9. Compliance and Individual Sanctions in the Enforcement of Competition Law

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This chapter describes the status quo of criminal enforcement in selected Member States of the European Union and discusses the desirability of criminal enforcement of competition law from a policy perspective. It concludes that at least in Germany the introduction of a criminal offence for horizontal hardcore cartels beyond the existing bid-rigging offence would be desirable, provided an automatic criminal immunity provision for immunity recipients under a leniency programme within the European Competition Network is introduced and the Bundeskartellamt is involved in the criminal prosecution. The introduction of effective criminal enforcement would make compliance training both more important and more effective. Criminalisation makes compliance more important because compliance training helps to spread knowledge about the criminal offence — and only a known threat can deter. Criminalisation makes compliance training more effective because the participants of compliance sessions are motivated to pay attention to avoid criminal liability.

9.1. Introduction

Compliance training can be exhausting for the participants. Managers and employees sit through the first presentation telling them how important it is to comply with product safety standards.[2] The next speaker stresses that the most important thing in the world is to comply

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[2] Think of recent recalls, e.g., for Takata airbags (Tabuchi & Ivory (2016)); for the defect in the ignition switch for GM vehicles, which resulted in a criminal penalty of $900m and private settlements of at least a further $600m (Wright (2015)) in addition to a large-scale recall (Vlasic & Stout (2014)); or for the defect leading to uncontrolled acceleration in Toyota vehicles, resulting, inter alia, in a financial penalty of $1.2 bn (see Department of Justice (2014)).

with anti-corruption laws.[3] The following presentation highlights that *actually* the most important thing in the world is to comply strictly with money-laundering statutes.[4] Shortly before the next presenter can impress the importance of compliance with environmental standards upon the captive (but not captivated) audience, the managers and employees of certain German car manufacturers have dozed off (*cf* Department of Justice 2016). By the time competition law is discussed, only those who secretly answer e-mails or play games on their mobile devices are still awake.

It is challenging enough for law students who have chosen to specialise in any of these subjects to stay alert for a prolonged period of time. Why should managers and employees who have chosen a different career path, and perceive compliance training as an irritating distraction that keeps them from doing their "real work", be any more focused?

In order to get an audience's attention, it is necessary to avoid abstractions and focus on the personal incentives for members of the audience. Attention in the sleepiest school classroom becomes rapt as soon as the word "exam" is dropped. This word focuses students' attention on extrinsic incentives. Likewise, attention in a compliance seminar becomes suddenly extraordinarily focused once the members of the audience are told that "if you fix prices, you go to prison".

The same effect cannot be achieved by saying that "your undertaking may be hit by a high fine". As Part 2 describes in more detail, on the level of the European Union there are growing incentives for undertakings to refrain from entering into cartels. However, to paraphrase the National Rifle Association: undertakings do not form cartels, people form cartels (*cf* Snyder 2016). If the goal is to prevent cartelisation, the message has to get through to the individuals who may actually interact with competitors. That competition authorities may impose a multi-million euro fine on the undertaking does not directly concern their individual incentives; there is a principal-agent problem. Individual sanctions, and in particular criminal sanctions, would address this principal-agent problem (Wils 2003: 434; 2008: § 559; Wagner-von Papp 2010a: 292–293; 2010b: 270–271).

Many Member States in the European Union have picked up on this problem and have introduced individual sanctions in the form of criminal or individual administrative sanctions. Part 3 of this chapter describes some of these approaches, the level of individual enforcement

[3] See, eg, the Siemens scandal (on the consequences for compliance, see, eg, Sindhu (2009)). Good relations to the government may help, *cf* Adams & Boxell (2006) on the attorney-general's intervention in the investigation by the Serious Fraud Office (SFO) into alleged corruption of BAE in Saudi Arabia.

[4] See, eg, the HSBC case (Department of Justice 2012).

in selected Member States, and some of the problems such enforcement faces or creates on the Member State level.

In Part 4, I examine the arguments for and against criminal enforcement against individuals for competition law infringements. Whether criminalisation is desirable crucially depends on the institutional framework of the jurisdiction in question and the form the criminal provision takes. The question whether criminalisation of competition law infringements is desirable can therefore not be answered in the abstract. Specifically in the German context, however, the reasons for introducing further criminal sanctions for horizontal hardcore cartels outweigh the reasons against criminalisation. Some of the remaining institutional arguments against criminalisation do carry a certain weight, but can be addressed in a broader reform that would introduce criminal sanctions but also modify existing institutions.

It is important to recognise that such an institutional reform would indeed be a necessary complement to the introduction of criminal sanctions. It would be a mistake to insert a criminal prohibition provision into the criminal code or competition legislation and hope that this in itself deters anyone and does not result in unintended consequences. In particular, institutional reforms are required to optimise the interaction between criminal sanctions and leniency programmes, and the cooperation between competition authorities and prosecutors. The introduction of criminal sanctions, after all, is not an end in itself. Its goal is to achieve greater deterrence on the individual level. In order for criminal sanctions to be effective, the offence has to be integrated into the antitrust enforcement system, and criminal sanctions have to be accompanied by a procedural framework that allows effective and transparent enforcement, both nationally and internationally.

In Part 5, I discuss international aspects of the criminalisation debate. Part 6 concludes.

9.2. Rising Sanctions on Undertakings and their Inadequacy

It is no secret that fines on undertakings for competition law infringements under Article 23 of Regulation (EC) 1/2003 have sharply increased over the past three decades. Over each of the five-year periods from 1990 to 1994, and from 1995 to 1999, the European Commission imposed fines of about €300 million in total.[5] In the five-year period from 2000 to 2004, this

[5] See European Commission, Cartel Statistics, https://perma.cc/KP5P-4GGJ, Table 1.4 (court adjusted) (at the time of writing last changed on 6 April 2016; for periodically updated statistics see http://ec.europa.eu/competition/cartels/statistics/statistics.pdf).

increased tenfold to about €3 billion.[6] From 2005 to 2009, this sum rose again by a factor 2.5 to some €8 billion, where it stayed for the five-year period from 2010 to 2014.[7]

This sharp rise in total fines is not so much driven by an increase in the number of fined undertakings; that number stayed remarkably stable (with the exception of the period from 1995 to 1999) at around 150 to 200 undertakings per five-year period.[8] The rise is partly attributable to a larger number of cartel cases, which rose from about 10 cartels in each of the two five-year periods in the 1990s to about 30 cartels in each of the three five-year periods since 2000, arguably due to the introduction of the leniency programmes.[9]

Mostly, however, the rise seems driven by higher average fines per undertaking. The average fine per undertaking rose from below €2m (1990-1994) to approximately €6m (1995-1999), €20m (2000-2004), and eventually approximately €40m for the latest two full five-year periods (2005-2009 and 2010-2014).[10] The distribution of cartel fines per undertaking is heavily skewed: the eleven largest cartel fines per undertaking range from €320m to €715m.[11] For about ten per cent of all fined undertakings the fine makes up about 8 to 10 per cent of their global annual turnover.[12]

What do these figures tell us about the effectiveness of relying on fines on undertakings alone? Two possible scenaria have to be distinguished: in the first scenario, the expected fine on the undertaking exceeds the expected benefits from the cartel: fines are optimal. In the second scenario, the expected benefits from the cartel exceed the expected fine on the undertaking: fines are sub-optimal.

Let us first assume that the current fines for the undertakings have already reached an optimal level. If that is the case, cartels "do not pay" for the undertaking, and the undertaking would want their agents to refrain from entering into cartels. Incentives for the manager or employee in question can, however, diverge. Entering into a cartel can still be attractive for these

[6] Ibid. The amounts do not seem to be adjusted for inflation, however.

[7] Ibid.

[8] Ibid, Table 1.8 (at the time of writing last changed 6 April 2016).

[9] Ibid, Table 1.10 (at the time of writing last changed 6 April 2016). The number of immunity recipients was 20, 25, and 21, for the three five year periods from 2001 to 2005, 2006 to 2010, and 2011 to 2015, respectively (see Wouter P.J. Wils, 20 Years of Leniency, forthcoming), thus accounting fairly precisely for the jump to around 30 cartel cases in each of these periods from the baseline of about 10 cartel cases per five-year period before 2000.

[10] See Lianos, Jenny, Wagner-von Papp, Motchenkova & David (2014: 129) (the average fine for the full period from 2010-2014 is only about €41m, as opposed to the €50m reported in that report, because the report was published in May 2014 and could not take into account later events, which included both the downward court adjustment of cartel fines and a number of lower fines imposed in 2014).

[11] European Commission, n 5, Table 1.6 (at the time of writing last updated 6 April 2016).

[12] Ibid, Table 1.11 (at the time of writing last updated 31 December 2015).

individuals, who may hope to boost their division's sales and so keep their jobs, get a performance bonus, or even be promoted. The fine imposed on the undertaking does not directly affect these incentives. There is a principal-agent problem.

Ex ante screening for managers and employees that will not enter into cartels is not realistically possible.[13] Nor is it practically feasible for the principal (the undertaking) to monitor its agents (managers and employees) perfectly, at least in larger undertakings. This leaves aligning the incentives as a remedy for addressing the principal-agent problem.

The undertaking may indeed take some steps to align the incentives of the undertaking and its managers and employees. The undertaking could pass on some of its displeasure about fines and damages payments to the responsible managers or employees in the form of termination of employment, clawing back bonuses, or perhaps even by seeking indemnification for competition fines or damages.

Contrary to occasional assertions by opponents of criminalisation (Ost 2014: 134–135; Dreher 2011: 242–243), these indirect internal sanctions are, however, not an effective deterrent (Monopolkommission 2014: 146). They are unlikely to be imposed by the undertaking for several reasons.

First, even where the undertaking does not wish its agents to engage in cartels, it may be reluctant to terminate the employment in every case in which an infringement occurs. Ditching employees too readily may make future recruitment more difficult. Employment law may be, or be perceived as, an obstacle. A "zero tolerance" policy may even be counterproductive from a compliance angle: The fear of termination of employment may prevent employees that have contributed to a cartel from "owning up", thereby preventing an early and successful leniency application. The individual's continuing cooperation may be important for the success of a leniency application, and a zero-tolerance policy may deter the individual from admitting her own contribution.

Secondly, even to the extent an undertaking should be willing to commit to a "zero tolerance" policy, this is not necessarily a sufficient disincentive for the agents. In some cases, the incentive for the individual to enter into a cartel is that they are falling behind performance targets and fear immediate termination of employment. In these cases, the temptation to boost sales by entering into a cartel will hardly be offset by the remote possibility that the employment will eventually be terminated if and when the cartel is uncovered — even if this contingency materialises, termination would still be delayed, probably by several years.

[13] Employing risk averse, civic-minded bureaucrat-type personalities would arguably reduce the danger of cartels, but might still be suboptimal in terms of vigorous competition.

Furthermore, given that the average cartel duration even of detected cartels is approximately five to seven years,[14] and investigations and prosecutions take additional time, chances are good that the employee or manager is no longer employed by the same undertaking by the time that undertaking could seek termination or other remedies against the individual in question (Wils 2003: 429, 434; 2008: § 559). In contrast, for the imposition of criminal sanctions the fact that the individual has moved on is irrelevant; the only question would be if prosecution may be barred by a statute of limitations.

The danger of the undertaking seeking indemnity for the fine is even more remote. First, at least in the United Kingdom and Germany, courts have rejected claims brought by undertakings for indemnification.[15] Secondly, there are de facto obstacles. In particular where board members were involved in the infringement, there is an obvious principal-agent problem between the board as an agent, which decides on whether to initiate an action, and the interest of the shareholders as principals. In Germany, this principal-agent relationship should be attenuated where the firm in question is governed by a two-tiered board; but even there the supervisory board may be personally attached to the members of the executive board. The principal-agent problem is theoretically also attenuated by the possibility of derivative shareholder actions; but these have high procedural and evidentiary hurdles, show little promise in the antitrust sector even in the United States, and play practically no role in the antitrust context in Europe. At any rate, such claims would be limited to purely financial

[14] Levenstein & Suslow (2011: 462–463) look at 81 cartels with participants from at least two jurisdictions ("international cartels") that were prosecuted in the US or the EU with start dates from 1990; they find a mean duration of 8.1 years (standard deviation s=5.8 years) and a median of 7 years (see also ibid, 463–464, citing older studies that report similar means of between 5.3 and 8.3 years). Combe & Monnier (2011: 243) consider a sample of 64 European cartels between 1975 and 2009 and find a mean duration of 7 years. Bryant & Eckart (1991) look at a sample of 184 detected cartel cases (US Department of Justice cases from the period between 1961 and 1988) and find a mean duration of between 5.2 and 7.3 years (with a median of between 3.6 and 5.8 years) (the ranges indicate the lowest and highest duration estimates, respectively). See also Harrington Jr & Wei (2015), who argue that the estimated duration derived from the average duration of *detected* cartels is only mildly biased because of two countervailing effects: on the one hand, when cartels are detected, their lifetime is cut short, and so for that reason they may have a shorter duration than those cartels that are not detected, and additionally, the probability of dying cartels to be detected may be higher (in particular because this transforms the stag-hunt-game of leniency programmes into prisoners' dilemmas); on the other hand, longer cartels may be overrepresented in the sample of detected cartels because they are more likely to be detected at some point in their lifetime.

[15] In the United Kingdom, it was held that the *ex turpi causa* doctrine prevented the undertaking from seeking indemnification from employees and directors, because the Chapter I prohibition and Article 101 TFEU are addressed to the undertaking itself. *Safeway Stores Ltd and others v Twigger and others*, [2010] EWCA Civ 1472, [2011] Bus. L.R. 1629 (for a discussion, see, eg, Kapp & Hummel 2011). The UK Supreme Court has recently indicated that it may not unreservedly stand behind *Safeway v Twigger*, see *Les Laboratoires Servier and another v Apotex Inc and others*, [2014] UKSC 55, [2015] A.C. 430, 451 [45]: "[T]his is not a case in which any question arises as to the correctness or otherwise of a decision such as that of the Court of Appeal in *Safeway Stores Ltd v Twigger* [...], which held that a company could not recover from directors or employees who had by involving the company in acts contravening the Competition Act 1998 caused it to incur a 'personal' liability for penalties imposed under that Act." In Germany, the Landesarbeitsgericht Düsseldorf reached the same result by a similar route: indemnification was held to run counter the purposes of the fine imposed on the undertaking; this was considered to be in particular the case where the fine incorporates elements of disgorgement of illegal gains; and the possibility of imposing fines on the undertaking and the individual was considered to preclude the possibility for the undertaking to seek indemnification from the responsible individuals, both individuals in management (LAG Düsseldorf, 20 January 2015, 16 Sa 459/14, *Neue Juristische Online-Zeitschrift* 2015, 782, 789 ff.; the court below had considered capping the damages claim at the maximum amount for the individual fine) and employees (LAG Düsseldorf, 27 November 2015, 14 Sa 800/14, *BeckRS* 2016, 65558, para 164 (*obiter*, because the court considered the employee's participation in the cartel not to be proven, ibid, paras 180 ff.)).

consequences for the individual and are capped at the level of consumer insolvency.[16] This cap for recovery will prevent many undertakings from even trying to recover from individuals. Similar arguments prevent the possibility of victims bringing damages actions against the responsible individuals directly from being an effective deterrent (see Eiden 2014).

Therefore, in the scenario in which sanctions on undertakings are optimal, direct individual sanctions are necessary to overcome the principal-agent problem.

The analysis is complicated by the fact that we simply do not know whether the sanctions on undertakings are indeed optimal.[17] Fines have admittedly skyrocketed over the past two decades and look very high in absolute terms. It is, however, still not clear whether the expected fines are higher than the expected benefits from the cartel. Calculating the optimal fine in the real world meets with several difficulties. Even at an aggregate level, it is difficult to calculate (average) cartel profits. One of the most problematic issues is that it is nearly impossible to determine the rate of detection. The 15–17 per cent figure that is often bandied about derives from a sample of detected cartels, and the authors of that study were careful to explain that for the population of undetected cartels, this is an *upper bound* for the detection probability, and the detection probability for that population could be lower (Bryant & Eckart 1991). Leniency programmes have probably increased the detection probability, but again the effect is nearly impossible to quantify empirically (Marvão & Spagnolo 2015).

If fines are in reality sub-optimal, then two problems compound each other. First, agents may have their own selfish motives for entering into the cartel, for example, meeting sales targets for bonuses, continued employment or promotions, just as in the case of optimal fines that was discussed above. Secondly, the undertaking in this scenario does not have an incentive to discourage its agents from entering into cartels. On the contrary. If fines are suboptimal, the undertaking does not mind the agents entering into cartels; it only minds them getting caught. The internal sanctioning mechanisms discussed above that are at least theoretically possible — such as terminating the employment, clawing back bonuses, or seeking indemnities — would therefore likely not be used by the undertaking. Theoretically, the undertaking would even have no interest at all in employing any of these measures because this would deter other employees from entering into profitable cartels. In practice, it is possible that the undertaking

[16] While Director & Officers' Insurance could lead to deeper pockets, D&O Insurance will not cover willful law infringements.

[17] See on the one hand Combe & Monnier, supra note 14, 267–268 (finding that in about half of the cases the fines did not even skim off the gains, so that they would not even be deterrent if the detection probability were 100%) and on the other hand Allain, Boyer, Kotchoni & Ponssard (2013) (finding that between 30 and 80 per cent of the fines imposed from 2005 to 2010 were deterrent, depending largely on the assumptions about the competitive mark-up in the counterfactual, about the cartel overcharge, and about the demand elasticities).

would nevertheless employ some of the measures, for example sacrifice the responsible employees, to create the perception that the undertaking distances itself from the infringement (*cf* Ransiek & Hüls 2009: 160). It could even be that the detection of the first cartel makes future cartels unprofitable, either because the probability of detection becomes higher because, for example, the competition authorities keep a closer eye on the activities of a previous offender, or because the fine increase for recidivism is sufficiently high. Where fines on the undertaking are sub-optimal, the introduction of criminal sanctions would create an incentive for individuals to withstand suggestions or pressure from the undertaking to engage in prohibited conduct (Jones & Harrison 2014).

One can, of course, make the argument that if fines on undertakings are still sub-optimal, one should first raise the fines on undertakings even further before turning to individual sanctions. However, there are limits to this approach (Monopolkommission 2014: § 148).

First, as mentioned above, approximately ten percent of fined undertakings are fined at a level that approaches the statutory cap of 10 per cent of the annual global turnover (Article 23(4) of Regulation 1/2003). Unless this statutory cap is raised, increasing fines for these undertakings more than trivially is impossible.

Secondly, raising the level of fines in such a way that a greater proportion of infringers is fined at the statutory cap level risks creating perverse incentives because of a loss of marginal deterrence. Consider the extreme case that fines are raised to a level such that all cartels are fined at the 10 per cent cap. In this case, cartels could nearly costlessly extend their scope or duration, or engage in any other conduct that would usually constitute an aggravating factor under the Fining Guidelines, such as instigating and leading the cartel, coercing others into the cartel, or becoming a recidivist.[18]

Thirdly, the fines calculated under the Fining Guidelines are already reduced in some cases to avoid an inability to pay.[19] Putting firms out of business in cartelised markets, which tend to be concentrated anyway, is not a particularly good idea, and so, in addition to the statutory cap in Article 23(4) Regulation 1/2003, there is a de facto cap for fines on undertakings at the solvency level.

Fourthly, unless courts can be persuaded that the high fines are necessary to skim off the gains from cartels, they may be unwilling to go along with further increases of the fines. Up

[18] I say only "nearly costlessly" because any extension of scope or duration of the cartel or intensification of cartel activity would increase the probability of detection of the cartel, so that the expected fine would rise. Nevertheless, if the cartel is considered to be profitable in the first place, it is likely that the marginal increase in the detection probability would be lower than the marginal increase in cartel profits where, for example, the cartel duration is extended.

[19] See point 35 of the Fining Guidelines. See also Almunia & Lewandowski (2010); Monopolkommission (2014) § 148.

to now, the courts have been willing to defer to the competition authorities' assessment that fine levels needed to be raised to be dissuasive. Persuading them of the need for ever higher fines may, however, not be easy given the problems in quantifying the optimal fine based on robust empirical evidence.

Apart from these legal and de facto limits on raising fines on undertakings even further, higher fines on undertakings would not address the principal-agent problem identified above. Alternatively or cumulatively to raising the fine level, one could increase the expected fine by raising the probability of detection (Dreher 2011: 240). This, however, would also fail to address the principal-agent problem. Of course, any unused potential to raise the detection probability efficiently should be tapped. The suggestion that deterrence can be substantially increased by this route implies, however, that competition authorities are currently not using the full potential of their powers. They are arguably doing the best they can with their present powers; the low-hanging fruit has been picked. A way to increase the detection probability further would be to increase the authorities' powers — and one way to do this is to give them the powers that are available only in criminal investigations, such as wiretapping (below 9.4.3., sixth argument). Some other additional powers, such as offering rewards for whistleblowers (Monopolkommission 2014: §§ 199–209; Zimmer 2016), could arguably even be introduced without criminalising cartels, but are similarly controversial.

9.3. Individual Sanctions on the Member State Level

While there are no individual sanctions on the European Union level, a majority of Member States have introduced individual sanctions of some sort, often criminal sanctions.[20] When it comes to sanctions against individuals, some Member States, such as Germany, the Netherlands, Poland and Spain, rely (mostly or exclusively) on administrative sanctions, sometimes complemented by more limited criminal provisions in particular for bid rigging.[21]

[20] At least the following EU jurisdictions provide for criminal sanctions for cartels (or, where noted, only bid rigging): Austria (bid rigging only, Ablasser-Neuhuber & Neumayr 2015: 19); Belgium (Lebrun & Bersou 2015: 25: 'Bid rigging is the sole cartel activity which is likely to lead to criminal sanctions'); the Czech Republic (Fiala 2015: 65); Denmark (since 2013, Rung-Hansen 2015: 71); France (Viros 2016); Germany (bid rigging; Wagner-von Papp 2011; Wagner-von Papp 2016; Zimmer 2016); Greece (Papadopoulos & Lisa Lovdahl Gormsen 2015: 107); Hungary (bid rigging; Szabó 2015: 120); Ireland (Andrews & Collins 2015: 137–138; for more detail see Massey & Cooke 2011: 105); Italy (Caiazzo & Costantini 2015: 154); Poland (bid rigging only, Hansberry-Bieguńska & Krasnodębska-Tomkiel 2015: 214); Romania (separate provisions for cartels and bid rigging, Rădulescu & Iacob 2015: 229); Slovenia (Pipan Nahtigal & Tjaša Lahovnik 2015: 247–248); UK (for the amended cartel offence, see Stephan 2014; Gilbert 2015; for the 2002 version, see Stephan 2008; Joshua 2011: 129). This does not even include criminal sanctions for procedural offences, such as in Cyprus or Finland. Finland, and Sweden (and in the EFTA Switzerland) considered, but eventually rejected criminalisation. In the EEA, Norway has also criminal sanctions (Sando & Hageler 2015: 208). To be sure, in many of these jurisdictions this is pure law in the books without any significant enforcement. Yet even this law in the books may become relevant when it comes to extradition, see below 9.5.

[21] For example, the following Member States provide for administrative sanctions for individuals (such as fines and/or director disqualifications), either in addition or as an alternative to criminal sanctions. Germany provides for individual fines of up to €1m for all intentional or negligent competition law infringements, in addition to the criminal bid-rigging offence (see below 9.3.2.). The UK provides, in addition to the criminal cartel offence, for director disqualification orders (see below

Others use primarily criminal sanctions to the extent they hold individuals liable. The most prominent examples of this approach are the United Kingdom and Ireland, but several continental Member States, such as France or Italy, also fall into this category, even though the requirements for criminal liability in these latter Member States tend to be more restrictive.

9.3.1. United Kingdom

The experience in the United Kingdom is well publicised, and I will only briefly summarise it here.

The cartel offence was enacted as s 188 in the Enterprise Act 2002 (EA 2002), which went into effect on 20 June 2003; it was amended by s 47 of the Enterprise Regulatory Reform Act 2013 (ERRA 2013), which went into effect on 1 April 2014. The Competition and Markets Authority (CMA) has summarised the provision as follows:

> "a person commits the offence if he or she agrees with one or more other persons that two or more undertakings will engage in certain prohibited cartel arrangements, namely price fixing, market sharing, bid-rigging, and limiting output. The offence is subject to certain exclusions and defences. The maximum penalty on conviction on indictment is five years imprisonment and/or an unlimited fine."[22]

In England, Wales and Northern Ireland, the prosecution is brought by the Director of the Serious Fraud Office (SFO), or by or with the consent of the CMA (formerly: OFT). In Scotland prosecutions are brought by the Crown Office and Procurator Fiscal Service (COPFS) on behalf of the Lord Advocate. The Enterprise Act 2002 provides that the CMA may issue a no-action letter that prevents a prosecution in England, Wales and Northern Ireland.[23] The OFT has declared that such no-action letters will be issued to Type A leniency

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9.3.1.). Greek law provides, in addition to the criminal cartel offence, for individual administrative fines of between €200,000 and €2m (Papadopoulos & Lisa Lovdahl Gormsen 2015: 107). Slovenia, also in addition to its criminal cartel offence, provides for individual administrative fines of between €5,000 and €30,000 (Pipan Nahtigal & Tjaša Lahovnik 2015: 248). Lithuania, while not providing for criminal liability, provides for individual fines and director disqualifications (Kolesnikovas 2015: 176). The Netherlands considered re-criminalising cartels, but eventually decided against it (Frese 2014: 222–224), but Dutch law does provides for individual administrative fines of up to €450,000 (de Pree & Molin 2015: 197; Frese 2014: 202–208). Portugal provides for administrative fines on individuals, albeit of a very low magnitude (between approximately €1000 and €5000, Marques Mendes & Vilarinho Pires 2015: 222–223). Article 63.2 of the Spanish Competition Act provides for administrative fines of up to €60,000 for individuals (see Jiménez-Laiglesia et al 2015: 262). Swedish law provides for "injunctions against trading" similar to director disqualifications (Pettersson, Carle & Lindeborg 2015: 269). With effect from January 2015, Poland introduced administrative fines on individuals of up to 2m Polish zlotys (at the time of writing: approximately €455,000) (Motyka-Mojkowski 2015: 1109–1111; Hansberry-Bieguńska & Krasnodębska-Tomkiel 2015: 214). There are special criminal prohibitions against bid rigging, for example, in Germany, Austria, Hungary, and Poland.

[22] CMA (2014: § 1.3). Until s 47 of the ERRA 2013 came into force on 1 April 2014, the conduct had to be shown to be "dishonest".

[23] s 190(4) EA 2002.

applicants on a blanket basis, and may be issued on a discretionary basis to Type B or C applicants (OFT 2013).

With regard to cartels in Scotland, immunity is not automatic, however. Where the criminal investigation falls into the remit of COPFS, the Memorandum of Understanding between the Competition and Markets Authority and the Crown Office and Procurator Fiscal Service of July 2014 governs the interaction between the CMA and COPFS (CMA & COPFS 2014). With regard to leniency applicants, the Memorandum of Understanding requires consultation between CMA and COPFS (CMA & COPFS 2014: § 13). Where the CMA recommends criminal immunity for the leniency applicant, the COPFS "will accord such a recommendation serious weight", will "take cognisance of the CMA's own rules on leniency", and will "where possible" give an early indication whether criminal immunity will be granted before the identity of the leniency applicant is disclosed (CMA & COPFS 2014: §§ 14–16).

At the time of the introduction of the cartel offence, about five to seven prosecutions per year were expected. Actual enforcement lagged significantly behind these predictions. There have been criminal prosecutions in three cartel cases to date: the *Marine Hose Cartel*, the *Fuel Surcharges Cartel*, and the *Galvanised Steel Tank Cartel*.

The first prosecutions were those against three individuals in the *Marine Hose Cartel*. They had been apprehended in the United States, and their US American plea agreements de facto ensured that they had an interest not only in pleading guilty before the Southwark Crown Court, but even in not contesting any prison sentences in so far as they did not exceed 20 months (David Brammar), 24 months (Bryan Allison) and 30 months (Peter Whittle) respectively.[24] While Judge Rivlin imposed higher sentences than these (namely: 36 months for Peter Whittle and Bryan Allison, and 30 months for David Brammar), the Court of Appeal eventually reduced the sentences to the 20, 24 and 30 month minimum sentences anticipated in the US American plea agreements.[25] The Court of Appeal indicated that it might have reduced the sentences even further if the defendants had only sought such a further reduction.[26]

While the defendants in the *Marine Hose Cartel* received incarceration sentences, the case was widely seen as atypical: the result had been largely predetermined by the US plea

[24] *R v Whittle and others*, [2008] EWCA Crim 2560, [25]–[28].

[25] *R v Whittle and others*, [2008] EWCA Crim 2560.

[26] Ibid [31].

agreements, and because of the defendants' guilty pleas the criminal cartel offence remained untested in trial.

The second prosecution for an infringement of the cartel offence, and the first attempt at a contested trial, was the *BA Fuel Surcharges Cartel* (*R v Burns*), in which Virgin Atlantic had been the leniency applicant receiving immunity. Interestingly in our context, one of the reasons for selecting this case for criminal prosecution was that it allegedly involved "members of senior management, including a BA board member, most of whom had received competition compliance training" (OFT 2010: 10). On the first day of trial, the prosecution had to admit that several thousand e-mails that had previously thought to have been corrupted were recoverable and should have been disclosed to the defendants. The judge refused to grant more time for the prosecution to remedy this defect, and so the prosecution offered no evidence (OFT 2010).

After this debacle, it was doubted whether the cartel offence could ever be revived (Joshua 2011). The collapse of the prosecution left the question unanswered whether a jury could ever be persuaded that cartel members acted "dishonestly" under the applicable Ghosh test (*R v Ghosh* [1982] EWCA Crim 2). This question had been raised in the literature soon after the cartel offence had been introduced in 2002, and the discussion by the House of Lords in the Ian Norris case under what circumstances cartel agreements constituted the common law offence "conspiracy to defraud" increased this uncertainty.[27]

In 2015, the Competition and Markets Authority (CMA) initiated prosecutions in the *Galvanised Steel Tank Cartel*.[28] One defendant (Mr Nigel Snee) pleaded guilty, and was later sentenced to a suspended six month prison sentence plus 120 hours of community service. In sentencing, the judge considered a two-year prison sentence as the appropriate starting point, but reduced the sentence because of the substantial cooperation of the defendant (CMA 2015b). Two other defendants did not plead guilty and were acquitted at trial — because the jury did not find the "dishonesty" requirement in the then applicable version of s 188 Enterprise Act 2002 to be proven (CMA 2015a). It is difficult to say whether this vindicated the prediction in the legal literature that had warned that this element could be difficult to prove, or whether this literature became a self-fulfilling prophecy: the defence could rely on literature written by antitrust practitioners and academics that cast doubt on whether the requirement was met.

[27] *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 2 WLR 673 (HL(E)).

[28] For a summary, see Blake 2015.

The unsuccessful prosecution against the two defendants who had not pleaded guilty in the *Galvanised Steel Tank Cartel* is not, however, necessarily indicative for the probability of success in future prosecutions. The Enterprise Regulatory Reform Act 2013 (ERRA 2013) had already removed the dishonesty requirement before the *Galvanised Steel Tank Cartel* case was decided, and had replaced the dishonesty requirement with a number of exceptions and defences; it was just that these modifications were not yet applicable to the *Galvanised Steel Tank Cartel*.

The modified cartel offence is not committed where the counterparty is sufficiently informed about the arrangement in advance.[29] It is now a defence to the cartel offence that the individual did not intend to conceal the nature of the arrangement from the CMA or from customers.[30] It is also a defence that "he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation".[31]

It remains to be seen whether criminal prosecutions under this regime will be any easier and whether criminal prosecutions will become more prevalent (see Gilbert 2015; Stephan 2014). I remain sceptical (similarly Nikpay & Taylor 2014: 284). The main problems with criminal prosecutions in the United Kingdom are arguably not so much a function of the formulation of the cartel offence but of the enforcement institutions. Enforcement concerning white collar criminality generally, not only in competition law, has seen a string of failures in the United Kingdom (*cf* Wardaugh 2014: 276–277). Criminal prosecutions are extremely expensive in the United Kingdom. Procedural errors may result in acquittal or mistrial. While the extensive rights of defence exist not only in white collar crime but also in blue collar crime, white collar criminals can more easily afford an expert defence team that ferrets out procedural missteps by the prosecution. As Roscoe Pound wrote as early as 1910, after describing the law in the books protecting the defendant in the United States:

> "But prosecuting attorneys and police officers and police detectives do not hesitate to conduct the most searching, rigid and often brutal examinations of accused or suspected persons, with all the appearance of legality and of having the power of the state behind them. It is true, no rich man is ever subjected to this process to obtain proof of violation of anti-trust or rebate legislation and no powerful politician is thus dealt with in order to

[29] s 188A EA 2002, as amended by s 47(5) ERRA 2013.

[30] s 188B(1), (2) EA 2002, as amended by s 47(6) ERRA 2013.

[31] s 188B(3) EA 2002, as amended by s 47(6) ERRA 2013.

obtain proof of bribery and graft. The malefactor of means, the rogue who has an organization of rogues behind him to provide a lawyer and a writ of habeas corpus has the benefit of the law 'in the books'." (Pound (1910) 17).

Of course, this is not a feature specific to the common law — in all jurisdictions wealthier defendants will be able to afford better lawyers and benefit from more expert knowledge. It is, however, the case that procedural defects in civil law jurisdictions are often treated less absolutely than they are in common law jurisdictions. A German court would not have let the trial in *R v Burns* collapse; it would have granted an extension to remedy the procedural defect.

Another factor is arguably the high staff turnover and the institutional inconsistency over time in the UK. It is difficult to keep track of the names, acronyms and initialisms, competences and constitution of investigating and prosecuting bodies — in the competition sector, for example, DGFT, OFT, CC, CAT, CMA, and SFO, and when it comes to economic regulation and crime more generally, FSA, FCA, Prudential Authority, and NCA. Continental institutions tend to be nearly set in stone, sometimes guaranteed in the constitution, and staffed by career officials that for the most part stay for life. While the higher turnover in the UK institutions allows for more injection of fresh ideas and for less ossified bureaucracy, it is also associated with less accumulated institutional knowledge and esprit de corps. The National Audit Office (2016, para 9) noted the disruption and additional cost of the transformation of the OFT and CC into the CMA. The higher staff turnover may be part of the reason why the British competition authorities are at the cutting edge when it comes to policy papers, but rank rather badly when it comes to enforcement.[32]

Overall, then, the much discussed UK cartel offence has a track record of four guilty pleas, resulting in three prison sentences (of 20, 24 and 30 months, plus criminal fines and director disqualification orders) and one suspended six-month sentence, in more than a dozen years of its existence, with no convictions in contested prosecutions at all. The removal of the dishonesty requirement may make prosecutions easier in the future, although the new exceptions and defences also raise difficult issues to be resolved (Stephan 2014, Gilbert 2015).

In addition to the criminal cartel offence, the Enterprise Act 2002 also introduced the power for courts to disqualify directors for infringing what is today Articles 101, 102 TFEU or their

[32] Wils (2013). The National Audit Office (2016) noted: „The low caseflow we identified in 2010 has continued, with the Office of Fair Trading and the CMA making 24 decisions and the regulators just eight since 2010. The UK competition authorities issued only £65 million of competition enforcement fines between 2012 and 2014 (in 2015 prices), compared to almost £1.4 billion of fines imposed by their German counterparts. The CMA faces significant barriers in increasing its flow of competition cases, although recent activity means it now has 12 ongoing cases."

UK equivalents, the Chapter 1 or Chapter 2 prohibitions of the Competition Act 1998, and the power for the OFT (now the CMA) to accept equivalent undertakings.[33] The Director Disqualification Order (DDO) or the equivalent undertaking prevent the individual from acting as a director (or receiver or insolvency practitioner), or from "directly or indirectly" promoting, forming or managing a company. The advantage of these procedures is that the provisions do not require a criminal conviction; they provide for an administrative sanction.

The OFT considered making increased use of DDOs, but has not yet followed up on this announcement. The only Competition DDOs that were imposed were the ones imposed against the three defendants in the Marine Hose Cartel cases.

9.3.2. Germany

Despite some early precursors in Germany that rendered certain forms of bid-rigging criminal offences, for example, in Prussia, and despite the criminal sanctions in the Allied Decartelisation ordinances, the framers of the Gesetz gegen Wettbewerbsbeschränkungen (GWB), the German Act against Restraints of Competition, decided against the inclusion of criminal sanctions — at least on a temporary basis, until the spirit of competition had been internalised by the business community (Wagner-von Papp 2010a: 275–282; 2011: 160–164). Instead of continuing the categorisation as criminal offences in the Allied Decartelisation ordinances, competition law infringements in the GWB were qualified as "administrative offences" (Ordnungswidrigkeiten), although the drafters indicated that this qualification could be changed to genuine criminal offences once the business community had internalised the new competition norms.[34] However (unlike on the EU level today), it is not only undertakings that are subject to administrative fines, but also — and primarily — individuals. These administrative sanctions on individuals will be discussed below 9.3.2.1. In 1992 courts began to apply the general fraud offence to bid-rigging arrangements, and in 1997, the legislature added a criminal bid-rigging offence, § 298 of the Criminal Code (Strafgesetzbuch, StGB). This will be discussed below 9.3.2.2.

9.3.2.1. Individual administrative fines

§ 81(1), (2) GWB provides that a number of substantive and procedural infringements of European and German competition law constitute administrative offences. While the substantive competition provisions are mostly addressed to "undertakings" (or associations of undertakings), the German law on administrative offences provides for the primary liability of

[33] s 204 EA 2002, amending the Company Directors Disqualification Act 1986 (c. 46) and inserting ss 9A–9E into that Act.

[34] Bundestags-Drucksache 1/3462, Annex 1, 21–22 and Bundestags-Drucksache 2/1158, Annex 1, 27–28, quoted in Wagner-von Papp (2010a: 281; 2011: 164).

the individual. For these purposes, the characteristic "undertaking" is notionally attributed to an individual tasked with representing the undertaking (§ 9 OWiG). The undertaking itself is then derivatively liable (§ 30 OWiG), although a fine can be assessed against the undertaking even where the individual as the primary offender is not prosecuted (§ 30(4) OWiG). Where the proprietor has at least negligently failed to take the necessary precautions to prevent infringements of the undertakings' duties, the proprietor may additionally be liable under § 130 OWiG.

As the offences are administrative ones, the prosecuting authority — here, the competition authorities, in particular the Bundeskartellamt (§ 81(10) no 3 GWB) — have discretion whether or not to prosecute.[35] This prosecutorial discretion has allowed the Bundeskartellamt to publish a leniency notice addressed to individuals (as well as to undertakings and associations of undertakings), which promises automatic immunity provided the conditions for immunity are met, and a discretionary reduction of up to 50 per cent if the applicants makes a "significant contribution to proving the offence" and the other leniency conditions are met.[36]

The maximum statutory fine for individuals is €1 million.[37] Detailed statistics on the actual practice on setting individual fines are difficult to come by.[38] The Bundeskartellamt has revealed in a case before the Federal Constitutional Court that in the period from 1993 to 2010 it had fined 510 individuals and 563 legal entities for competition law infringements — approximately one individual per legal entity.[39] The average fine per individual in that period was €56,000.[40] This average, however, includes not only horizontal cartel cases (for which fines are arguably on average higher than for other cases), and the maximum fine was doubled from €500,000 to €1 million in 2005 without retrospective effect, so that most of the fines in the sample will have been based on the lower maximum. Both these effects mean that today the average individual fine for hardcore horizontal cartels is probably higher than €56,000.

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[35] § 47 Gesetz über Ordnungswidrigkeiten (OWiG). The *Bundeskartellamt* is empowered to publish guidelines in particular on the setting of the fine, and has done so as far as fines for undertakings and associations of undertakings are concerned. The latest version are the 2013 Guidelines. *Bundeskartellamt*, Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings, 25 June 2013, https://perma.cc/T3L5-WDHD.

[36] *Bundeskartellamt*, Notice no 9/2006, Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases — Leniency Programme — of 7 March 2006, https://perma.cc/LNS9-NZ8Q.

[37] § 81(4) GWB. Theoretically, this maximum could be exceeded where this is necessary to skim off illegal gains, § 17(4) of the Gesetz über Ordnungswidrigkeiten (OWiG), which applies with the modification in § 81(5) GWB.

[38] The following paragraph partially replicates what I wrote in Wagner-von Papp (2016) § 15.

[39] BVerfG, 19 December 2012, 1 BvL 18/11, WuW/E DE-R 3766, paragraphs 52, 60 – Verzinsungspflicht, available at http://www.bverfg.de/entscheidungen/ls20121219_1bvl001811.html (in German).

[40] Ibid., paragraph 60.

There are some indications that in larger cartel cases, typical individual fines are in the order of magnitude of €200,000 to €250,000. In the beer breweries cartel, 14 individuals were fined a total of approximately €3.6 million.[41] Even if this amount were uniformly distributed among all these 14 individuals, the fine for each of these 14 individuals would be approximately €257,000. Since a skewed distribution seems more probable than a uniform distribution, the highest fine is likely to have been higher—possibly substantially higher—than that. Similarly, individual fines of €250,000 and €200,000 were reported in the Wholesale Paper[42] and Grauzement[43] cases, respectively. However, the quantification of the fine depends on multiple factors, among others the wealth and income of the person fined.[44] Accordingly, individual fines even in cartel cases can be substantially lower than the previous numbers suggest.[45]

At first sight, individual administrative fines could appear to address the principal-agent problem. However, there are two conceptual problems with individual administrative fines in general, and one problem specifically with the implementation in Germany.

First, an administrative fine is akin to a speeding fine: it carries no moral opprobrium — it is a "price", not a "sanction". Provided the potential perpetrator is willing to pay this price for a being paid a bonus, being promoted, or not being let go for failing to reach performance targets, the administrative fine does not hold much terror. The price is the subjectively expected fine. Objectively, this would be the discounted expected fine — assuming a 20 % detection probability and a €100,000 fine and a duration of some 5 to 10 years before the infringement is actually sanctioned, this would be substantially less than €20,000. Subjectively, it is likely that cartel participants are overconfident and so underestimate the probability that they are going to be detected. In contrast, a criminal offence would threaten a criminal convication with a possible entry into the federal criminal register, and at least a potential incarceration term. In addition to the legal sanctions foreseen in the criminal offence, a criminal conviction may also have indirect but severe implications for future

[41] Bundeskartellamt, 2 April 2014, Fallbericht Bußgelder gegen Brauereien (Summary Case Report on the decisions of 27 December 2013 and 31 March 2014, Case B10-105/11), http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B10-105-11.pdf?__blob=publicationFile&v=1.

[42] BGH, 19 June 2007 – KRB 12/07, NJW 2007, 3792, WuW/E DE-R 2225, § 10 — Papiergroßhandel (Wholesale Paper).

[43] In the Cement case, the individual fine of €200,000 imposed on the individual "Ed. Sch." was reduced by 5 per cent (€10,000) on appeal because of the long duration of the appeal procedure, BGH, 26 February 2013 – KRB 20/12, WuW/E DE-R 3861, §§ 1, 87–91 — Grauzement (Cement).

[44] Second sentence of § 17(3) of the Administrative Offences Act (OWiG).

[45] E.g., in the Cement case, the lowest of the fines for nine individual appellants was only €6,000, BGH, n. 43. In another cartel case, the Higher Regional Court Düsseldorf set a fine of some €40,000 for one of the individuals, OLG Düsseldorf, 29 May 2015, V-2 Kart 1+2/13 (OWi), NRWEntscheidungen. For a discussion of the factors influencing the setting of the individual fines in an information exchange case, see OLG Düsseldorf, 29 October 2012, V-1 Kart 1–6/12 (OWi) §§ 140–96, NRWEntscheidungen — Silostellgebühren.

employability and the social standing of the perpetrator (see also below 9.5.). These imponderables make the potential infringer's "hedonistic" calculus between the short-term gains and the potentially devastating long-term consequences nearly impossible, and are likely to be conceived as a real "sanction" to be avoided rather than a "price" to be paid.

The second problem is closely related to the first one: Because the administrative individual fine is just a "price", it can be completely compensated ex post or ex ante by the undertaking (Wils 2003: 438; 2008: §§ 579, 580; Monopolkommission 2014: § 152; Zimmer 2016: § 17). It is unlikely that such compensation would be made explicit. First, if sanctions on the undertaking should already be optimal, then it would not be in the undertaking's interest to compensate the individual. Second, in some jurisdictions an explicit compensation for fines may be illegal, either because it undermines the individual sanction's effects, or because it uses the undertaking's resources for purposes not in the undertaking's interests and so breaches fiduciary duties. Third, the undertaking would arguably not want to be seen to encourage illegal conduct.

Nevertheless, it does seem likely that there is implicit compensation. Indeed, the incentives just described (of getting a promotion, a pay raise or a bonus, or of not being fired) serve as implicit ex ante compensation. What is more, undertakings could provide further incentives to compensate implicitly ex post: if fines are still suboptimal, there is an interest in encouraging the conduct; and even if fines are already optimal, it is likely that the undertaking wants to send out a more general signal to managers and employees that those who go to the limits to increase profitability are not left hanging even if they have overstepped the mark. It is likely that the undertaking wants to encourage risk-seeking conduct, even if it does not want to encourage law-breaking.

The third problem is not one that attaches to administrative fines generally, but specifically to the way they are implemented in Germany. Two important functions of sanctions are the deterrence of infringements and the reinforcement of law-abiding conduct. These functions require that the sanctions are *seen* to be imposed. While it is understandable and in keeping with Continental privacy standards that the Bundeskartellamt does not publish the names of the individuals on whom fines have been imposed, there is no good reason not to publish the (approximate) amount of fines that are imposed on (anonymised) individuals. Even the data published in the biennial reports of the Bundeskartellamt (Tätigkeitsberichte) do not allow the calculation of the mean, median, spread or skewness of the distribution of individual fines — hence the reliance above on the data that were submitted to the Federal Constitutional Court as a "one off", and on the anecdotal glimpses into actual fining practice provided by appeal court judgments or selective Bundeskartellamt press releases. It is unclear whether the

opaqueness of the individual fine levels is deliberate policy, because the fine levels would actually not be deterrent if they were known, or whether it is due to neglect or a misconceived fear that the publication could raise privacy concerns.

9.3.2.2. Criminal sanctions

Discussions in Germany about criminalising cartel conduct (or possibly even other competition law infringements) have been going on since the inception of the GWB. Up to now, calls for the introduction of a cartel offence have not resulted in reforms that include a general cartel offence. However, in 1997, the legislator inserted a provision specifically for bid rigging (§ 298 StGB). Criminal liability attaches to cartel conduct only where the general fraud provision is infringed, or where the new bid rigging provision is infringed.

Cartel conduct comes at least close to committing fraud (§ 263 StGB). The elements of the fraud offence in Germany are deceptive conduct (*Täuschung*) on part of the perpetrator, an induced mistake (*Irrtum*) on the part of the victim that causes the victim's decision to make a transfer of value (*Vermögensverschiebung*) which results in harm (*Schaden*). Traditionally, the argument has been that if the price is fixed by a cartel, there is no deceptive conduct vis-à-vis the direct customer because there is said to be no tacit assumption that the price is set independently and therefore there is no deceptive conduct or induced mistake. It may also be difficult to establish that the victim suffered harm with the certainty required for a criminal conviction.

In 1992, the Federal Court of Justice distinguished earlier precedent (BGHSt 16, 367) and held in the *Rheinausbau I* decision that as far as bid rigging is concerned, the elements of the fraud offence may be satisfied (BGHSt 38, 186). Where goods or services are procured through a tendering process or auction, it is clear to those participating in the bidding process that the issuer of the call for bids assumes that the entered bids are arrived at independently, so that submitting a bid based on an agreement between independent bidders amounts to deceptive conduct and an induced mistake. While it may be difficult to prove harm because of the difficulties in establishing the counterfactual price with sufficient certainty, the Federal Court of Justice considered it sufficient that the trial judge be able to form a conviction on the basis of circumstantial evidence showing a high probability that the price would have been lower but for the agreement (BGHSt 38, 186, part III.4.). The Court pointed, inter alia, to statistical analyses on cartel overcharges. The Court even seems to suggest that the very fact of the existence of the agreement shows that the price was higher than it would have been, because otherwise the agreement would not have been sustainable. However, the Court additionally points to cross-payments between conspirators.

Some authors have suggested that not only bid rigging, but cartel conduct more generally may constitute fraud (Baumann & Arzt 1979: 35). While it is true that customers do not have a legimate expectation that the price for any given good or service be "just" or "adequate", it is not easy to justify why in today's well-established market economies customers should not have a legitimate expectation that prices are set independently. Indeed, a recent survey shows that 64 per cent of the 2648 German respondents agreed or strongly agreed that prices were set independently, as opposed to 27 per cent that agreed or strongly agreed with the position that businesses do not set their prices independently from competitors (Stephan 2015, Table 3). Even if this were not the de facto empirical assumption, one can make the case that the existence of Article 101 TFEU and § 1 GWB show that independent price setting is the normative standard. Given such an empirical or normative baseline, an offer may be seen as an implicit assertion that it complies with this standard. In other contexts, German courts are quite willing to imply statements: for example, impecunious persons who order food or beverages in a restaurant or bar, or who order goods online or via mail order, are considered implicitly to assert their ability and willingness to pay; they are convicted of criminal fraud.[46] In the cartel context, one could equally well imply the assertion that prices have been set independently. Indeed, the argument for finding actionable misrepresenation and induced mistake is even stronger in the cartel context: the cartel is antecedent illegal conduct (§§ 1, 81 GWB, Article 101 TFEU), which may be considered to give rise to a duty to disclose ("*Ingerenz*"), so that the failure to disclose could in itself amount to fraudulent conduct by omission.

With regard to the additional fraud element of "harm", it is true that harm may be difficult to prove in the price-fixing scenario, because one would need to establish the counterfactual price to show harm. However, this element could be established by the same methods which BGHSt 38, 186 applied in the bid rigging scenario. Accordingly, it does not seem impossible or even particularly far-fetched to qualify all or nearly all cartels as fraud. However, this is not what the courts actually do outside the bid rigging context, and so this theoretical possibility is irrelevant for the "law in action" of interest here. In the law in action, the general fraud provision is only of relevance when it comes to bid rigging.

In 1997, the legislature chose to insert a separate bid-rigging offence into the Criminal Code, punishable by a criminal fine or a prison sentence not exceeding five years. While, as just described, bid rigging was already considered to be criminal conduct since 1992 to the extent that there was sufficient circumstantial evidence that the counterfactual competitive price

[46] See, for example, OLG Hamm, 5 June 1996, 4 Ss 60/96. Further references in Mayer Lux (2013: 224 ff.).

would have been lower, the new provision does not require a showing of harm and therefore is easier to prosecute.

Where the elements of the general fraud prohibition are satisfied as well as those of the bid rigging provision, there is concurrent liability; the fraud offence protects the wealth of other persons, the bid-rigging offence competition as an institution, although some argue that the wealth of other persons is protected by the bid rigging prohibition as well. This concurrent liability may become particularly relevant where the conditions for *aggravated* fraud are met, which includes cases of fraud committed in an organised gang, fraud that is committed "professionally", and fraud that results in a large loss (§ 263(3), (5) StGB). In these cases, the law provides for increased minimum sentences (of six months imprisonment in the case of § 263(3) StGB, and one year imprisonment in the case of professional fraud committed as a member of an organised gang, § 263(5) StGB, in which case the offence becomes a felony, § 12 StGB) and an increased maximum sentence of 10 years, which exceeds the five-year maximum sentence for bid rigging.

The introduction of the bid-rigging provision § 298 StGB was accompanied by a number of ancillary provisions. § 82 of the GWB ensures that the competition authority retains its competence to prosecute the undertaking for the administrative offence even where individuals are prosecuted criminally. The two procedures are separate, so that the efficiency *vel non* of the criminal prosecution of the individual does not have an effect on the prosecution of the undertaking. A provision in the Guidelines on Criminal and Administrative Offence Procedures requires early cooperation between prosecutors and competition authorities (RiStBV No 242). § 100a(1), (2)(r) of the Criminal Procedure Code (Strafprozessordnung, StPO)) provide that telecommunications may be intercepted where there is an evidence-based suspicion that the bid-rigging offence was committed.

Actual enforcement of the bid-rigging offence seems to compare favourably to the situation in the United Kingdom. It is difficult to get exact statistics on enforcement. The official statistics of the Statistisches Bundesamt report 297 convictions and 42 suspended prison sentences for bid rigging from 1998 to 2013 inclusive (Statistisches Bundesamt (1999-2015), Wagner-von Papp 2016: §§ 13, 14; see also Wagner-von Papp 2010a: 285–286, 302; 2011: 167–168, 182; Zimmer 2016: § 5). To dispel a misunderstanding: these are not cases "where Section 298 of the German Criminal Code has been cited" (Ost 2014: 134); they are cases in which bid rigging was the *most serious* of the offences for which the defendant was convicted (Statistisches Bundesamt 2015: 13).

As I have explained elsewhere in greater detail (Wagner-von Papp 2010a: 285–286; 2011: 166–170), these official statistics are underinclusive, because they systematically omit cases

in which defendants are additionally sentenced for aggravated fraud or other offences that carry a higher maximum sentence than the five years imprisonment for bid rigging due to the coding of the data. These cases are instead reported in the statistics for aggravated fraud etc. Anecdotally, there are by now at least three convictions to unsuspended incarceration sentences which are not reflected in the official statistics. The first is the conviction of a Member of the German Parliament, who voted for the introduction of the bid rigging offence of § 298 StGB and was later convicted for aiding and abetting bid rigging and sentenced to prison (BGHSt 49, 201; Wagner-von Papp 2011: 168–169). In the second case of a conviction to a prison sentence to be served, the defendant had previously participated in a European cartel, which was uncovered and the defendant's undertaking fined by the European Commission; while the appeal against this Commission decision was still pending before the European courts, the defendant reestablished the bid rigging cartel within Germany. He was criminally prosecuted for this second cartel and sentenced to 2 years and 10 months in prison.[47] The third case was decided in 2015 by the Federal Court of Justice, where "defendant E." was sentenced to two years and four months for bid rigging and other corruption charges.[48]

Despite this active enforcement of the bid rigging provision, it is difficult to describe the German experience with the bid rigging offence so far as an unqualified success story.

The most urgent issue is the lack of clarity regarding criminal immunity for leniency applicants. The competition authority has discretion whether or not to prosecute administrative offences (§ 47 OWiG), and the leniency policy of the Bundeskartellamt is a self-binding policy that exercises this discretion in favour of the immunity recipient. In contrast, the public prosecutor is, at least in principle, obligated to prosecute criminal offences ("principle of legality", § 152(2) StPO). There is no criminal immunity provision specifically for leniency applicants. The Bundeskartellamt's leniency policy explicitly states that it must refer proceedings, even as far as the immunity recipient is concerned, to the public prosecutor where § 298 StGB or another criminal prohibition is infringed (Bundeskartellamt 2006, § 24).

As a practical matter, it seems very likely that the public prosecutor would close cases against immunity recipients, and most likely even leniency recipients. Statutory amendments have long made heavy inroads that put the principle that the public prosecutor must prosecute every crime into perspective. In reality, the prosecutor has a great deal of discretion how to allocate its resources under §§ 153–154f StPO. Indeed, the legislator of a recent amendment

[47] LG Munich II (2006); Wagner-von Papp 2011: 169–170.

[48] BGH, 29 April 2015, 1 StR 235/14, BeckRS 2015, 12466; Wagner-von Papp 2016: § 14.

assumed that an investigation would generally be closed against suspects who helped uncover a crime listed in § 100a StPO (such as bid rigging under § 298 StGB) where the suspected offence did not carry a minimum prison sentence, which is the case for § 298 StGB.[49] However, all these provisions allow the exercise of discretion not to prosecute or to reduce or abstain from sanctioning only *in individual cases*. Under the current rules, it is therefore not possible to guarantee automatic criminal immunity to a leniency applicant in competition cases. This would not, however, prevent the introduction of a criminal immunity provision de lege ferenda, just as there is a criminal immunity provision in § 371 of the Tax Code (AO).

Another problem is that criminal enforcement is not well publicised in Germany (Kartte & von Portatius 1975: 1171; Wagner-von Papp 2010a: 288; 2011: 170–172; 2016: § 10). Neither prosecutors nor the Bundeskartellamt have systematic knowledge of convictions or sentences imposed (*cf* Ost 2014: 134). Nor, one may infer, have potential perpetrators that are meant to be deterred by criminal enforcement.

A first factor resulting in this poor publication are privacy concerns. The naming and shaming that occurs in many common law jurisdictions, often even before a guilty verdict, is anathema to continental jurisdictions. This would not, however, prevent reporting on an anonymised basis after conviction. The second obstacle to better publication of prosecutions and convictions is the decentralised enforcement through local or regional public prosecutors before regional courts (Wagner-von Papp 2016: § 22).

A related problem is that the criminal enforcement of the bid rigging offence is not well coordinated with the competition authorities. As mentioned above, Guideline RiStBV No 242 requires an early and close cooperation between prosecutors and the competition authorities. As I mentioned in 2010, this provision seems to be honoured more in its breach than its observance, and so joint working groups between competition authorities and prosecutors would be helpful (Wagner-von Papp 2010a: 288, 289; see also 2016: § 20). From 2012 onwards, the Bundeskartellamt sought to remedy this by inviting prosecutors to annual meetings.[50] Nevertheless, the information flow appears incomplete.

At least equally important is that the competition authorities are not involved in the criminal prosecution at all, even though their expert knowledge could help the courts, for example, understand the relevant issues and the likely harm inflicted by the cartel. In the proceedings concerning administrative fines, § 82a GWB allows the Bundeskartellamt to put questions to

[49] Where the suspected offence carries a minimum prison sentence, § 49b StGB applies, and the court may either reduce the sentence under § 49 StGB or may abstain from imposing any sentence. This could become relevant for our context where a leniency applicant committed aggravated fraud.

[50] Bundeskartellamt, Press Releases of 10 February 2012, 15 April 2013, and 3 June 2014.

the accused, witnesses, and expert witnesses. Similarly, in private enforcement actions, the court has to inform the competition authorities, which can then make representations, point the court to evidence, and ask questions to the parties, witnesses and expert witnesses (§ 90 GWB). There is no such involvement when it comes to criminal proceedings. And even the participation rights in the GWB fall short of the powers that are given to tax authorities when it comes to the prosecution of tax crimes (Biermann 2007: 43; Federmann 2006: 518–520; Raum 2014: paragraph 3; Wagner-von Papp 2016: § 23). There is no reason to deny the competition authorities in criminal competition cases the rights that the tax authorities have in criminal tax cases. Again, this is something that can and should be fixed.

The fourth problem is that the decentralised enforcement makes the appropriate case prioritisation nearly impossible. A busy prosecutor may have an incentive to close a large-scale complex case, perhaps extracting a payment under § 153a StPO, in order to save scarce resources that would be needed to investigate the complex arrangements. Meanwhile a small-scale amateurish bid-rigging attempt between local plumbers may be easy to prove and therefore be prosecuted. In other words, the private incentives for the prosecutor in the case selection may differ from a societal perspective.

The fifth problem is that § 298 StGB singles out bid rigging and subjects it to a regime completely different from that governing other hardcore cartels.

There are admittedly several reasons why bid rigging may be "special". First, the connection between the cartel and the resulting harm is particularly evident in bid rigging cases, making it particularly clear that this is not a "victimless crime". Second, the evident deception, induced mistake, transfer of value and resulting harm moves bid rigging particularly close to traditional fraud, a fact acknowledged by German courts since the Rheinausbau decisions described above. Third, bid rigging often occurs in organised form such as bid rotation cartels, which depend on repeated rigged bids so that every conspirator can "take their turn". Fourth, bid rigging often affects public procurement and occurs concurrently with other corruption offences, such as bribery; indeed, § 298 StGB was introduced into the criminal code as part of a legislative package addressing corruption (Dreher 2011: 235). Fifth, because of the occurrence of bid rigging in public procurement, it is "the tax payers' money" that is affected, and the perpetrators' prioritising their own private gain over the public good, which the affected project sought to advance, may be considered particularly selfish, anti-social and immoral. Sixth, where bid rigging affects auctions of foreclosed properties, victims may belong to the poorest members of society; while this argument may sound as if it were tailor made to the cases in the United States after the 2008 financial crisis, it was raised in the 19th century Germany in the debates about the introduction of a bid rigging offence into the

Federal Criminal Code, modelled on the Prussian provision (German Reichstag, Document no 54, Volume III, 155, 182; von Sybel 37th Session, 7 April 1870, protocol: 726). For some or all of these reasons, bid rigging has historically often been singled out for special treatment: from the Prussian royal decree of 1797, the Napoleonic Code pénal of 1810, the Prussian Criminal Code of 1851, to § 298 StGB enacted in 1997.

Even though all these factors make bid rigging particularly well-suited to criminalisation, they may or may not be present in any given bid-rigging case, and they may or may not be present in other hardcore cartel cases. It is difficult to justify why someone who participates in a global price-fixing cartel that resulted in harm amounting to billions of euros gets away with an administrative fine, while a local builder who talks with a competitor about prices over a pint of beer is criminally liable. It does not make sense from either a consequentialist perspective (in how much harm does the infringement result?) or a moral perspective (how much "criminal energy" do the perpetrators manifest in their conduct? How culpable are they?) to use as the distinguishing criterion the mechanism by which goods or services are allocated, whether by tender, auction bid, negotiations, or posted prices.

9.3.3. Ireland

It is impossible to describe all the different individual sanction regimes in EU Member States in detail here. The spectrum reaches from no individual liability at all to potential criminal liability for any infringement of anti-competitive agreements or abuses of dominant positions in Ireland.

In Ireland, any infringement of sections 4 or 5 of the Competition Act 2002 can be prosecuted criminally under sections 6 to 8 of the 2002 Act. Prison sentences are, however, confined to hardcore cartels relating to price-fixing, output or sales limitation, or customer and market sharing arrangements (s 8 with s 6(2) of the 2002 Act); for other infringements, only criminal fines may be imposed. There is no provision for administrative or civil fines; while there is the possibility to institute civil proceedings, they can only result in declaratory or injunctive relief.

The maximum prison sentence for hardcore cartels was initially five years. This was raised to 10 years by the Competition (Amendment) Act 2012. Director disqualification will follow a criminal conviction automatically.

Some 20 individuals have been convicted to date, but no defendant has served time in prison. The sanctions have been either criminal fines or suspended prison sentences (Massey & Cook 2011). The fact that all prison sentences to date were suspended has often been criticised, and

the Judge in the Duffy case, Mr Justice McKechnie, was on the verge of imposing an unsuspended prison sentence, refraining from doing so only to prevent unequal treatment compared to other defendants in the same cartel, who had previously received milder sentences (*Director of Public Prosecutions v Patrick Duffy and Duff Motors* 23 March 2009: §§ 35 *et seq*). The 2012 Act removed the possibility of applying section 1(1) of the Probation Act 1907 to offences under sections 6 and 7 of the 2002 Act, but no cases to which the 2012 Act applies have been brought yet.

9.3.4. France

In France, there is provision for criminal sanctions for individuals under Article L. 420-6 of the Code de Commerce. In addition to a competition infringement under Article L. 420-1 (anti-competitive agreements) or L. 420-2 (abuses of dominant positions), it must be shown that the individual was "personally and decisively" involved in the infringement's conception, organisation, or implementation, and acted "fraudulently". The need for "personal" involvement restricts the criminal provision to those who actually acted, potentially excluding persons higher up in the hierarchy who may have known about the infringement (*cf* Blaise 2013: § 10; Viros 2016: § 10). The need for "decisive" involvement has been described as "obscure" (Blaise 2013: § 10); at a minimum, the individual must have played an "active" role, but it is less clear whether more is required, such as being the ring-leader or main persona of the infringement (Blaise 2013: § 10; Viros 2016: § 11 (stating that activity by mere "presence" would be insufficient)). "Fraudulence" has been said to require a "bad faith" element (Viros 2016: § 12; also *cf* Blaise 2013: § 10), reminiscent of the former "dishonesty" requirement in the UK cartel offence (Jenny 2013: § 68), but it has also been said that some decisions appear to let it suffice that the individual was conscious of the illegality of the conduct (Blaise 2013: § 10). Where the cumulative requirements of personal, decisive and fraudulent involvement are met, the individual is criminally liable for a fine of up to €75,000 and a prison sentence of up to four years.

As in Germany, telecommunications may be intercepted in criminal investigations (Articles 100 to 100-7 of the Criminal Procedure Code), and these provisions have been used in practice (Viros 2016: § 20).

While the cumulative requirements of personal decisive involvement and fraudulence, which requires "bad faith" conduct, are difficult to prove, there have been a number of prosecutions and convictions. David Viros reports that over the first two decades of the existence of the provision, the rate was approximately two convictions per year (Viros 2016: § 13). The Rapport Coulon reports even higher numbers, namely 124 convictions in the nine years

between 1998 and 2006 inclusive (Coulon 2008: 116), but at that time the provision applied to legal persons as well as individuals. While most convictions of individuals were for criminal fines or suspended prison sentences, there have been at least five prison sentences that were not suspended (Viros 2016: § 13).

Problems that have arisen in French criminal competition law enforcement are mostly reminiscent of those encountered in the UK and Germany.

The difficulties of proving personal, decisive, and fraudulent involvement are not unlike the problems that the "dishonesty" requirement created in the former UK cartel offence before the element was removed. This removal has led to calls for removing the restrictive requirements in the French provision as well (Jenny 2013: § 68).

As in Germany, the scope of the criminal provision is problematic. Whereas the bid rigging offence in Germany is arguably too narrow, the problem with Article L. 420-6 Code de Commerce is that it is too wide (Blaise 2013: §§ 15, 23–29). The criminal provision, by referring to Articles L. 420-1 and 420-2 in their entirety, comprises theoretically all anti-competitive agreements and abuses of dominant positions. This wide scope is undesirable for three reasons. First, it may lead to a chilling effect that deters procompetitive conduct. Secondly, it imports the need to consider economic evidence into the criminal trial, where it seems problematic because of the principle of legal certainty in criminal law (Blaise 2013: §§ 15, 25). Thirdly, the excessive scope of the offence may make courts reluctant to punish criminally what seems like a mere regulatory provision that does not make any distinction according to the seriousness of the infringement and does not fit well with the conception of criminal law as a remedy of last resort (see Blaise 2013: §§ 7, 23–26).

As in Germany, the offence is prosecuted not by the competition authority but by local public prosecutors before local courts (Viros 2016: § 12), resulting in little press coverage and public awareness, although Article L. 420-6 Code de Commerce provides that the sentence can be published at the defendant's expense.

As in Germany, the French criminal provision does not sit easy with the Autorité de la Concurrence's leniency programme. The Autorité de la Concurrence has announced in its leniency notice that it will not communicate its file on its own motion to the public prosecutor where a leniency application was made (Autorité de la Concurrence 2015: § 53). However, this is no guarantee that public prosecutors will refrain from initiating criminal investigations on their own motion, and so leniency applications may be deterred by the threat of potential criminal liability (Blaise 2013: § 13). It is also unclear on what legal basis the Autorité de la Concurrence could currently withhold evidence from the prosecutor (Coulon 2008: 65; Blaise

2013: § 13). While a reform proposal in the Rapport Coulon suggested the introduction of a model similar to the no-action letter in the UK based on consultation between the competition authority and the prosecutor or the judge, this suggestion has not (yet) been acted upon (Coulon 2008: 64–65, 106 (recommendation no 19); see also Blaise 2013: § 28).

French law has taken some steps to improve the involvement of the competition authority in criminal proceedings. Like German competition authorities, the Autorité may refer cases to the prosecutor. Pursuant to Article L. 450-1-IIbis of the Code de Commerce, a provision inserted in 2014, the investigating judge may request by letter rogatory support from a representative of the Autorité de la Concurrence. The investigating judge may also request the opinion by the Autorité de la Concurrence under Article L. 462-3 Code de Commerce.

9.4. Pros and Cons of Criminalisation

The views on whether there should be criminal liability for competition law infringements are extraordinarily divided. There are fervent supporters and equally fervent opponents. There are various reasons for the divisiveness on the topic.

9.4.1. Objectives of Criminal Law

There are already diverging opinions on the fundamental question what the objectives of criminal law are, and what conduct should accordingly be criminalised in the first place. General deterrence, reinforcement of law-abiding conduct, individual deterrence, rehabilitation, retribution, and incapacitation are some of the contenders as objectives. It seems unlikely — although, as the "King of the Pipes" case (footnote 120) showed, not impossible — that one and the same individual will be a cartel recidivist. Individual deterrence, rehabilitation and incapacitation therefore play at best a minor role in our context. Those who consider — like Franz von Liszt— individual deterrence, rehabiliation and incapacitation the only or predominant legitimate objectives of criminal law will therefore be less inclined towards the criminalisation of competition law.

In contrast, those who consider general deterrence and the positive reinforcement of law-abiding conduct as the main objectives may be more favourably inclined towards criminalisation.As far as general deterrence is concerned, competition law infringements are generally not committed in the heat of the moment, but are deliberate and calculated acts that are particularly amenable to a "cost-benefit analysis" by the potential perpetrator.

Additionally, white collar criminals often start from a social position fairly high up the ranks. The prospect of a prison sentence, even a relatively short one, is particularly deterring because a conviction often means a loss of acquired social capital and chances of future

employment in addition to the direct sanctions imposed (Monopolkommission 2014: § 156; 2015: § 198; Wagner-von Papp 2010b: 273; Werden & Simon 1987: 935–936). Potential cartelists are usually moving in social circles that disapprove of associating with "criminals". One participant of the Marine Hose cartel who was extradited (see below 9.5.1.) to the United States, pleaded guilty and served eight months in prison there, summarised his experience as follows: "'I am totally ruined,' Pisciotti says wearily during an interview in his home north of Milan. 'They destroyed me, my bank account, my family, my career. Everything.'" (Crofts 2015). While some of these effects would arguably be attenuated in the criminal justice systems in most European jurisdictions, any argument that the threat of incarceration would not have a substantial additional deterrent effect is simply implausible (Monopolkommission 2014: § 156).

Opponents of criminalisation sometimes claim that criminal sanctions would not increase deterrence (Bundeskartellamt 2015a: 13) or at least that there is no "systematic" evidence for the increased deterrence (Kartte & von Portatius 1975: 1170; Dreher 2011: 238). There are several problems with this argument.

First, it should be remembered that the administrative prosecution against the undertaking is unaffected by the question whether the individual offence is an administrative offence or a criminal offence, so that any argument based on the idea that criminal prosecutions against individuals would lead to a reduction in deterrence on the corporate level fails the mark.

Second, for the reasons outlined above, it is implausible that criminal sanctions should not be more deterring than administrative fines (Monopolkommission 2014: § 156). The answer by opponents of criminalisation is that criminal sanctions would be less vigorously enforced, and that therefore overall deterrence would fall (Bundeskartellamt 2015a: 13). It is of course true that the deterrence is a function not only of the severity of the sanction, but of the expected sanction, which depends on the probability of prosecution and conviction. Nevertheless, the argument that there is no increase in deterrence in the case of the introduction of a criminal offence lacks merit. Even disregarding for the moment the possibility of enforcing criminal provisions effectively and efficiently by improving the instutional framework and procedures, the argument simply overlooks that even in cases in which the public prosecutor decides not to prosecute the criminal offence, it will transfer the case to the administrative authority (here, the competition authority) under § 43 OWiG for the prosecution of the administrative offence. In other words, the introduction of an additional criminal offence need not impair the effectiveness of the existing enforcement scheme one *iota*. The claim that there is no additional deterrence would therefore have to be that the expected probability of conviction for the criminal offence would be not only low, but zero.

Third, contrary to the assertion, there *is* systematic evidence. The OFT (2007) commissioned a survey from Deloitte, which asked lawyers and companies to say how important they considered various sanctions for deterrence.

Among the 214 UK and Brussels competition lawyers asked, 141 (66 %) considered criminal sanctions "very important" and an additional 40 (19 %) considered them "important" for deterrence. For comparison: for fines, the respective numbers were 101 (48 %) and 81 (37 %), for private damages actions 39 (18 %) and 64 (30 %), and for director disqualifications 80 (37 %) and 75 (35 %) (OFT 2007: 105-106).

When asked an open-ended question what could be done to improve deterrence, the second most frequently mentioned aspect was "More criminal prosecutions for cartels" (33 mentions, following "encourage private damages actions" with 35 mentions; OFT 2007: 109).

Perhaps even more significantly, among the 202 companies, 127 (63 %) considered criminal penalties for cartels "very important", and an additional 47 (23 %) considered them "important"; for fines, the respective numbers were only 74 (37 %) for "very important" and 87 (43 %) for "important".

The OFT summarised these result as follows:

> "Both lawyers and companies agreed that criminal penalties were the most important sanction and private damages actions the least. There was some difference in the ranking of fines: while companies considered director disqualification and adverse publicity more important than fines, lawyers did not." (OFT 2007: § 5.58)

The OFT concluded that "[t]hese results highlight the importance of sanctions which operate at the individual, rather than corporate, level." (OFT 2007: § 5.59). These results were obtained, by the way, at a time when there had not yet been a single criminal prosecution in the UK.

Fourth, as even opponents of criminalisation concede (Dreher 2011: 238), there is additionally anecdotal evidence that cartels try to avoid and carve out the United States. I have pointed out elsewhere that this is no conclusive proof of the deterrence of a criminal offence, because it could also be due to the more effective private enforcement in the United States. Nevertheless, it is very likely that the outlook of being prosecuted criminally plays an important role in the actors' decision to avoid the United States.

Another important function of criminal law is the reinforcement of law-abiding behaviour. There are two distinct aspects to this. First, where the conviction of others' is publicised,

those engaging in economic activity but not in anticompetitive conduct are reinforced in their conviction that they have chosen the right path. As far as this argument is concerned, one may, however, wonder whether the marginally higher "satisfaction" (or should I say "Schadenfreude"?) that comes from hearing about the criminal convictions of others as opposed to hearing others receiving a high administrative fine counts for much.

Nevertheless, the reinforcement of law-abiding behaviour is important in another sense. Hardcore cartels are essentially fraudulent conduct, even if one can debate whether they can be technically subsumed under the fraud offence. While it is sometimes claimed that cartels are "victimless" crimes, this is patent nonsense — sometimes the harm stays concentrated with specific victims and sometimes it is spread across a large number of victims, but this does not make the harm disappear. When it comes to general or computer fraud offences, dispersion of harm across many victims does not matter for the question whether a crime is committed — think of those who defrauded bank customers by deducting one penny from many accounts. If no individual victim suffered a significant loss, this may be considered in the sentencing, but that is a separate matter. The difference between a cartel and a garden variety fraud is mostly that the sums in question are usually much higher in cartel cases, sometimes in the millions of euro, that the perpetrators come from a white collar background, that the infringement is committed by conspiring with others often over an extended period of time, and that the level of the organisation and attempts at concealment are often very elaborate. All these factors, except for the white collar element, would tend to make the offence more instead of less serious. Treating cartel conduct as an administrative offence — in the same category as a less important traffic infraction —, while small-scale fraud and theft are treated as criminal offences without any de minimis limitation may well create the impression in the populace that the legal system "only goes after the little guy". Such a perception may undermine trust in the legal system and legal compliance.

9.4.2. What are the Two States to be Compared?

One problem in the discussion is that the question whether criminalisation of competition law infringements is desirable cannot be answered in the abstract. As in any comparison, it is important that the states to be compared are well-defined. The general discussion about criminalisation of competition law infringements is sometimes distorted by strawman arguments. Of course a badly drafted criminal provision without ensuring effective enforcement and embedding criminal enforcement in the overall antitrust enforcement system would be a bad idea. The real question is whether criminal enforcement of competition law infringements, if well implemented, would be desirable or not. So, what are the two states to be compared?

9.4.2.1. What Conduct Should be Criminalised?

There is sometimes debate (or confusion) as to what conduct should be criminalised. Opponents of criminalisation sometimes decry the problems that would arise if all competition law infringements, such as vertical restraints and abuses of dominant positions, were subjected to criminal sanctions. This is largely a strawman argument.

It is true that some legal regimes have gone for such "wholesale" criminalisation, in which all competition law infringements including vertical restraints and abuses of dominant positions are made criminal offences, at least on the level of statutory law: this is true, for example, for the United States, France and Ireland.

However, in the United States there is today a consensus that criminal sanctions should be reserved for horizontal hardcore restraints (price-fixing, output or sales limitation, bid rigging as well as customer and market sharing arrangements); there has not been any criminal enforcement against vertical restraints or monopolisation for decades, and the Department of Justice is clear in its communications that it will only employ criminal law against hardcore cartels.

In Ireland, the "wholesale criminalisation" should be taken with a pinch of salt: custodial sanctions are only available for the hardcore infringements price-fixing, output or sales limitation, or customer and market sharing arrangements (section 8 with section 6(2) of the Competition Act 2002), and other infringements are not prosecuted criminally as a matter of prosecutorial discretion.[51]

In France, the overbroad criminal provision is one of the problems for criminal enforcement (see especially Blaise 2013), but especially the requirement that the offence must have been committed "fraudulently" would arguably prevent a successful prosecution of non-hardcore competition infringements.

The prevailing view in competition circles is that criminalisation should only be considered for horizontal hardcore infringements, namely price-fixing, output or sales limitation, bid rigging, and customer and market sharing arrangements (Monopolkommission 2014: §§ 120–123; Wils 2003: 442–443; 2008: §§ 575–577; Wagner-von Papp 2010a: 291, 297–298; 2010b: 277–278, 2011); see already Kartte & von Portatius 1975: 1172, conceding that "qualified infringements of competition law, such as ... price fixing, indeed deserve criminal punishment", but fearing a slippery slope to the criminalisation of other infringements). For

[51] In 2012 Ireland considered the decriminalisation of non-hardcore offences, but this was given up when its Attorney General advised that substantial civil fines could raise constitutional concerns under Article 38 of the Irish Constitution.

all practical purposes, this is the position in the United States, and it is the statutory position in the United Kingdom. While some contributors to the German debate would go further (Biermann 2007: 33–34, noting that this should be part of the discussion; Baumann & Arzt 1970), such an extension would risk a chilling effect for pro-competitive conduct and the danger of false positives.

The following discussion proceeds on the basis that a criminal provision would be narrowly drafted to include only horizontal hardcore restraings, namely price-fixing, output or sales limitation, bid rigging, and customer and market sharing arrangements.

One could consider limiting the scope even further. One way to avoid the system being overburdened by de minimis cases with relatively low social harm would be to require a minimum threshold, for example, in terms of the affected turnover (for various solutions see Tiedemann 1976: 152–158); those cartels falling below such a threshold could continue to be dealt with as an administrative offence. Of course, such a de minimis threshold would have to be formulated in such a way that it does not create insurmountable obstacles in the criminal process; asking for a minimum harm or overcharge, for example, would arguably make the offence impossible to prosecute.

9.4.2.2. How can False Positives and a Chilling Effect on Legitimate Horizontal Cooperation be Avoided?

Even with a cartel offence that is limited in its scope to horizontal hardcore cartels (9.4.2.2), there remains a delimitation issue. There is a danger that the formulation of the cartel offence could encompass some legitimate horizontal cooperation, or that some individuals at least fear that legitimate horizontal cooperation could be caught.

This is the issue that the "dishonesty" requirement in the original UK cartel offence was meant to solve and that the exceptions and defences in the new UK cartel offence are meant to solve.

The practical significance of the issue is fairly limited. Cartels that have been prosecuted so far in countries that have criminal cartel offences were hardly forms of cooperation that could potentially be justified by pro-competitive reasons. Even a hardcore horizontal cartel is difficult enough to prosecute, so that prosecutors and criminal courts for practical reasons would not want to go near cases that are borderline legitimate cooperation.

Additionally, in reality many other criminal offences are much more open textured than a cartel offence aimed at horizontal hardcore cartels would likely be. Consider, for example, § 266 StGB or environmental offences — and yet managers are usually not deterred from

engaging in profitable conduct even if there is some risk of criminal liability in the background.

The assertion, made by some opponents of the criminalisation of cartel conduct, that it is impossible to define criminal cartel conduct with sufficient certainty and precision, appears to assume that criminal offences must be so precise as to require no interpretation or delimination of borderline conduct at all (see, eg, Dreher 2011: 240–241; see already Kartte & von Portatius 1975: 1171). This is simply not true of any criminal offence. The current bid-rigging provision merely refers to making a bid 'based on an illegal arrangement', and yet this has not led to any substantial problems in practice. Indeed, the Federal Constitutional Court has explicitly held the provision not to be so vague as to be unconstitutional (BVerfG 2 April 2009, 2 BvR 1468/08). If the meaning of all criminal provisions were self-evident and did not require interpretation, most literature on criminal law would be superfluous. Furthermore, if it were truly impossible to craft a criminal offence, and if the current formulation of the competition law provisions were constitutionally too vague, then it would be impermissible to impose administrative fines in the tens of millions of euro (on undertakings) and tens or hundreds of thousands of euro (on individuals), because — as Dreher concedes (2011: 240) — the principle of legal certainty (*nullum crimen, nulla poena sine lege certa et scipta*) applies to administrative offences as well. It is one thing to demand that a criminal provision be narrowly tailored and well drafted; it is quite another thing to demand impossible standards. The mere fact that any wording in a criminal cartel provision will require interpretation cannot be seen as an insurmountable obstacle.

Nevertheless, it is of course better to make the delimitation between legal and illegal conduct as clear as possible. Elevating the subjective (mens rea) elements of the offence, such as requiring an additional element of "dishonesty" or Absicht (eg, "with the purpose of distorting competition") would be one way to go. However, as the dishonesty requirement in the old UK cartel offence has shown, this may result in obstacles to the prosecution even of genuine hardcore cartels. The new UK regime partially also relies on additional "intent" requirements (eg, as to the concealment of the arrangement from the competition authority) in the new defences to the cartel offence.

Another possibility would be to give undertakings the opportunity to lodge their agreement with the competition authority in advance, and to guarantee the non-application of the criminal offence to the extent that the implementation does not exceed what is contained in the agreement (similar to the new UK cartel offence and the suggestion by Biermann 2007: 32; however, Dreher 2011: fn 99 considers this approach "impracticable" without elaborating). One could object that this would, in essence, replicate to some extent the old

notification system under Article 101(3) TFEU. However, most of the costs of the old notification system can be avoided. First, there would be no need for the competition authority to "clear" the agreement. The lodging of the arrangement itself could be enough (similar to the old "*Widerspruchskartelle*" under German law), because it would only affect the applicability of the criminal offence — similar to the non-application of fines under the old notification system once the agreement was notified. Nor would there be a requirement to notify for anyone — notification would be purely optional, so that no-one would have to incur costs if they were sufficiently certain their arrangement did not fall under the criminal offence. Nor would competition authorities be required to spend significant resources on the scrutiny of the notified arrangements — first, hardcore cartels would be unlikely to notify in the first place even if there were known to be only occasional scrutiny, and second, even if a cartel slipped through the net, administrative sanctions could still be imposed.

The new cartel offence in the UK reaches a similar result by including a defence that the arrangement was not intended to be concealed from the competition authority or the counterparty.

In Germany, the Monopolkommission (2015: § 204) has recently submitted a concrete proposal for a criminal cartel provision; this may serve as a starting point for the discussion. In my view, a provision less directly based on the wording of Article 101 TFEU may be preferable, in order to avoid a direct application of the broad interpretation of the wording necessary in the administrative enforcement to criminal enforcement, for example when it comes to "indirectly" fixing prices. A combination of the Monopolkommission's recommendations — especially as to the definition of the personal scope of the offence, including the acting employee as well as management involved in the conduct — with the older recommendation by the Expert Commission to Fight White Collar Crime 1975 in § a (Tiedemann 1976: 204–5) will capture most of the relevant aspects of the offence. It may be worth exploring whether the new UK cartel offence with its exceptions and defences, in particular with regard to a voluntary notification, could give inspiration to draft a sufficiently narrow offence.

9.4.2.3. Increased Defence Rights — a Marginal Issue

Arguments made in the international discussion are in particular that criminal trials are more expensive and require a higher standard of proof than non-criminal sanctions, and that the defendant has increased defence rights (e.g. Dreher 2011: 235). These may be compelling arguments in jurisdictions in which administrative or civil fines can currently be imposed

with less judicial scrutiny and defendants have less defence rights than in criminal proceedings.

In Germany, however, even the current administrative fines are in principle subject to proceedings with criminal procedure standards (§ 46(1), 77(1) OWiG; Monopolkommission 2014: § 173). It is true that some aspects of the strict requirements of criminal procedure can be relaxed by the court under §§ 77–78 OWiG. In particular, it is marginally easier for the court to reject an application to take evidence once the court is already convinced that a certain fact has been established (§ 77(2) OWiG). This relaxation is meant to be a compromise between the defendant's rights of defence and the resources spent on minor offences. It has to be borne in mind, however, that the paradigm cases of administrative offences concern small fines for minor traffic infractions — the general range of administrative fines is between €5 and €1000 (§ 17(1) OWiG). In such cases of small fines, it may well be disproportionate to spend enormous resources in order to protect the defendant against the small probability of wrongful conviction associated with the rejection of such an application, given that the consequence even of a wrongful conviction is usually no more than a relatively low administrative fine without substantial further consequences. In competition cases, however, the fine is likely to exceed the general range of administrative fines substantially. The second sentence of § 77(1) OWiG provides that the court has to take account of the import of the case in deciding on the extent to which it takes evidence. Given the high administrative fines in competition cases — even on average they exceed the general maximum of § 17(1) OWiG by a factor of 56 —, the second sentence of § 77(1) OWiG already requires the application of criminal standards even in the administrative fines procedure.

The situation should be similar in other European jurisdictions in which fines are imposed on individuals: substantial individual fines of the sort imposed for competition law infringements are to be classified under the Engel criteria as "criminal sanctions" for purposes of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) anyway. For fines on undertakings, this has been decided in the *Menarini* case; for fines on individuals, this applies a fortiori. Procedures in cases in which fines against individuals have been imposed therefore have to comply at least with the standards required by Article 6 ECHR.

This means that the marginal increase in defence rights and the complexity of litigation is not a very strong argument in jurisdictions that already impose significant sanctions against individuals — certainly not in Germany.

In Germany, some contributors — including the current Vice President of the Bundeskartellamt — suggest, on the contrary, abolishing individual sanctions completely, on the assumption that the quasi-criminal procedure standards, which currently also apply to fines imposed on undertakings, could then be removed in favour of curtailed judicial review in a quasi-administrative procedure (Bundeskartellamt 2015b; Ost 2014: 134)

If this were the counterfactual scenario against which individual criminal sanctions would have to be compared, the marginal difference of defence rights would indeed be greater. However, for reasons of German constitutional law and ECHR case law, there are limits to the curtailment of the judicial review of fines as high as those imposed in competition law even if the sanctions are imposed exclusively on undertakings (Bundeskartellamt 2015b). In addition, the approach would not address the Principal-Agent problem at all.

What is true, however, is that some of the traditional guarantees in the criminal and quasi-criminal procedure are unnecessarily cumbersome without strengthening the rights of defence (see Bundeskartellamt 2015b). In so far as this is the case, the criminal procedure should be overhauled and simplified (Bundeskartellamt 2015b; Ost 2014). These reforms, however, mostly apply to the criminal and quasi-criminal (administrative offence) procedure alike, and are therefore necessary or at least desirable, completely independently of the decision to criminalise cartel conduct.

The introduction of criminal sanctions would not make the procedure for individual sanctions substantially more burdensome when compared to the status quo.

9.4.2.4. Criminal Immunity

The discussion of the criminal provisions in the UK, France and Germany has shown that one of the most problematic aspects is interference with leniency programmes. While it may be difficult to quantify the success that these programmes have had, and while one must be careful not to overrely on leniency programmes lest they lose their effectiveness, there is very little doubt that for all practical purposes they have been very successful instruments for the detection and prosecutions of cartels indeed. Opponents and proponents of criminalisation agree that criminalisation should not come at the price of impairing leniency programmes (Wagner-von Papp 2010b: 275–276, 282; 2014; Biermann 2007: 45–46; Dreher 2011: 242; Monopolkommission 2014: §§ 175–181).

There is, then, the question whether leniency programmes can be effective in the presence of criminal sanctions. If there is no coordination between the leniency programme and the threat of criminal sanctions, then criminal sanctions are likely to be detrimental to leniency

programmes: where a potential applicant faces potential imprisonment or other criminal sanctions, the prize offered of immunity for administrative fines will be particularly tempting. This, it should be recalled, is the current situation for bid-rigging in Germany and all infringements in France, even though in both countries the actual enforcement of criminal sanctions on the successful leniency applicant are arguably low.

However, this is not a logically necessary consequence of the introduction of criminal sanctions. It is possible to introduce criminal sanctions and provide for criminal immunity for the successful immunity recipient. This is the situation in the United States and in England, Wales and Northern Ireland. If there is criminal immunity, leniency programmes are significantly strengthened: the differential between the consequences of applying for leniency and being caught becomes greater than it was without criminal sanctions. What is more, it multiplies the number of players in the leniency game, and so increases the mutual distrust that results in the effectiveness of leniency programmes.

The question is therefore only whether there are any legal obstacles to the introduction of criminal immunity for immunity recipients under the leniency programme in the jurisdiction for which criminal sanctions are considered. In France, this does not appear to be the case; the Rapport Coulon (2008) explicitly suggested the introduction of immunity. In Germany, constitutional reservations are sometimes voiced in the context of criminal immunity. However, the criminal immunity provision in § 371 of the Tax Code (Abgabenordnung, AO) has hardly presented constitutional problems (see Bundesverfassungsgericht, 28 June 1983 — 1 BvL 31/82; Monopolkommission 2014: § 179). It is unclear why an equivalent provision for immunity recipients under a competition leniency policy should be any different in this regard. The Monopolkommission (2015: 210) has made a concrete proposal for an immunity provision.[52] In other jurisdictions, the situation may of course be different, depending on the relevant constitutional provisions.

Any remaining constitutional doubts would, however, be removed in the European Union if EU legislation provided for a prohibition of individual sanctions where they would interfere with leniency programmes. The current consultation may result in such EU legislation.

[52] The recommendation awards criminal immunity to perpetrators where the competition authority awards immunity from fines to the undertaking, but excludes immunity for the sole instigator and coercers. A debate is to be had whether this should not be reduced to excluding only coercers, so as not to deter leniency applications from institgators; otherwise, especially cartels with only two members would be stabilised. More importantly, the recommendation would have to be amended to take account of individual leniency applications.

9.4.3. Utilitarian Arguments

Arguments for and against criminalisation can be subdivided into utilitarian or pragmatic arguments on the one hand, and moral arguments on the other.

Utilitarian or pragmatic arguments in favour of criminalisation can be summarised as follows (see already Wils 2003: 432–442; 2008: §§ 547–574; Wagner-von Papp 2010a: 292–296; 2010b: 270–277; Monopolkommission 2014: §§ 154–166):

1. Individual sanctions are needed to overcome the principal-agent problem that arises when only undertakings are sanctioned.
2. Individual sanctions other than criminal sanctions can be factored into the calculation as a price rather than a sanction, because they lack the moral opprobrium and extra-legal (social) consequences associated with a criminal conviction.
3. Criminal sanctions are a particularly deterrent sanction especially for white collar perpetrators because of the additional cost of social capital, and because of the higher opportunity costs if custodial sanctions are imposed, or in case the criminal conviction forecloses future employment opportunities. The argument that there is a lack of empirical evidence for this increased deterrent effect has been rejected above.
4. Criminal sanctions are an effective deterrent because white collar criminality is usually the result of rational deliberation rather than hot-tempered spur-of-the-moment decision making (Coffee 1980: 424; Cseres, Schinkel & Vogelaar 2006: 7).
5. Criminal sanctions reinforce and spread the message that cartel conduct is prohibited.
6. Criminal sanctions would allow the prosecuting authority to make full use of the investigatory tools that are not available in the procedure for administrative offences (see, eg, § 46(3) OWiG).

   In particular, it is to be expected that a criminal cartel offence would also be listed in § 100a StPO, as is already the case for § 298 StGB (§ 100a(2)(r) StPO), which allows the interception of telecommunications without the knowledge or consent of those communicating. Such wiretapping has been used to good effect in competition cases, for example, in France and Chile; in the United States, the possibility for wiretapping where there is a suspicion of antitrust offences was introduced in the Antitrust Criminal Investigation Improvement Act 2005. In addition, the inclusion in the catalogue of § 100a StPO would also allow recordings outside of a residential home under § 100f StPO.
7. Provided the criminal offence takes criminal immunity into account, leniency programmes will be strengthened. The differential between the payoffs for applying for leniency and for being detected or reported by the other cartelist becomes greater.

Utilitarian or pragmatic arguments against criminalisation can be summarised as follows (see in particular Dreher 2011: 240–243; Möschel 1980: 49–52; and the discussion in Wagner-von Papp 2010a: 297–300; 2010b: 277–281.):

1. An overbroad definition could result in overdeterrence and a chilling effect. This issue has been discussed above. For a criminal offence restricted to horizontal hardcore cartels, namely price fixing, market sharing, bid rigging, and limiting sales or output, especially if combined with the possibility of registering the agreement with the competition authority to avoid criminal sanctions, the argument is unconvincing.
2. A major problem in France and Germany is the shift in the prosecuting institutions once an offence is a criminal one from the competition authority to (often local or regional) public prosecutors and the criminal courts. Such a shift is undesirable for several reasons: general public prosecutors cannot match the competition authorities' expertise on and dedication to competition law and policy; resources of local and regional prosecutors are scarce, and non-competition matters that consume less resources will be prioritised; local or regional enforcement leads to fragmented enforcement and may so impair a consistent case priorisation (possibly leading to the closing of complex, high-stake cases, and the prosecution of low-stake, but easy-to-prove cases); general criminal courts may lack the expertise regarding competition law that the courts dealing with the administrative cartel offences have acquired; and criminal cases tried in local or regional courts are generally not well publicised.

   It is to be noted, however, that there is nothing inevitable in shifting the prosecution from the competition authority entirely to the general public prosecutor once an offence is made a criminal one. At a minimum, the coordination between the competition authority and the general prosecutor could be improved along the lines of the fiscal authorities when it comes to the prosecution of tax crimes (Biermann 2007: 43; Federmann 2006: 518–520; Raum 2014: paragraph 3; Wagner-von Papp 2016: § 23). A federal or at least more strongly coordinated regional specialised prosecutor for economic crime has been debated for decades (Emrich-Katzin 2013). And while it is true that the "Monopoly for Prosecutions" currently lies with the public prosecutor (with narrow exceptions for private prosecutions), this is not a constitutionally required state of affairs (Bundeskartellamt 2015b: 31–33). Similarly, there is no reason not to task the courts that currently deal with administrative cartel offences with dealing with criminal cartel offences as well; indeed, this was one of the recommendations made more than 40 years ago by the Expert Commission on White Collar Crime 1975 (Tiedemann 1976: 208).

3. If there is no accompanying criminal immunity provision (and there currently is none for bid rigging in Germany, and none in France), then the introduction of (further) criminal sanctions may negatively affect the rate of leniency applications. If the choice is between a system with an effective leniency programme without criminal sanctions, and one with criminal sanctions but no effective leniency programme, then it is very likely that the former system is more effective in deterring cartels. The most effective system, however, would most likely be one with criminal sanctions and an immunity prize.
4. Opponents argue that criminal prosecutions would be too complex and costly. As explained above, current prosecutions under the administrative offence in Germany are already quasi-criminal, so that the marginal increase in the burden for the justice system would not be high. Furthermore, in a typical year the Bundeskartellamt imposes individual fines on some 100 individuals. Criminal prosecutions under a cartel offence would arguably be in a similar order of magnitude (in the United States, the Department of Justice has filed charges on average against 54 individuals per year in the ten years from 2005 to 2014, DOJ (2014)). It seems incongruous that the criminal justice system should be able to prosecute, as was for example the case in 2013, more than 6000 aggravated fraud cases, more than 3000 computer fraud cases, some 2000 cases of embezzlement, and more than 1700 insolvency crimes under the criminal code plus 2000 under the Insolvency Code (Insolvenzordnung, InsO) (Statistisches Bundesamt 2015: 38-54) — and yet break down if it were tasked with prosecuting an 100 cartelists per year criminally instead of in quasi-criminal proceedings.
5. Sometimes the question of marginal deterrence is raised in the context of the criminalisation debate: would cartelists commit additional crimes if they are 'criminally liable' anyway, perhaps to conceal the crime or to avoid prosecution (Spagnolo 2006: 143–146)? The answer to this question is likely no. Sentences for a criminal cartel offence would, in most cases, be expected to be low for first time offenders. Even in the supposedly draconian United States, the average sentence has been 24 months in the fiscal years between 2010 and 2015 (Snyder 2016), and the highest sentence ever imposed in the United States was 5 years imprisonment (United States v. Frank Peake, No. 14–1088 (1st Cir, 14 October 2015); Snyder 2016). Any additional crimes that could be committed to conceal the antitrust offence could therefore be taken into account in sentencing, so that marginal deterrence is not a real issue (see already Werden & Simon 1987: 935).
6. Similarly, any concerns that criminalisation could induce cartels to take additional measures to conceal the cartel and therefore make detection harder are unwarranted.

> The existing level of enforcement already provides a strong incentive to conceal, and it is unlikely that criminalisation would lead to a large marginal increase in resources spent on avoiding detection. The only realistic problem that could occur here is that criminal sanctions could deter leniency applicants from disclosing the cartel; but this would only be the case if a successful leniency application did not result in criminal immunity. This only reinforces the point, encountered several times above, that it is indispensable to introduce a criminal immunity provision — something that needs to be done in Germany (and France) even at the current level of criminalisation.

The most compelling utilitarian argument against criminalisation is that it could weaken leniency programmes if the law does not provide for criminal immunity; but this is an argument in favour of providing for a criminal immunity provision, not one against criminalisation. Only if there were insurmountable obstacles to a criminal immunity provision would this be different. At least in Germany, this is not the case. What is more, the question of a criminal immunity provision exists anyway because of the existence of the bid rigging provision.

The second utilitarian argument that has some validity at first sight is that a criminal offence could be less effectively enforced than the current administrative offence. However, if the current administrative offence (§ 81 GWB) is retained, and a narrower criminal provision were added, then the worst that could happen would be that public prosecutors would refer these cases back to the competition authorities for the prosecution of the administrative offence (§ 43 OWiG). In addition, if the legislator is willing to give the competition authorities a greater role in the prosecution of the criminal offence, which would be very desirable, then it is unclear why prosecution of the criminal offence should be less vigorous.

Overall, the greater deterrence that would result from the introduction of a criminal offence, and the increased effectiveness of the leniency programme if such a criminal offence were combined with a criminal immunity provision (resulting from increased distrust between cartel participants and leading to a higher probability of detection) arguably dominate.

9.4.4. Moral Argument

Criminal offences differ from administrative offences largely in the degree of moral opprobrium. The question from this perspective is whether horizontal hardcore cartel offences justify as much moral opprobrium as is necessary for criminalisation.

This may be discussed at an abstract level — what moral norms have been infringed (see in particular Whelan 2014), and whether cartel conduct is *malum in se* (as the Irish judge in

Duffy assumed) or merely *malum prohibitum*. Such a discussion mostly assumes that there is an objective cut-off point, if not a bright line for determining whether conduct deserves criminal punishment. In the German discourse, it is uncontroversial that the legislature has, outside a certain core of criminal offences such as violent crime, a large degree of discretion in categorising offences as criminal or administrative in nature. Nevertheless, the categorisation should be consistent with comparable offences. For decades, even before cartels were labelled as the "supreme evil of antitrust" and sanctioned with multi-million euro fines, the categorisation of cartels as mere administrative offences has been the outlier in the set of administrative offences.

The two factors that are decisive for the categorisation are the degree of the "harm" inflicted (Erfolgsunrecht, below 9.4.4.1.) and the degree of "criminal energy" manifested in the deed (Handlungsunrecht, below 9.4.4.2.). Opponents of criminalisation often add a third criterion: public opinion (below 9.4.4.3.).

9.4.4.1. Harm Inflicted

With regard to the first element (Erfolgsunrecht), few commentators deny that the social harm inflicted by cartel conduct is considerable. First, one can argue that the harm inflicted on the institution "competition" is sufficient to justify criminalisation (for this line of argument, see in particular Wardaugh 2014: 43–51; see also Tiedemann 1976: 102–106; 2001). Second, even if one looks for more concrete harm to the wealth of victims, the case for criminalisation is strong. By its nature, it is very difficult to quantify the harm inflicted even by detected cartels, not to mention that caused by undetected cartels. The European Commission estimated the annual harm inflicted by cartels on the EU economy to be in the range between €16.8 billion and €261.2 billion (Ashton & Henry 2013: 211, § 8.002). The Bundeskartellamt estimates that its cartel enforcement brings benefits in the order of magnitude of between €500 million and €750 million annually (Bundeskartellamt 2011: 15–16), and that does not even include the benefits for German markets derived from the EU Commission's enforcement. Overall, there can be little discussion that the social harm inflicted by horizontal hardcore cartels is of a magnitude that justifies the use of criminal sanctions (see already Tiedemann 1976: 106-120).

9.4.4.2. Criminal Energy Manifested

With regard to the criminal energy exerted (Handlungsunrecht), many cartels build up an elaborate organisation. Not infrequently, the cartel organisation consists of a hierarchical organisation with coordination on various levels of management. In the German railway track cartel, for example, there were two-tiered meetings of the participants, with high-level

coordination by executive managers and detailed coordination by mid-level managers (Bundeskartellamt 2012).

Cartels also take great pains to conceal their conduct. In the German *Railway Track Cartel*, for example, the participants coordinated their telecommunications via prepaid telephone cards (Bundeskartellamt 2012). The amount of criminal energy spent in cartel activity becomes even clearer when looking at the secret video and recordings of telecommunications which the Federal Bureau of Investigation made of the *Lysine Cartel*.[53] The participants among other things joke about attendance of the FBI at the meeting, deliver the memorable line that "our competitors are our friends, the customers are the enemy", and discuss the dangers of meeting on US American soil because of its strict antitrust laws. Because they show the criminal intent of the participants so clearly, the Lysine Tapes have been called "the single greatest antitrust compliance tool ever created." (O'Brien 2015: 24)

Some cartels even resort to threats, violence or other means associated with traditional criminal organisations. The "*Dutch Construction Cartel*" allegedly involved many such features, including threats of physical violence, bribery and other corruption offences (van Bergeijk 2008; van Duyne 2007; Zembla 2001-2006). The criminal court in the German *Pipes Cartel*, LG Munich II (2006), also found threats as an aggravating factor. Threats and violence were also used in the *French Beef Cartel* (European Commission, [2003] OJ L209/12 § 173).

9.4.4.3. Public Opinion

Nevertheless, opponents argue that that there is no wide-spread recognition in the German population that cartel conduct is criminal conduct. This was the argument that kept the legislator of the German Act against Restraints of Competition in 1958 from inserting a criminal offence instead of the administrative offence, and it is an argument still made today (Dreher 2011; Ost 2014). Dreher has also made the argument that this is a crucial difference to the United States, because the public there perceived cartels as criminal conduct and immoral (Dreher 2011).

The argument has long been challenged as asking the wrong question, because the population's understanding whether conduct deserves criminal punishment often follows the legislature's decisions to criminalise or decriminalise conduct. The legislature may shape public opinion, it is not confined to following it (Baumann & Arzt 1970; Wagner-von Papp 2010a: 281–282; 2010b: 274; Monopolkomission 2014: § 165).

[53] Links to the transcripts are contained in Hammond (2005); the videos themselves are available on Youtube.

Even assuming that the legislature should follow public opinion rather than shape it, however, there is now evidence that shows that the public is not as indifferent to cartel conduct as has been assumed without empirical basis by many (myself included, Wagner-von Papp 2010b: 274; Dreher 2011; Wardaugh 2014: 308). Stephan (2015; 2016) reports on surveys conducted in the United Kingdom, Germany, Italy and the United States. The survey for Germany, which was conducted by YouGov and included a representative sample of 2648 panel members, found that:

- 75 % of those surveyed knew that price fixing is illegal in Germany;
- a majority of respondents was of the view that "price fixing is as serious as fraud"; slightly over 50 % were of this view, and an additional slightly below 5 % thought price fixing was more serious than fraud, which is nearly identical to the percentage of US respondents;
- a clear majority of respondents was of the view that price fixing is as serious or more serious than insider trading; nearly 50 % thought that price fixing is as serious, and nearly 20 % thought it was more serious than insider trading;
- a clear majority of respondents was of the view that price fixing is more serious than illegally downloading music.

Fraud (§ 263 StGB), insider trading (§ 38 WpHG), and illegally downloading music (§ 106 UrhG) are criminal offences in Germany. With regard to the offence mentioned last, the legislature even rejected a de minimis exception that had been proposed. Considering price fixing as serious as or more serious than these offences therefore implies that a majority of respondents is for the criminalisation of price fixing.

It is true that when asked what sanctions the individual involved in price fixing should face, only 28 % of the German respondents included "imprisonment". This is similar to the proportion of respondents in the UK and Italian survey (27 % and 26 %, respectively), and somewhat lower than the percentage of respondents in the United States (36 %). It would seem, however, that the sanction of imprisonment was understood to mean the actual imposition of a custodial sentence in all cases, rather than providing for a sentencing range that also included a custodial sentence; otherwise, it would not make sense to consider price fixing as serious as or even more serious than the criminal offences fraud or insider trading, which both are criminal offences that include imprisonment in the sentencing range (Stephan 2016; Wagner-von Papp 2016: § 8).

Far from finding criminal sanctions for horizontal hardcore cartels abnormal, the public would arguably find it problematic that entering into an elaborate price-fixing cartel with a

complex structure and refined subterfuges to conceal the scheme from the authorities, which results in losses of tens or hundreds of millions of euros, is an administrative offence, while the legal system has no compunction about imposing criminal penalties on the homeless person who steals a bread roll. Anatole France famously wrote: "*Ils y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain*." (France (1894) 118).[54] This was not meant as a policy prescription.

The argument here is not that horizontal hardcore cartels should be criminalised *because* the public considers price fixing at least as serious as fraud and insider trading. It is the opponents of criminalisation who claim, without empirical support, that the public would not agree with criminal sanctions for cartels. To the best of my knowledge, the YouGov survey summarised above is the best available evidence on this issue, and it provides evidence that the public understands the harmfulness of cartels and that they are comparably serious to, or more serious than, existing criminal offences.

While public sentiment is not irrelevant, there could be good reasons not to follow it. Just because the crowd demands that heads roll, and that individuals go to prison whenever a business decision has serious consequences for the economy, for example, this is not a reason to criminalise commercial decision-making as soon as it turns out to have been ill advised (in hindsight or even objectively). Nor would it be a good idea to let laypersons define the conduct that should be criminal in competition law. With regard to cartels, however, the vox populi also seems to be in accordance with a technical assessment. Hardly anyone denies that the overall social harm inflicted by cartels is considerable and exceeds the harm inflicted by many other forms of crime. While the case law currently finds the elements of the general fraud provision (§ 263 StGB) to be satisfied only in the special case of bid rigging, this is not the only possible interpretation of the elements in a legal assessment, and is not at all decisive for the moral assessment. What is more, given the criminalisation of the bid-rigging offence in Germany, it is difficult to argue that a minor bid-rigging agreement by local plumbers is more immoral than a large-scale price-fixing agreement (see already Möschel 1980: 47–48, 57–58, but as an argument against the criminalisation of bid-rigging arrangements).

Of course, one can be of the view that the bar for criminalisation should generally be set higher. An outright abolitionist who believes that criminal law in its entirety is incapable or inappropriate to guide social conduct will inevitably consider the criminalisation of hardcore cartels inapposite. Even short of such an extreme position, one can advocate the

[54] "[The poor have] to work under the majestic equality of the law, which prohibits the rich and the poor to sleep under bridges, beg in the streets and steal bread".

decriminalisation of many non-violent crimes, and if such an overall revision were to take place, the comparators would shift. The argument above was made in the context of the existing criminal law, and tried to place horizontal hardcore cartels into the matrix of existing criminal offences. From this perspective, the moral culpability of those entering into horizontal hardcore cartels seems higher than for many existing criminal offences, so that from a moral perspective there is a good case for criminalisation.

9.4.5. Overall assessment

From a moral perspective, cartel activity appears nearly indistinguishable from fraud, and often displays the special features of aggravated fraud, in particular organised conspiratorial conduct and the infliction of great harm. Even from a legal perspective it can be argued that the elements of the offence are met not only in the case of bid rigging, but also in the case of other horizontal cartels such as price fixing —in today's market economy customers have a legitimate expectation that the prices have been arrived independently, and, empirically, the public indeed appears to have this expectation (Stephan 2015). Non-disclosure then constitutes implicit misrepresentation, induces a mistake which causes the value transfer; resulting harm can be established in the same way in which the Federal Court of Justice has established it in the bid-rigging cases, namely by comparing the transaction price with the counterfactual price that would have resulted under independent price setting. The legal qualification of hardcore cartels (other than bid rigging) as fraud is, however, an extreme minority view.

Nevertheless, at a minimum hardcore cartels are on or near the borderline to criminal fraud. As the recent survey has shown, the public recognises this (above 9.4.4.3.). Cartels inflict great social harm. They involve clandestine conspiracies, often perpetuated over a long period of time. The moral case for opprobrium by imposing criminal sanctions on cartels is clearer than for many existing criminal offences. From the perspective of coherence and consistency in the criminal justice system, the current qualification of cartels (other than bid rigging) as merely administrative offences is the outlier (Monopolkommission 2014: § 163). Criminalising horizontal hardcore cartels would restore coherence and consistency.

This leaves utilitarian and pragmatic arguments against criminalisation. It is true that criminalisation must take care not to impede the effectiveness of the competition authorities' cartel investigations. These administrative investigations and prosecutions are the bedrock of competition law enforcement, and they must not be endangered. These are the arguments that have traditionally been made by competition lawyers. At closer inspection, however, there are few reasons why criminalisation should interfere with the effectiveness of enforcement by the

competition authorities, and all of them can be addressed and have to be addressed anyway, regardless of further criminalisation (*cf* Monopolkommission 2014: §§ 172–191). First, there is the necessity to provide for a criminal immunity provision for successful immunity recipients. Crucially, the introduction of such a criminal immunity provision is necessary anyway, even if one decided to criminalise further cartel conduct, because of the criminal sanctions for bid rigging in Germany (and the situation in France is similar). Secondly, public prosecutors may be less focused on competition offences and may lack the requisite specialist knowledge. This can be addressed by sufficient involvement of the competition authority in the criminal investigation and prosection. Again, this is an issue that should be addressed anyway, because it creates problems even in the prosecution of cartels as administrative offences (Bundeskartellamt 2015b).

The cartel offence would have to be drafted narrowly in order to avoid type I errors and a chilling effect. An offence focused on horizontal hardcore cartels with a possibility of escaping criminal prosecution where the agreement was notified to the competition authority would not run these risks. The new UK cartel offence may serve as an already quite good model, even though some of the uncertainties of the new defences should be avoided. With regard to the chilling effect argument, one should see that the statutory law in the United States is much too broad, involving all conduct under sections 1 and 2 Sherman Act, and yet business goes on, based on the mere pronouncements of the Department of Justice that it will criminally prosecute only horizontal hardcore cartels.

A “cheap” criminalisation by creating mere “law in the books” that competition law infringements or cartel conduct constitutes a criminal offence without any complementing institutional reforms or active enforcement would indeed do more harm than good. This objection, however, cannot be made against the introduction of a criminal cartel offence that is narrowly tailored and accompanied by the introduction of a criminal immunity provision, the integration of the competition authority in the criminal investigation and prosecution, and the extension of the competence of the courts dealing with the administrative cartel offence to the new criminal cartel offence. Where this is the case, criminalisation can address the principal-agent problem effectively, effectively deter individuals from entering into cartels, and strengthen leniency programmes at the same time.

Criminalisation, if well done, is therefore desirable both from a moral and from a utilitarian perspective, provided the accompanying changes in the enforcement institutions are made at the same time.

9.5. International Aspects

9.5.1. Criminalisation and Extradition

The considerations above have looked at criminalisation from a purely national perspective. In reality, of course, many cartels have a cross-border element, an aspect that is often neglected in the criminalisation debate.

In particular where an international cartel has substantial and intended effects in the United States or, if import commerce is not affected, the cartel has direct, substantial and foreseeable effects in the US and gives rise to a claim in the US, US law applies (*United States v. Nippon Paper*), and the United States have made clear that they will aggressively enforce their laws against foreigners as well as against US nationals. Gone are the days when the Department of Justice granted foreigners "no-jail" plea agreements (O'Brien 2015: 22–23). Nevertheless, enforcement jurisdiction is strictly territorial, and so criminal jurisdiction depended, until recently, on the voluntary submission of individuals to US American prosecution. Many individuals did submit voluntarily, in part because international travel would otherwise have become a great hassle because of red-flagging by Interpol.

Not all individuals, however, did submit voluntarily to extradition. Over the last two decades, however, the United States has entered into numerous modernised extradition treaties (Girardet 2010). A condition of these modernised extradition treaties is "dual criminality". The numerous criminal offences in the EU (see the list in footnote 95), even to the extent that they are only "law in the books", may become relevant here.

The case of Mr Romano Pisciotti is instructive. Mr Pisciotti was allegedly a participant of the Marine Hose Cartel. The United States requested his arrest and extradition. When Mr Pisciotti wanted to connect flights at Frankfurt International Airport, he was detained. The Marine Hose Cartel was a bid-rigging cartel, so that it was criminal conduct under German law. The dual criminality requirement of the extradition treaty between United States and Germany was therefore fulfilled. Mr Pisciotti challenged the extradition before the German Federal Constitutional Court (BVerfG, 17 February 2014, 2 BvQ 4/14, WuW/E DE-R 4275; Röhrig 2015) and the European General Court (Case T-403/14, ECLI:EU:T:2014:692) and Court of Justice (Case C-411/14 P, ECLI:EU:C:2015:48), but to no avail. He was extradited to the United States. His experience has been summarised as follows:

> "Romano Pisciotti spent 669 days in custody. This included two hours in a police station in Lugano, Switzerland; 10 months in a jail in Frankfurt, Germany, fighting extradition; and eight months in a US federal prison in Folkston, Georgia, in a room with around 40

> mainly Mexican inmates and a single corner toilet. [...] 'I am totally ruined,' Pisciotti says wearily during an interview in his home north of Milan. 'They destroyed me, my bank account, my family, my career. Everything.'" (Crofts 2015)

A German national would not be extradited from Germany due to Article 16 of the German Constitution, a provision which Mr Pisciotti argued should be applied to all EU nationals. Nor would a foreign price-fixer currently be extradited from Germany for lack of dual criminality. However, a price fixer of German (or for that matter, any other) nationality travelling to or connecting via London or possibly Paris could become the "next Pisciotti", regardless of the fact that German law does not consider cartels criminal offences, and regardless of the fact that criminal enforcement in the United Kingdom (so far) tends towards zero and in France is not very frequent either. Both the United Kingdom and France have "dual criminality" extradition treaties similar to Germany's with the United States.[55]

In other words, to the extent a cartel has substantial and intended effects in the United States, horizontal hardcore cartels are de facto already "criminalised" worldwide. If there were significant chilling effects on legitimate conduct from cartel criminalisation, we should see them already at least in all markets that have a global dimension. Realistically, however, many actors in Germany and other European jurisdictions will not consider the criminal law in other jurisdictions, even where their conduct affects markets that are global in reach. Criminalising the conduct in their home jurisdictions may make them aware of the danger of going to prison for cartel conduct — a danger in which they already are, with or without criminalisation in their home jurisdiction.

9.5.2. The Need for a One-Stop Shop for Leniency with Criminal Immunity

The importance of complementing a criminal offence with a provision on criminal immunity for the immunity recipient under a leniency policy has been emphasised a number of times above.

And yet, more is required when one takes the international dimension into account. Assume that State A has a criminal offence and provides that the first successful leniency applicant will be immune from criminal prosecution. Taken by itself, this is a sensible way to approach the problem, and the leniency programme will remain effective. Indeed, the leniency programme will be especially effective, because the cartelists now fear criminal prosecution

[55] For the United Kingdom, see already the earlier case of Ian Norris, who was eventually extradited to the United States from the United Kingdom. His extradition was not, however, based on the cartel offence, because s 188 EA 2002 had not been in force when he entered into a cartel; nor did the House of Lords consider cartel conduct to fall under the common law offence of conspiracy to defraud (*Norris v Government of the United States of America* [2008] UKHL 16, [2008] 2 WLR 673 (HL(E)). Instead, his extradition was based on obstruction of justice charges. Those participating in horizontal hardcore cartels after June 2003, however, would satisfy the dual criminality requirement.

unless they receive are the first through the door, and because they know that the other cartelists also fear criminal prosecution. Mutual distrust is high. There is a "race to the competition authority" of State A.

Now assume that States B, C, D, E and F follow exactly the same scheme as State A. Again, in the case of purely domestic cartels, the scheme works well for each of them. However, in case there is an international cartel between members from A, B, C, D, E and F, a potential leniency applicant may not be the first applicant in all jurisdictions. Assume that a cartelist would indeed be the first in States A, B, C, D and E, but fails to be the first applicant in State F and therefore has to fear that State F prosecutes the responsible individuals criminally. Depending on the likelihood of prosecution, the severity of the sanction, and whether the decision-makers themselves would be criminally liable, this may deter the potential applicant from making use of the leniency policy.

The European Commission has highlighted the problematic impact which individual sanctions in Member States may have on the use of leniency programmes.[56] The Commission has indicated that a solution on the EU level may be necessary (European Commission 2014a: § 42, 2014b: § 102), possibly along the lines of the Swedish solution, which exempts from trading prohibitions individuals in undertakings that is granted immunity or a reduction in the fine under a leniency programme not only of the Swedish competition authority, but also of the Commission or another NCA. The advantage of a solution on the level of EU law would be that it would overcome any objections that may exist under national constitutional law against criminal immunity rules (Wagner-von Papp 2014). The CMA in its response to the consultation considered the Commission's intervention superfluous and recommended its own solution to other Member States, which grants criminal immunity to immunity recipients under the leniency programmes of the CMA and the European Commission (and discretionary criminal immunity to those who receive reductions under those leniency programmes). In contrast to the Swedish solution, this does not, however, capture the problem described above where immunity was granted not by the Commission, but the NCA of another state.

Preferable would be a third solution: a central clearing agency for leniency applications or at least markers on the global or — more realistically — European level (Wagner-von Papp

[56] European Commission (2014a) § 41: „The majority of Member States provide for sanctions to be imposed on individuals for breaches of competition law, over and above fines on undertakings. If such systems do not provide for leniency for the employees of undertakings which are considering applying for corporate leniency, this may lead to disincentives to cooperate with authorities EU-wide. The threat of investigations and sanctions targeted at employees may deter potential corporate applicants from applying." and even more clearly European Commission (2014b) §§ 99–102, highlighting the interjurisdictional externalities of the threat of criminal sanctions.

2016: § 41) with attendant automatic criminal immunity for the immunity recipient under the leniency programme.

9.6. Conclusions on criminal cartel conduct and compliance

Criminal sanctions for horizontal hardcore cartels are desirable from a moral perspective. Whether they are desirable from a utilitarian and pragmatic perspective depends on the institutional framework. In Germany, the conditions for a criminalisation of cartel conduct are good. All that is required is the introduction of a narrowly drafted cartel offence for horizontal hardcore cartels, a criminal immunity provision — which is long overdue anyway for the bid-rigging offence —, and provision for the Bundeskartellamt's involvement in the criminal prosecution of the cartel offence similar to the tax authorities' involvment in the prosecution of tax evasion. In other nations, the conditions for effective criminal enforcement may be better or worse than in Germany.

The European Commission could help Member States such as France and Germany to overcome their reluctance to create automatic criminal immunity, and it could help Member States such as the UK recognise that the interjurisdictional externalities are not fully resolved by national immunity provisions that cover only the national and the EU leniency programme.

The introduction of effective criminal enforcement of the cartel offence would make compliance training both more important and more effective. Criminalisation makes compliance more important because they help to spread knowledge about the criminal offence — and only a known threat can deter. The goal of criminalisation is, after all, not to send individuals to prison for their criminal conduct. It is to prevent them from engaging in criminal conduct. Criminalisation makes compliance training more effective because the participants of the compliance training realize that they have 'skin in the game': "the threat of prison sentences helps make compliance programs effective" (Werden, Hammond & Barnett 2012).

The German "founding fathers" of the GWB, when opting for an administrative offence instead of a criminal one, indicated that this may be for a transition period only, and that a switch to genuine criminal sanctions may be appropriate once knowledge and familiarity with a competition regime are more widespread (Wagner-von Papp 2010a: 281; 2011: 164; Monopolkommission 2015 § 200). The time has come to make this switch: the fundamental notions of competition have permeated public knowledge (above 9.4.4.3.), and thanks to compliance schemes the business community has a good understanding of the standards and ample opportunities to fill in any remaining gaps in their knowledge (*cf* Monopolkommission 2014: § 145).

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