²⁷ Ibid.

¹²⁸ See Deloitte, ‘The Deterrent Effect of Competition Enforcement by the OFT’ (Report No OFT962, Office of Fair Trading, United Kingdom, November 2007).

¹²⁹ Ibid 72.

¹³⁰ Ibid.

¹³¹ Cf Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 22, 505.

¹³² Ibid.

¹³³ *R v Jamieson* [1988] VR 879, 888 (Young CJ).

appropriate tool to act as a deterrent to others.¹³⁴ In another case, *R v Pantano*,¹³⁵ it was similarly expressed that those persons who are involved ‘in serious white collar crime must expect condign sentences’, since ‘the commercial world expects executives and employees in positions of trust ... to conform to exacting standards of honesty.’ These cases relate to white collar crimes separate from cartel behaviour. However, while previous experience has not been encouraging,¹³⁶ it cannot be excluded that the same approach will be taken in sentencing for cartel offences in the future.¹³⁷ The follow-up questions then become whether prison terms for cartelists should be suspended, what the length of the non-parole period should be and — in cases of multiple offences — whether they should be served concurrently or cumulatively.¹³⁸

C The Improved Effectiveness of Leniency Programs

The sanction of imprisonment improves the effectiveness of public antitrust leniency programs.¹³⁹ These programs set the conditions under which immunity or a reduction of penalties can be granted to participants in a cartel.¹⁴⁰ The pillars of leniency — heightened fear of detection, severe sanctions and transparency in enforcement policies — are based on the simple principles of risk versus reward.¹⁴¹ If cartelists have a significant fear of detection and the consequences of getting caught are too severe, then the rewards of voluntarily self-reporting become too important to risk losing the race for leniency to another cartel member.¹⁴² This dynamic results from the phenomenon often referred to as the ‘prisoner’s dilemma’.¹⁴³ But on the other hand, if cartelists believe that they will not get caught, they are likely to continue with cartel activity.¹⁴⁴

¹³⁴ Ibid.

¹³⁵ *R v Pantano* (1990) 49 A Crim R 328, 330 (Wood J).

¹³⁶ See D K Round, J J Siegfried and A J Baille, ‘Collusive Markets in Australia: An Assessment of their Economic Characteristics & Judicial Penalties’ (1996) 24(4) *Australian Business Law Review* 292, 299 n 23.

¹³⁷ See also Beaton-Wells and Fisse, *Australian Cartel Regulation*, above n 22, 506.

¹³⁸ Ibid.

¹³⁹ See, eg, Competition Committee, ‘Promoting Compliance with Competition Law’, above n 32, 31; Connor, above n 33, 315.

¹⁴⁰ Werden, above n 25, 34. See also Pranvera Këllezi, ‘International Report’ in Bruce Kilpatrick, Pierre Kobel and Pranvera Këllezi (eds), *Compatibility of Transactional Resolutions of Antitrust Proceedings with Due Process and Fundamental Rights & Online Exhaustion of IP Rights* (Springer, 2016) 3, 9.

¹⁴¹ Ann O’Brien, ‘Leadership of Leniency’ in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015) 17, 21.

¹⁴² Ibid 20–1.

¹⁴³ Ibid. See also Andreas Stephan and Ali Nikpay, ‘Leniency Decision-Making from a Corporate Perspective: Complex Realities’ in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015) 139–41.

¹⁴⁴ O’Brien, above n 141, 21.

Similarly, if individual sanctions are not severe enough,¹⁴⁵ a cartel member is likely to simply weigh the benefits of cartel participation against the minimal sanctions and continue profitable business as a cartelist.¹⁴⁶ It follows that sanctions must be so severe that potential penalties for cartel conduct outweigh the potential rewards.¹⁴⁷ It also explains why the United States, in particular fervently argues that prison sentences provide the foundation for an effective leniency program.¹⁴⁸ Even if full immunity is no longer available, the threat of imprisonment provides a cartelist with a powerful incentive to cooperate with the prosecution authority in exchange for a reduction in sentence.¹⁴⁹

Yet, these considerations do not necessarily exclude the possibility of a successful and effective leniency program outside of a criminal antitrust regime.¹⁵⁰ Regardless of whether a cartel activity is subject to criminal or administrative/civil sanctions, the program is effective so long as the potential risk outweighs the possible reward. Having said this, a particular formula for this purpose does not exist.¹⁵¹ In the European Union, for example, where no criminal regime exists and thus no offenders can be sent to jail, (only) heavy fines of an administrative or civil nature are imposed for hard core cartel activity.¹⁵² Nonetheless, being a jurisdiction without any criminal sanctions, the European Union must still be considered a model of success in terms of leniency, since these fines are sufficiently punitive and are not simply viewed as a tax or a cost of doing business.¹⁵³ But if a jurisdiction exclusively relies on fines to deter cartel practises, and it is not able to obtain fines of the same magnitude as the European Union, then it might fail to successfully induce amnesty applications.¹⁵⁴

D *Appealing to Moral Conscience*

Cartel conduct is often equated with theft in moral terms. A frequently quoted description of cartels in this context was given by Joel I Klein, former Assistant Attorney General of the DOJ, who compared cartelists to thieves:

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Cf Caron Beaton-Wells, 'Testing the Effectiveness of Immunity Policies for Cartel Conduct: Reflections and Proposals' in Nye Perram (ed), *International Commercial Law and Arbitration: Perspectives* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2014) 215, 220.

¹⁴⁸ Hammond, 'Cornerstones of an Effective Leniency Program', above n 122.

¹⁴⁹ Gregory J Werden, Scott D Hammond and Belinda A Barnett, 'Deterrence and Detection of Cartels: Using all the Tools and Sanctions' (2011) 56(2) *Antitrust Bulletin* 207, 215.

¹⁵⁰ Hammond, 'Cornerstones of an Effective Leniency Program', above n 122.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

Let me start with the obvious: cartel behaviour (price-fixing, market allocation and bid-rigging) is bad for consumers, bad for business and bad for efficient markets generally. And let me be very clear: these cartels are the equivalent of theft by well-dressed thieves and they deserve unequivocal public condemnation.¹⁵⁵

Since corporate executives are not necessarily mere ‘maximisers’ of profits for themselves and their principals, they might feel a moral responsibility to follow the law, and this commitment could possibly outweigh their profit calculation.¹⁵⁶ Indeed, psychological research suggests that normative commitment is generally an important factor in compliance with the law.¹⁵⁷ Public punishment and the threat of imprisonment send a message that cartel activity is not only undesirable, but also immoral,¹⁵⁸ which might in turn influence social norms and thus an individual’s normative commitment.¹⁵⁹ Ultimately, making a violation punishable by imprisonment is far more newsworthy than simply imposing fines,¹⁶⁰ and potential cartelists are a class of criminals who read the newspapers.¹⁶¹

Moreover, when society imposes fines for particular forms of conduct, it essentially sends the message that such conduct is tolerated so long as the penalties are paid.¹⁶² However, society does not just tax offences like embezzlement or fraud because it wants to send a clear signal that such conduct is not acceptable at all.¹⁶³ With regard to hard core cartels, sending such a message can also have a significant moral effect on businesspeople,¹⁶⁴ many of whom would likely opt not to engage in cartels even if they knew that their criminal conduct would never become public.¹⁶⁵

E Avoidance of the Indemnification Problem

Another compelling reason for the use of imprisonment is the problem of indemnification. It is a matter of fact that, even if fining individuals may

¹⁵⁵ Joel I Klein, ‘The War against International Cartels: Lessons from the Battlefield’ (Paper presented at Fordham Corporate Law Institute, 26th Annual Conference on International Antitrust Law & Policy, New York, 14 October 1999) <<http://www.justice.gov/atr/speech/war-against-international-cartels-lessons-battlefront>>.

¹⁵⁶ Christopher D. Stone, ‘Sentencing the Corporation’ (1991) 71(2) *Boston University Law Review* 383, 389.

¹⁵⁷ Wils, above n 63, 145.

¹⁵⁸ Competition Committee, ‘Promoting Compliance with Competition Law’, above n 32, 31.

¹⁵⁹ Wils, above n 63, 145.

¹⁶⁰ *Ibid.*

¹⁶¹ Donald I Baker and Barbara A Reeves, ‘The Paper Label Sentences: Critiques’ (1977) 86(4) *Yale Law Journal* 619, 625.

¹⁶² Competition Committee, ‘Cartel Sanctions against Individuals’ (Issues Paper No DAF/COMP(2004) 39, Organisation for Economic Co-operation and Development, 10 January 2005) 101 <<http://www.oecd.org/competition/cartels/34306028.pdf>>.

¹⁶³ Werden and Simon, above n 64, 933.

¹⁶⁴ Cf Werden, Hammond and Barnett, above n 149, 213.

¹⁶⁵ Competition Committee, ‘Cartel Sanctions against Individuals’, above n 162, 101.

have some deterrent effect, the associated costs may be met in some form by the corporation.¹⁶⁶ Even if the court specifies that the individual executive must pay the fine himself or herself, there is no possibility to monitor such a ruling.¹⁶⁷ Similarly, if reimbursement is outlawed by a jurisdiction, businesses may find a way of eliminating or reducing the risk to their agents of engaging in cartel conduct.¹⁶⁸ For example, businesses may compensate executives in advance for taking the risk of being penalised, or indemnify them after the fact.¹⁶⁹ In doing so, the deterrent value of the penalty is taken away.¹⁷⁰

In contrast, the sanction of imprisonment cannot be indemnified.¹⁷¹ It is also difficult to arrange an adequate compensation for the manager's risk in advance.¹⁷² As one senior executive of a corporation has been reported as saying, 'as long as you are only talking about money, the company can at the end of the day take care of me ... but once you begin talking about taking away my liberty, there is nothing that the company can do for me.'¹⁷³

In summary, it is questionable whether or not fines on individuals are an equally effective alternative to imprisonment.¹⁷⁴ The effectiveness of individual fines ultimately depends on whether a wrongdoer can expect any kind of reimbursement from the company or not.¹⁷⁵

F *Proportionality*

A further argument in favour of using imprisonment as a sanction for cartel conduct is supported by the principle of distributive justice.¹⁷⁶ In general, imprisonment is not uncommon for non-violent offences, such as counterfeiting, tax evasion or business fraud, which are frequently committed by the desperate and powerless.¹⁷⁷ As indicated earlier,¹⁷⁸ cartels potentially cause an enormous amount of harm to consumers and the economy.¹⁷⁹ On the grounds of equity and the need to uphold confidence in the law, the most onerous and stigmatising punishment — imprisonment — should not be withheld from those with economic and

¹⁶⁶ Baker and Reeves, above n 161, 631.

¹⁶⁷ See also Roger D Blair, 'A Suggestion for Improved Antitrust Enforcement' (1985) 30(2) *Antitrust Bulletin* 433, 441 n 22.

¹⁶⁸ Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 19–20.

¹⁶⁹ Wils, above n 63, 146.

¹⁷⁰ *Ibid.*

¹⁷¹ Blair, above n 167, 440–1.

¹⁷² Wils, above n 63, 146.

¹⁷³ Baker, above n 36, 705.

¹⁷⁴ Wils, above n 63, 146.

¹⁷⁵ Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 19.

¹⁷⁶ Ehlermann and Atanasiu, above n 86, 439.

¹⁷⁷ *Ibid.*

¹⁷⁸ See above Part II(B).

¹⁷⁹ Andreas Stephan, 'Why Morality Should be Excluded', above n 119, 137.

social status.¹⁸⁰ There is no reason not to treat cartel participation as seriously as any other white collar offence. By doing so, society's disapproval of anti-competitive agreements may be adequately expressed, and a strong signal sent to courts that hard core cartel conduct is a very serious crime.¹⁸¹

G Concluding Remarks

The sanction of imprisonment for entering into hard core cartels might not serve the same vital incapacitating purpose as it does for certain categories of violent criminals, whose incarceration is required for safety reasons.¹⁸² Also, since cartel offences can be seen as property crimes,¹⁸³ the logic of *lex talionis* — the principle that a punishment inflicted should correspondent in degree and kind to the crime of the wrongdoer — could be said to favour fines as punishment instead.¹⁸⁴

However, as explained in the previous paragraphs, there are various arguments in favour of the use of custodial sentences against individual cartel defendants. For one thing, the imposition of fines alone is unlikely to guarantee effective deterrence.¹⁸⁵ Certainly, there is a range of alternative sanctions or remedies, such as (temporary or indefinite) disqualification orders from participation in the management of company, private actions for damages, loss of licenses required to do business, community service or the creation of negative publicity (such as through mandatory advertisement in journals), that may be available to punish cartel conduct.¹⁸⁶ However, imposed in isolation, it seems unlikely that these sanctions could have as strong a deterrent effect as imprisonment.¹⁸⁷ By way of illustration, the use of a director disqualification sanction could potentially be more effective than a fine in the sense that it will be more difficult to shift the cost of the sanction from the individual to the corporation. However, such a remedy does not exclude the possibility that the very same individual will arrange to work in a different way for the company.¹⁸⁸

Although it is questionable whether or not isolated sanctions other than imprisonment can effectively deter individuals from anti-competitive practices, however, a combination of these sanctions might create a sufficiently strong deterrent.¹⁸⁹ Arguably, the totality of these sanctions

¹⁸⁰ *Ibid.*

¹⁸¹ Competition Committee, 'Cartel Sanctions against Individuals', above n 162, 93, 99.

¹⁸² Ehlermann and Atanasiu, above n 86, 437.

¹⁸³ Cf above Part II(B).

¹⁸⁴ Ehlermann and Atanasiu, above n 86, 437.

¹⁸⁵ See above Part III(B)(2).

¹⁸⁶ Cf Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 19–20; Wils, above n 63, 147–8.

¹⁸⁷ *Ibid.*

¹⁸⁸ Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 20.

¹⁸⁹ *Ibid.*

and remedies has not yet been sufficiently utilised. However, if these sanctions are imposed in the right balance by regulatory authorities and courts, they might constitute an effective deterrence of cartel conduct as well.

The deterrent effect of specific sanctions or remedies may also depend on their criminal or administrative/civil nature, as criminal convictions usually lead to a condemnation by society in a manner that civil sanctions cannot.¹⁹⁰ Hence, the fact that certain violations of the law are characterised as criminal offences may already be sufficient for individuals to comply with the law and resist attempts by their companies to engage in unlawful cartel conduct.¹⁹¹ The prospect of having a criminal record, for example, might already prevent potential cartelists from entering into an unlawful agreement.¹⁹²

IV Concerns over the Imposition of Imprisonment — Are they Really Justified?

A Overview of Objections Raised

1 General comments

Despite the strength of the arguments in favour of imprisonment as a sanction for cartel conduct,¹⁹³ numerous jurisdictions remain unpersuaded.¹⁹⁴ The same applies to academics, many of whom disagree with the idea of imprisonment.¹⁹⁵ During the reform of Swiss cartel legislation (which entered into force on 1 April 2004), for example, the Swiss government stated that it would be ‘open’ to new ideas concerning effective measures against cartels. However, after extensive debate, it concluded that there were no convincing arguments in favour of the introduction of sanctions against individuals.¹⁹⁶ In 2008, the desirability of the implementation of jail sentences for competition law infringements were discussed again.¹⁹⁷ It was vigorously debated, among other things, whether custodial sentences were really an appropriate option within the

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ See above Part III.

¹⁹⁴ Cf Competition Committee, ‘Promoting Compliance with Competition Law’, above n 32, 32.

¹⁹⁵ See, eg, Caron Beaton-Wells and Brent Fisse, ‘U.S. Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique’ (2011) 56(2) *Antitrust Bulletin* 277, questioning whether imprisonment is a highly effective deterrent to cartel conduct. The authors claim that an individual’s choice to take part in a cartel ‘is likely to be influenced just as much, if not more, by dispositional, organisational, situational and cultural factors’: at 283.

¹⁹⁶ Competition Committee, ‘Cartel Sanctions against Individuals’, above n 162, 105.

¹⁹⁷ Kai Hüscherlath, Nina Leheyda and Patrick Beschoner, ‘The Deterrent Effect of Antitrust Sanctions: Evidence from Switzerland’ (2011) 56(2) *Antitrust Bulletin* 427, 443.

Swiss legal system and culture.¹⁹⁸ On 17 September 2014, the Swiss Parliament finally decided not to carry out any further reform of anti-cartel legislation.¹⁹⁹

Certainly, the benefits of prison sanctions should be weighed against their drawbacks. Those who oppose the criminalisation of hard core cartel conduct usually do so for the following reasons.²⁰⁰

2 *Lack of consistency with social and legal norms*

It is often argued that imprisonment for breaches of competition law is inconsistent with social and legal norms.²⁰¹ A country might be reluctant to introduce imprisonment for antitrust violations as they are not considered sufficiently serious to justify such drastic measures.²⁰² Further, unlike other white collar crimes, such as tax fraud, individuals participating in hard core cartels rarely enrich themselves.²⁰³ Rather, the corporation benefits from their conduct and thus should be subject to sanctions.²⁰⁴ The obvious counter-point to this argument, however, is that cartel activity results in considerable social harm.²⁰⁵ Cartels steal from consumers, contribute to inflation, stifle innovation, undermine free markets and destroy public confidence in the economy.²⁰⁶

3 *High costs of imprisonment*

As previously mentioned,²⁰⁷ according to some economists, a social cost/benefit analysis suggests that only financial sanctions (preferably civil fines) should be imposed on individual cartel offenders.²⁰⁸ It is claimed that imprisonment causes significant costs for society — both in terms of the general costs of incarceration as well as of loss of activity of arrested executive managers.²⁰⁹ The costs of imposing imprisonment erroneously are generally also higher than the costs of fines, including the suffering of those being unjustly punished.²¹⁰

¹⁹⁸ Ibid 444–6.

¹⁹⁹ See Clare O'Dea and Urs Geiser, *Competition Issues Left Open as Cartel Law Fails* (18 September 2014) SWI <http://www.swissinfo.ch/eng/high-swiss-prices_competition-issues-left-open-as-cartel-law-fails/40788182>.

²⁰⁰ See below Part IV(A)(2)–(6). See also Buccirosi and Spagnolo, above n 78, 99–100.

²⁰¹ Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 24.

²⁰² Hüschelrath, Leheyda and Beschorner, above n 197, 446.

²⁰³ Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 24.

²⁰⁴ Ibid.

²⁰⁵ Competition Committee, 'Cartel Sanctions against Individuals', above n 162, 102.

²⁰⁶ Ibid.

²⁰⁷ See above Part III(A).

²⁰⁸ Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 25.

²⁰⁹ Buccirosi and Spagnolo, above n 78, 100; Organisation for Economic Co-operation and Development, 'Cartels: Sanctions against Individuals', above n 18, 25.

²¹⁰ Wils, above n 63, 145.

4 *Higher standards of evidence leading to a lower probability of conviction*

Criminal offenses are more difficult to prove than civil ones.²¹¹ The criminal burden of proof requires proving the cartel conduct as well as an appropriate mental state (*mens rea*) of the cartelist ‘beyond reasonable doubt’.²¹² The substantially high threshold for evidence can cause problems in investigations and prosecutions, and finally lead to less effective anti-cartel enforcement.²¹³ New Zealand, for instance, in reviewing its system of sanctions against cartels, came to the conclusion that higher standards of proof due to criminalising anti-cartel laws were likely to lead to fewer prosecutions and a reduction of successful cases.²¹⁴

Opponents of criminal sanctions also claim that the detection and prosecution of cartels can be extremely challenging, since the individuals who engage in such conduct are likely to be more alert and careful than other (less organised or more opportunistic) criminals.²¹⁵ Cartelists may tend to increase their efforts to hide cartel activities.²¹⁶ In addition, individuals and companies might be more reluctant to provide information in response to requests if no appropriate leniency policy is implemented.²¹⁷

5 *Difficulties of coordination between competition and criminal authorities*

Questions may also arise regarding the institutional design of the allocation of responsibility for criminal prosecutions.²¹⁸ Should the competition authority be in charge of pursuing criminal offenders, or rather the public prosecutor? Should they be bound by each other’s decisions and policies? How should the optimal coordination between leniency programs and criminal sanctions be designed? These and other issues need to be considered cautiously when two separate institutions are involved.²¹⁹

Although there are good reasons to authorise a competition authority to prosecute cartel activity (for example, the high level of competition law expertise), there are also downsides to such an approach (for

²¹¹ Competition Committee, ‘Cartel Sanctions against Individuals’, above n 162, 102.

²¹² Competition Committee, ‘Promoting Compliance with Competition Law’, above n 32, 141.

²¹³ *Ibid.*

²¹⁴ Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 25.

²¹⁵ *Ibid.* 26.

²¹⁶ *Ibid.*

²¹⁷ Julian M Joshua, ‘A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcore Cartel Conduct’ (2002) 23(5) *European Competition Law Review* 231, 237.

²¹⁸ Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 28.

²¹⁹ *Ibid.* 22.

example, the high costs of building up staff for prosecutions).²²⁰ It is admittedly no easy task to find the right balance in a system where two separate authorities are dealing with the same matter.

6 *Double jeopardy in international investigations*

International law does not recognise the principle of inadmissibility of double jeopardy (*ne bis in idem*) which would prevent different jurisdictions from prosecuting the same individual for participation in the same cartel.²²¹ If more countries consider introducing criminal sanctions against individuals, in multi-jurisdictional cases, the same individual could be subject to criminal sanctions in more than one country.²²² As a consequence, the question would arise whether criminal authorities must consider prosecutions of an offender in other countries when they investigate the same individual for cartel participation.²²³ Assuming that there is an ‘optimal’ jail sentence, for instance, one could ask whether an accumulation of prison sentences in different jurisdictions would be appropriate in order to attain the most efficient deterrent.²²⁴ As the question of ‘optimal’ effects of sanctions is answered differently on a national level, finding a consensus on a multinational level would be a very formidable task.

B *Responding to These Concerns*

At first glance, the aforementioned objections to severe sanctions against individuals in hard core cartel cases might seem persuasive. Nevertheless, as the example of the United States has proven, these concerns may be addressed sufficiently in a well-designed system of criminal sanctions. If a jurisdiction decides to introduce criminal sanctions such as imprisonment, a number of conditions need to be fulfilled in order to ensure that these sanctions contribute as effectively as possible to antitrust enforcement.²²⁵

First, and most importantly, there needs to be a broad political and public consensus that hard core cartels are harmful to the economy and therefore deserve severe punishment.²²⁶ Furthermore, a well-resourced and dedicated investigating and prosecuting authority is required.²²⁷ If

²²⁰ Ibid 28.

²²¹ Ibid 13. Within European countries, however, the *Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders* [2000] OJ L 239/19, art 54, is applicable.

²²² Organisation for Economic Co-operation and Development, ‘Cartels: Sanctions against Individuals’, above n 18, 30.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Competition Committee, ‘Hard Core Cartels’, above n 18, 28; Wils, above n 63, 148.

²²⁶ Baker, above n 36, 694; Wils, above n 63, 150–1.

²²⁷ Wils, above n 63, 150–1.

anti-cartel offences have to compete with ‘typical’ criminal offences, such as child abuse or manslaughter, generalist prosecutors will probably not afford cartelists much priority.²²⁸ This requirement is met, for instance, by the DOJ Antitrust Division in Washington DC and its various criminal sections and offices in the United States.²²⁹ Moreover, the threat of imprisonment must be credible. Judges and juries must be willing to impose custodial sentences in hard core cartel cases. (This is guided by the *Sentencing Guidelines* in the US,²³⁰ although they are not mandatory.)²³¹ Further, imprisonment should not be used as the *only* penalty for hard core cartels.²³² Rather, imprisonment should be complementary to corporate (and other individual) sanctions,²³³ not least because undertakings usually benefit from anti-cartel violations committed by their managers. Without assigning liability to the corporation, serious problems with incentive would result.²³⁴

To deal with all these conditions at the same time is, admittedly, a formidable challenge. Yet, once they have been addressed successfully, imprisonment could not only work in anti-cartel laws, but also play an important role in detecting and preventing hard core cartels.

V Conclusion

The criminalisation of cartel conduct is increasingly common in many global jurisdictions.²³⁵ It is generally justified on the basis that cartelisation can result in considerable harm to domestic and international markets.²³⁶ Since the *Sherman Antitrust Act*²³⁷ was passed in 1890, the United States has used its criminal enforcement system with zeal and confidence, although cartels have not yet been, and might never be, completely eliminated.²³⁸ The apparently effective US criminal regime did not emerge overnight.²³⁹ Rather, it took nearly a century to achieve the current result.²⁴⁰ This might also apply for those countries that are currently struggling with the effective use of criminal enforcement remedies. As Donald Baker, former Assistant Attorney General in charge of the Antitrust Division of the DOJ once commented, it may be the case

²²⁸ Ibid 149.

²²⁹ Antitrust Division, *Sections and Offices* (16 April 2016) United States Department of Justice <<http://www.justice.gov/atr/sections-and-offices>>.

²³⁰ United States Sentencing Commission, *Guidelines Manual* (1 November 2014) <<http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf>>.

²³¹ Baker, above n 36, 694; Wils, above n 63, 150.

²³² Wils, above n 63, 151.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ See also Stephan, ‘Four Key Challenges’, above n 19, 362.

²³⁶ Ibid.

²³⁷ 15 USC § 1 (1890).

²³⁸ Werden, Hammond and Barnett, above n 149, 234.

²³⁹ Mark Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success* (Edward Elgar Publishing, 2012) 218.

²⁴⁰ Ibid 224.

that ‘the United States is simply a few years ahead of the other major countries in using criminal enforcement remedies this way.’²⁴¹

This article has highlighted that the introduction of prison sanctions for individuals responsible for antitrust violations can be effective — not only in theory, but also in practice. Most importantly, the sanction of imprisonment appears to have the potential to achieve a level of deterrence unattainable by other sanctions.²⁴² To become an effective deterrent, though, a number of criteria must be addressed.²⁴³ Otherwise, there is a risk that the process of criminalisation might harm competition law enforcement rather than enhancing it.²⁴⁴

Clearly it is challenging to design an ‘optimal’ mix of sanctions, which enables the reduction of hard core cartels.²⁴⁵ The perfect ‘fit’ may vary across jurisdictions, having regard to the unique social, political and economic structures and contexts of particular countries. However, finding workable ways of imposing custodial sanctions as a penalty for antitrust offences appear to be worth the effort.

²⁴¹ Baker, above n 36, 694.

²⁴² Cf Stephan, ‘Four Key Challenges’, above n 19, 362. See also above Part III(B).

²⁴³ Jones and Harrison, above n 29, 5. See also above Part IV(B).

²⁴⁴ See also Stephan, ‘Four Key Challenges’, above n 19, 362.

²⁴⁵ Connor, above n 33, 338.