

Analysing the place of the Criminal Cartel Offence within the Regulatory Landscape of Anti-cartel Enforcement in the UK: more change needed?

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Abstract

Whilst modern competition law is no longer in its infancy in the UK, its contours continue to evolve and develop as understanding of its challenges and complexities increases. The addition of a criminal cartel offence within the wider anti-cartel enforcement landscape was intended to improve the deterrent impact of the regime. However, the offence itself has arguably failed to have a significant impact upon the fight against cartel activity. Attempting to determine the reasons behind the failure of the criminal cartel offence is not new. It has been the subject of much academic debate, and indeed a Government consultation. This work however, aims to add a new perspective through which the question can be conceptually analysed. It does so by examining the place that the criminal cartel offence occupies within the anti-cartel enforcement landscape, in order to discover the impact that the regulatory dynamics have had on the enforcement and success of the cartel offence. Regulatory dynamics in the context of this work are the interactions that occur between the various aspects of anti-cartel enforcement.

The introduction of the criminal cartel offence in the UK in 2002 for individuals who engage in hard-core cartel activity was at the time, largely atypical across the traditional competition law landscape in Europe. The criminal cartel offence represented a new tool with which the Competition and Markets Authority could fight cartels, and brought the individuals ultimately responsible for their creation within the scope of the law for the first time. The anti-cartel strategy in the UK is based on deterrence theory, and it was within this tradition that the criminal cartel offence was created. In the 10 years that followed its enactment however, there had been only one successful prosecution. In 2013, the offence was amended to make it easier to prosecute, but enforcement of the offence remains muted.

This work analyses the position of the criminal cartel offence within the wider anti-cartel enforcement landscape. A landscape that, at the time of writing, includes European Union competition law and policy. The purpose of this work therefore, is to determine whether further changes to the cartel offence in the UK that account for the complex matrix of interactions that occur within the anti-cartel regulatory landscape, can improve its impact on the fight against cartels, and to extrapolate recommendations from the UK experience for any Member States who wish to add criminal sanctions to their enforcement toolkit in the future.

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‘The difference between a successful person and others is not a lack of strength, nor a lack of knowledge, but rather a lack of will.’

Vincent Lombardi

Declaration

This research is my original work. It would not have been possible however, without the work that has come before it. Where the work of others has been included, best efforts have been made to clearly reference it.

The law as discussed in this thesis is accurate up until the UK formally leaves the European Union. On the 26th June 2016, a referendum was held across the UK to determine whether it should remain as a member or leave the Union. By a bare majority of 52% to 48% the UK voted to leave.¹

On the 29th March 2017, Theresa May as Prime Minister of the UK, notified the EU of the UK's intention to leave by way of Article 50 TEU.² This triggered a 2 year period in which the terms of the UK's exit and the nature of its subsequent relationship with the EU, was to be negotiated. The initial date for the UK's official departure was therefore, the 29th March 2019. However, the Theresa May failed to get Parliamentary support for the deal that she negotiated with the Union and was forced to ask for an extension to the 2 year negotiation period, twice.³

The new departure date is the 31st October 2019 unless a deal can be agreed before that.⁴ There is still a chance that the UK will choose to rescind its Article 50 TEU notification, which the EU have indicated they will accept,⁵ and remain as a full Member State of the EU. The author lives in hope.

¹ European Commission Press Release, 'Joint Statement by Martin Schulz, President of the European Parliament, Donald Tusk, President of the European Council, Mark Rutte, Holder of the Presidency of the Council of the EU, Jean-Claude Juncker, President of the European Commission' 24th June 2016. Available at: <https://www.bbc.com/news/uk-scotland-scotland-politics-46481643>. Last accessed 10th April 2019.

² European Council, Letter from the UK to the European Council triggering Article 50 notification procedure. Available at: <http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf>. Last accessed 10th April 2019.

³ European Council Press Release, 'European Council (Art. 50) conclusions, 21 March 2019.' Available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/03/21/european-council-art-50-conclusions-21-march-2019/>. Last accessed 10th April 2019.

⁴ European Council, Decision taken in agreement with the United Kingdom extending the period under Article 50(3) TEU, 11th April 2019, EUCO XT 20013/19. Available at: <https://data.consilium.europa.eu/doc/document/XT-20013-2019-INIT/en/pdf>. Last accessed 10th April 2019.

⁵ Case C-621/18 Request for a preliminary ruling under Article 267 TFEU from the Court of Session, Inner House, First Division (Scotland, United Kingdom) 3rd October 2018. Judgement of the Court, 10th December 2018. Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=208636&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2198016>. Last accessed 10th April 2019.

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	Article 75
	Article 83
	Article 101

Article 102

Article 258

Modernisation Regulation EC 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] EU

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Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJL 173 12.6.2015

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Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)

Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 26 November 2016, OJ L349/1

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

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Case 20/64 *Albatros* [1965] ECR I

Case 203/80 *Casati* [1981] ECR 2595

Case 203/80 *Casati* [1981] ECR 2595, at para. 27

Case 205/06 *Commission v Austria*; and Case 249/06 *Commission v Sweden* [2009] ECR I-301

Case 231/83 *Centre Leclerc v Au Ble Vert* [1985] ECR

Case 26/62 *NV Algemene Transport en Expeditie Onderneming Van Gen den Loos v*

Netherlands administratie der belastingen [1963] ECR

Case 295/04, 297/04, 298/04 *Manfredi et al v Lloyd Adriatico assicurazioni Spa* [2006] ECR I-06619

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Case 360/09 *Pfeiderer v Bunderskartellamt* [2011] EUECJ

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Verizon Communications v Law Offices of Curtis Trinko (2004) 540 US 398

Table of Abbreviations

ACCC	Australian Competition and Consumer Commission
AFSJ	Treaty on the Area of Freedom and Justice
BA	British Airways
BIS	Department for Business, Skills and Innovation
CA 1998	Competition Act 1998
CAT	Competition Appeal Tribunal
CC	Competition Commission
CDO	Competition Disqualification Order
CESR	Committee of European Securities Regulator
CRA 2015	Consumer Rights Act 2015
CJEU	Court of Justice of the European Union
CLEER	Centre for the Law of EU External Relations
CMA	Competition and Markets Authority
CPS	Crown Prosecution Service
CSMAD	Criminal Sanction for Market Abuse Directive
CSR	Corporate Social Responsibility
DG COMP	Directorate-General for Competition
DoJ	United States Department of Justice
DTI	Department of Trade and Industry
EA 2002	Enterprise Act 2002
Econfin	European Union Council of Finance Ministers
ECSC	European Coal and Steel Community
EEC	European Economic Community
ERR 2013	Enterprise and Regulatory Reform Act 2013
ESC	European Securities Committee
EU	European Union
FSA	Financial Services Authority
FSMA 2000	Financial Services and Markets Act 2000
GCA	German Competition Authority (the Bundeskartellamt)
GCR	Global Competition Review

GDP	Gross domestic product
ICN	International Competition Network
IRM	Institute of Risk Management
KKV	The Swedish Competition Authority (the Konkurrensverket)
LIBOR	London Interbank Offered Rate
NCA	National Competition Authority
MAD	Market Abuse Directive
MAR	Market Abuse Regulation
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
SFO	Serious Fraud Office
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VAA	Virgin Atlantic Airways

Chapter 1. Introduction

1.1. Background

Hard-core cartels are anti-competitive agreements between competing undertakings that fix prices, restrict output, rig bids, or divide or share markets.⁶ In colluding in this way they harm consumers and the competitive process by, inter alia, chilling innovation, appropriating consumer surplus and creating a ‘deadweight loss’ in the economy, which occurs when consumers who would have purchased goods at the competitive price, choose not (or are unable) to purchase the goods at the artificially inflated price.⁷ In the European Union (the ‘EU’) they also pose a threat to the internal market by creating artificial barriers to trade. They are considered to be not only the most ‘egregious violations’⁸ of competition law but the ‘supreme evil of antitrust.’⁹

The threat posed by cartels should not be underestimated as they are thought to cause a ‘multi-billion dollar drain on the global economy.’¹⁰ The International Competition Network (the ‘ICN’) believes that there is a widely held belief that cartel activity is ‘devoid of pro-competitive benefits.’¹¹ The fight against hard core collusion therefore, has spread to ‘a significant number of jurisdictions’¹² around the world.¹³

⁶ See OECD, ‘Recommendations of the Council Concerning Effective Action Against Hard Core Cartels,’ C(98)35/final, 25 March 1998, 2(a). Available at: <http://www.oecd.org/daf/competition/2350130.pdf>. Last accessed 24th January 2019.

⁷ See generally, Barry Rodger and Angus McCulloch, ‘Competition Law and Policy in the EU and UK’ (Routledge, 2015).

⁸ OECD, ‘Recommendation of the Council Concerning Effective Action Against Hard Core Cartels’ supra n.6.

⁹ *Verizon Communications v Law Offices of Curtis V. Trinko* (2004) 540 US 398, at 408.

¹⁰ OECD, ‘Hard Core Cartels Report’ 2000. Available at: <https://www.oecd.org/competition/cartels/2752129.pdf>. Last accessed 20th November 2018.

¹¹ ICN, ‘Defining Hard Core Cartel Conduct – Effective Institutions, Effective Penalties,’ Report Prepared by the ICN Working Group on Cartels, ICN 4th Annual Conference, Bonn, 6-8th June 2005, 14. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_BuildingBlocks.pdf. Last Accessed 24th January 2019.

¹² Caron Beaton-Wells, ‘Criminal Sanctions for Cartel Conduct: The Leniency Conundrum’ (2017) 13(1) *Journal of Competition Law & Economics* 125.

¹³ Outside of the USA however, despite there being a growing number of ‘countries having adopted criminal cartel sanctions (excluding bid-rigging) the number of individuals who have actually served jail time is practically negligible.’ Andreas Stephan, ‘Is the Head of Germany’s Bundeskartellamt Right to Suggest Criminal Law Sanctions are Too Severe for Cartels.’ Available at: <https://competitionpolicy.wordpress.com/2014/11/24/is-the-head-of-germanys-bundeskartellamt-right-to-suggest-criminal-law-sanctions-are-too-severe-for-cartels/>. Last accessed 12th December 2018.

As a Member State ('MS') of the EU the fight against cartels and the development of competition law in the UK has been influenced and guided by the EU who retain exclusive competence over the establishment of competition rules necessary for the functioning of the internal market.¹⁴

In 2002 the UK Government sought to enhance their enforcement toolkit and so enacted the Enterprise Act 2002 (the 'EA 2002') which, amongst other things, created a criminal offence for the individuals responsible for cartel agreements.¹⁵ In doing so it added criminalisation to a regulatory landscape that had previously been reliant upon administrative investigations and fines targeted at undertakings who engage in hard core collusive conduct.¹⁶ Further, it implicitly recognised the fact that cartel agreements occur because directors (or other natural persons) are acting as agents on behalf of undertakings which are essentially, artificial entities incapable of doing anything on their own account.¹⁷ The agency issue is supported by the OECD which has stated that:

'As agents of corporations commit violations of competition law, it makes sense to prevent them from engaging in unlawful conduct by threatening them directly with sanctions and to impose such sanctions if they violate the law.'¹⁸

This realisation is reflected in a 'growing tendency in a wide variety of jurisdictions to hold individuals accountable for the creation and implementation of cartels.'¹⁹

The UK's position was that reliance upon the traditional administrative sanctions for infringements of Article 101 TFEU and Chapter 1 provisions only, meant that there was a gap in the anti-cartel enforcement tool kit. Not only because the level of fine required to make administrative sanctions a true deterrent was unachievable in practice,²⁰ but also because it

¹⁴ Treaty on the Functioning of the European Union, Article 3(1)(b).

¹⁵ EA 2002, s 188.

¹⁶ The fines, provided for by the Competition Act 1998 are a domestic reproduction of the EU provisions in Article 101 of the Treaty on the Functioning of the European Union (the 'TFEU').

¹⁷ John P. Lowry and Arad B. G. Reisberg, 'Pettet's Company Law: Company Law and Corporate Finance' 4th edition (Pearson Education Limited: 2012) p.128.

¹⁸ OECD, 'Cartels: Sanctions against Individuals,' OECD Competition Committee, 2003, 2. Available at: <https://www.oecd.org/competition/cartels/34306028.pdf> Last accessed 24th January 2019.

¹⁹ Peter Whelan, 'Competition Law and Criminal Justice,' in *The Intersections of Antitrust*, Galloway (ed) (Oxford University Press, forthcoming).

²⁰ Wils estimates that to adequately deter cartels, fine would need to be set at 150% of annual turnover, a level at which only 18% of convicted companies would have sufficient funds to pay. See, Wouter P. Wils, 'Is

meant that the individuals responsible for implementing (or causing to be implemented) cartel agreements remained outside of the scope of the law and the reach of the relevant authorities, the Office of Fair Trading (the ‘OFT’) at the material time and because of the impact that it had on deterrence. It was felt that,

‘[t]he cartel offence helps to deter the most serious and damaging forms of anti-competitive conduct: hard core cartels. The possibility that business people will face imprisonment if found guilty of the offence should radically alter the incentives to engage in cartels.’²¹

This argument is strengthened by the fact that optimally deterrent fines against undertakings are not achievable in practice, without threatening the financial stability and viability of the firm.²² In this context therefore, Whelan argues that a cartel fine becomes merely ‘a “tax” on (detected) cartel activity’²³ rather than an effective deterrent against such activity.

Historically in Europe, criminal law sanctions are not traditionally a competition law tool and so the UK’s move to strengthen its enforcement tool kit with the threat of imprisonment was largely atypical at the time.²⁴ The UK’s decision to implement a criminal sanction appeared to be heavily influenced by ‘the advocacy efforts of the Antitrust Division of the US Department of Justice (the ‘DoJ’) who have been consistent in their belief that ‘the most effective deterrent for hard-core cartel activity... is stiff prison sentences.’²⁵ Indeed, the American experience was referenced heavily in the White Paper that proceeded the EA 2002.²⁶

Criminalization of EU Competition Law the Answer?’, in Cseres et al (eds) *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, (Edward Elgar Publishing, 2006) and Craycraft et al, ‘Antitrust Sanctions and a Firm’s Ability to Pay,’ (1997) 12 *Review of Industrial Organisation* 171, respectively.

²¹ BIS, ‘A Competition Regime for Growth: A Consultation on Options for Reform’ (BIS 2011) 61.

²² This is discussed in more detail in 2.2. [The Genesis of the UK Criminal Cartel Offence](#); Wils (2006) *supra* n.21.

²³ Peter Whelan (forthcoming) *supra* n. 19.

²⁴ The USA in contrast, have had some form of criminal sanction for engaging in cartels since the Sherman Act 1890.

²⁵ Belinda A. Barnett, ‘Criminalization of Cartel Conduct – The Changing Landscape,’ Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop, Adelaide, 3 April 2009, 2. Available at: <https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape>. Last Accessed 24th January 2019.

²⁶ DTI, ‘Productivity and Enterprise: A World Class Competition Regime’ July 2001, cm 5233.

Competition policy traditionally seeks to employ enforcement tools that deter prohibited conduct by altering the incentives to engage in it. Reflecting economic theories of deterrence and punishment, and utilising certain aspects of game theory, competition policy in the EU has focused upon diminishing the economic benefit of collusive agreements through a series of fines, and destabilising the cartels by way of a programme of leniency aimed at cartel participants. It did not however, properly engage with the symbiotic relationship of directors acting on behalf of, or for the benefit of, their firms. Not long after the introduction of the Chapter 1 prohibition in the UK however, the Government decided that it would push forward with its policy of cartel reduction by way of deterrence, but that the deterrent threats would not only be aimed at the undertakings, who are unable as ‘fictional entities’²⁷ of acting on their own, but at their agents as well. In so doing, it was felt that the gap in deterrence would be closed and the regulatory toolkit would enable enforcement to reflect the realities of collusive conduct.

The UK decided that the most effective deterrent would be the threat of criminal sanctions for individual cartelists,²⁸ and so, as enacted by section 188 of the Enterprise Act 2002. Personal fines were rejected on the basis that undertakings may ‘wish to incentivise’²⁹ directors to collude and ‘simply indemnify any sanctioned individuals by paying the financial sanction’³⁰ for them.³¹ The criminal cartel offence came into force on the 20th June 2003, and the original estimate was that the new offence would result in approximately six to ten prosecutions a year.³²

The subsequent ten years of criminal enforcement did not unfold in the anticipated way. The OFT managed only one successful prosecution, which came about as the result of an American plea-agreement,³³ and one ill-fated contested case that collapsed before the defence was called to put forward their case.³⁴ This, together with the overall perceived failure of the section 188

²⁷ John P. Lowry and Arad B. G. Reisberg (2012) *supra* n.17, p.128.

²⁸ DTI, ‘Productivity and Enterprise: A World Class Competition Regime,’ (2001) *supra* n.26.

²⁹ Peter Whelan (forthcoming) *supra* n. 19.

³⁰ *Ibid.*

³¹ For discussion see, Patrick Massey, ‘Criminal Sanctions for Competition Law: A Review of the Irish Experience’ (2004) 1(1) *The Competition Law Review* 23.

³² Anthony Hammond and Roy Penrose, ‘Proposed Criminalisation of Cartels in the UK: A Report Prepared for the Office of Fair Trading’ (2001). Hereafter, the ‘Penrose Report.’

³³ *R v Whittle (Peter)* [2008] EWCA Crim 2560. Hereafter referred to as ‘The Marine Hose Cartel.’

³⁴ See, David Teather, ‘BA price-fixing trial collapses,’ *The Guardian*, 11th May 2010. Available at: <https://www.theguardian.com/business/2010/may/10/ba-price-fixing-trial-collapses>.

offence led to the removal of ‘dishonesty’ from the definition as it was regarded as too high a bar in practice, for the authorities to overcome.³⁵ The purpose of so amending the offence therefore, was to make obtaining a successful prosecution easier and in so doing, improve its deterrent effect. The perhaps unintended consequence of removing the moral component of the offence’s definition was to bring it more clearly into line with the utilitarian, deterrence focused policy approach adopted in the UK. The reality however, is that the prosecutions that have occurred in the 6 years since the passing of the Enterprise and Regulatory Reform Act 2013 (the ‘ERR 2013’), have been by way of the original ‘dishonest’ cartel offence, referred to as ‘legacy’³⁶ cases,³⁷ with no prosecutions being brought under the amended ‘easier to prosecute’ cartel offence.

Throughout the entire history of the criminal cartel offence, from its creation in the EA 2002 to its amendment in ERR 2013 there has been very limited discussion of the interconnected nature of anti-cartel enforcement, and very little academic discussion of the growing body of ‘regulatory mix’ literature and how it could be used to help negotiate what has become, a very complex regulatory landscape. Many academics have nevertheless, criticised the ‘piece-meal’³⁸ approach to anti-cartel legislative action, and recognised the threat that it poses to a truly optimal response to the problem of cartels. Antitrust literature is now starting to address the connection between the theory that provides the foundation for competition policy and enforcement action, and the enforcement toolkit and its practical application.³⁹ This work seeks to augment and enhance this discussion and place the exploration of that connection within a wider discussion of the dynamics of the regulatory space that has been created in the UK for seeking to deter and punish cartels. The amendments to the working of section 188 of the Enterprise Act 2002 as originally drafted, provide a rich opportunity for deeper analysis as

³⁵ For discussion see, Andreas Stephan, ‘How Dishonesty Killed the Cartel Offence’ (2011) 6 Criminal Law Review 446.

³⁶ Jonathan Galloway, ‘Securing Legitimacy of Individual Sanctions in UK Competition Law’, World Competition 40, no 1 (2017): 121-158.

³⁷ Peter Nigel Snee pleaded guilty to a charge under s.188 EA 2002, and was given a sentence of 6 months in prison, suspended for 12 months, and 120 hours community service. See, <https://www.gov.uk/government/news/director-sentenced-to-6-months-for-criminal-cartel>. Last accessed 19th February 2019. Mr Snee’s alleged co-cartelists pleaded and were found not guilty. Barry Kenneth Cooper pleaded guilty under s.188 EA 2002, and was given a sentence of 2 years in prison, suspended for 2 years and was disqualified from being a director for 7 years. See, <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>. Last accessed 19th February 2019. The CMA decided against prosecuting any further alleged participants in the cartel.

³⁸ See for example, Bruce Wardhaugh, ‘The Cartel Offence Within a “World Class” Competition Regime: An assessment of the BIS Consultation Exercise and its Results,’ (2012) 8(3) European Competition Journal 573.

³⁹ For example, see Peter Whelan (forthcoming) *supra* n. 19.

to whether corrective legislative reform accurately identified the cause of the perceived enforcement problems. This is particularly true given that those amendments have not led to a significant increase in the number of criminal prosecutions, and could in fact represent a lost opportunity to significantly enhance the overall regime, and alter the perception of cartel activity amongst those who are most likely to engage in it. This is arguably demonstrative of the fact that the amendments failed to adequately identify and address the challenges of making a criminal offence work within a complex administrative regulatory space, built largely upon economic theories of deterrence. An examination of theoretical principles is not a purely academic one, and it was A V Dicey himself that said,

‘Every law or rule of conduct must, whether its author perceives the fact or not, lay down or rest upon some general principle, and must therefore, if it succeeds in attaining its end, commend this principle to public attention or imitation, and thus affect legislative opinion.’⁴⁰

In the context of anti-cartel legislation, which is subject to ‘almost no political opposition’⁴¹ in most developed competition law jurisdictions, it is particularly important that the academic discourse that aids in shaping its form, helps to anchor the popular political preferences of the time, to accepted concepts and theorem in order to ensure that the possibilities and limitations of competition policy are properly understood, and further, to ensure that policy disasters of the past are not mindlessly reproduced in the future.⁴²

At the time of writing, the UK remains a Member State of the EU. That membership adds a further layer of complexity to the enforcement landscape whilst simultaneously providing a high degree of intellectual rigour, legal precedent and cohesion to UK policy; 28 heads are after all, better than 1. It is for this reason that despite the UK’s planned departure of the EU that this work retained discussion of the intricate and dynamic relationship, and the impact of that relationship upon the legislative environment in the UK. Further, the lessons from the UK experience could provide useful insights for any Member States who may decide to implement

⁴⁰ Dicey, ‘Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century,’ (Macmillan: 1962) 2nd Ed, p.41.

⁴¹ Robert H. Bork, ‘The Antitrust Paradox: A Policy at War with Itself’ (Basic Books Inc. Publishing, New York: 1978) p.7.

⁴² ‘the machinery of antitrust enforcement grinds steadily on, mindlessly reproducing both the policy triumphs and disasters of the past.’ Robert H. Bork, *ibid*, p.4.

criminal sanctions for individuals who engage in cartel activity, in the future. Surprisingly, at the conclusion of this thesis, the nature of the relationship between the UK and the EU post-Brexit, remains unclear so it is impossible to determine with any certainty what influence that relationship may have on competition policy in the UK in the future. However the Withdrawal Agreement envisages a very close relationship between the UK and the EU for at least the duration of the transition period.⁴³ Further, an in-depth consideration of post-Brexit competition law and its relationship to the EU competition law regime is outside of the scope of this work, although it will undoubtedly provide a rich source for academic debate, including other doctoral research, and perhaps even litigation, for years to come.

1.2. Thesis Objectives

The objective of this work is to analyse the place of the criminal cartel offence within the regulatory space of anti-cartel enforcement in the UK both in order to better understand its underwhelming performance, and to identify how that performance can be improved. To achieve these objectives it is important to firstly identify the various elements that operate within that regulatory space, and then to ascertain how those elements interact. The process of examining and understanding the matrix of enforcement actions, policy goals and theoretical objectives for anti-cartel regulation, it is hoped, will help to bring clarity and cohesion to what has become a very complex regulatory environment. In doing so, it the objective of this work to identify how the criminal cartel offence can inhabit that space with better effect in the future.

Despite being regarded as an important element of achieving deterrence, and having been amended once already, the section 188 offence has not resulted in a significant, or even a moderate number of prosecutions. This work therefore will also consider what impact that notable lack of enforcement could have on the deterrent effect of the offence, and potentially the anti-cartel regime as a whole. After having identified the dynamics of the regulatory matrix, the objective of this work is to examine whether those interactions can be better negotiated for the benefit of both the cartel offence in particular, and the wider regime as a whole.

⁴³ European Commission, 'Withdrawal Agreement explained' 8th February 2019. Available at: https://ec.europa.eu/commission/publications/eu-uk-withdrawal-agreement-explained_en. However, Theresa May has, at the time of writing, been unable to secure support for the Withdrawal Agreement in Parliament.

The anti-cartel enforcement regulatory space in the UK is inherently complex. It is a multi-layered approach, making use of a variety of enforcement tools in a jurisdiction, within a jurisdiction.⁴⁴ Add to this the paradoxical nature of competition policy as a whole and the result is that what has been created is an intricate matrix of instruments, goals, policy objectives and interest that somehow must be formulated in such a way as to ensure that they work harmoniously together. At the time of writing, there has been little engagement in the antitrust literature with the dynamics of anti-cartel enforcement, and so this work seeks to address this gap in the literature.

The criminal cartel offence has been singled out in this work for three main reasons;

1. Criminal law responses are unusual in European competition law and so extra care must be taken to understand the implications of its inclusion. Criminal law tends to be more moralistic in a way that competition law usually avoids, approaching problems from a largely utilitarian way. The inclusion of concepts such as moral blameworthiness brings new challenges into competition policy that competition lawyers and academics may be unaccustomed to;
2. Despite still being fairly atypical in Europe, the idea of introducing criminal sanctions for cartels is becoming more popular. With that increased popularity comes an increased need to understand how to make such inclusion work within the traditional competition law framework. The UK experience shows that this is not necessary a simple matter and the lessons learned by analysing the UK could be valuable to other Member States considering a similar approach in the future.
3. The UK has decided that it will leave the EU. Once it is outside of the EU's jurisdictional scope and influence there may come a time when the UK's legislative framework needs to be re-evaluated. A better understanding of the complex interactions that exist within that framework, and of the limitations of competition policy itself, will help to inform that re-evaluation and help to ensure that any amendments made are done so for the benefit of anti-cartel enforcement as a whole.

⁴⁴ Pablo Del Rio and Michael P. Howlett, 'Beyond the "Timbergen Rule" in Policy Design: Matching Tools and Goals in Policy Portfolios' (2013) Lee Kuan Yew School of Public Policy Research Paper No. 13-01.

1.3. Thesis Scope

The jurisdictional scope of this work is predominantly the UK. The regulatory dynamics that are considered focus upon the enforcement mechanisms that are available to the competition authorities in the UK. However, the harmonisation of competition law across the EU has influenced the genesis of competition law and policy in the UK, and in doing so has influenced the enforcement of anti-cartel law as well. The relationship between the EU and the UK as a Member State is therefore relevant to, and is itself explored in various parts of this thesis as it has impacted upon how the UK has designed and enforced the criminal cartel offence up until this point in time. Chapter 5 in particular considers the implications of one specific obligation that arises. Nevertheless, the relationship between the EU and the UK is varied, complex and deeply entrenched. It is not within the scope of this work to examine the full nature of that relationship, even within the context of competition law generally. Such a consideration would be worthy of a thesis of its own. This work therefore, has chosen to concentrate its efforts on one legal obligation, Article 4(3) of the Treaty on European Union (the ‘TEU’) because of its potential to influence the UK’s implementation of atypical competition law responses.

The USA has led the charge in respect of criminal sanctions for individuals who chose to engage in hard core collusive agreements and where relevant, reference is made to that leadership in this work.⁴⁵ The focus of the thesis however, is the current state of affairs in the UK, and because of procedural, legal, historical and societal differences between the United States and the UK, an in-depth comparison between the two is not directly relevant to the concerns of this work.

The thesis does not address the question of whether criminalisation was the ‘right’ decision. It works from the perspective that the criminal cartel offence is now a feature of the enforcement landscape in the UK, and so endeavours to provide clarity and insight into the nature of that landscape in order to provide guidance as to how to best negotiate its intricacies for the benefit of the cartel offence in particular, but also anti-cartel enforcement as a whole.

⁴⁵ During the pre-legislative debates in the House of Commons for the Enterprise Act 2002, the policy approach of the United States was referred to as the ‘gold standard’. See Dr Vince Cable, Hansard, House of Commons, 10th April 2002, cmn 64.

Further, this work considers the problem of legislating against cartels from a legal perspective and not an economic one. Whilst the importance of economic theory cannot be ignored in a work that discusses competition law, this is essentially a doctrinal legal piece of research and not an economic one. It is perhaps the case that a review of the same problems by an economist may yield different, though hopefully not inconsistent conclusions, such an economic evaluation however, is not within the scope of this work.

1.4. Research Questions

In light of the objectives and scope of the doctoral thesis outlined above, the primary research question is set out as:

After analysing the regulatory dynamics of anti-cartel enforcement in the UK, and the place that the criminal cartel offence occupies within it, is more change needed to ensure that the section 188 offence has a better impact as a method of reducing cartel activity and thereby, protecting consumers and competition?

In order to answer that question, a number of secondary research questions will need to be addressed:

1. What are the theories of punishment that the criminal cartel offence is predicated upon, and how do those theories fit within the wider competition policy landscape of anti-cartel enforcement?⁴⁶
2. Should deterrence be the primary crime control objective of the cartel offence?⁴⁷
3. What are the dynamics of the theoretical foundations of anti-cartel enforcement, the policy objectives, and the enforcement toolkit of anti-cartel enforcement in the UK?⁴⁸
4. What, if any, are the implications of underwhelming enforcement of the criminal cartel offence in the UK on their obligations as a Member State of the EU, and their

⁴⁶ Chapter 2: Theories of Criminal Punishment and the Cartel Offence.

⁴⁷ Chapter 3: Cartel Crime Reduction: Understanding Deterrence and the Alternatives.

⁴⁸ Chapter 4: The Regulatory Dynamics of Anti-cartel Enforcement.

sovereign right to create and implement criminal sanctions for individuals in an area of exclusive EU competence?⁴⁹

5. Market abuse has been described as analogous to cartelisation and is, like competition law, subject to a high degree of harmonisation within the EU. Can any insights be gained from examining European market abuse regulations, for the benefit of the anti-cartel enforcement regime in the UK?⁵⁰
6. What recommendations can be made to improve the enforcement framework in the UK, and provide insight for other Member States who may seek to add criminal sanctions to their anti-cartel toolkit in the future?⁵¹

In answering the above questions, it is the hope of the author to articulate the importance of ensuring that the practical legislative response to the problem of hard core cartels is firmly, and clearly rooted to the theoretical foundations that ensure an effective and legitimate regulatory response. Further, it is the aim of this work to provide a better understanding of the dynamics specific to the UK's anti-cartel regulatory space for the purpose of enabling a clearer and more logically consistent assessment of the framework in the future, as the regime continues to grow and evolve.

In order achieve these aims and address the secondary research questions, the thesis looks at the theoretical foundations for State's intervention into individual conduct for the purpose of crime control, and how they fit within the context of traditional competition law. It then moves on to consider in more detail, deterrence theory, the preferred cartel reduction policy tool in competition law. This work will also examine what alternative crime control strategies may be available to anti-cartel enforcement now that criminal law policy has been introduced to the legislative framework. The thesis then moves on to an examination of the regulatory mix that has been created to tackle hard core collusion in the UK, and the nature of the interactions that occur between the policy objectives, and the enforcement tools that have been chosen to satisfy them. So far there have been limited attempts to thoroughly consider the matrix of enforcement in the UK and this work brings together aspects of the regulatory mix literature with anti-cartel enforcement literature in order to address what the author perceives to be a gap in the competition law literature. The dynamics of anti-cartel enforcement in the UK are influenced

⁴⁹ Chapter 5: The Loyalty Principle and the Criminal Cartel Offence

⁵⁰ Chapter 6. Improving the Anti-cartel Regulatory Framework: lessons from the law on market abuse.

⁵¹ 7.6. Recommendations

by the relationship that the UK has with the EU as one of its Member States. This work will therefore, consider the potential implications upon Member States' ability to legislate for criminal sanctions within their own jurisdiction as a result of the complex dynamics that exist in the anti-cartel regulatory space. This work will also seek to draw upon the experience of market abuse regulation in the EU with the aim of illuminating potential conceptual solutions of navigating complex regulatory spaces aimed at tackling delinquent economic behaviour.

1.5. Originality and Contribution

The originality of this work can be identified in a number of areas. The first is the use of regulatory mix literature to understand and analyse the dynamics of the anti-cartel regulatory space in the UK,⁵² and thereby examine the criminal cartel offence's place within that space. Regulatory mix theory has an establish body of literature and represents one perspective from which complex regulatory regimes can be understood. It is regularly employed to tackle environmental law regulatory frameworks, and has provided a means by which a clear framework for intricate and complex problems can be legislated for. There is little engagement with regulatory mix theory in the competition law literature, however. Nevertheless, it singled itself out as a useful theorem for the purpose of this work because of its ability to provide a paradigm for negotiating complex regulatory responses for difficult to legislate for problems.

Chapter 4 in particular is able to build upon the theoretical grounding in chapters 2 and 3, and elevate the competition law debate by infusing literature from regulatory theory and from other regulatory fields, so as to provide an original contribution to the debate in competition law and policy. Chapter 4 applies the tools of regulatory mix theory to the problem of anti-cartel enforcement. Much of this work's originality therefore, is born from the convergence of competition law and criminal policy within the framework of regulatory mix theory. The idea that the ad-hoc manner in which the legislative response to cartels has been approached is

⁵² See for example, Michael Howlett and Jeremy Rayner, 'Design Principles for Policy Mixes: Cohesion and Coherence in 'New Governance Arrangements' (2007) 26(4) Policy and Society 1; Gunningham and Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Policy' (1999) 21 Law & Policy 49; Pablo Del Rio and Michael P. Howlett, 'Beyond the "Timbergen Rule" in Policy Design: Matching Tools and Goals in Policy Portfolios' (2013) Lee Kuan Yew School of Public Policy Research Paper No. 13-01.

problematic, is not new to the competition law community, nor is the paradoxical nature of competition policy itself. The analysis of the regulatory dynamics of anti-cartel enforcement reveals that such an approach is unsuitable for the fight against cartel activity.

The UK's relationship with the EU provides a further level of intricacy and sophistication to the competition law landscape considered in this work. It is not without its tensions however, and Chapter 5 examines one of those tensions which arises because of the duty of sincere cooperation contained in Article 4(3) of the Treaty of the European Union (the 'TEU') in light of the inclusion of a criminal cartel offence in the UK. The hypothesis that Article 4(3) TEU and the criminal cartel offence in the UK (or indeed any Member State) may be a challenging combination was originally raised (though unexplored) by Joshua and Klawiter in 2001.⁵³ This work aims to explore that idea, and in doing so therefore, adds a new perspective to the academic literature on the implications of criminalising cartel conduct. Chapter 5 of this work therefore, also accounts for some of this work's original contribution to the anti-cartel literature.

Chapter 6 also contributes to the original contribution to the academic literature made by this thesis. It considers the issue of duality of enforcement. A comparative legal analysis approach is used which examines the example set by the EU's approach to tackling market abuse. The EU Market Abuse Regulation⁵⁴ and the Criminal Sanctions for Market Abuse Directive⁵⁵ have been used to fight a difficult to detect, complex economic crime and have created a framework within which criminal and administrative sanctions for that delinquent conduct can co-exist. This work turned to market abuse for its comparative legal analysis as insider dealing, one particular form of market abuse, was quoted as having 'similar characteristics' to hard core collusion when the criminal cartel offence was originally debated.⁵⁶ Further, anti-market abuse regulation faces similar challenges to those faced in the fight against cartel activity, and is also subject to a high degree of harmonisation in the EU. A comparative legal analysis approach is used to extrapolate insights from the experience of regulating market abuse to the challenges faced when fighting cartels, for the purpose of examining whether there are any insights that

⁵³ Julian M. Joshua and Donald C. Klawiter, 'Step Forward or Another Complication – The UK Criminalization Initiative,' (2001) 16 Antitrust 67.

⁵⁴ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L173/1.

⁵⁵ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), OJ L173/179.

⁵⁶ DTI, 'Productivity and Enterprise: A World Class Competition Regime,' supra n.26, para. 7.34.

can be used to improve the impact of the criminal cartel offence on cartel crime, without jeopardising the impact that administrative sanctions have on cartels. There is some literature that aims to use the existing normative solutions developed in the sphere of market abuse to inform the regulation of cartels but, at the time of writing, it is limited. Chapter 6 of this thesis therefore, seeks to contribute to this body of academic work.

This thesis aims to bring a new perspective to the study and understanding of regulating cartels, particularly when the choice is made to implement criminal sanctions. This thesis also furthers the understanding of the limitations and possibilities of such regulation in light of the obligations that arise by way of Membership of the European Union.

1.6. Methodology

‘Designing research principally, though not exclusively, involves the process of moving from the conceptual to the concrete to clarify the project.’⁵⁷ This statement was taken from a text discussing empirical legal research. Whilst this project does not engage in such research, there are some similarities that can be drawn between empirical research and the doctrinal research that this work undertakes. In terms of the ‘design’ of the research, both of which are dependent upon a doctrinal assessment of the legal question under review, starts with a ‘hunch’⁵⁸ which the researcher must turn into an identifiable, and researchable question. In the context of this work, the seed that would become the central ‘hunch’ of this work was the question of why the criminal cartel offence had failed, and was continuing to fail to have a significant impact upon cartel activity in the UK. This is not a new question. It has been the subject of much academic debate, and indeed a Government consultation. This work however, aims to add a new perspective through which the question can be conceptually analysed. The hunch that became the rationale for this work was that the placing of a criminal sanction, uncritically within a competition law regulatory space had contributed to the underwhelming and inadequate impact that the criminal cartel offence could have upon the fight against hard-core collusion in the UK. The next step in the process was to define the concepts inherent in the ‘hunch’ and create a primary research question which could adequately articulate the central concepts in need of

⁵⁷ Lee Epstein and Andrew D. Martin, ‘An Introduction to Empirical Legal Research’ (Oxford University Press: 2014) p.9.

⁵⁸ Ibid, p.9.

analysis, that would enable conclusions to be drawn. Those foundational concepts relate to the ideological differences between criminal policy and competition policy, and the impact of combining the two within one enforcement space.

This project is rooted in doctrinal legal research which ‘lies at the heart of any lawyer’s task because it is the research process used to identify, analyse and synthesise the content of the law.’⁵⁹ Doctrine is sometimes defined as the ‘synthesis of rules, principles, norms, interpretive guidelines and values’ that ‘explains, makes coherent or justifies a segment of the law as part of a larger system of law.’⁶⁰ This definition is intuitively appropriate to a central element of this thesis which seeks to analyse the position of the criminal cartel offence within the wider sphere of anti-cartel regulation. However, to consider this work as purely doctrinal research is not an entirely adequate reflection of the project. The doctrinal element of the work aims to ‘provide a systematic exposition of the rules governing a particular legal category, analyse the relationship between [the] rules, explain areas of difficulty and, perhaps predict future developments.’⁶¹ However, there is also a ‘reform oriented’⁶² element to the thesis which seeks to ‘evaluate the adequacy of existing rules’⁶³ and to recommend ‘changes to any rules found wanting.’⁶⁴ Additionally, one of the central purposes of this work is to anchor the practical manifestation of anti-cartel enforcement to the accepted theoretical justifications for state intervention in this area, where currently a disconnect exists. Therefore, there is a theoretically focused aspect to the thesis that aims to ‘foster a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of legal rules and procedures that touch’⁶⁵ upon the central concepts under analysis.

This thesis therefore, engages with theoretical research and incorporates it with a normative legal doctrinal methodology. This enables the work to create a framed analysis that roots enforcement practices and tools to the relevant theories and policies, ultimately to help make

⁵⁹ Terry Hutchinson, ‘Doctrinal Research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge: 2018, 2nd edition) p.12.

⁶⁰ Dennis Pearce, Enid Campell and Don Harding, ‘A Discipline Assessment for the Commonwealth Tertiary Education Commission,’ (Canberra, Australian Government Publishing: 1987).

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press: 2007) p.30.

‘better law.’⁶⁶ Elements of comparative-style legal analysis are also used in later chapters as a way of ‘promoting insight and knowledge’⁶⁷ to gather insights that could ‘illuminate different perspectives that may yield a deeper understanding’⁶⁸ of the complex challenges that are yet to be thoroughly explored in the context of anti-cartel enforcement in the UK.

It was important for this work to adopt a mixed approach because a purely doctrinal analysis may have resulted in an ‘inward-looking’⁶⁹ thesis, and it was important to the author of this work to not only identify the relevant elements of the regulatory environment that the UK has created to tackle cartels, but also to create a ‘high quality, policy-relevant’⁷⁰ analysis capable of real world application for the improvement of cartel enforcement. Further, it was important to the author to not only point out failings, but to be in a position to recommend solutions. Competition academics are concerned, on the whole, with the protection of competition for the benefit and welfare of society, and it is with this overriding concern in mind, that this work seeks to offer a new perspective for dealing with the complexities that have stifled the enforcement of the criminal cartel offence in the UK. This would only be possible by making use of a mix of research methodologies.

1.7. Thesis Structure

This work is divided into 7 chapters. Chapter 2 provides contextual background for the implementation of the criminal cartel offence and examines the theoretical foundations for the use of criminal law sanctions in general. The chapter looks at the genesis of the offence and the failures of the pre-existing regime that it was hoped the section 188 offence would address. It then addresses the failures of the cartel offence itself and in doing so, builds a base upon which the cartel offence can be understood within the wider context of anti-cartel regulation in the UK. It looks at the motivations for introducing the section 188 offence and examines them against the theoretical justifications for the creation and use of criminal sanctions. In doing so

⁶⁶ Ibid.

⁶⁷ Edward J. Eberle, ‘The Method and Role of Comparative Law,’ (2009) 8(3) Washington University Global Studies Law Review 451.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Lee Epstein and Andrew D. Martin (2014) *supra* n. 57, p.14.

it provides the groundwork for examining the dynamics that exist in the regulatory landscape, between the theory, policy objectives and the enforcement toolkit.

Deterrence is accepted as the primary cartel reduction policy of anti-cartel enforcement in the UK. Chapter 3 therefore, focuses on deterrence theory as a crime control method. It examines what conditions are necessary to create a real deterrent effect and reflects upon whether those conditions have been present in the UK. As highlighted in Chapter 2, deterrence is not the only means by which crime can be tackled and reduced. This chapter therefore looks at alternative mechanisms that could also be used in the fight against cartels. That discussion begins to highlight the interconnected nature of anti-cartel enforcement in the UK, which is a concept that is explored in more detail in Chapter 4.

Chapter 4 analyses the dynamics of the interconnections that exist in the complex regulatory landscape that has been created for fighting cartels in the UK. The chapter uses regulatory mix theory as a framework within which those dynamics can be considered. Regulatory mix theory has been chosen as a lens through which anti-cartel regulation can be viewed because of its success in navigating other complex regulatory environments.

The influence of the EU plays an important role in the examination in Chapter 5 because of the role that EU law has played in the creation and evolution of competition law in the UK. The previous chapters examined the place that the criminal cartel offence occupies within anti-cartel regulation in the UK and what may have caused its underwhelming impact upon the fight against cartels. Chapter 5 considers the impact that the muted enforcement record of the criminal cartel offence could have on that underlying relationship between the UK and the EU. The chapter focuses upon one important, but largely unexplored element of the relationship between the EU and its Member States in the context of criminal sanctions for competition law, and that is Article 4(3) TEU. The chapter examines what impact the ineffective enforcement of a criminal cartel offence could have upon the obligation of loyal cooperation contained within Article 4(3) TEU.

Chapter 6 turns again to the EU and uses a comparative legal analysis of how the EU has managed to legislate for duality of enforcement in the field of market abuse in order to seek potential insights as to how the UK could better negotiate the complexities of anti-cartel enforcement in the UK.

Chapter 7 is the concluding chapter of this work. It brings together the analysis of the thesis and draws a series of conclusions about the place of the criminal cartel offence in the regulatory landscape of anti-cartel enforcement in the UK. It then makes a series of recommendations for creating a more cohesive and clearly structured framework within which anti-cartel enforcement regulation can exist in general, and within which the criminal cartel offence in particular, can thrive. It outlines an argument in favour of further change for the section 188 offence to ensure that it has a more positive impact upon the fight against cartels in the future.

Chapter 2: Theories of Criminal Punishment and the Cartel Offence

2.1. Introduction

The use of the criminal law as a sanction for a breach of competition law, whilst growing in popularity, remains far from standard practice across the Member States of the EU. Indeed in 2002 when the criminal cartel offence was originally enacted in the UK, it was largely atypical across Europe for such a response to the problem of cartels to be adopted.⁷¹ It is for this reason that this chapter examines the reasons that a criminal punishment may be chosen to tackle a perceived social harm, and in particular which of those justifications could be used to articulate the rationale for the unusual inclusion of a criminal sanction for anti-competitive behaviour in particular.

Administrative fines, which are the traditional means by which cartel arrangements are dealt with in Europe, are used because of the belief that a correctly calculated fine can act as a deterrent to those undertakings that are considering subverting the competitive process by colluding with their competition. These fines are supported by a programme of leniency that seeks to exploit the presumed unstable nature of a cartel, and based upon the game theory model called the ‘prisoner’s dilemma.’⁷² This type of cartel reduction theory assumes that cartelists make rational decisions based upon a cost versus benefit analysis of colluding. A fine of an adequate size, it is believed, would alter the outcome of that calculation and thereby dissuade the undertaking from engaging in the cartel.⁷³ This approach to the fight against cartels is based upon utilitarian theories of crime control in general, and economic deterrence theory in particular. These will be considered in more detail later in this chapter, and the next. The leniency programme operates within this framework of enforcement by seeking to alter the likelihood that the cartel is detected, by incentivising members of the cartel to blow the

⁷¹ At the time when the criminal sanctions were first contemplated in the UK, in Europe only Austria, France, Norway and Ireland had a criminal offence covering cartel activity, and Germany had a criminal bid-rigging offence. See DTI, ‘Productivity and Enterprise: A World Class Competition Regime,’ *supra* n.26, para. 7.12.

⁷² See generally, Christopher R. Leslie, ‘Antitrust Amnesty, Game Theory, and Cartel Stability,’ (2006) 31 *Journal of Corporate Law* 453.

⁷³ Gary Becker, ‘Crime and Punishment: An Economic Approach,’ (1968) 76 *Journal of Political Economy* 169.

whistle on their co-cartelists in exchange for a reward (namely a reduction of, or immunity from the ultimate fine.) The implications of the use of a leniency programme upon the internal dynamics of the regulatory space will also be considered later in this work.

This chapter looks at the impetus for the creation of a criminal law response to cartels and considered the theoretical arguments that were used to support its inclusion in the anti-cartel enforcement landscape in the UK. The chapter will then explore the amendment of the section 188 offence and the potential impact that the removal of dishonesty as the substantive test had on the nature of the offence, and its place within the regulatory space. Arguably a criminal offence that is reliant upon retributivist theories of criminal punishment to justify its existence and directs its use, is fundamentally changed when the very component that represents those retributivist elements is removed. Such a fundamental shift in the theoretical basis for serious State interference in the lives of its citizens should not avoid scrutiny.

In order to participate in that scrutiny this chapter first explores in more detail the genesis of the criminal cartel offence and the main events that led to its creation and later amendment. In doing so it highlights the articulated (and implied) justifications for its creation. The chapter then turns to the main theoretical justifications for imposing criminal punishments in general in order to provide a basis upon which the theoretical justifications for the creation of a criminal cartel offence can be analysed, both as a dishonest offence as was originally the case, and in its current form as amended by ERR 2013.

2.2. The Genesis of the UK Criminal Cartel Offence

Prior to the creation of the criminal cartel offence, in the UK there existed no sanctions for the individuals responsible for implementing (or causing to be implemented) hard-core anti-competitive agreements between undertakings. Chapter 1 of the Competition Act 1998 (the ‘CA 1998’) represented the totality of the UK’s legislative response to cartel activity and prohibits undertakings from engaging in hard-core agreements.⁷⁴ Hard-core agreements are defined in the CA 1998 as price-fixing agreements, market sharing agreements, agreements to

⁷⁴ Competition Act 1998, Chapter 1, s 2(1).

limit the supply or production of goods or services, and bid-rigging arrangements.⁷⁵ This approach to cartel regulation adopted in the CA 1998 ‘expressly aligned domestic law relating to agreements’ with the approach of the EU contained in Article 101 of the Treaty on the Functioning of the European Union (the ‘TFEU’). Article 101 TFEU represents the primary enforcement tool of the EU in the fight against cartels. Since the decentralisation of competition law enforcement, the Member States have been under a legal obligation to ensure that they effectively enforce Article 101 TFEU within their jurisdictions.

The Chapter 1 prohibition in the UK is an administrative sanction that voids any hard-core agreements that ‘have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.’⁷⁶ Those undertakings judged to have engaged in the proscribed agreements will be liable for a fine of up to 10% of annual turnover.⁷⁷ The purpose of the fine is to deter undertakings from engaging in cartels in the first place by altering the cost versus benefit calculation that it is thought takes place on the question of whether to collude with their competitors, and to disgorge them of their illicit cartel rents should they choose to cartelise anyway. The leniency programme was created to enhance the deterrent element of the administrative regime but in so doing, allows for undertakings to minimise or completely avoid any fine, and thereby, retain their cartel rents.

Despite the prominence of administrative fines for cartel activity across the EU and the UK, there exist very good reasons why the level of fine required for the creation of optimal deterrence is unachievable in practice. Given that deterrence is the driving force behind administrative sanctions for undertakings who engage in hard core collusion, its inability to achieve optimal deterrence in practice is a concern. Calculating the level of fine required to achieve optimal deterrence is done by dividing the expected gain from a cartel by the probability of being caught and prosecuted. Wils has fleshed out the details of the equation and estimates that the average mark-up of a cartel is 20% which is then reduced to a gain of 10% of turnover per year. The average duration of a cartel he estimates to be 5 years, and the probability of punishment as one in three.⁷⁸ The equation therefore becomes:

⁷⁵ Competition Act 1998, Chapter 1, s 2(2).

⁷⁶ Competition Act 1998, Chapter 1, s 1(b).

⁷⁷ Competition Act 1998, Chapter 1, s 36(8).

⁷⁸ Wouter P. Wils, (2006) *supra* n.20.

$$\text{Cartel Gain (10\% of annual turnover x 5 years) / probability of getting caught} \\ = 150\% \text{ of annual turnover}^{79}$$

Imposing fines of 150% of annual turnover would put the financial viability of the majority of firms facing the fine at risk. Driving firms into bankruptcy would not only result in the suffering of innocent employees, shareholders and suppliers, but would be a staggeringly disproportionate sanction given that the firm itself is likely to have gained by only 10% over the 5 years, and it would be far from a pro-competitive outcome as it would result in a reduction of the number of competitors operating in that market. Whelan argues that in this context, fines can be regarded as ‘a mere “tax” on (detected) cartel activity’⁸⁰ which may be written off by some undertakings as just another cost of doing business.

The second critical failure of a system which relies solely upon administrative fines to tackle cartel activity is that it fails to acknowledge the reality of how firms operate. Undertakings are artificial entities incapable of making decisions. It is the individuals responsible for the operations of the undertaking who collude on the firm’s behalf. By relying upon administrative sanctions for the undertakings only, those who are ultimately responsible for the cartel remain outside of the reach of the law.

Together these two criticisms of an enforcement regime that relies only upon administrative sanctions make a compelling case for the creation of sanctions for individuals who engage in cartel activity and does indeed represent not only a ‘gap in deterrence’⁸¹ but a gap in enforcement. The UK government argued, and many agreed, that the only way in which that gap could be plugged was through the use of criminal sanctions,⁸² and it was for this reason that the section 188 offence was created by way of the Enterprise Act 2002 (the ‘EA 2002’).

The criminal law is usually and rightfully reserved for the most serious and harmful conduct. During the contemporaneous debate on the creation of the cartel offence the government sought to articulate why cartel agreements fell into that category, without however, attempting to fully explain what the serious criminal harm of a cartel actually was. In that vein however, many an

⁷⁹ Peter Whelan, (forthcoming) supra n.19.

⁸⁰ Peter Whelan, Ibid.

⁸¹ Ibid.

⁸² DTI, ‘Productivity and Enterprise: A World Class Competition Regime’ supra n. 26, Box 7.3, p.40.

academic and indeed, the then Secretary of State for Trade and Industry likened cartels to theft.⁸³ It is a comparison with which this work does not agree, nevertheless, it does indicate an attempt to engage with the difficult but necessary task of making plain what aspect of a cartel represents the harm worthy of criminalisation. Theft is a crime of dishonesty, the legal meaning of which brings with it a judgement to be made as to moral blameworthiness of the conduct. This element of moral condemnation was included in the original cartel offence as a means of narrowing the scope of the offence so as to avoid ‘inadvertently criminalising practices that would be lawful under civil competition law prohibitions,’⁸⁴ but also, in order to ‘signal the seriousness of cartel conduct to the business community, the general public and the courts.’⁸⁵ This is not a utilitarian concern and meant that deterrence therefore, was not the sole justifying objective of the creation of the cartel offence. The inclusion of dishonesty as the substantive mens rea test for the offence and the associated moral judgement that a dishonest offence requires indicated that retributive considerations had now been introduced into the anti-cartel regulatory space for the first time.⁸⁶

Notwithstanding, the section 188 offence was primarily intended to have a positive impact upon the deterrent effect of anti-cartel enforcement in the UK. It was thought that the existence of a criminal sanction would drastically alter the cost versus benefit analysis of the decision to collude and so would induce fear based compliance with the law. The seriousness of the threat, it was thought, would be communicated by an anticipated 6 to 10 prosecutions a year.⁸⁷ In the ten years that followed the creation of the offence however, the OFT managed to secure only one conviction. That conviction however was uncontested and came about by way of a plea deal with the American Department of Justice (the ‘DoJ’) of the Marine Hose Cartel.⁸⁸ In that case the British defendants, Peter Whittle, David Brammar and Bryan Allison all agreed

⁸³ See, for example, Margaret Bloom, ‘[Cartel] activity is equivalent to theft. It has no redeeming features’ in ‘Key Challenges in Public Enforcement: A Speech to the British Institute of International and Comparative Law.’ 17th May 2002; Klein, J.I., Address, International Anti-Cartel Enforcement Conference, Washington, DC, September 30, 1999; Richard Whish, ‘Competition Law’ (Oxford University Press: 2009), p.498.

⁸⁴ Andreas Stephan, ‘The UK cartel offence: a purposive interpretation,’ (2014) Criminal Law Review 879

⁸⁵ Ibid.

⁸⁶ The criminal cartel offence was implemented when the Modernisation Regulation 1/2003 was still in contemplation, and the inclusion of dishonesty was a means of ensuring that there would be no conflict with the EU’s desire to decentralise anti-cartel enforcement. Regulation 1/2003 however, stated that criminal sanctions for cartel activity would not be per se prohibited.

⁸⁷ Anthony Hammond and Roy Penrose, ‘Proposed Criminalisation of Cartels in the UK; A Report Prepared for the Office of Fair Trading,’ (OFT 2001).

⁸⁸ *R v Whittle, Grammar & Allison* [2008] EWCR Crim 2560.

to plead guilty in America in exchange for being sentenced and imprisoned in the UK.⁸⁹ The only contested case to be brought by the OFT resulted in its spectacular collapse before the defence was even required to put forward their case.⁹⁰ The collapse of the case against the four British Airways executives and its subsequent review, were pivotal in the decision to amend section 188 EA 2002 and remove dishonesty as the substantive test for the offence despite it never having been tested in court. The arguments made in favour of its removal largely centred around increasing the ease with which prosecutions could be secured.⁹¹ Less consideration was however given to how the removal of the moral component, used for signalling the seriousness of the offence, would alter the underlying justifications for the implementation of a criminal offence for cartel activity, or how its place within the anti-cartel regulatory space would be affected.

The section 188 offence was enacted as part of the Enterprise Act 2002 and was the only piece of criminal law within the entire statute, which arguably is another indication of the perspective with which the criminal cartel offence was being viewed at the time. It made a person guilty of a criminal offence if he dishonestly agreed with one or more persons to ‘make or implement, or cause to be made or implemented, arrangements ... relating to at least two undertakings.’⁹² The arrangements in question are the same as those prohibited in the CA 1998, namely direct or indirect price-fixing of a product or service,⁹³ the limitation or prevention of supply⁹⁴ or production,⁹⁵ the division or sharing of a market,⁹⁶ or the rigging of a bid.⁹⁷

The inclusion of dishonesty as the substantive test for the offence was a step away from the approach adopted in the administrative sanctions that avoids any articulation of moral wrongfulness. At the relevant time the test for dishonesty was defined in *R v Ghosh*⁹⁸ and stated that a person is dishonest if ‘according to the standards of reasonable and honest people’

⁸⁹ *United States of America v Bryan Allison*, Criminal No. H-07-487-01; *United States of America v David Brammar*, Criminal No. H-07-487-02; *United States of America v Peter Whittle*, Criminal No. H-07-487-03.

⁹⁰ David Teather, ‘BA price-fixing trial collapses,’ 11th May 2010, The Guardian. Available at: <https://www.theguardian.com/business/2010/may/10/ba-price-fixing-trial-collapses>. Last accessed 18th November 2018.

⁹¹ For discussion see, Paul Gilbert, ‘Changes to the UK Cartel Offence – Be Careful What You Wish For,’ (2014) 6(3) Journal of European Competition Law and Practice 192.

⁹² Enterprise Act 2002, s 188.

⁹³ Enterprise Act 2002, s 188(2)(a).

⁹⁴ Enterprise Act 2002, s 188(2)(b).

⁹⁵ Enterprise Act 2002, s 188(2)(c).

⁹⁶ Enterprise Act 2002, s 188(2)(d) and (e).

⁹⁷ Enterprise Act 2002, s 188(2)(f).

⁹⁸ [1982] Q.B. 1053; [1982] 2 W.L.R. 110 CA (Criminal Division).

the defendant ‘realised what [they] were doing was by those standards dishonest.’⁹⁹ This element of moral culpability was new to competition lawyers, the OFT and to the regulatory space in which the offence was to operate. Even after the offence had been in force for a few years, evidence, although limited, indicated that there still lacked a strong consensus amongst the general public that cartel activity was worthy of imprisonment, despite the fact that in general it was acknowledged that it was seriously harmful.¹⁰⁰ Such feeling could perhaps have been established over time by way of consistent enforcement of the section 188 offence; however, in the five years that followed, the only successful prosecution by way of section 188 was of the Marine Hose cartel.

In that case the three defendants had created a cartel that operated in the market for marine hoses which was estimated, by the European Commission, to be worth roughly €32 million between 2004 and 2006.¹⁰¹ The cartel was created in 1986 and had remained active until the defendants (along with other individual members of the cartel) were ultimately arrested in Texas in 2007. Together the defendants had worked to fix prices, allocate bids, share markets and exchange commercially sensitive material. The arrests were carried out by the DoJ after a coordinated investigation instigated by a leniency application made to the European Commission by Yokohama, one of the cartel participants.¹⁰² In respect of the UK defendants, each entered into a plea agreement with the DoJ, the terms of which required them to plead guilty to a violation of the Sherman Antitrust Act, 15 U.S.C. § 1 ‘from at least as early as 1999’ to the 2nd May 2007, and in the UK to a violation of the Enterprise Act, s 188 between the 20th June 2003 and the 2nd May 2007, in exchange for being able to serve out their terms of imprisonment in the UK rather than in the United States.¹⁰³ The agreement also stipulated that should they receive a sentence in the UK courts shorter than that which they had agreed to in

⁹⁹ The test has since been amended by a Supreme Court ruling in *Ivey v Genting Casinos* [2017] UKSC 67. In that case the Court determined that ‘the principle objection to the second [subjective] leg of the *Ghosh* test is that the less the defendant’s standards conform to what society generally accepts, the less likely he is to be held criminally responsible for his behaviour’ (para. 58). Therefore, following that case only the first, objective leg of the old *Ghosh* test need be proven for a finding of dishonesty to be made.

¹⁰⁰ Andreas Stephan, ‘Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain’ (2008) 5(1) Competition Law Review 123.

¹⁰¹ European Commission Press Release, ‘Antitrust: Commission fines marine hose producers €131 million for market sharing and price fixing cartel,’ 28th January 2009, IP/09/137. Available at: <https://www.google.com/search?client=safari&rls=en&q=the+european+commission+estimated+that+the+marine+hose+cartel+was+worth+32+million&ie=UTF-8&oe=UTF-8>. Last accessed 11th February 2019.

¹⁰² The application was made to the European Commission who as a result, levied no fine against Yokohama for their involvement in the cartel. The investigation was a coordinated effort between the European Commission, the DoJ, the OFT, as well as other international competition authorities in Japan and Korea.

¹⁰³ The difference in the dates is reflective of the period of time in which cartel activity was criminalised in the UK.

their US plea deal, they would serve the remaining period of their American sentences in an American prison. Upon conviction in the UK however, the judge at first instance sentenced both Whittle and Allison to 3 years imprisonment, and Brammar to 30 months.

At the time the OFT claimed that this ‘first criminal prosecution sends a clear message to individuals and companies about the seriousness with which UK law views cartel behaviour.’¹⁰⁴ That message however, was arguably undermined when the defendants successfully appealed the duration of their sentences. The Court of Appeal, who lowered their terms of imprisonment to the minimum sentence agreed upon in their plea deal with the DoJ, stated that they could have been persuaded to ‘reduce the sentences further than [they had] been invited to’¹⁰⁵ had counsel for the defendants’ so argued.¹⁰⁶ Sanction severity plays a critical role in the creation of a real world deterrent¹⁰⁷ and Marine Hose case does nothing to demonstrate that the judiciary in the UK have an appetite for imposing sentences towards the upper limit provided for in section 188.¹⁰⁸ Further, the investigation came about as a result of a leniency application made to the European Commission, and so not as a result of the threat of criminal sanctions in the UK. Arguably therefore, the only significant role that the criminal cartel offence played in this particular case was to create the reciprocity needed for the extradition of the defendants. Whilst the deterrent function of the offence in this case, may well have been limited, the retributive element of the section 188 offence was arguably engaged as it signalled, for the first time since its creation 6 years earlier, that engaging in hard-core cartel activity was in fact a serious enough to warrant criminal prosecution. In order to overcome the reality of the previous total lack of enforcement of the offence, and the collaborative role of the OFT in the prosecution, the OFT needed to use the Marine Hose Cartel

¹⁰⁴ OFT Press Release, ‘Three imprisoned in first OFT criminal prosecution for bid rigging,’ 11 June 2008. Available at: <http://webarchive.nationalarchives.gov.uk/20131101181416/http://oft.gov.uk/new-and-updates/press/2008/72-08>. Last accessed 7th August 2017.

¹⁰⁵ *R v Peter Whittle, Bryan Allison, David Brammer* [2008] EWCA Crim 2560; (2008) WL 4820465, para. 31.

¹⁰⁶ They went on to say that they had ‘doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represents their clients in a UK court. Ibid, para. 28.

¹⁰⁷ The role of sanction severity in the creation of a deterrent effect is considered in more detail in section 3.2.4. of this work.

¹⁰⁸ Indeed, in the subsequent cases where defendants have pleaded guilty, terms of imprisonment have been imposed, but suspended. Barry Kenneth Cooper received a 2 year prison sentence, suspended for 2 years and was disqualified from being a director for 7 years after pleading guilty under section 188, for his participation in a cartel for the supply of precast concrete drainage products. Peter Nigel Snee received a sentence for 6 months in prison, suspended for 12 months after he pleaded guilty under section 188 for his participation in a cartel for the supply of galvanised steel tanks for water storage. His alleged co-cartelists pleaded, and in fact were found, not guilty under section 188. See, CMA Cases. Available at: https://www.gov.uk/cma-cases?parent=&keywords=&case_type%5B%5D=criminal-cartels&closed_date%5Bfrom%5D=&closed_date%5Bto%5D=. Last accessed 17th September 2018.

case as a springboard to greater enforcement of the criminal cartel offence if it were to have the deterrent impact upon cartel activity that it was intended to have.¹⁰⁹ The next criminal prosecution was not initiated however, for another 4 years.

The second criminal prosecution under section 188 EA 2002 occurred in 2010 and was to be the very first contested criminal cartel case in the UK. It turned out to be a critical turning point in the story of the criminalisation of competition law, but not for the reasons the OFT had surely hoped for. The case involved four British Airways executives (the 'BA' executives) who were being criminally prosecuted for their alleged involvement in a cartel accused of fixing the prices of fuel surcharges with their competitor, Virgin Atlantic Airways ('VAA'). Their co-cartelists, the executives at VAA, had received immunity from criminal prosecution as a result of a corporate leniency application which also led to VAA receiving total immunity from any administrative fine. The case against the BA executives collapsed however, upon the court discovering that roughly 70,000 electronic documents in the possession of VAA had not been disclosed to the defence. This led to Mr Justice Owens ordering the acquittal of the defendants. The 'spectacular collapse'¹¹⁰ of the case led some to 'raise serious questions about the OFT's competence as a criminal prosecutor and its reliance on a leniency programme.'¹¹¹ A review was conducted of the OFT's handling of the case which highlighted various contributing factors,¹¹² but which did not explicitly identify the dishonesty test as one of them, although it was alluded to.¹¹³ In a response to a Government consultation on options for reforming, inter alia, the criminal cartel offence the OFT articulated very clearly their view of the place that dishonesty had within the definition of the section 188 offence:

¹⁰⁹ The OFT stated that after the Marine Hose Cartel case, they would continue to 'investigate and prosecute cartels vigorously.' OFT Press Release, 'Three imprisoned in first OFT criminal prosecution for bid rigging,' 11 June 2008. Available at: <https://webarchive.nationalarchives.gov.uk/20140402202948/http://www.of.gov.uk/news-and-updates/press/2008/72-08>. Last accessed 17th September 2018.

¹¹⁰ Andreas Stephan, 'Collapse of BA Trial Risks Undermining Cartel Enforcement,' <https://competitionpolicy.wordpress.com/2010/05/12/collapse-of-ba-trial-risks-undermining-cartel-enforcement/>. Last accessed 6th April 2019.

¹¹¹ Ibid.

¹¹² 'The collapse of the case resulted from a highly unusual combination of factors... The issues identified essentially relate to the processes used in the case... With the benefit of hindsight it was not ideal as the OFT's first contested criminal case... OFT, 'Project Condor Board Review,' https://assets.publishing.service.gov.uk/media/556876f5274a1895000008/Project_Condor_Board_Review.pdf. Last accessed 6th April 2019.

¹¹³ 'In particular, the alleged cartel was a bilateral one in which the immunity applicant and its witnesses (who were also immune from prosecution) were equally implicated in the alleged offence. The reliability of the witnesses might be questioned.' OFT, 'Project Condor Board Review,' https://assets.publishing.service.gov.uk/media/556876f5274a1895000008/Project_Condor_Board_Review.pdf. Last accessed 6th April 2019.

‘Relying on a normative concept, such as dishonesty, to define the criminal cartel offence inevitably introduces some uncertainty... Such uncertainty is reflected to some extent in the range of factors that have been raised by those under investigation by the OFT as potential counter-arguments to the suggestion that their conduct was dishonest ...

There is no certainty as to how a jury would approach any of these matters when assessing dishonesty, particularly in relation to conduct which many jury members **may not consider inherently dishonest** (emphasis added) ...

The OFT believes that such uncertainty is inherently undesirable ... It also makes it more difficult and resource-intensive to investigate and prosecute the offence, as even those who may be ready to admit their involvement in cartel conduct will have an incentive to contest the case in the hope that a jury will be persuaded that they were not acting dishonestly. This in turn impacts on the number of cases that can realistically be investigated and prosecuted and the level of deterrence that can be achieved.

In a speech to the Law Society not long after, the then Senior Director of the Cartel and Criminal Enforcement Group of the OFT, Ali Nikpay summarised their position even more succinctly:

‘[T]o date there has only been one successful criminal cartel prosecution and two prosecutions in total. Given its importance to the regime, this naturally raises the question as to why. I can answer that question in one word: “dishonesty.”’¹¹⁴

The OFT statements are indicative of a number of things. The rejection of a normative standard as the test for the criminal cartel offence because of the nuanced motivations that may motivate collusions, and the acknowledgement that cartels were not considered inherently wrong by the standards of reasonable people is problematic. Indeed, fundamentally:

¹¹⁴ Ali Nikpay, Speech to the Law Society Anti-Trust Section, 11 December 2012. Transcript available at: https://webarchive.nationalarchives.gov.uk/20140402205844/http://oft.gov.uk/shared_oft/speeches/2012/1112.pdf. Last accessed 10th August 2018.

‘Just because questions of morality are difficult and unfamiliar does not mean that competition lawyers can ignore them while still seeking to utilise the perceived advantages of criminal deterrence. If we are to use criminal law, we must abide by its conventions and justify our offence on its own terms.’¹¹⁵

Indeed, the reality is that ‘the criminal trial is inherently a “moral space” where guilt and innocence are established.’¹¹⁶ Traditionally, the criminal law is reserved for behaviour ‘if it deserves moral opprobrium and/or clearly causes societal harm,’¹¹⁷ and to it is arguably the challenges that it poses to prosecution is insufficient reason to seek to avoid it. A more advantageous approach would be to better define the criminal wrongfulness of a cartel and define the offence so as to target that harm. If prosecution of the offence is still challenging, investigative processes should be improved in order to ensure that the evidential burden of proving the offence is satisfied.¹¹⁸ Defining the offence in this way would help to improve the ‘comprehensibility’¹¹⁹ of the cartel offence and would go some way to addressing the problem of the lack of strong feeling that cartel activity is inherently criminal.

Nevertheless, despite the issue of dishonesty never actually being tested in court, the impact of its inclusion as the substantive test for the criminal cartel offence was reassessed. During the consultation process that preceded the ultimate reform, the Government stated that whilst the section 188 offence had helped to ‘deter the most serious and damaging forms of anti-competitive conduct’¹²⁰ the fact that there had been ‘only two cases prosecuted since 2003 ... weaken[ed] the offence’s deterrent effect.’¹²¹ The focus therefore, remained firmly on the deterrent impact of the cartel offence and it was with the deterrent effect in mind, that the offence was ultimately amended so as to remove dishonesty as the substantive test.

¹¹⁵ Angus MacCulloch, ‘The Cartel Offence: Defining an Appropriate “Moral Space”’ (2012) 8(1) European Competition Journal 73.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Despite claims by the OFT that dishonesty was the cause of its poor enforcement record for the original criminal cartel offence, there have been more cases brought under the unaltered offence or ‘legacy’ cases that have been brought under the new ‘easier to prosecute’ offence.

¹¹⁹ Peter Whelan, ‘A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law,’ (2007) 4(1) Competition Law Review 7.

¹²⁰ DTI, ‘A Competitive Regime for Growth: a consultation on options for reform: Government Response to Consultation,’ March 2012, p.10. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192722/12-512-growth-and-competition-regime-government-response.pdf. Last accessed 18th August 2018.

¹²¹ Ibid.

The amendment of the offence occurred by virtue of the Enterprise and Regulatory Reform Act 2013 (the ‘ERR 2013’) which also brought about the amalgamation of the OFT and the Competition Commission (the ‘CC’),¹²² to create the Competition and Markets Authority (the ‘CMA’).

The newly amended criminal cartel offence makes a person guilty of a criminal offence if they agree with one or more other people to make or implement, or cause to be made or implemented, the hard-core agreements articulated in the original offence (price fixing, market sharing, production or supply limitation, and bid rigging) relating to at least two undertakings. By removing the requirement that criminal agreements had to be entered into dishonestly, the scope of the offence was significantly widened. Instead of attempting to provide a more self-contained definition of what was illegal, the ERR 2013 instead sought to carve out agreements that were not. Therefore section 188A EA 2002 now states that:

(1) An individual does not commit an offence under section 188(1) if, under the arrangements—

- (a) in a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected,
- (b) in the case of bid-rigging arrangements, the person requesting bids would be given relevant information about them at or before the time when a bid is made, or
- (c) in any case, relevant information about the arrangements would be published, before the arrangements are implemented, in the manner specified at the time of the making of the agreement in an order made by the Secretary of State.

(2) In subsection (1), “relevant information” means—

- (a) the names of the undertakings to which the arrangements relate,
- (b) a description of the nature of the arrangements which is sufficient to show why they are or might be arrangements of the kind to which section 188(1) applies,

¹²² The CC has previously been responsible for market investigations and merger inquiries.

- (c) the products or services to which they relate, and
 - (d) such other information as may be specified in an order made by the Secretary of State.
- (3) An individual does not commit an offence under section 188(1) if the agreement is made in order to comply with a legal requirement.
- (4) In subsection (3), “legal requirement” has the same meaning as in paragraph 5 of Schedule 3 to the Competition Act 1998.¹²³

In addition to the carve out above, the ERR 2013 also added a number of defences. Now, according to section 188B of the EA 2002, it is a defence for an individual charged with the cartel offence to show that:

- (1) In a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service.
- (2) At the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from the CMA.
- (3) Before the making of the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.

As stated above, the aim of the reform was to improve the prosecutability of the offence and thereby, its deterrent effect. The removal of dishonesty also brought the offence more closely into line with the predominantly utilitarian approach to dealing with cartels adopted by the administrative side of the anti-cartel regulatory space. However, there was little to no discussion of the impact that its removal, and the significant alteration to the nature of the offence that it signified, would have upon its relationship with the other tools in the enforcement toolkit. Further, the moral wrong-worthiness of the offence, as exemplified by the inclusion of dishonesty, was one of the justifying elements that supported the creation of a

¹²³ Enterprise Act 2002, s 188A, as amended by the Enterprise and Regulatory Reform Act 2013, s 47.

criminal offence in the first place. The removal of that element on that justification was similarly not considered.

This work therefore, now turns to a consideration of what justifies the creation of a criminal offence, before also exploring the utilitarian and retributivist arguments for imposing criminal punishment. The purpose of so doing is to begin to articulate a standard against which the enforcement of the criminal cartel offence, within the wider scope of anti-cartel enforcement in general, can start to be assessed.

2.3. Criminal Law Theory: justifying criminal sanctions

The imposition of criminal punishment involves the infliction of harm by the State upon its citizens. That harm includes physical, financial, reputational and emotional harm, and is one of the most significant examples of State power. In order to be regarded as a legitimate exercise of that power, it should not be considered as an excessive interference with individual freedom. Some would argue that there is a tendency for the over-criminalisation of conduct enabled by a lack of a coherent theory of criminalisation.¹²⁴ This has in turn led to ‘few meaningful constraints on the scope of the criminal law.’¹²⁵ Brown argues that this state of over criminalisation has partly come about because:

‘Legislators create crimes, and legislatures do not abide by a consistent set of principles regarding what matters are appropriate for criminalization. They employ criminal law purely instrumentally, as a tool for achieving whatever end majorities choose to pursue.’¹²⁶

This has caused legislators to create “ancillary offences” – statutes designed to support a complex regulatory scheme that persons find ingenious ways to circumvent.¹²⁷ Husack goes on to explain the threat of these kind of offences which include an ‘absence of culpability

¹²⁴ Douglas Husak, ‘Criminal Law Theory’ in Martin .P. Golding and William.A. Edmundson et al (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (John Wiley & Sons Ltd 2008) p.108.

¹²⁵ Ibid.

¹²⁶ Darryl K Brown, ‘Can Criminal Law be Controlled?’ (2009-10) 108 Michigan Law Review 925.

¹²⁷ Douglas Husak, *supra* n. 124.

requirements ... the implicit trust in prosecutorial discretion to prevent abuse'¹²⁸ both of which he argues are 'incompatible with fundamental principles long held sacrosanct by criminal law theorists.'¹²⁹ This would imply that at the very least culpability should be a consideration when articulating a criminal offence, although it would appear not an absolute requirement. Indeed, the use of strict liability offences is not uncommon, however it is far beyond the scope of this work to enter the debate on criminalisation and how its scope should be defined. Nevertheless, preventing the overuse of criminal sanctions is important in a fair and just society, and in order for that to be the case there need to be some reason or justification for the limitation of individual behaviour by way of the criminal law. Further, the integrity of the criminal justice system as a whole is put at risk when a criminal sanction is unjustifiable, unfair and illegitimate as it threatens society's normative commitment to obey the law voluntarily.

2.3.1. The Scope of the Criminal Law, and the Criminal Cartel Offence

Some would argue that one of the most important and defining features of the State is that it 'has an obligation to take steps to prevent harm'¹³⁰ to its people by 'encouraging peaceable living among citizens and safeguarding the basic means by which citizens can live good lives.'¹³¹ The mechanisms by which a State facilitates this and the justifications for those mechanisms vary. Nevertheless, in most penal systems criminal sanctions imposed by the State, whether in the pursuit of the prevention of further harm or some other objective,¹³² involve the infliction of harm on those found guilty of transgressing accepted societal norms. This therefore, is not only to be regarded as a legitimate, but also a fundamental function of the State. The exercising of such censuring powers through the criminal law system however, 'means treating people in way which we would not to be justifiable in contexts other than punishment.'¹³³ To ensure therefore, that the imposition of such punishment is a justifiable manifestation of State power, and given that there exists no coherent finite definition of what

¹²⁸ Ibid.

¹²⁹ Ibid. See also, Ashworth, 'Is the criminal law a lost cause?' (2000) 116 Law Quarterly Review 225–56; Adams, 'The new ancillary offences' (1989) 1 Criminal Law Forum 1–39.

¹³⁰ Andrew Ashworth and Lucia Zedner, 'Punishment Paradigms and the Role of the Preventive State', in Simester, A. P., Antje Du Bois-Pedain, and Ulfrid Neumann (eds) *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Bloomsbury Publishing, 2014) p.3.

¹³¹ Ibid, p.4.

¹³² It is von Hirsch who argues that the prevention of harm rather than the upholding of 'moral order' is the preferred prerogative of State power. See Andreas von Hirsch and A Ashworth, 'Proportionate Sentencing: Exploring the Principles,' (OUP 2005) p.14.

¹³³ William Wringe, 'An Expressive Theory of Punishment, (Palgrave Macmillan 2016), p.7.

should constitute a criminal offence worthy of such punishment, there must be a way in which the outer scope of the criminal law can be delineated. Some academics have therefore, argued in favour of ‘limiting principles’¹³⁴ that aid in determining when the criminalisation of an action may not be appropriate.¹³⁵

In much the same way that the new criminal cartel offence does not attempt a definition capable of capturing all of the possible ways in which the crime may be committed, but to carve out the ways in which it is not, these limiting principles attempt a similar task. Drawing on the work of various theorists, those principles are as follows:

- A) Prohibitions should not be included in the criminal law for the sole purpose of ensuring that breaches are visited with retributive punishment¹³⁶
- B) The criminal law should not be used to penalise behaviour that does no harm¹³⁷
- C) The criminal law should not be used to achieve a purpose that can be achieved as effectively whilst imposing less suffering¹³⁸
- D) The criminal law should not be used if the harm of the penalty is greater than the harm of the offence¹³⁹
- E) The criminal law should not be used to compel people to act in their own best interests¹⁴⁰
- F) The criminal law should not include prohibitions that do not have strong public support¹⁴¹
- G) A prohibition should not be included if it is not enforceable¹⁴²

When each of these limiting principles is applied to the criminal cartel offence it is possible to establish whether there are any significant ideological obstacles that would preclude the creation of a criminal cartel offence.

¹³⁴ Nigel Walker, ‘Punishment, danger and stigma: the morality of criminal justice,’ (Rowman and Littlefield 1980) p.4.

¹³⁵ Ibid, p.4-8.

¹³⁶ Beccaria, ‘Of Crimes and Punishment,’ (1764).

¹³⁷ Jeremy Bentham, ‘An Introduction to the Principles of Moral Legislation,’ (1789).

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ John Stuart Mills, ‘On Liberty,’ (1859).

¹⁴¹ James Fitzjames Stephen, ‘Liberty, Equality, Fraternity,’ (Henry Holt & Co. 1882).

¹⁴² Nigel Walker (1980) supra n.134.

The first principle states that creating a sanction for the sole purpose of enabling the infliction of punishment is not an appropriate use of the criminal law. An additional, justifying element is required. Retributive theories justify punishment as the infliction of harm in response to wrongdoing or infliction of harm,¹⁴³ and it is this additional element of wrongdoing or harm, that is crucial. That a criminal punishment should only be applied when a wrongful or harmful act has been committed is arguably intuitive, as to do otherwise would place the State in the position of inflicting harm in unnecessary and disproportionate ways. However, in the context of the cartel offence, whilst it is widely accepted that hard-core cartels are indeed harmful, the task of articulating that harm within the context of the criminal law has not been simple. Nevertheless, defining the harm to be punished is an important process when creating a criminal offence, especially when attempting to ‘translate a desire for increased competition law deterrence into criminal law’¹⁴⁴ in part because competition law does not typically concern itself with backward looking policy concerns such as the wrong-worthiness of proscribed conduct. The criminal law by contrast focuses on the guilt and innocence, and the punishment of guilty for their wrongdoing; for that wrongdoing to be judged it is crucial to know what it is.¹⁴⁵

When the original cartel offence was introduced to the competition law landscape, there was no mention of the harm that cartels caused contained within the definition of the offence. Instead, the focus was upon the ‘dishonesty’ of entering into agreements that circumvent the competitive process whilst also taking advantage of others who do not. Some have argued that the avoidance of relying upon the harm of cartels when defining the criminal cartel offence is beneficial as it will prevent the need to introduce complex economic arguments to lay juries¹⁴⁶ when attempting to prove the case against a defendant. However, no matter how persuasive the arguments are for the exclusion of harm from the definition of a criminal cartel offence, a suitable alternative definition of the criminal harm of a cartel should be made clear. This need has arguably become even more pressing since the removal of dishonesty as the substantive test for the offence.

¹⁴³ For discussion see for example, Whitney R. P. Kaufman, ‘The Problem of Punishment,’ in *Honor and Revenge: A Theory of Punishment* (Springer, Dordrecht: 2013).

¹⁴⁴ Angus MacCulloch (2012) *supra* n.115.

¹⁴⁵ *Ibid.*

¹⁴⁶ See for example, C Harding, ‘The Anti-Cartel Enforcement Industry: Criminological Perspective on Cartel Criminalisation’ in Beaton-Wells and Ezrachi (eds) *Criminalising Cartels* (Hart Publishing: 2011); Angus MacCulloch, (2012) *supra* n.155.

This ties in with the second limiting principle requiring that an action does harm before it can be considered for criminalisation. That hard-core cartel cause harm is widely accepted. In competition law terms, that harm is colluding to avoid the influence of the competitive process, enabling the cartel to become a ‘price setter.’¹⁴⁷ This leads to, inter alia, consumers paying more for goods than they are worth,¹⁴⁸ a loss of innovation and efficiency gains, a lost consumer surplus that would have otherwise belonged to the consumer but that was instead, appropriated¹⁴⁹ by the cartel,¹⁵⁰ and the ‘deadweight loss’ which occurs when consumers are deterred from purchasing a product because of its artificially inflated price.¹⁵¹ However, not all harms are deserving of protection by the criminal law and indeed Mill argued that,

‘society admits no right, either legal or moral, in the disappointed competitors ... it feels called on to interfere, only when means of success have been employed which is contrary to the general interest to permit – namely fraud or treachery, and force.’¹⁵²

Some have argued that the appropriate measure of harm for a criminal cartel offence is the harm done to the ‘market as an institution used by society to distribute goods and services, i.e. as a means of distributive justice’¹⁵³ whilst others have argued that harm should be rejected as the basis of criminalisation of cartels and instead, the key rationale for individual criminal sanctions should focus on the subversion of the competitive process.¹⁵⁴

When the cartel offence was originally created,¹⁵⁵ dishonesty filled the role as identifier of the harm or wrongdoing. However, when, as articulated by the OFT, there is not an inherent belief

¹⁴⁷ Bruce Wardhaugh, ‘Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion’ (Cambridge University Press, 2014) p.7.

¹⁴⁸ Worth is normally determined by competitive market conditions which is a reflection of supply, demand, availability and innovativeness.

¹⁴⁹ It is this appropriation that has led some commentators to liken cartel agreements to theft, see: Richard Whish, ‘Recent Developments in Community Competition Law 1998/99’ [2000] *European Competition Review* 219, 220. However, others maintain that as the purchasing of a cartelised product is a voluntary transaction where the consumer wants the goods and the offered price is below the consumer’s reservation price, it is not morally comparable to theft. See: s. Bishop and M. Walker, ‘The Economics of EC Competition Law: Concepts, Application and Measurement’ (Sweet and Maxwell, 3rd eds, 2010) pp.166-167.

¹⁵⁰ Bruce Wardhaugh (2014) *supra* n.147, p.8.

¹⁵¹ *Ibid*, p.38.

¹⁵² John Stuart Mill (1859), *supra* n.140, ch 5.

¹⁵³ John Rawls, ‘A Theory of Justice’ (Harvard University of Press: 1971).

¹⁵⁴ Angus MacCulloch (2012) *supra* n.115.

¹⁵⁵ In the DTI White Paper that preceded the original cartel offence it was stated that:

‘Hard-core cartels are serious conspiracies which **defraud** business customers and consumers and have wide economic impacts. If discovered they jeopardise the interests of shareholders, creditors and employees. Their cost to the global economy runs into billions of dollars. The offence merits a strong sentence.” DTI (2002) *supra* n. 26, para. 7.35 (emphasis added).

that cartel agreements are dishonest, an inevitable problem occurs because ‘dishonesty cannot *inculcate* collective moral censure ... because it *presupposes* and relies upon such collective moral censure already existing.’¹⁵⁶ When it was removed, the Government chose not to seek a replacement that would act as an indicator of the specific harm or wrongdoing that that criminal offence was seeking to address. Arguably therefore, the removal of dishonesty has not only changed the nature of the offence itself, but has altered the justifications for imposing criminality without now articulating what aspect of the offence is deserving of that criminality.

There has been much discussion in the academic literature as to what could adequately and appropriately articulate the harm at the core of cartel which is deserving of criminal sanction.¹⁵⁷ Arguably the most convincing are those which acknowledge that the inherent harm of a cartel is not the secrecy in which they are made,¹⁵⁸ which is merely a ‘symptom of increasing moral repugnance of cartel activity, not the cause’¹⁵⁹ but the intention to avoid the effects of competition.¹⁶⁰

The third limiting principle requires that the criminal law only be used when an alternative that causes less suffering cannot be found that achieves the same purpose. This will be referred to as the ‘suffering cost’ of criminal sanctions. This is a reflection of the desire that State interference be proportionate and no more than is necessary to achieved the desired goal. In the context of the criminal cartel offence, this equation is made muddier by the lack of a clear indication of exactly what aspect of cartel agreements is deserving of criminal punishment. However, once the decision was taken to focus attention of criminal sanctions upon the individuals responsible for implementing cartel agreements, practical options were limited to two; criminal liability and director disqualifications. As has been previously stated, fines were rejected quite early in the debate because of the possibility that individuals could be indemnified against financial sanctions by their employers. Competition Disqualification

¹⁵⁶ R Williams, ‘Cartels in the Criminal Law Landscape’ in Beaton-Wells and Ezrachi (eds) (2011) supra n.146.

¹⁵⁷ See for example, BIS Consultation, paras. 6.40 – 6.48; Harding supra n.130; Caron Beaton-Wells, ‘Capturing the Criminality of Hard Core Cartels: The Australian Proposal,’ (2007) 31 Melbourne University Law Review 675; Bruce Wardhaugh (2014) supra n.147; Angus MacCulloch (2012) supra n. 115.

¹⁵⁸ Peter Whelan argues in favour of examining the moral wrongfulness of a cartel by determining the extent to which it represents a violation of moral norms against stealing, deception and or cheating. See, Peter Whelan, ‘Criminalization and the Challenge of “Moral Wrongfulness,”’ (2013) 33(3) Oxford Journal of Legal Studies 535. For a counter argument see, Angus MacCulloch, ‘The Cartel Offence: Defining an Appropriate “Moral Space,”’ (2012) 8(1) European Competition Journal 73.

¹⁵⁹ Angus MacCulloch, *ibid.*

¹⁶⁰ *Ibid.*

Orders ('CDOs') are considered to be a powerful deterrent, and operate on a much lower evidential standard than the criminal offence making them easier to prove. They do not carry the same degree of censure as a criminal sanction however, and so do not fulfil the educative and moralising functions that a criminal prosecution would. The level of punishment is vastly different with criminal sanctions depriving the convicted of their liberty and director disqualification orders simply depriving those determined to be 'unfit' from working as a director for a specified period of time.

CDOs have been found to be second only to criminal sanctions in terms of their deterrent effect¹⁶¹ and if employed regularly, would avoid the disastrous effects of under-enforcement on that deterrent effect. If deterrence is the overriding objective of individual sanctions, arguably the suffering cost of the criminal offence cannot be justified. If however, the criminal sanctions are seeking to achieve some other, retributive function for example, the suffering cost equation may have a different outcome. Dishonesty played a role in articulating what that alternative function may be, its removal without replacement makes identifying that function more difficult.

The fourth limiting principle requires that the harm of the punishment should not be greater than the harm of the crime. Quantifying the harm of a crime or its punishment is an incredibly difficult task. The scope of the harm to be considered is not clear. Should only those who are directly harmed be included, or should the harm inflicted indirectly be caught within that scope? As the element of cartel agreements that justifies criminality has not been clearly identified by the Government, its relationship to the potential punishment, 5 years in prison, is difficult to establish. When deciding upon a term of 5 years, the White Paper that proceeded the original EA 2002 offence looked to the jurisdictions of Canada, Japan and the USA for guidance,¹⁶² as well as to UK offences that they felt were analogous such as insider trading and obtaining property by deception.¹⁶³ Whilst it is beneficial to look for outside guidance when determining the sentence for a new criminal offence, more has to be done to link the chosen

¹⁶¹ CMA, 'The deterrent effect of competition authorities' work: Literature review' 7th September 2017. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642801/deterrant-effect-of-competition-authorities-work-lit-review.pdf. Last accessed 16th November 2018.

¹⁶² At the relevant time, both Japan and Canada provided for terms of imprisonment for up to 5 years for breaches of their criminal cartel offences, and the Sherman Act provided for a term of imprisonment not exceeding 3 years.

¹⁶³ At the relevant time section 15(1) of the Theft Act 1968 provided for up to 10 years in prison. It has since been repealed by the Fraud Act 2006.

sentence to the actual harm of that offence. This would be beneficial for not only ensuring the legitimacy of the criminalisation of the act, but would also make the sentencing of those found guilty simpler for the judiciary. In the absence of official sentencing guidelines and with no connection between the (ambiguously defined) harm and the sentence, there is a real risk that the objectives sought by criminalisation could be ultimately undermined by sentences that are too lenient or indeed, too severe. This is particularly true if the primary objective of the criminal offence is deterrence.

The fifth limiting principle is that the criminal law should not be used as a means to compel people to act in their own best interest. There are examples of where the criminal law has successfully been used in this way however. One such example is section 14(3) of the Road Traffic Act 1998 which requires that a person is guilty of an offence if they fail to wear a seat belt whilst driving or riding in a car. The wearing of a seat belt is in the interests of the person wearing it as it significantly reduces the risk, and severity of injury to the wearer in the event of a collision.¹⁶⁴ Despite the fact that wearing a seat belt reduces the risk of injury and death, there was significant push back when the issue of compulsory seat belts was first raised, and it took 15 years and 12 attempts to finally make it law.¹⁶⁵ Laws which seek to compel individuals to act in their own best interest are often categorised as examples of ‘legal paternalism’ which many argue against as it represents an unjustified interference with an individual’s ‘protected realm of sovereign self-rule’¹⁶⁶ even if the ‘self-harm the state wants to prevent is big or the coercion needed to prevent it is small.’¹⁶⁷ This is because ‘sovereignty is an all or nothing concept; one is entitled to absolute control of whatever is within one’s domain however trivial it may be.’¹⁶⁸ There is much debate as to the appropriateness of the criminal law when deployed in a paternalistic way¹⁶⁹ and it is not within the scope of this work to add to that debate. Nor is it within the scope of this work to explore that debate because within the context of the criminal cartel offence it adds nothing to the analysis. Individuals enter into hard-core

¹⁶⁴ It was estimated that the year after it became legally compulsory to wear seat belts the number of fatalities was reduced by 25.7%, and the number of serious injuries fell by 22%. See, Road Safety Observatory, ‘Seat Belts: How Effective: Key Statistics,’ 30 Jan 2017.

¹⁶⁵ Road Safety GB, ‘How has the seatbelt law evolved since 1968?’ 9 April 2018. Available at: <http://roadsafetygb.org.uk/news/how-has-the-seatbelt-law-evolved-since-1968/>.

¹⁶⁶ Heidi Malm, ‘Feinberg’s anti-paternalism and the balancing strategy’ (2005) 11(3) Legal Theory 193.

¹⁶⁷ Ibid.

¹⁶⁸ Joel Feinburg, ‘Harm to Self’ (Oxford University Press 1986) p.55.

¹⁶⁹ See for example, Russ Shafer-Landau, ‘Liberalism and Paternalism’ (2005) 11 Legal Theory 169; Richard J Arneson, ‘Joel Feinberg and the Justification of Hard Paternalism’ (2005) 11(3) Legal Theory 259; Williamson A Edmundson, ‘Comments on Richard Arneson’s Joel Feinberg and the Justification of Hard Paternalism’ (2005) 11(3) Legal Theory 285.

anticompetitive agreements in order to pursue either their own best interests, or those of their firm as they perceive them to be. This limiting principle therefore, would not act as a bar on the criminalisation of such conduct.

The sixth limiting principle is that the criminal law should only be used when there is strong public support. This is linked to the idea that ‘people comply with the law because they believe it is the right thing to do’¹⁷⁰ and in order to create and sustain that belief ‘a normative model of crime control ... secure[s] compliance and cooperation by developing policies that generate legitimacy.’¹⁷¹ It is not, in this instance therefore, deterrence that persuades citizens to obey the law, but a belief that the laws (and the legal system) are, in general, just and legitimate, and should therefore be obeyed. When criminality is created without public support, it risks being considered an illegitimate manifestation of the State’s power over its citizens which can in turn undermine the public’s commitment to comply with that law. When the legitimacy of enough of the State’s actions is questioned it could arguably lead to a significant erosion of the general commitment to comply with the legal system in general. However, where legitimacy of State action is maintained, it ‘leads individuals to follow rules not because they agree with each specific rule ... but because they accept that it is morally right to abide by the law.’¹⁷²

In the case of the criminal cartel offence, which some empirical evidence suggested only had limited support when it was introduced,¹⁷³ relies upon the legitimacy of the Government and criminal justice system as a whole to bring the offence within the scope of the public’s ordinary commitment to obey the law. Legitimacy in this context then is the ‘psychological property of an authority ... that leads those connected to it to believe that it is appropriate, proper and just.’¹⁷⁴ In practice therefore, criminal sanctions can be included within the legal landscape of a jurisdiction even when they lack strong public support if there is support for the criminal justice system in general, a support that is partly encouraged by the legitimacy (and perceived legitimacy) of that system. There is however, arguably an obligation to provide especially robust, clearly articulated justification for the imposition of a criminal offence when there is limited societal support for it.

¹⁷⁰ Jonathan Jackson, Ben Bradford et al, ‘Why do People Comply with the Law? Legitimacy and the Influence of Institutions,’ [2012] 52, 6(1) British Journal of Criminology 1051.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Andreas Stephan (2008) *supra* n.100.

¹⁷⁴ Tyler, ‘Why People Obey the Law,’ (Princeton University Press 1990) p.375.

The final limiting principle is that criminal laws should always be enforceable. This again is linked to the legitimacy of criminal sanctions and the criminal justice system as a whole and the desire to preserve the reputation of the criminal law. It is clear that the criminal cartel offence can indeed be enforced, although with what degree of success is arguably up for debate. Its enforceability problems however, are not solely to be laid at the feet of the offence itself. Nevertheless, the ‘communicative effort which punishment involves [should be made] even if we are certain that it will fail ... we owe it to the victim who has been wronged, and to the offender, as a moral agent and fellow citizen to make the effort.’¹⁷⁵ This implies that the criminal law is seeking to achieve something more than simple deterrence and that it has other roles in the fight to reduce crime.

When the criminalisation of cartel conduct is considered against each of these limiting principles, the first thing that is clear is that at the time of its creation, there was insufficient consideration of the appropriateness of a cartel sanction within the context of the criminal law. Most, if not all of the contemporaneous discussion focused upon the use of a criminal cartel sanction within the context of competition law. This has meant that little has been done to clearly articulate the criminal wrong of a cartel, or to elaborate upon what other crime reduction functions the criminal cartel offence could achieve. Deterrence cannot be the sole function of the offence as otherwise the position that it is a preferable enforcement tool over the competition disqualification order becomes more difficult to maintain. The competition disqualification orders are a highly effective deterrent and result in significantly less harm for those guilty individuals against whom they are used. They are however, only enforceable against a small class of culpable individuals and so there is an argument to be made that to focus enforcement action on such a small class of people would enable others of equal culpability to evade sanction. This argument however, is not without its faults. The current system of leniency allows for equally culpable defendants to evade sanction if it is to the benefit of the deterrent effect of the enforcement regime as a whole. Given that the enforcement of the criminal cartel offence is so inherently challenging, the position that the deterrent effect of the regime would be better served by focusing upon the use of competition disqualification orders, and thereby a limited class of culpable cartelists, is not without merit, as the lower

¹⁷⁵ Duff and Garland, ‘An Introduction’ in Duff and Garland (eds), *A Reader on Punishment* (Oxford University Press 1994), p.5.

evidential burden of the disqualification orders means that when enforced enthusiastically, more individual cartelists are likely to be subject to the orders. More frequent use of the orders would, according to deterrence theory, mitigate the effect of the less severe sanction on the creation of an impactful deterrence effect.

The preceding discussion considered what arguments may exist that would preclude the use of a criminal cartel offence but are not positive arguments in its favour. The positive justifications for the inclusion of a criminal sanction in the competition enforcement landscape can be divided into two broad categories, those that are forward looking or utilitarian, consequentialist justifications, and those that are backward looking, or retributive, non-consequentialist justifications. An exploration of these aspects of criminalisation and the theories of criminal punishment, may help to better understand the space that the section 188 offence occupies in the criminal policy sphere, as well as the competition enforcement sphere. It will also help to identify the various crime reduction functions that the criminal cartel offence could fulfil, functions that the contemporaneous debate on the criminalisation of individuals for participating in cartels failed to thoroughly engage with. This discussion also serves a more practical function; if the underlying theory for the section 188 offence can be clearly articulated it helps to provide a ‘critical standard’¹⁷⁶ against which the actual enforcement practices and legislative responses can be measured.

2.4. Justifications for Punishment and the Cartel Offence

The relationship between the criminal cartel offence and theories of punishment has become an increasingly prominent part of the academic literature on the cartel offence.¹⁷⁷ That was not always the case and indeed, at the time that the section 188 offence was first created it received very little attention at all. It is not the intention of this work to attempt to reshape that debate, but it is useful to articulate the main aspects of it in order to clarify the position that the criminal offence occupies in both the sphere of both criminal and competition policy. This is particularly true given the potentially radical change to the nature, and justifications for the offence that arguably occurred when dishonesty was removed, and not replaced, from the definition of criminal cartel conduct. An exploration of the theories that justify the imposition

¹⁷⁶ Nicola Lacey, ‘State Punishment’ (Routledge 1988).

¹⁷⁷ See for example, Peter Whelan, ‘The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges,’ (Oxford University Press: 2014).

of punishment will enable an assessment of that change to be made. In addition to that, it will be the first step to clearly delineating the link between the theories of criminal punishment, the goals of anti-cartel policy, and the enforcement tools ultimately used to achieve those goals. At the time of writing, there is no clear path from the theoretical foundations of criminal punishment to the theoretical foundations of the section 188 offence, or to the enforcement tools and choices of the CMA.

2.4.1. Theoretical Justifications for Criminal Punishment

Utilitarian theories of punishment are forward looking and consider the benefit that the imposition of a punishment, which is by its very nature an imposition of harm, can have in the future, for example, a reduction in crime. That could be achieved because the imposition of the punishment deterred others (and the punished) from committing crime in the future because the threat of that punishment scared them sufficiently to induce another, law abiding course of action. The punishment could also reduce crime in the future because it rehabilitated the offender, or if it involved a term of imprisonment for example, incapacitated them from committing further crime. The focus of this work will be upon the deterrent justification for the imposition of criminal punishments as that has been the dominant perspective in the literature to date. That is not to say that rehabilitation and incapacitation do not play a role in the reduction of cartel crime. Some academics have argued that rehabilitation is inappropriate in the antitrust context because they argue that it focused upon,

‘those recidivist individuals who, after being punished, are, by their very nature, still incapable of adhering to the law – [so] is of limited relevance when one is considering the punishment of rational and educated corporate decision-makers who are capable, one assumes, of learning from their mistakes.’¹⁷⁸

The implication being therefore, that rehabilitation is reserved only for those who are ‘powerless to choose not to violate the law’¹⁷⁹ because for example, of an addiction to drugs or alcohol.¹⁸⁰ Others have argued that,

¹⁷⁸ Ibid.

¹⁷⁹ Michael Vitiello, ‘Reconsidering Rehabilitation,’ (1990-1991) 65(5) Tul L Rev 1011, citing *Powel v Texas*, 392 U.S at 567 (Fortas J., dissenting).

¹⁸⁰ Ibid.

‘certainly no one would claim any rehabilitative effect from the imposition of criminal punishment on those pillars of the community who agree with their competitors to fix prices.’¹⁸¹

This view of rehabilitation however, is based upon its more modern incarnation; the ‘medical model.’¹⁸² Its roots nevertheless, predate this interpretation of the rehabilitative effects of punishment and are based upon a belief that ‘crime [is] a product of society, rather than a result of inherent sinfulness.’¹⁸³ It thereby placed an emphasis upon offering an offender ‘a chance at moral transformation.’¹⁸⁴ This view of rehabilitation, unlimited by the modern medical therapeutic definition, could arguably be in line with modern antitrust enforcement. The typical cartel member is one without a passion for criminal conduct in general and is usually someone who has demonstrated that in most aspects of their life that they have a normative commitment to obey the law. That normative commitment however, is not extended to the prohibitions of anti-cartel enforcement, within the corporate ‘society’ in which cartel agreements are reached. Punishment then becomes a way in which their moral judgment can be rehabilitated or transformed. In this context therefore, rehabilitation is almost synonymous with the moralising and educative function of the criminal law that is a critical element of the compliance literature.

Some academics have argued that incapacitation is an inappropriate justification for criminal punishment for cartel conduct because,

‘we do not wish to put cartelists (who, their cartel activity notwithstanding, are usually productive, law-abiding members of society) behind bars *merely* to prevent them from being physically able to cartelize again in the future.’¹⁸⁵

Whelan goes on to say that there are far less severe alternatives to imprisonment that would incapacitate reoffending, namely competition disqualification orders, but that they are to be considered inferior to criminal sanction because of their ability to create a general deterrent

¹⁸¹ Baker DI and Reeves BA, 'The Paper Label Sentences: Critiques.' (1977) 86(4) Yale LJ 619.

¹⁸² Ibid.

¹⁸³ Ibid. See G, McHugh, ‘Christian Faith and Criminal Justice’ (1978) 32-33.

¹⁸⁴ Ibid.

¹⁸⁵ Peter Whelan (2014) *supra* n.177, p.28.

effect.¹⁸⁶ This argument is in line with the earlier discussion of the principles that limit the scope of the criminal law to prohibit conduct and so, incapacitation in the narrow context of justifying criminal sanction is therefore, not appropriate, but that does not negate its role in the wider, crime reduction enforcement landscape.

The fourth justification for the imposition of criminal punishment is backward looking, and seeks to validate the use of the sanction because a wrong has been committed and that wrong deserves to be punished. This approach to criminal punishment is referred to as a retributive theory of criminal punishment, and together with deterrence, which is a utilitarian justification, are considered to be the most appropriate means by which criminal sanctions for cartel conduct can be advocated and it for this reason that the focus of this work will rest upon them.

2.4.2. Utilitarianism and the Cartel Offence

Utilitarian theories of criminal punishment can be traced back to Jeremy Bentham (1748 – 1832), although since its inception many variations of the original thesis have developed. Utilitarianism maintains that an action can be justified by the consequent utility that the action has. In terms of legal punishment therefore, it can be justified when the future consequence of the punishment has a greater utility than the harm of the punishment itself.¹⁸⁷ Utilitarian theories of punishment seek to ‘evaluate actions in terms of their propensity to maximise goodness’¹⁸⁸ and believe that the ultimate measure of morality is that of utility.¹⁸⁹ Bentham’s classical theory argues that an action that produces more good than the alternatives is the right action.¹⁹⁰ Bentham believed that mankind had been placed under the ‘two sovereign masters’¹⁹¹ of pleasure and pain, and that people had an innate tendency to seek out one and avoid the other.¹⁹² In the context of legal sanction, utilitarian theory argues that the primary function of the sanction, the infliction of harm, is outweighed by beneficial the consequence of that sanction.¹⁹³ That consequence is the deterrent effect that the public imposition of that harm

¹⁸⁶ Ibid.

¹⁸⁷ Jeremy Bentham, ‘An Introduction to the Principles of Morals and Legislation’ (W. Pickering 1823).

¹⁸⁸ Andrew Altman ‘Arguing about law: An introduction to legal philosophy’ (Wadsworth/Thomson, 2001) p.135.

¹⁸⁹ Ibid.

¹⁹⁰ Jeremy Bentham (1823) *supra* n.187.

¹⁹¹ Ibid, p.11.

¹⁹² Ibid, p.67.

¹⁹³ See Beccaria, ‘An essay on crimes and punishments,’ translated from the Italian; with a commentary, attributed to Mons. de Voltaire, translated from the French. (1767), p.31.

is said to create, which is capable of persuading others to obey the law in the future. This in turn will result in fewer crimes¹⁹⁴ in the future which is beneficial to the happiness of society.¹⁹⁵ This indirect consequence of the punishment is sufficiently utile that when balanced against the ‘primary mischief’¹⁹⁶ of the sanction, a net utility to society has been achieved. The ultimate aim of utilitarian theory therefore, is the overall reduction of pain or harm within society. That by definition, must include the pain suffered by the defendant as a result of the imposition of a punishment for wrongdoing. The sanction must therefore, ‘be employed only when the disutility of its imposition is less than the utility to society secured by its deterrent effect.’¹⁹⁷ The infliction of a punishment also serves to address any increased temptation to reoffend that may be induced by the successful commission of a crime.¹⁹⁸

The deterrent effect of punishment can be divided into two broad categories; special deterrence, which operates to prevent the subject of the punishment, from reoffending, and general deterrence which operates as a deterrent on the public in general.¹⁹⁹ In the anti-cartel enforcement landscape general deterrence is the primary motivating factor as it is felt that ‘(individual) recidivism following incarceration is considered to be “virtually non-existent” even if recidivism by the corporate body is acknowledged by EU antitrust enforcement policy and practice.’²⁰⁰

Gary Becker’s seminal work has introduced an economic perspective to the debate on utilitarian theory that has become influential in the discussions about the creation of deterrence in the anti-cartel enforcement space. In his work, the maximisation of wealth is the determinative standard by which the utility of an act is to be judged.²⁰¹ This economic approach to deterrence theory argues that individuals are rational and can be expected to act in their own,

¹⁹⁴ Walker, ‘Punishment, Danger and Stigma: The Morality of Criminal Justice,’ (Barnes & Nobel 1980).

¹⁹⁵ Jeremy Bentham, (1823) *supra* n.187, p.74.

¹⁹⁶ *Ibid*.

¹⁹⁷ Peter Whelan (2014) *supra* n. 177, p.28, quoting Calvani and Calvani, ‘Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?’ (2009) 17 *Competition and Consumer Law Journal* 119.

¹⁹⁸ Hugh LaFollette and Ingmar Persson, ‘The Blackwell Guide to Ethical Theory,’ (Blackwell Publishers Ltd: 2013) p.235.

¹⁹⁹ Johannes Andenaes, ‘Punishment and Deterrence’ (University of Michigan Press; 1974).

²⁰⁰ Peter Whelan, (2014) *supra* n.177, p.29.

²⁰¹ Gary Becker (1968) *supra* n.73.

welfare maximising interests.²⁰² If therefore, the ‘price’ of the punishment is greater than the gain of the prohibited action, a person will be deterred from breaking the law.²⁰³

Utilitarian theory is not without its critics, one of the most powerful of which is that it fails to address the fact that a wrongful conviction that produces the sought after general deterrence would still be justified by pure utilitarian theory.²⁰⁴ Although the harm of a criminal sanction suffered by an innocent person will be greater than the harm suffered by a guilty one, if the deterrent effect of the sanction is created, the net utility to society could still be achieved and therefore the imposition of the sanction would, in theory at least, be justified.²⁰⁵ The assumption of rational thinking crucial to the economic theory of deterrence articulated by Becker has been also been criticised for failing to ‘adequately reflect reality.’²⁰⁶ The strength of this criticism is arguably dependent upon the specific crime in question. In the example of the drug addict, rationality is likely to play a very limited role in the decision of whether or not to commit. In the context of the cartel offence however, a higher degree of rationality could reasonably be expected to be present in the decision of whether or not to collude illegally. The process of maintaining a cartel agreement also implies a high degree of rational consideration. Therefore, in the context of anti-cartel enforcement this particular criticism of economic deterrence theory is less powerful. A further criticism is based on the premise that the cost and the benefit of the commission of a crime can in practice, be adequately quantified so,

‘while economic theory can indeed be used to set the quantum of punishment, its application in a real world scenario, where the variables may not be determined accurately, can prove difficult if not impossible.’²⁰⁷

²⁰² Ibid.

²⁰³ For a criticisms of economic theories of behaviour see, Thaler and Sunstein who’s work contends that ‘people frequently behave in a way that economic theory finds difficult to predict.’ Richard H. Thaler and Cass R. Sunstein, ‘Nudge’ Improving Decisions about Health, Wealth, and Happiness’ (Penguin: 2009). Herbert Simon won a Nobel Prize in 1973 for his work which argued that, ‘people are unable to make economically optimal decision because they lack the capacity to store the voluminous information needed for such decision, as well as the cognitive ability to process it.’ Jeroen van der Heijden, ‘Behavioural insights and regulatory practice: A review of the international academic literature’ (2019). See also, Herbert Simon, ‘Administrative behavior. A study of decision-making processes in administrative organization’ (Free Press, New York: 1945); Mark Kusters and Jeroen Van der Heijden, ‘From Mechanism to Virtue: Evaluating Nudge Theory’ (2015) 21(3) Evaluation 276.

²⁰⁴ Hart, ‘The Concept of Law’ (Clarendon Law Series: 1961).

²⁰⁵ Von Hirsch, ‘Censure and Sanctions’ (Clarendon Press 1993), 152.

²⁰⁶ Peter Whelan (2014) *supra* n.177, p.36.

²⁰⁷ Ibid, p.35.

In respect of the cartel offence, calculating the benefit of committing the offence is in theory, more simple to ascertain that would be the case for a non-economic crime. However, the true calculation of the harm of a cartel is a complex process that requires a counterfactual against which the effect of the cartel can be judged. Further, the typical cartelist is likely to be a well remunerated individual of otherwise good standing. The impact of a prison sentence for a cartelist then is likely to be high, both economically and reputationally which, according to utilitarian theory, would mean that a less severe sentence would achieve the deterrence effect sought. This argument is further supported by the fact that the direct benefit of the cartel is not typically felt by the individual cartelists, but by the undertaking. Nevertheless, the criminal cartel offence provides for a term of imprisonment of up to 5 years. This is perhaps to mitigate for the exceptionally low enforcement of the criminal cartel offence, a variable that is considered in economic deterrence theory.²⁰⁸ This approach however, risks over enforcement in individual cases and disproportionate sentences for the purpose of manipulating the behaviour of other potential cartelists, which could undermine the legitimacy of the offence in the view of the wider public. To punish an individual in a manner that is disproportionate to the offence he committed just so that future potential harm could be perhaps avoided ignores the autonomy of the individual in question. Kant criticised this aspect of utilitarian theory when he said that punishment,

‘[c]an never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the grounds that he has committed a crime; for a human being may never be manipulated as a means to the purposes of some else...*He must first be found to be deserving of punishment before any consideration is given to the utility of his punishment for himself or for his fellow citizens.*²⁰⁹

The economic theory of deterrence has long been deployed to determine how to create a sufficient deterrent effect in anti-cartel enforcement. In respect of administrative fines levied against undertakings the question of calculating the benefit of the cartel agreement in order to determine the level of requisite fine is much simpler than the same calculation in respect of prison sentences for individual cartelists. The pursuit of deterrence in an administrative context

²⁰⁸ Gary Becker (1968) *supra* n.73.

²⁰⁹ Immanuel Kant, ‘The Metaphysical Elements of Justice,’ Translated by John Tadd (The Macmillan Publishing Company 1965) p.100 (original emphasis).

is also arguably less controversial as the liberty of individual people is not being leveraged to manipulate the possible future behaviour of others. Deterrence has dominated the criminal enforcement landscape however, despite the fact that the original inclusion of dishonesty alluded to a more moralistic approach to fighting cartel crime.

2.4.3. Retributivism and the Cartel Offence

Retributivism, which some regard as ‘the oldest theory of punishment’²¹⁰ finds its classical roots in Immanuel Kant’s, ‘The Metaphysical Elements of Justice.’²¹¹ Its central tenant is that justice can only be achieved when those who are guilty of doing wrong are punished. It is a backward, or non-consequentialist justification because the imposition of criminal punishment focuses on the wrongful act that has been committed and not any future benefit that may arise from that punishment, like, for example, the prevention of the further wrongful acts yet to be done. Punishment is deserved not because of the future benefit of that punishment, but because transgressing accepted standards deserves punishment, i.e. punishment is a wrongdoer’s just desserts. Punishment therefore, becomes a way to condemn unacceptable behaviour and to apportion blame for harm upon the guilty.²¹² Followers of retributivist thinking maintain that in focusing only upon each individual defendant and the punishment that they deserve, they are affording them a respect that utilitarians do not as utilitarian theory it is argued, uses them simply as a means to an end.²¹³

Modern retributive supporters have moved away from this classical justification of criminal punishment and recognise that there are other benefits of punishment than simply the punishment is deserved because it is deserved. The most prominent of those benefits are the removal of any ‘unjust advantage’ that a wrongdoer has obtained by his wrongdoing,²¹⁴ and the role of criminal sanctions are a communicator to society of the wrongfulness of an action.²¹⁵

The criminal cartel offence as originally drafted, appeared to embrace this approach to punishment. Cartelists were to be punished not simply in order to deter future illegal collusion,

²¹⁰ W. LaFave and A. Scott, ‘Handbook on Criminal Law’ (West Publishing Company: 1972), p.24.

²¹¹ Ibid.

²¹² K.E. Boxer, ‘Rethinking Responsibility,’ (Oxford University Press: 2013) p.107.

²¹³ Immanuel Kant, (1965) *supra* n.209, p.100.

²¹⁴ See for example, Sadurski, ‘Giving Punishment its Due,’ (Reidel, Dordrecht Netherlands: 1985)

²¹⁵ See for example, Von Hirsch, ‘Censure and Sanctions,’ (Clarendon Press: 1993).

but because to enter into a cartel was a dishonest and wrongful act, thereby deserving of punishment. The severity of the potential sanction, up to 5 years in prison, would ‘restore social balance’²¹⁶ and ‘neutralize an unfair advantage secured by non-compliant citizens in breach of the law.’²¹⁷ It would also serve to communicate to society the seriousness of the offence and arguably therefore, contribute to society’s normative commitment to obey the law in general, and that law in particular, reducing the need for the State to compel its citizens into obedience. This principle can be traced back to Plato who said that the purpose of punishment ‘is not to cancel the crime – what is once done can never be made undone – but to bring the criminal and all who witness it to complete renunciation of such criminality.’²¹⁸

The removal of dishonesty, without a moralising equivalent, could therefore be said to fundamentally change the philosophical justification for the imposition of criminal punishment for individuals who enter into illegal agreements. A retributive approach to the punishment of individual cartelists perceives justice as a value in and of itself, worthy of pursuing.²¹⁹ In contrast with deterrence theory, which requires that a constant flow of successful prosecutions be maintained in order for optimal deterrence to be achieved, a retributive approach to sanctioning requires only upon discovery, the guilty are punished. The amended cartel offence brings individual sanctions more closely in line with the majority of anti-cartel enforcement. In doing so however, it perhaps risks further undermining its perception as an effective deterrent, if the anticipated increased ease of prosecution (that was a driving force of dishonesty’s removal) does not materialise.

The retributive approach to criminal punishment is not without its criticisms. By failing to concern itself with the prevention of future crime for example, it is open to the criticism that a government that relies solely upon retributive approaches to criminal punishment, is failing in one of its fundamental functions of government, namely the protection of its people from harm. An approach to punishment based only on just desserts appears to ignore this ‘relatively

²¹⁶ Peter Whelan (2014) *supra* n.177, p.32. See also, Hampton, ‘A New Theory of Retribution,’ in R.G. Frey and C.W. Morris (eds) *Liability and Responsibility: Essays in Law and Morals*, (Cambridge University Press 1991), pp.377-414.

²¹⁷ *Ibid.*

²¹⁸ Plato, ‘Laws’ translated by Bury, R. (Harvard University Press 1926) pp. 187-192.

²¹⁹ *Ibid.*, p.34.

straightforward proposition that helping to prevent persons from mistreating others is an important and legitimate function of the state.²²⁰ It also appears to be blind to the fact that,

‘[t]he very form of criminal punishment strongly suggests a preventative design. When the state criminalises conduct, it issues a legal threat: such conduct is proscribed and violation will result in the imposition of specified penalties. This threat surely has *something* to do with inducing citizens to refrain from the proscribed conduct.’²²¹

2.5. Conclusions

It is important to try to understand the justification for creating a criminal cartel offence and thereby, permitting the use of criminal punishment upon individuals who engage in illegal collusion because ‘if we do not know why we punish, we cannot even begin to ask the question of whether punishment is morally justified.’²²² It is more, therefore, than an academic exercise; it helps to create a standard against which the practical function of enforcement and punishment can be judged. When the justification and therefore, aim, of the punishment is unclear the choice of appropriate enforcement tool also becomes unclear. In a complex regulatory space that has many interconnected features, this lack of clarity could arguably result in unexpected and unintended reactions between enforcement tools, and ultimately the wrong tools being used at the wrong time, to the overall detriment in the fight against cartel activity.

The original cartel offence appears to have attempted to utilise retributive theories of punishment whilst also pursuing utilitarian objectives. Instead of relying upon an argument rooted solely in the need for greater deterrence, perhaps because that need had not been adequately demonstrated, moralistic language became central to the discussion of why a criminal law response to cartels was required. This approach, given the novel nature of the cartel offence, had its benefits as it meant that a greater focus upon communicating the wrongfulness of hard-core agreements to people who, ordinarily it would appear, are persuaded to comply with the law and avoid engaging in illegal and wrongful activities. It did however, introduce entirely new policy considerations to competition law, arguably without the proper

²²⁰ Andreas von Hirsch and Andrew Ashford, ‘Proportionate Sentencing: Exploring Principles,’ (Oxford University Press 2005) p.14.

²²¹ Andreas von Hirsch, ‘Proportionality in the Philosophy of Punishment? From “Why Punish” to “How Much”’ (1990) Criminal Law Forum 259.

²²² Whitney Kaufman (2013) *supra* n 143, p.1.

consideration of how those considerations would sit amongst the rest of the anti-cartel enforcement toolkit, particularly the operation and perception of the leniency programme. Dishonesty's removal therefore, brought the criminal cartel offence in line with the remainder of the enforcement toolkit and in doing so, could have reduced the risk of difficult and unintended reactions between enforcement tools. Nevertheless, what has been created is an anti-cartel regulatory space that is too heavily weighted in favour of deterrence, and if the desired increased ease of prosecutions does not occur, the legitimacy of the offence may be further jeopardised. A purely deterrence focused approach to reducing cartel crime is less effective as a moral educator and so risks overlooking the various and nuanced ways in which people can be persuaded into obeying the law. This is particularly relevant in the sphere of crime committed in a corporate environment by individuals who appear to, in most aspects of their life, have some degree of normative commitment to legal obedience evidenced by their lack of criminal history.

A more nuanced approach to tackling cartels that seeks to incorporate some element of moral blameworthiness is arguably better suited therefore, to this conundrum; that cartelists appear to have a high degree of normative commitment to law obedience in most aspects of their life, that could perhaps, in the right circumstances, be extended to cartel crime. Further, despite the critical role that deterrence plays in justifying the inclusion of a criminal sanction in a previously administrative only regime, it seems clear that the concept of deterrence, and more importantly, how it is created in practice, has been underestimated by the Government as evidenced by the then, Secretary of State for Trade and Industry, Patricia Hewitt MP quoting the words of David Lenon when he said,

‘I do not believe that many business people will end up in jail as a result of the government’s proposal. But introducing a criminal sanction should provide a strong disincentive.’²²³

²²³ DTI (2002) *supra* n. 21.

Chapter 3: Cartel Crime Reduction: Understanding Deterrence and the Alternatives

3.1. Introduction

The previous chapter sought to understand the various theoretical justifications for imposing criminal sanctions upon individuals found to have engaged in hard core cartel agreements. In doing so it highlighted that there is a degree of disconnect between the theory underlying the criminal cartel offence and its practical enforcement, typified by the belief that the existence of the sanction alone is sufficient to achieve the desired goal. The primary justification articulated by the government when the sanctions were introduced, and again when it was amended, was the utilitarian goal of deterrence. Deterrence itself is not the end objective, it is a means by which the end could be achieved. The end of course, is a reduction in the number of cartels and thereby, a reduction in the harm that cartels inflict upon consumers, and the competitive process.

The analysis in Chapter 2 showed that deterrence is only one way in which criminal cartel sanctions could be justified, and the desired objective of obedience with the cartel laws could be achieved. It showed that when the original cartel offence was created, there was some intent to engage with retributivist theories of punishment which focus on punishing offenders rather than preventing future offences. A retributivist approach to enforcement, whilst not consequentialist in nature, can play a role in controlling, and reducing crime by helping to create the perception that cartels are serious and morally condemnable offences, something that will be considered in more detail later in the chapter.

This chapter aims to consider the deterrence theory in more detail and thereby, explore and address the disconnect that currently exists between theoretical deterrence and real world cartel deterrence. It will also explore alternative methods of crime control that the UK have been slow to fully engage with. The purpose of so doing is to establish whether a more holistic and inclusive response to cartels could benefit the regime, and its outcomes, as a whole.

Deterrence is the primary mechanism by which the reduction of cartels is to be achieved in the UK, indeed some have argued that is it ‘the only significant function of sanctions for cartel

activity,²²⁴ and yet when the criminal cartel offence was created, little time was taken to understand how the theoretical concept of a deterrent effect would be achieved in practice. Further, as articulated in the previous chapter, when the cartel offence was originally created, the inclusion of dishonesty as the substantive mens rea test indicated that deterrence was not the exclusive means by which cartel activity was to be tackled. Nevertheless, the almost exclusive focus on deterrence in practice has arguably meant that alternative methods of addressing the problem of cartels have not been adequately considered, a problem which has potentially been exacerbated by the removal of dishonesty as the substantive test for the offence.

This chapter seeks to explore how practical deterrence can be created in the context of the criminal cartel offence. This will provide a way of identifying any shortfalls in the current enforcement landscape. The chapter will then go on to consider alternative methods of crime control that could be utilized in order to enhance the anti-cartel enforcement space in the UK. Alternative methods of crime control are arguably an important element of a successful approach to cartel reduction because most people comply with the law voluntarily, without the need for coercive threats, and to ‘conceive the preventative effects of punishment as simply a matter of deterrence or intimidation is to miss more subtle points which are fundamental.’²²⁵ Some have argued that these more subtle points can be included in a generous definition of deterrence,²²⁶ whilst others maintain that they are ‘something quite different and independent of deterrence.’²²⁷ It is this latter position that this work takes because obeying the law because of some level of ‘unconscious control’²²⁸ without, perhaps, even being aware of the specific laws that are being obeyed, cannot be regarded as the same as refraining from breaking the law out of fear of a known sanction. Further, when government institutions intend for their enforcement choices to reduce crime in a utilitarian manner, they do so in the hope that they

²²⁴ Werden, ‘Sanctioning Cartel Activity: Let the Punishment Fit the Crime’ (2009) 5(1) European Competition Law Journal 19.

²²⁵ Gordon Hawkins, ‘Punishment and Deterrence: The Educative, Moralising and Habituated Effects’ (1969) 2 Wisconsin Law Review 550.

²²⁶ See for example William B. Bankston and James A. Cramer, ‘Toward a Macro-Sociological Interpretation of General Deterrence’ (1974) 12(3) Criminology 251; and Paul Tappan, ‘Crime, Justice and Correction’ (McGraw-Hill Book Company, New York: 1961).

²²⁷ Gordon Hawkins, ‘Punishment and Deterrence: The Educative, Moralizing and Habituated Effects’ (Wisconsin Law Review: 1969).

²²⁸ Ibid.

will prevent future crime in the narrow sense²²⁹ articulated above, and it is against this standard that specific crime control tools are judged.

3.2. Understanding Deterrence

Deterrence as a mechanism for controlling crime is popular across the globe. Indeed, Morris states that ‘every criminal law system in the world, except one, has deterrence as its primary and essential postulate.’²³⁰ In respect of competition law, some have argued that ‘effectiveness in the field of the fight against cartels is ultimately about deterrence’²³¹ so its relationship with the State’s duty to protect its citizens from harm cannot be ignored. Nevertheless, the theoretical capacity for deterrence to reduce undesired and prohibited conduct needs to be properly understood and utilised correctly if the desired goal is to be achieved in practice.

Deterrence in the context of this work adopts a narrow usage, derived from Cesare Beccaria’s, ‘On Crimes and Punishment’²³² which arguably provided the basis for Jeremy Bentham’s model of deterrence,²³³ which again, provided the basis for the more modern incarnation of deterrence theory as articulated by Nobel Prize Winner, Gary Becker in his seminal work, ‘Crime and Punishment: An Economic Approach.’²³⁴ That ‘narrow usage specifies that a person is deterred from doing something if he failed to act because he feared the extrinsic consequences of that action.’²³⁵ This definition therefore, excludes any intrinsic factors that may have produced a similar result, such as feelings of guilty or moral outrage.²³⁶

²²⁹ Deryck Beyleveld, ‘A Bibliography of General Deterrence’ (Saxon House: 1980) p.xvii.

²³⁰ Morris, ‘Impediments to Penal Reform’ (1966) University of Chicago Law Review 33. Greenland is the one exception where the traditional focus of the criminal code is on rehabilitation.

²³¹ Guersent, O., ‘The Fight Against Secret Horizontal Agreements in the EC Competition Policy’ in Hawk, B (ed) *Annual Proceedings of the Fordham Corporate Law Institute*, (Juris Publishing Inc: 2003).

²³² ‘Men are naturally avaricious and pursue their own self interest. A social contract, embodied in the law, represents a minimum self sacrifice of individuals in order to maximise their self-interest. Punishment is therefore needed to keep those in line who, for temporary gain, attempt to withdraw their part in the contract. This it does by introducing costs for illegal behaviour which outweigh the temporary gains. The sole rational purpose of punishment is to prevent the criminal from inflicting new injuries on citizens and to deter others from similar acts. The more severe and certain a punishment is, and the more rapidly it follows the commission of a crime, the more effective it is in achieving its purpose.’ Cesare Beccaria, ‘On Crimes and Punishments’ in Stanley E. Grupp (ed) *Theories of Punishment* (Indiana University Press 1971) p 117.

²³³ Jeremy Bentham (1823) supra n. 187.

²³⁴ Gary Becker (1968) supra n.73.

²³⁵ Deryck Beyleveld (1980) supra n. 212, p.xv.

²³⁶ Ibid.

The literature on deterrence in this narrow sense is vast and diverse, but much of it agrees that deterrence can be further divided into the two sub-categories of ‘general deterrence’ and ‘special deterrence.’ General deterrence aims to deter the ‘unsanctioned population’²³⁷ from committing the regulated crime, and specific deterrence aims to deter the already punished individual from reoffending.²³⁸ In a recent review of the literature, the CMA also highlighted the importance of incremental deterrence upon the enforcement landscape in the UK.²³⁹ Incremental deterrence refers to the additional deterrent effect of one enforcement tool as compared to another, or the marginal increase in the overall deterrent effect of the regime as a whole when a measure is added, amended or removed.

For the purposes of precision it is important to remember that ‘there are no deterrents, only measures which may be deterrents’²⁴⁰ This clarity is helpful because it recognises that the inclusion of an enforcement tool within a regulatory landscape is insufficient alone to achieve deterrence, the tool is merely a means by which, if implemented correctly and in the correct conditions, can create a deterrent effect capable of manipulating behaviour. The ‘correct implementation’ includes an offence which is clearly defined and capable of enforcement, with a sanction that outweighs the intended gain of the crime. The ‘right conditions’ include a general acceptance that the conduct is wrong, and the ability to communicate the enforcement actions and successes of the responsible authority. Each of these elements work together to turn the legislative threat of a sanction and turn it into a real world fear which dissuades people from breaking the law, even though they still wish to.

The threat of the sanction is the most obvious element required to create a deterrent effect but alone it is insufficient to create a credible deterrent effect for the purpose of reducing crime. The advantage of this approach to crime control is that it places much of the control in the hands of the State; choose a sufficiently severe sanction and citizens can be compelled into obeying the law, even when they do not want to. The belief is that people act in their own best interests and so can be manipulated through the use of rewards and punishments.²⁴¹ People who do follow this instrumentalist approach to decision making will base their decisions upon

²³⁷ Ibid, p. xxi.

²³⁸ Gordon Hawkins, ‘Deterrence: The Problematic Postulate’ (1969) 2(3) Australian and New Zealand Journal of Criminology 132.

²³⁹ CMA (2017) supra n.161.

²⁴⁰ Deryck Beyleveld (1980) supra n. 212, p.xix.

²⁴¹ Tyler, ‘Why People Obey the Law’ (Yale university Press 1990) p.3.

their own estimates of whether they will get caught and punished, and how this compares to the potential benefit to be derived from committed the proscribed act.²⁴² This view of crime control however, implies that if all people made the choice to obey the law in this way, the State would be in a constant state of compelling its citizens to comply with the law when their best interests would otherwise be best served by not obeying the law, and would only voluntarily comply when doing so was in their best interests anyway.²⁴³ Intuitively, this cannot be the case in practice as generally, people are not in a constant state of suppressing urges to break the law solely because they reasonably expect to get caught and fear the punishment if they do.

Nevertheless, in the context of crimes which are committed after a relatively rational consideration of the costs and the benefits, deterrence theory can arguably play an important role in altering the calculation of whether to commit a crime in favour of legal obedience instead. However, whilst *ignorantia legis neminem excusat*, ignorance of the law (or its sanctions) is the perfect excuse for not being deterred by it. Therefore, a ‘law-enforcement measure will only act as a deterrent in certain circumstances.’²⁴⁴ Those circumstances, as outlined in the literature, are:

1. Knowledge that the act is prohibited,
2. Fear that there is a genuine risk of being caught (certainty of detection),
3. Fear that there is a genuine risk of being successfully prosecuted (certainty of prosecution), and
4. Fear of the sanction, and a genuine belief that it will be imposed by the courts (sanction severity)²⁴⁵

This work will refer to these conditions as the ‘chain of deterrence’ with each condition being a link within that chain. For a deterrent effect to be created in practice, each link within the chain must operate sufficiently to allow the communication of the threatened sanction to operate a dissuasive force upon the deterrable potential criminal. It is important to define this

²⁴² Michael R. Geerken and Walter R. Gove, ‘Deterrence: Some Theoretical Considerations’ (1975) 9(3) Law & Society Review 497.

²⁴³ Tyler (1990) *supra* n.227, p.21.

²⁴⁴ Deryck Beyleveld (1980) *supra* n. 212, p.xxv.

²⁴⁵ See for example, Shlomo Giora Shoham, Ori Beck and Martin Kett, ‘International Handbook of Penology and Criminal Justice’ (CRC Press: 2007); Deryck Beyleveld (1980) *supra* n. 212.

class of people as the target of deterrent focus because although an individual knows of a criminal prohibition and would fear its associated sanction, his decision to obey the law may be totally independent of that knowledge and fear. 'He may have simply not wanted to commit the crime, he may not have had the opportunity, or the ability.'²⁴⁶ It cannot be said therefore, that he was deterred.²⁴⁷ Zimring and Hawkins articulated the targets of deterrent threats to be the 'marginal group', one of three categories of the population. The three categories consist of: the law-abiding – those who obey the law for moral or habitual reasons; the criminal group – those who will commit crime no matter what steps are taken to deter them; and the marginal group – those who could be persuaded to commit crime or not depending upon the circumstances.²⁴⁸

These categorisations are not unproblematic as they imply a staticness that is arguably not reflective of reality, for example, a member of the criminal group may be 'undeterrable' because he suffers from a drug or alcohol addiction, but if treated for that addiction and in remission, may in the future be deterred by the threat of more legal sanctions, or indeed may become a member of the law-abiding group.

Beyleveld focuses his criticism of this categorisation however, on the fact that it seeks to base the differences between each category upon 'differences between persons rather than upon differences between actions.'²⁴⁹ He argues that:

'deterribility is a direct function of types of actions ... and only indirectly a function of types of persons. In order to construct a typology what is required is to divide up explanations of compliance or non-compliance, group them, and then only secondarily apply them to persons. We should really speak of "marginal actions" ... Persons are only 'marginal' in so far as they contemplate crimes which can only be prevented by

²⁴⁶ Deryck Beyleveld (1980) *supra* n. 212, p.xxxii.

²⁴⁷ Jack P. Gibbs and Maynard L. Erickson, 'Capital Punishment and the Deterrence Doctrine' in Hugo Adam Bedau and Chester M. Pierce (eds) *Capital Punishment in the United States*, (AMS Press Inc, New York 1976) 299-313.

²⁴⁸ Franklin E. Zimring and Gordon J. Hawkins, 'Deterrence: The Legal Threat in Crime Control' (University of Chicago Press 1973); Franklin E. Zimring, 'Threat of Punishment as an Instrument of Crime Control' (1974) 118(3) *Proceedings of the American Philosophical Society* 231; Franklin E. Zimring, 'The Legal Threat as an Instrument of Social Change' (1983) 39(4) *Journal of Social Issues* 143; Franklin E. Zimring and Gordon Hawkins, 'Deterrence and Marginal Groups' (1968) 5(2) *Journal of Research in Crime and Delinquency* 100.

²⁴⁹ Deryck Beyleveld (1980) *supra* n.212, p.xxxii.

successful deterrence. Furthermore, a person can be marginal in relation to one crime but law abiding in relation to another...²⁵⁰

Therefore, even before considering whether a chain of deterrence has been created it is first necessary to determine whether the specific offence in question is a deterrible offence. Extrapolating from the discussion in the previous chapter, as deterrence is a utilitarian crime control method, a deterrible offence is one in which it is reasonable to assume that an instrumental decision making process is utilised when contemplating whether or not to obey the law. In practice therefore, the most deterrible offences are those which are calculated acts or are at least 'capable of calculation in terms of ... utility.'²⁵¹ Marginal acts are therefore more likely to be morally neutral as people are less likely to make an instrumental decision about whether or not to commit morally condemnable crimes.²⁵² Once it has been established that an act is capable of being deterred, the next step is to consider whether a chain of deterrence has been created.

3.2.1. Knowledge of Criminality

In order to be deterred against committing a specific crime a potential defendant must at the very least, be aware that the action is prohibited by the criminal law, and whenever possible, the severity of the sanction that can be imposed when prosecuted for that crime. In respect of certain crimes specific knowledge of the legislative sanction may not be necessary for law-abiding, or even marginal persons to be persuaded to obey the law. For example, in general a person does not have to have specific knowledge of the crime of rape to know that it is illegal, and it is very unlikely that such knowledge will be the determining factor in a rapist's decision of whether or not to commit the crime. Crimes in this category therefore, are not rightly regarded as instrumental or deterrible crimes.

In contrast, for a legislative sanction to operate as a deterrent for a marginal or deterrible act, the State must take steps to attempt to communicate the criminality of that act to those who may consider engaging in it. In the context of the criminal cartel offence, it is for this reason

²⁵⁰ Ibid, p.xxxii.

²⁵¹ Ibid, p.xxxiv.

²⁵² Johannes Andenaes, 'Deterrence and Specific Offences' (1971) 38(3) The University of Chicago Law Review; Johannes Andenaes, 'Does Punishment Deter Crime?' (1968) 11 The Criminal Law Quarterly 76.

that the CMA has an obligation to advocate for fair and effective competition and to publicise its enforcement actions. In a recent review of literature, the CMA highlighted that any enforcement action that it takes has a greater deterrent impact upon other firms in the same sector, in part because it increases the knowledge amongst other firms in that sector of the illegality of collusive conduct.²⁵³ Over time, as the number of enforcement actions increase, it should be expected that the degree of ignorance of the legal threats in place for cartel behaviour, will decrease.

Increased knowledge of the criminality of hard-core collusive agreements could also have a beneficial impact upon voluntary compliance rates. If, for example, there was a gradual increase in the number of cartelists being sent to jail, the moral neutrality with which some people appear to regard cartel conduct, may be altered in favour of a more moral blameworthy view, arguably thereby increasing the likelihood that those who have a degree of normative commitment to not commit morally condemnable crimes, include hard-core collusion within the scope of the crimes they will not commit.

3.2.2. Certainty of Detection

The probability of an act being detected is sometimes considered in the literature under the more expansive term, certainty of punishment.²⁵⁴ Certainty of punishment includes both the certainty of detection and the certainty of prosecution. In the context of this work however, it is appropriate to consider each element separately, and that is because of the specific challenges inherent to anti-cartel enforcement. The detection of cartels raises particular challenges, referred to as the ‘cartel problem,’²⁵⁵ that are not always relevant in the context of traditional crimes. The cartel problem is borne of the inherent secrecy of cartels combined with the fact that some of the typical detectable symptoms of collusive agreement, similar pricing amongst competitors for example, may just be examples of normal market conduct. The challenge that poses for investigators then is rather than having to determine whether an action was illegally rather than legally carried out, as for example in the case of rape, they must establish whether in fact the act was carried out at all.²⁵⁶ This is not a problem exclusive to cartel as ‘[e]nforcers

²⁵³ CMA (2017) supra n.161.

²⁵⁴ See for example Andrew Von Hirsch, ‘Criminal Deterrence and Sanction Severity: An analysis of recent research’. Institute of Criminology. Colloquium (Hart 1999)

²⁵⁵ Rodger and Angus McCulloch, supra n.7.

²⁵⁶ Ibid.

regularly face extreme difficulties in detecting errant behaviour when the regulated community is vast ... and where breaching rules is cheap and easily carried out in a clandestine manner.²⁵⁷

In order for a deterrent effect to be created there must be a belief that there is a realistic prospect of being detected for committing the crime. When considering morally neutral offences, the degree of certainty of detection is likely to play a crucial role in the level of deterrence created.²⁵⁸ In the case of parking violations for example, an offence that the majority of people would consider morally neutral, it is likely a proportion of those same people would take an instrumental approach to deciding whether or not to park in a prohibited manner. They would not, therefore, park illegally when the potential pleasure of parking more conveniently (but illegally) is outweighed by the risk of being caught and fined. If however, there is a genuinely held belief that they are very unlikely to be caught, because for example they will not be parked there for very long, they may be much more inclined to take the risk.²⁵⁹ External factors, such as the presence of a parking official, or if they have recently received a parking fine, are likely to alter the perception of the likelihood of their detection.²⁶⁰

As previously mentioned the detection of cartels, as with many financial crimes, could be regarded a weak link in the chain of deterrence. Any enforcement policy seeking to deter cartels must therefore take steps to address and mitigate that weakness. Attempts have been made to determine the detection rate of cartels, with some estimating the probability of detection in the EU to be around 13%²⁶¹ and others placing that probability between 15% and 20%.²⁶² In traditional competition law behavioural economics, the low detection rate of cartels has an important impact on the severity of the sanction deemed to be appropriate for creating deterrence. This is because utilitarian deterrence theory maintains that a low rate of detection can be offset by increasing the ultimate sanction as dissuasion will occur only when the benefit of the cartel rents is less or equal to the expected sanction.²⁶³ The expected sanction is the

²⁵⁷ Robert Baldwin, Martin Cave and Martin Lodge, 'Understanding regulation: theory, strategy, and practice,' (Oxford University Press on Demand: 2012) p.28.

²⁵⁸ Tyler (1990) *supra* n. 174.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ Emmanuel Combe, Constance Monnier and Renaud Legal, 'Cartels: The Probability of Getting Caught in the European Union' (2007) SSRN. Available at:

<https://ssrn.com/abstract=1015061> or <http://dx.doi.org/10.2139/ssrn.1015061>. Last accessed 2nd October 2018.

²⁶² Ormosi, 'A Tip of the Iceberg? The Probability of Catching Cartels' (2014) 29(4) *Journal of Applied Econometrics* 549.

²⁶³ Gary Becker (1968) *supra* n.73.

average sanction times the inverse probability of getting caught.²⁶⁴ The calculation is not so clear cut when criminal prohibitions and non-pecuniary sanctions are to be considered. If a purely instrumental approach was adopted for calculating the appropriate sentence, given the likely social standing and salary of a typical cartelists, very short periods of incarceration should be sufficient to induce a significant deterrent threat (the lost remuneration would be high and therefore the financial consequences would be high, together with the social shaming and stigma of a criminal conviction would be higher than compared, for example, to an unemployed repeat offender who commits a theft).

The inclusion of a leniency programme, whereby whistle-blowers can achieve immunity from or a reduction in fine from the competition authorities in exchange for otherwise unattainable information regarding a cartel, is the primary mechanism by which competition authorities have sought to tackle the cartel problem. It is considered by some to be critical to effective cartel detection and thereby deterrence.²⁶⁵ The resulting overall lower penalties²⁶⁶ is accepted as the inverse of the above proposition; higher detection rates require lower penalties for effective deterrence.

Credible detection rates are also reliant upon the knowledge and abilities of the competition authorities because ‘brilliant theory without skilful implementation’²⁶⁷ will never lead to optimal enforcement. An effective competition agency is dependent upon a number of factors, including sufficient budgetary allocation,²⁶⁸ adequate internal planning and strategy implementation, and most importantly of all ‘the capabilities of the managers and staff who implement the agency’s programmes.’²⁶⁹ The mix of knowledge and experience of the staff must reflect the needs of the agency and the policy mechanisms that they seek to implement. The inclusion of a criminal sanction therefore, requires the addition of staff with experience of

²⁶⁴ Emmanuel Combe, Constance Monnier and Renaud Legal, (2007) *supra* n. 247.

²⁶⁵ For discussion see: International Competition Network, ‘Trends and Developments in Cartel Enforcement,’ presented at the 9th Annual ICN Conference in Istanbul, April 20th 2010. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf>. Last accessed 2nd October 2018.

²⁶⁶ Caron Beaton-Wells, ‘Criminal Sanctions for Cartel Conduct: The Leniency Conundrum’ (2017) 13(1) *Journal of Competition Law and Economics* 125.

²⁶⁷ William Kovacic, Hugh Hollman and Patricia Grant, ‘How Does Your Competition Agency Measure Up?’ (2011) *European Competition Journal* 24.

²⁶⁸ The Government have increased the annual budget of the CMA to £23.6 million for 2018-2019 as the UK ‘prepares’ to leave the EU and the CMA contemplates taking on the additional competition law enforcement functions that will occur as a result. See Elizabeth Truss MP, ‘Spring Statement: Written statement – HCWS540’ 13th March 2018. Available at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-03-13/HCWS540>. Last accessed 2nd October 2018.

²⁶⁹ *Ibid*.

criminal investigations and prosecutions to a highly skilled staff of economists, lawyers and managers. An ongoing assessment of the needs of the agency is vital to its success, particularly when fundamental alterations are made to the mix of policy tools or to the scale of enforcement required. A successful agency therefore will typically be created ‘through a series of incremental improvements over time.’²⁷⁰

When the criminal cartel offence was originally added to the enforcement toolkit, there was arguably a failure to recruit enough suitably qualified personnel to oversee and implement the new function. This was likely a contributing factor to the failure of the prosecution of the British Airways Executives. Following the creation of the CMA however, this failure was addressed with, *inter alia*, the recruitment of their first in-house General Counsel and the creation of the Director of Criminal Enforcement position.²⁷¹ However, prior to the amalgamation of the CC and the OFT, the CC routinely scores an Elite 5 Star rating in the annual Global Competition Review enforcement rankings. The CMA however, received only a 4 star rating in the most recent review.²⁷² A senior member of the CC Legal Department had mused, prior to the amalgamation, that the joining of the two agencies may drag the effectiveness of the CC down rather than pull the OFT up,²⁷³ and there appears, at least by the GCR’s standards, to be some anecdotal evidence that that may have initially been the case.

3.2.3. Certainty of Prosecution

Certainty of prosecution, the second element of certainty of punishment, poses its own particular challenges. It refers to the likelihood that once an illegal act has been detected, a prosecution will be successfully carried out, resulting in the punishment of the criminal. In respect of the criminal cartel offence, the inherent secrecy of the agreements and the difficulty with which evidence of them is obtained, combined with the higher evidential burden and procedural protections for criminal cases, mean that the decision to prosecute is not a foregone

²⁷⁰ Kovacic et al (2011) *supra* n.253.

²⁷¹ Kate Beioley, ‘New competition regulator CMA creates three new cartel roles’ 9th October 2014, *The Lawyer*. Available at: <http://www.thelawyer.com/issues/online-october-2014/new-competition-regulator-cma-creates-three-new-cartel-roles/>. Last accessed June 2016.

²⁷² GCR, ‘United Kingdom’s Competition and Market Authority’. Available at: <https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144784/united-kingdoms-competition-and-markets-authority>.

²⁷³ Statements made to the author during the course of her employment at the Competition Commission in 2012.

conclusion.²⁷⁴ Additionally, in pre-2013 cartel cases where dishonesty is still at issue, it is unclear how a prosecution will fair when part of their case will be dependant upon the testimony of an equally culpable cartelists who, in order to obtain immunity from prosecution, has had to admit that they have acted dishonestly.

Immunity from prosecution is atypical in traditional criminal law offences in the UK and as a result there is little empirical information available as to how a British jury may receive the testimony of a culpable whistle-blower, particularly an admittedly dishonest one. Research conducted in Australia found that the support for immunity from prosecution for whistle blowers was low even when the information that they provided would likely have been otherwise uncovered by the authorities.²⁷⁵

The reality of the increased difficulties with which criminal prosecutions face in the context of anti-cartel enforcement, meant that in 2017/18, despite 10 civil enforcement cases being opened by the CMA against undertakings for engaging in hard-core collusion, there were no criminal enforcement cases opened against any of the individuals responsible for creating and implementing those hard-core agreements.²⁷⁶ Further, when the CMA has chosen to bring a case and it has been contested by the defendants, the CMA have not faired well.²⁷⁷ In 2015 they brought their first criminal case since the collapse of the trial against the British Airways executives. The case involved a cartel agreement between three competitors in the market for supplying galvanised steel tanks for water storage in the UK. A civil investigation of the cartel

²⁷⁴ The Crown Prosecution Service (the 'CPS') standard for determining whether a criminal prosecution should proceed can be divided into two limbs; the evidential stage and the public interest stage. In summary, there must be sufficient evidence of the crime to provide that there is a realistic prospect of conviction, and there must be sufficient evidence that the prosecution is required in the public interest. When cartelists are to be prosecuted by way of section 188, it is the CMA who have sole responsibility for bringing the case, not the CPS. Nevertheless, they apply the same Full Code Test when determining whether or not to criminally prosecute cartelists. See: CMA, 'Cartel Offence Prosecution Guidance' March 2014, CMA9, para. 3.1. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA_9_Cartel_Offence_Prosecution_Guidance.pdf. Last accessed 2nd October 2018.

²⁷⁵ Caron Beaton-Wells (2017) supra n.266.

²⁷⁶ CMA, 'Annual Report and Accounts 2017/18 (For the year ended 31st March 2018)' HC1112. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728268/CMA_Annual_Report_and_Accounts_2017_18.pdf. Last accessed 2nd October 2018.

²⁷⁷ In 2017, Barry Kenneth Cooper pleaded guilty under section 188 and was sentenced to 2 years imprisonment suspended for 2 years, and was disqualified from acting as a company director for 7 years for his part in a cartel for the supply of products in the construction industry. No other individuals involved with the cartel were prosecuted. See, CMA, 'Supply of precast concrete drainage products: criminal investigation,' 7 March 2016. Available at: <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>.

resulted in an infringement decision and a £2.5 million fine.²⁷⁸ The CMA brought criminal charges against three executives, one of whom, Peter Nigel Snee, pleaded guilty and was sentenced to 6 months imprisonment, suspended for 12 months, and 120 hours community service.²⁷⁹ The remaining two, Clive Dean and Nicholas Stringer however, contested the charges. Because the cartel agreement to fix prices, divide up customers and rig bids operated between 2005 and 2012, the CMA had to bring the criminal prosecution under the original cartel offence. Mr Dean and Mr Stringer therefore, maintained as their defence that they had not acted dishonestly. Counsel for their defence argued, *inter alia*, that they had not acted dishonestly because their agreements were implemented to save their businesses and thereby the jobs of their employees, not to increase their profits. At the material time, Ghosh dishonesty required that the conduct was dishonest by the standards of reasonable and honest people, and that the defendant realised that by that standard, his conduct would be considered dishonest. The jury took just two and a half hours to unanimously acquit both defendants.²⁸⁰

Cartelists who have been bold enough to contest prosecutions brought under the original cartel offence, so far have a 100% success rate.

3.2.4. Sanction Severity

The above discussion also serves to highlight that sanction severity can operate as an obstacle to optimal deterrence. Since the original cartel offence was created in 16 years ago, there have been only 5 criminal prosecutions brought by the OFT or the CMA.²⁸¹ Of those 5 cases only 3 resulted in convictions (2 by way of early guilty plea and 1 as a result of a plea deal with the Department of Justice). The UK courts, when unconstrained by the terms of an American plea

²⁷⁸ CMA, 'Supply of galvanised steel tanks for water storage: civil investigation,' 29 Jan 2016, CE/9691/12. Available at: <https://www.gov.uk/cma-cases/investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>.

²⁷⁹ CMA, 'Director sentences to 6 months for criminal cartel,' 14 Sept 2015. Available at: <https://www.gov.uk/government/news/director-sentenced-to-6-months-for-criminal-cartel>.

²⁸⁰ Norton Rose Fulbright, 'The galvanised steel tanks acquittal – the CMA loses on the day but proves its case for reforms,' July 2015. Available at: <http://www.nortonrosefulbright.com/knowledge/publications/130885/the-galvanised-steel-tanks-acquittals-the-cma-loses-on-the-day-but-proves-its-case-for-reforms>.

²⁸¹ The Marine Hose Cartel, the British Airways Executives, the Galvanised Steel Tanks Cartel (which has been counted as two cases for the purpose of this discussion because one defendant pleaded guilty whilst the remaining two cartel members contested the case and were found not guilty) and the Precast Concrete Products Cartel (where the defendant did not contest the case and pleaded guilty on the 21st March 2016. He received a 2 year prison sentence, suspended for 2 years and was disqualified from acting as a director for 7 years. See, CMA, 'Supply of precast concrete drainage products: criminal investigation' 15th March 2017, CE/9705/12. Available at: <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>.

deal, have shown that they are reluctant to condemn cartelists to spend time in jail. The two cartelists who pleaded guilty received suspended prison sentences and so in the absence of committing another crime (which seems unlikely given the otherwise law abiding nature of a typical cartelist) they will not spend a single day in jail.

Sanction severity plays an important role in the effective creation of a deterrent effect and it is ultimately the source of the fear that seeks to serve as a behaviour manipulator. The preceding links in the chain of deterrence are the means by which the threat is actualised, but the threat itself is the sanction. '[C]ultural values ... impose limits on'²⁸² the severity of a sanction in response to a crime. In some American states for example, capital punishment is still culturally acceptable for very serious crimes such as murder. In the UK however, the imposition of the death penalty for murder (or any other crime) is not culturally acceptable and so a cultural limit is placed upon the tolerated sanctioning power of the State. When discussions consider the severity of a sanction therefore, they must occur in light of the cultural and political context in which they exist.²⁸³

In Western nations that often means looking to the penal choices of other nations or for comparable offences to gauge the acceptable upper limit of a sanction. In the case of the criminal cartel offence the penal choices of the USA, Japan and Canada²⁸⁴ were considered, and insider dealing and obtaining property by deception were also considered as comparable offences. This, in part, led to the UK adopting a maximum sentence of a term of imprisonment of up to 5 years.²⁸⁵

Comparable offences and the penal choices of other nations should not however, be the totality of the discussion, as if crime reduction by way of deterrence is the primary objective being

²⁸² Franklin E Zimring, Gordon Hawkins and James Vorenberg, 'Deterrence: The Legal Threat in Crime Control' (The University of Chicago Press, 1973) p.14.

²⁸³ 'Were we living in [Beijing] [in the early part of the last] century when the authorities once exhibited the heads of drivers executed for exceeding the speed limit alongside signs indicating that limit (15mph), no doubt some of our scruples would seem weakly sentimental.' Griffiths, 'The Limits of Criminal Scholarship' (1970) 79 Yale Law Journal 1455.

²⁸⁴ At the material time the maximum sanctions for engaging in cartels were 3 years imprisonment in the USA, and 5 year imprisonment for both Japan and Canada. The maximum sanctions for insider dealing in the UK was 7 years, and obtaining property by deception was 10 years. See, DTI, 'Productivity and Enterprise: A World Class Competition Regime,' Cm 5233, July 2001. Available at:

<http://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/ccp/topics2/pdf2/cm5233.pdf>. Last accessed 9th October 2018.

²⁸⁵ Enterprise Act 2002, s 188

pursued, the sanction should be no more than is needed to create that deterrent effect.²⁸⁶ The cost of the sanction seeking to outweigh the benefit of the cartel, includes a variety of things. A term of imprisonment for example, will include the emotional cost of the loss of liberty, the psychological costs of shame and guilt, and the economic cost of lost employment.²⁸⁷ The cost to each offender will therefore vary depending upon their circumstances but in all cases '[t]he cost to each offender would be greater the longer the prison sentence since both forgone earnings and foregone consumption are positively related to the length of the sentences.'²⁸⁸ Given the circumstances of a typical carteliser therefore, even a short term of imprisonment is likely to carry a significant cost as they are likely to have earned a significant salary, the shame, guilty and emotional cost of a prison sentence for an educated, middle class, first time criminal. Further, it seems probable that there would also be an economic cost to society of prohibiting an otherwise intelligent and successful business person from working. In purely deterrence terms therefore, a term of 5 years in prison would arguably surpass what was required to outweigh the benefits of the cartel, particularly given that the benefits of a cartel are usually felt primarily by the undertaking and not the individual.

According to deterrence theory, when the certainty of detection is low this can be offset by an increase in the severity of the sanction.²⁸⁹ As was discussed above, the probability of detecting a cartel, even with the existence of the leniency programme, is relatively low. A term of imprisonment of up to 5 years should, according to the theory, mitigate somewhat for that low detection rate. However, with the courts showing a reluctance to actually send cartelists to jail, and with the Court of Appeal stating that it 'would have little, if any, knowledge of where to place [cartel] case[s] in the scale of seriousness'²⁹⁰ because at the time of the Whittle appeal, there was 'no sufficient body of case law ... to be able to make that assessment.'²⁹¹ Since then a further 2 defendants have been given suspended prison sentences by the courts, leading to a limited body of case law that indicated that prison terms are not the norm. So despite the detection rate being low, and the prosecution rate being even lower, the ultimate severity of the sanction is also relatively low, arguably calling into question the deterrent efficacy of criminal sanctions for cartelists in the UK.

²⁸⁶ Gary Becker (1968) *supra* n.73.

²⁸⁷ *Ibid.*

²⁸⁸ Michael K. Block and Robert C. Lind, 'An Economic Analysis of Crimes Punishable by Imprisonment' 4(2) (1974) *The Journal of Legal Studies* 479.

²⁸⁹ Gary Becker (1968) *supra* n.73.

²⁹⁰ *R v Whittle (Peter)* [2008] EWCA Crim 2560, per Lady Justice Hale at para. 13.

²⁹¹ *Ibid.*

Given that it is improbable that there will be a significant increase in the number of criminal prosecutions for engaging in cartels in the short to medium term, the challenge of ensuring that a credible sanction is imposed is unlikely to improve significantly in the absence of a set of sentencing guidelines²⁹² that advocate for terms of imprisonment that result in cartelists actually going to jail.²⁹³

3.2.5. Conclusions

A chain is only as strong as its weakest link. In the context of cartel criminalisation, the inherent nature of cartels makes detection a particular challenge, as well as prosecution particularly in the case of pre-2013 cartels where dishonesty must still be proven. The use of a leniency policy that encourages whistle-blowing is one mechanism that has been adopted to mitigate the challenges faced in detecting cartels. However, detection rates remain relatively low and this has the potential to degrade the chain of deterrence. This is arguably exacerbated by the low prosecutorial rates where when cartelists have been bold enough to fight a prosecution, so far they have done so with a success rate of 100%. According to deterrence theory however, these problems should be mitigated by the high sanction that is available for individuals who engage in cartels. However, in practice it would seem unlikely that successfully prosecuted cartelists will receive sentences anywhere close to the permitted maximum. The chain of deterrence therefore, risks further degradation by the sanctions that have in fact been imposed for those who have admitted their guilt.

Despite the fact that the severity of the sanction is the ultimate source of the deterrent fear, ‘the factors that make the most difference ... are the perceived likelihood of detection and enforcement, more than the objective severity of and subjective fearsomeness of the sanctions imposed.’²⁹⁴ Crime reduction objectives are more likely to be met if the certainty of

²⁹² The Sentencing Council was created by section 188 of the Coroner and Justice Act 2009. The guidelines they produce are a means to ‘promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary.’ See, Sentencing Council, ‘About Us’. Available at: <http://www.sentencingcouncil.org.uk/about-us/>. Last accessed July 2017.

²⁹³ Sentencing Guidelines provide for a range of sentences (s.121(4)) that vary in severity and enable the ultimate sentence to take various relevant factors (s.121(3)) into account and provide a starting point for sentencing (s.121(5)).

²⁹⁴ Caron Beaton-Wells and Christine Parker, ‘Justifying criminal sanctions for cartel conduct: a hard case’ (2013) 1(1) Journal of Antitrust Enforcement 198.

punishment is higher (which allows for a lower sanction, all other things being equal). An increase in detection rates is, to a large degree, the result of budgetary increases that enable greater recruitment of qualified investigators and prosecutors, as well as an increased enforcement. An increase in prosecution rates also brings with it an increase in costs. To a utilitarian, the increase in cost which would lead to an increase in detection, would also lead to an increase in the cost of the social harm caused by the cartelists' actions.²⁹⁵

The choice of investigative method and enforcement tool are critical therefore, and ensuring that the combined societal cost of the prohibited action is not too high, and the law enforcement response are proportionate.

It would seem therefore, applying the principals of deterrence theory the criminal cartel offence, with its low detection rate combined with its low punishment rate, has a long way to go to be considered truly effective as a mechanism of crime control in its own right. It does not exist in a vacuum however, and was introduced as an ancillary²⁹⁶ enforcement tool to the administrative sanctions that predated it. Its efficacy as a deterrent therefore, cannot be considered in isolation, and the CMA conclude that it has increased the deterrent effect of the overall anti-cartel enforcement regime in terms of cartel duration and overall harm.²⁹⁷ But that raises the question of whether the use of a sanction that has resulted in three individuals spending a significant time in jail, predominantly as a means to improve administrative enforcement of competition laws against undertakings is a breach of fundamental concepts of fairness and justice.²⁹⁸

3.3. Deterrence and the CMA

As the body responsible for the practical enforcement of the tools within the anti-cartel (and indeed competition law) legislative framework in the UK, the impact that their enforcement

²⁹⁵ Gary Becker, 'Crime and Punishment: An Economic Approach' in *The economic dimensions of crime* (Palgrave Macmillan, 1968) 13-68.

²⁹⁶ *IB v R* [2009] EWCA Crim 2575.

²⁹⁷ CMA (2017) *supra* n.161.

²⁹⁸ Further, whilst still a Member State of the EU, it also potentially muddies the relationship between the domestic enforcement of competition law and Regulation 1/2003.

choices and actions has cannot be underestimated. It is important therefore, to explore the CMA's approach to deterrence and their understanding of how it can be achieved in practice.

In 2017 the CMA published their review of the literature on the deterrent effect of the work carried out by competition authorities.²⁹⁹ It is the most extensive CMA publication to date on deterrence, and gives an in-depth review of much of the available literature about cartel and merger deterrence. Of particular interest to this work is the discussion about the challenges that exist in assessing deterrent effects of enforcement tools and practices, particularly the fact that 'few studies attempt to distinguish between the total deterrent effect of particular tools and policies ... and the incremental effect of increased enforcement activities.'³⁰⁰ Additionally, the paper highlights that the literature fails to thoroughly address the question of 'which type of interventions lead to greater levels of deterrence.'³⁰¹ The document clearly states what deterrence means in the context of cartels which they articulate as the impact that the regime and the actions taken by competition authorities have in 'preventing or reducing the severity of anticompetitive actions in contemplation or operation.'³⁰² The CMA highlighted that there is a particular challenge in assessing deterrence 'related to the interactions between different competition policy tools'³⁰³ as some studies have demonstrated that there is a degree of interdependency between different areas of competition law enforcement, for example, anti-cartel enforcement and merger control.³⁰⁴ The nature of the interactions between anti-cartel enforcement and merger control are beyond the scope of this work, but are mentioned to again highlight the highly complex and inter-related nature of competition law enforcement as a whole, as reflected in the challenges of anti-cartel enforcement in particular.

The CMA also acknowledges that a better understanding of the interdependencies that exist between the various elements of deterrence could help to give a more thorough understanding

²⁹⁹ CMA (2017) supra n. 161.

³⁰⁰ Ibid, at para. 1.9(c).

³⁰¹ Ibid, at para. 1.9(d).

³⁰² Ibid, at para. 3.2.

³⁰³ Ibid, at para. 3.24.

³⁰⁴ For discussion see, Andrea Cosnita-Langlais and Jean-Phillippe Tropeano, 'Fight Cartels or Control Mergers? On the Optimal Allocation of Enforcement Efforts within Competition Policy,' 3(C) (2014) *International Review of Law and Economics* 34; George Bittlingmayer, 'Did Antitrust Policy Cause the Great Merger Wave?' 28(1) (1985) *Journal of Law and Economics* 77; S. W. Davies, Peter L. Ormosi and Martin Graffenberger, 'Mergers after Cartels: How Markets React to Cartel Breakdown' (2015) Available at SSRN: SSRN: <https://ssrn.com/abstract=2383534> or <http://dx.doi.org/10.2139/ssrn.2383534>; Kai Hüscherlath and Florian Smuda, 'Do Cartel Breakdowns Induce Mergers? Evidence from EC Cartel Cases' (2013) ZEW Centre for European Economic Research Discussion Paper No. 36. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278874.

of deterrence as a crime control mechanism for anti-cartel enforcement.³⁰⁵ In summarising their review of the literature they state that,

‘most papers suggest that cartel enforcement deters anticompetitive activity and that this deterrence is reflected in the formation, stability and duration of cartels as well as the overcharge associated with cartels that form.’³⁰⁶

As each of these aspects of cartels are explored (formation, stability, duration, and harm) the impact of regime existence, regime characteristics, and a leniency programme, and their impact upon cartel-specific deterrence are considered. In the section, ‘Optimising Deterrence,’³⁰⁷ the deterrent impact of financial penalties are compared against the impact of the threat of imprisonment has in terms of achieving a deterrent effect. In this same way, private and public enforcement methods are compared. The ultimate conclusions that the CMA makes are that, inter alia, director disqualification orders are an underused resource capable of creating a powerful deterrent effect, and that private enforcement plays a more important role in deterring cartelists than had previously been thought³⁰⁸ highlighting the fact that a more diverse enforcement approach could improve the capacity of the anti-cartel regime to deter. In respect of CDOs for example, the purpose of which are to protect the public from unfit directors, and not deterrence. However, the CMA found that in one study, competition lawyers and companies identified CDOs as ‘ranked second only to criminal penalties.’³⁰⁹ This again highlights that whilst an enforcement tool may be used in pursuit of a primary objective, an attempt should be made to understand any potential secondary, and in some cases tertiary objectives that could be met through its use.

The importance placed upon the leniency programme to the deterrent goals of the regime by the CMA is clear from the report, which states that it plays a pivotal role in reducing cartel overcharge as well as impacting upon cartel formation.³¹⁰ The literature on the effect of a

³⁰⁵ CMA (2017) supra n.161, para. 7.11.

³⁰⁶ Ibid, at para. 4.3. They go on to highlight that a ‘small number of papers show no, or even a negative effect of enforcement. However, some of these papers have some methodological limitations.’

³⁰⁷ Ibid, at para. 4.84 – 4.94.

³⁰⁸ Ibid, at para. 4.93.

³⁰⁹ CMA (2017) supra n. 161, para. 4.89, referring to Deloitte, ‘The deterrent effect of competition enforcement by the OFT: a report for the OFT’ (2007) OFT962, at p.72. Available at:

http://webarchive.nationalarchives.gov.uk/20140402181127/http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft962.pdf. Last accessed June 2017.

³¹⁰ CMA (2017) supra n.161.

leniency programme on the stability of cartels however, shows the empirical evidence to be more mixed,³¹¹ with some papers even concluding that cartel stability is in fact improved in jurisdictions where there is a leniency programme.³¹² This is arguably corroborated by the finding that ‘it is common for leniency applicants to apply only months or years after the cartel has collapsed.’³¹³ The practical reality of this therefore, is that in cases where leniency applications are made when the cartel has already collapsed, or is close to it, the applicant has already benefitted from the cartel and will not be subject to a fine that could disgorge them of their illicit cartel rents. The individuals responsible will likely not be criminally punished or subject to CDOs (depending upon the type of leniency obtained). The cartel therefore, was not deterred, will not be fined, and the directors will not be incapacitated from further wrongdoing. The only available consequence would be the compensation of the cartel’s victims, but typically, information gained by way of a leniency application will not be made available for the purpose of a third party claim for damages. To a utilitarian, this outcome is acceptable when the overall benefit is outweighed by the social cost of allowing a culpable cartel participant to escape censure and retain cartel rents. That benefit naturally includes the future deterrence of other undertakings. The CMA claims that despite not being deterred overall, the cartel will likely have caused less harm because of the existence of the leniency programme and anti-cartel enforcement, meaning in part, that the cartel rents the immunised cartel is able to retain are lower than they otherwise would be, and the harm to the consumer is reduced. The harmful impact upon the competitive process however, is harder to mitigate as the mechanisms for subverting the competitive process will have still been successful, despite the overall harm being reduced.

The CMA review of literature is the first comprehensive document that they have compiled attempting to understand and articulate the deterrent effect of their work. They acknowledge some of the shortfalls of the review such as the difficulty of proving deterrence empirically:

‘it requires making inferences about infringements ... that never take place and the impact of [CMA] activities on the number of these ‘latent’ infringements ... In addition, the relationship between the observed (direct) impact and deterrent effect of

³¹¹ Ibid, at para. 4.73.

³¹² Caron Beaton-Wells and Christine Parker, ‘Justifying criminal sanctions for cartel conduct: a hard case’ (2013) 1(1) *Journal of Antitrust Enforcement* 198

³¹³ CMA (2017) *supra* n.161, para. 4.75.

competition authorities' work is not obvious: an authority may have a relatively low case load because it is not very good at detecting breaches of the law, or because it has deterred breaches of the law so effectively that not many remain to be investigated.³¹⁴

And the fact that 'individual aspects of enforcement are often considered independently' resulting in a lack of understanding as to 'the trade-off between different measures. For example, does increasing the enforcement rate improve deterrence at the same rate when penalties are high and when they are low?'³¹⁵ However, there is no critique at all of deterrence as an enforcement objective which, given its total dominance in the regulatory space of anti-cartel enforcement, is arguably short-sighted. It means that assumptions made in deterrence theory that individuals and, indeed, undertakings always act in a rational way and therefore can be deterred in the same rational way are accepted without question.

Deterrence is a means by which cartel crime is hopefully reduced. Deterrence itself is not the goal. Whelan argues that one of the reasons that the European approach to dealing with cartels is deficient is because there is a 'failure to subject cartels behaviour to adequate condemnation.'³¹⁶ Whilst he makes this argument in the context of the 'instrumental purpose of deterrence', it is an equally valuable criticism in respect of the wider crime reduction goals of the regime. This is again reflected in the lack of engagement with the multiple objectives that enforcement tools can pursue, and little understanding of how they may work together to enhance the overall impact of the regime.

3.4. Alternative Methods of Crime Control: The Educative and Moralising Effect

Deterrence theory is predicated upon the assumption that external influences applied by the State can be used to manipulate the behaviour of citizens, in a fairly formulaic way. It places the State in a constant state of having to compel people to obey the law using the legislative and enforcement mechanisms available to it, and so it a relatively costly way of ensuring legal obedience.³¹⁷ It is far too simplistic, and not at all accurate to argue that people obey the law

³¹⁴ CMA (2017) supra n.161, at para. 1.5.

³¹⁵ Ibid, para. 7.11.

³¹⁶ Peter Whelan, 'The Criminalization of European Cartel Enforcement' (Oxford University Press: 2014) p.45.

³¹⁷ Tyler, (1990) supra n.174, p.2.

simply because of they fear the legal consequences if they do not. Deterrence theory therefore, is arguably relevant only to those individuals who have adopted an instrumental approach to the question of legal obedience. Even Jeremy Bentham recognised that ‘other tutelary motives such as benevolence, religion and honour’³¹⁸ play a vital role in the decision, whether conscious or not, to obey the law. Those other motives are internalised factors that influence an individual’s decision to act in accordance with accepted societal legal rules and standards. Those internalised factors amount to a normative commitment to legal obedience based upon what is regarded as morally appropriate.³¹⁹ Compliance in this context is not therefore, reliant upon the fear of a particular punishment, but is motivated by those intrinsic factors.³²⁰ In order for those factors to operate in an influencing way, the norms must first become internalised. The following section considers various ways in which the process of internalisation of societal standards to a sufficient degree to result in compliance, rather than compulsion.

The imposition of punishment can ‘play an important part in the socialization process as a teacher of right and wrong’³²¹ because the fact that some behaviour results in punishment, and some does not, helps to educate society as to what behaviour is good or bad. Witnessing transgressors receive unpleasant consequences for engaging in proscribed conduct reinforces the message to society and helps the process of internalisation of that lesson. This then works to influence legal obedience when there is a degree of normative commitment to do what is considered ‘right’. Punishment in this context also becomes a barometer of how wrong the activity is;³²² the more severe the punishment, the more abhorrent the behaviour is by socially accepted standards. This is the ‘educative-moralising function of the law.’³²³ Punishment is a tool that can be used to express disapproval and this ‘helps to form and strengthen the public’s moral code and thereby creates conscious and unconscious inhibitions against committing crimes.’³²⁴ The intrinsic desire to obey the law occurs as a result of a moral education which is in part, learned by witnessing how people are treated when they break the law.³²⁵

³¹⁸ Jeremy Bentham (1823) *supra* n. 187, p.399.

³¹⁹ Tyler (1990) *supra* n.174, p.4.

³²⁰ *Ibid.*

³²¹ Zimring and Hawkins, ‘Deterrence: The Legal Threat in Crime Control’ (University of Chicago Press, 1973).

³²² *Ibid.*

³²³ Tappan, ‘Crime, Justice and Correction’ in Zimring and Hawkins (eds) *Deterrence: The Legal Threat in Crime Control*, *supra* n.320.

³²⁴ Johannes Andenaes, ‘General Prevention – Illusion or Reality’ (1952) *Journal of Criminal Law* 43.

³²⁵ *Ibid.*

In this context the process of a trial and the infliction of punishment become a mechanism by which societal disapproval is communicated, followed by stigmatization and loss of social status.³²⁶ The moral education that occurs as a result is useful for both forming and strengthening the public's moral code.³²⁷ It can also work in the reverse, and when a shift in societal attitudes means that behaviours are no longer considered morally wrong, the decriminalisation of those behaviours can serve to act as an educator to any parts of the community that are yet to catch up. An example would be the decriminalisation of homosexuality in the UK, which first occurred by virtue of the Sexual Offences Act 1967. This began to pave the way for the gradual improvements in the legal rights and equal treatment of the homosexual community that eventually led to the right for homosexual couple to legally marry in the UK.³²⁸ A further example is the recent referendum in the Republic of Ireland on the legalisation of abortion. Prior to the referendum, abortion in Ireland was only legal when a woman's life was at risk, but not when the pregnancy was as a result of rape or incest, or when there was a foetal abnormality.³²⁹ In practice, the laws in Ireland effectively banned legal abortion. This had led to on average, nine women a day travelling to the UK to obtain a legal and safe, but privately funded abortion,³³⁰ meaning that the option was only available to those who could afford it, and often leaving women to face the procedure alone and in a foreign country.³³¹ Perhaps most crucially of all, the Eighth Amendment denied the women of Ireland dominion over their own bodies. The Irish people voted overwhelmingly in favour of repealing the Eighth,³³² which was reflective of a larger change in Irish society away from traditionally conservative Catholic views, to more liberal and modern approach to human rights. The Prime Minister of Ireland, Leo Varadkar stated that the result was 'a culmination of a quiet revolution that's been taking in place in Ireland for the past 10 or 20 years.'³³³

³²⁶ Zimring and Hawkins (1973) supra n. 320, p.79.

³²⁷ Ibid.

³²⁸ Marriage (Same Sex Couples) Act 2013.

³²⁹ Eighth Amendment of the Constitution Act 1983, Part II, which states, 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.' Available at: <http://www.irishstatutebook.ie/eli/1983/ca/8/enacted/en/print>. Last accessed 28th October 2018.

³³⁰ Ashley Kirk, 'Nine a day: The women who have to travel for abortions as Ireland prepare for referendum,' 24 May 2018, The Telegraph. Available at: <https://www.telegraph.co.uk/news/2018/05/24/nine-day-women-have-travel-abortion-ireland-prepares-referendum/>. Last accessed 28th October 2018.

³³¹ Ibid.

³³² The result of the referendum was 66.4% in favour of repealing the Eighth Amendment, with a voter turn out of 64.51%, and to allow abortion in the first 12 weeks of pregnancy, and between 12 and 24 weeks in exceptional circumstances.

³³³ BBC News, 'Timeline: Ireland and abortion' 26th May 2018, The BBC. Available at: <https://www.bbc.com/news/world-europe-43962738>. Last accessed 28th October 2018.

One of the primary criticisms of punishment as a moral educator is that there is ‘little evidence to support the idea that morality is best taught by fear of legal punishment.’³³⁴ The fear of legal punishment is not the sole educator in this context however. It is the fact of criminalisation that seeks to educate as to the wrong worthiness of the conduct, reinforced by the process of prosecuting and convicting perpetrators. The punishment, as previously mentioned, serves as a gauge for the degree of condemnation and stigmatization that should be associated with the commission of the prohibited act.

In the 1953 Report of the Royal Commission on Capital Punishment it was stated that it was,

‘reasonable to suppose that the deterrent force of ... punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder *but also by building up in the community over a long period of time, a deep feeling of perculiar abhorrence for the crime of murder...* This widely diffused effect on the moral consciousness of society is impossible to assess but it must be at least as important as the direct part which [a] penalty may play as a deterrent in the calculation of potential murderers.’³³⁵ (emphasis added)

This highlights the fact that often the moralising impact of punishment is built up over time but that its role in securing obedience to the law is arguably as important as the role played by deterrence. This educative aspect is particularly important when there are ‘substantial movements up and down the scale of agency responses being contemplated.’³³⁶ Alterations in punishment such as this not only impact the level of deterrent effect of the prohibition but educate people that the behaviour is morally condemnable. For those who have a weaker commitment to obey the law in general, and who may be inclined to commit crimes that they regard as ‘not that bad’ if it is in their interests to do so, a review of punishment that leads to a significant increase in severity may lead them to conclude that the conduct is in fact ‘too serious’ of a crime and may cause him to turn away from it.³³⁷ In this context the punishment becomes an ‘eye-opener’³³⁸ and serves as an attention focusing mechanism.³³⁹ Further, the:

³³⁴ H.L.A. Hart, ‘Law, Liberty and Morality’ (Stanford University Press, 1963) p.58.

³³⁵ 1949-1953 (1953) Cmd 8921, 59.

³³⁶ Zimring and Hawkins (1973) supra n.320, p.90.

³³⁷ Ibid.

³³⁸ Johannes Andenaes, ‘Some Further Reflections on General Prevention’ (1968) Working Paper, Centre for Studies in Criminal Justice.

³³⁹ Zimring and Hawkins (1973) supra n. 320, p.83.

‘informal system of control, whereby close relationships ... influence you towards acting in such a way as to meet the normative expectations of the group, has long been considered to be the foundation of social order.’³⁴⁰

In the context of corporate crime the organisation therefore, plays an important role in an individual’s normative commitment to obey the law as the ‘cultural environment of a firm is closely linked to firm-level patterns of non-compliance.’³⁴¹ An individual’s assessment of the moral wrong worthiness of conduct therefore, can be influenced not only by the known sanction for engaging in such conduct, but also the prevailing attitudes of the environment in which they work. For example,

‘In companies that care less about [ethical conduct], ethically inclined managers may be ordered to engage in misconduct or encouraged to do so by superiors who turn a blind eye to how a goal is accomplished.’³⁴²

Over time, this can ‘lead to norm erosion and in the extreme, an organizational culture that supports illegitimate but expedient practices.’³⁴³ So once ‘a system of socialization is in place, persons learn the range of expectations of primary group members and comport their behaviour accordingly.’³⁴⁴ Indeed, in the recent and very well-publicised trial of Tom Hayes for his engagement in the manipulation of the LIBOR rate, he testified that the practice of such manipulation was ‘industry wide.’ He states that,

‘I acted with complete transparency to my employers. My managers knew, my manager’s manager knew. In some cases the CEP was aware of it. ... It was so endemic within the bank [at UBS], I just thought ... this can’t be a big issue because everybody knows about it.’³⁴⁵

³⁴⁰ Cass R. Sunstein, ‘Why Nudge? The Politics of Libertarian Paternalism’ (Yale University Press: 2014) p.195.

³⁴¹ Sally S. Simpson and Nicole Leeper Piquero, ‘Low Self-Control, Organizational Theory and Corporate Crime’ (2002) 36 Law & Society Review 509.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Cass R. Sunstein (2014) *supra* n. 339.

³⁴⁵ Erika Kelton, ‘Everybody Does it: Convicted UBS Libor “Ringmaster” Tells It Like It Is On Wall Street’ 7th August 2015, Forbes. Quoting Tom Hayes. Available at:

In an interview following his release from prison, Bryan Allison, one of the Marine Hose Cartel participants still felt that because the ‘majority of people causing cartels are usually doing it not for personal gain but for their business’³⁴⁶ he still does not ‘view it as dishonest.’³⁴⁷ He goes on to explain that he believes that people cartelise ‘because it’s expected of them, because they’ve always done it’³⁴⁸ and makes reference to conversations that he had with his cartel predecessors when he returned to the UK. All of this is indicative of the business culture in which he was operating and the influence it had upon him. Allison explains that he knew that cartelising was prohibited and that he was aware of the introduction of a criminal sanction for individuals who engage in cartels in the UK and the USA, but that nevertheless, he did not think that they would be discovered because ‘we [were] not involved with consumers, who [were] we hurting?’³⁴⁹

Whilst the views of Allison are anecdotal, they provide a view of the moral blameworthiness, or indeed lack of it, of cartel agreements from the perspective of a carteliser. The existence of the criminal offence in the USA and the creation of a criminal offence in the UK did little to educate him that what he was doing was far from morally neutral and was in fact a serious crime, in part because he was of the opinion that they were not directly harming consumers.³⁵⁰ It could potentially be the case therefore, that an organisational environment of unethical conduct can undermine the educative function of the law, and that whilst he has been educated by his own personal experience it is clear that the punishment of previous cartelists played no role in that education.

If the law is to have an educative and moralising impact it arguably must be reinforced by a culture of firm level true compliance as,

<https://www.forbes.com/sites/erikakelton/2015/08/07/everybody-does-it-convicted-ubs-libor-ringmaster-tells-it-like-it-is-on-wall-street/#5c50309234b5>. Last accessed 7th November 2018.

³⁴⁶ Michael O’Kane, ‘Does prison work for cartelists? – The view from behind bars: An Interview of Bryan Allison by Michael O’Kane’ (2011) 56(2) The Antitrust Bulletin 483. Allison seemed to find the idea of ‘grassing people up’ as more ‘unethical’ than the cartel itself.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ He also attributes his blasé attitude to the fact that he was an ‘at arms length’ participator in the cartel thanks to the part played by Peter Whittle as cartel coordinator. Michael O’Kane (2011) *supra* n.345.

‘[t]heorists uniformly hold that structures, processes and tasks are opportunity structures for misconduct because they provide (a) normative support for misconduct, (b) the means for carrying out violations, and (c) concealment that minimizes detection and sanctioning.’³⁵¹

If an environment of normative support for misconduct is created it is arguably unlikely that the enforcement actions of the relevant authorities will have an appreciable effect, either as an educator or moraliser, or indeed as a deterrent on individual (potential or actual) cartelists. The moralising and educative function performed by enforcement therefore, must permeate the organisation and effect those responsible for driving the direction of the firm. To focus on individual members of the cartel whilst neglecting the overriding context of the organisational environment ignores the fact that whilst some degree of self-interest will play a role in the decision to cartelise,³⁵² crime committed in the context of a corporation is ‘not reducible to individuals and their characteristics because the individual and the organization are symbiotic.’³⁵³

3.5. Conclusions

There is a naturally strong incentive for businesses to engage in collusion agreements and there is a statistically low chance of them being caught for doing so. The moral neutrality with which it appears many people view cartel agreements, together with a relatively simple cost benefit analysis that can be conducted in relation to collusion, means that conditions are right for an instrumentalist decision making process to be adopted by those in a position to create and engage in cartel crime. Prima facie, it would appear, therefore that an enforcement policy that seeks to exploit this cost benefit analysis and alter the calculations in favour of legal obedience would be an obvious choice. However, given the nature of cartels and the particular challenges that competition authorities face in protecting consumers and the competitive process from the harm that they cause, mean that an enforcement policy that is heavily reliant upon successfully navigating those specific challenges, will always difficult to execute. With a low rate of detection and prosecution, together with the likely low sanction means that, according to

³⁵¹ Diane Vaughan, ‘The dark side of organizations: Mistake, misconduct, and disaster’ (1999) 25(1) Annual Review of Sociology 271, 289.

³⁵² Sally S. Simpson and Nicole Leeper Piquero, *supra* n. 340.

³⁵³ *Ibid.* See also H. N. Pontell, K. Calavita and R. Tillman, ‘Corporate Crime and Criminal Justice System Capacity: Government Response to Financial Institution Fraud’ (1994) 11(3) Justice Quarterly 383.

deterrence theory, when viewed on its own merits the criminal cartel offence appears unlikely to be able to create a credible deterrent effect in practice. The effect that it has on other aspects of the anti-cartel regulatory space is also difficult to determine, it being empirically difficult to establish whether a leniency applicant for example, came forward because of the more credible threat of administrative sanctions, or because of the less likely but more serious threat of personal criminal sanctions.

Alongside a deterrent focused approach therefore, a concerted effort needs to be made to alter not only the cost-benefit calculation, but also the morality judgement of the conduct. In doing so a culture of genuine compliance at the firm level, and a normative commitment to ethical, law abiding behaviour at the level of individual directors and/or managers could be pursued.

Anecdotally, in the case of Bryan Allison of the Marine Hose Cartel, it was his belief that his conduct was not that bad together with his assessment that he was unlikely to get caught that enabled him (an otherwise law abiding citizen) to commit what he knew to be a crime. These two crucial aspects therefore, the calculation of moral blameworthiness and the subjective assessment of the risk of detection, played the most important role in his decision to participate in the cartel. Whilst this is not determinative it reinforces Beyleveld's thesis that it is the deterribility (or not) of the action and not the individual that is important.³⁵⁴ In the context of cartel crime this is what should arguably be the focus of enforcement efforts. As where deterrence is unlikely to be adequately achieved in practice because of the specific characteristics of the crime for example, a stronger focus should be placed upon altering the perception of the morality of the action in an effort to change it from being a deterrible offence, to a morally condemnable one. Given the likelihood that such crimes are much less likely to be committed by otherwise law abiding individuals (which cartelists are more prone to be) it could result in a significant shift in the balance between having to compel obedience through threats and punishment, to a genuine culture of voluntary compliance.

In order to achieve a radical shift in the perception of the morality of an action, steps must be taken to educate as to the harmfulness of the act. The inclusion of dishonesty as the substantive test for the original cartel offence is one way in which such an education could be achieved, along with a successful enforcement record which resulted in guilty cartelists being adequately

³⁵⁴ Deryck Beyleveld (1980) *supra* n.229.

punished. Its removal from the definition of the offence which resulted in an offence more clearly in line with a utilitarian, deterrence-focused enforcement policy has arguably diminished the capacity for the cartel offence to fulfil this educative and moralising role. Further, if the symbiotic nature of the relationship between organisation and individual is not properly recognised by any attempts to educate as to the moral culpability of cartel crime, the resulting impact of any such attempts could be seriously inhibited.

Chapter 4: The Regulatory Dynamics of Anti-cartel Enforcement

4.1. Introduction

The preceding chapters of this work have explored the genesis of the criminal cartel offence in the UK, and have examined the ideological foundations upon which a criminal sanction can be built within the context of anti-cartel enforcement. The next stage of this work is to address the fundamental research question of this work and to analyse the place of the criminal cartel offence within the regulatory space of anti-cartel enforcement in the UK. This will help to illuminate any issues that may have contributed to the underwhelming impact that the criminal cartel offence has had since its creation, and indeed since its later amendment. In order to do that it is important to understand the contours of the regulatory space that is under consideration, as well as the various elements that must operate within it and the way in which they relate to each other. These relationships between the various constituent parts of anti-cartel enforcement in the UK regulatory landscape, are what this work refers to as ‘regulatory dynamics.’

The manner in which the anti-cartel regulatory space has been typically approached by the legislature when amending or adding enforcement tools to it, is often criticised because of the piecemeal way in which those changes are undertaken.³⁵⁵ The failure to take a step back and consider the wider impact of any alterations is a failure to acknowledge the reality of a complex regulatory system. The criminal cartel offence was created without a thorough consideration of the impact that its existence and inclusion in the anti-cartel framework would have upon a regulatory space completely unaccustomed to criminal legal policy or enforcement. The same can be said of its subsequent amendment, and that is despite the fact that in the interim between creation and amendment, the Court of Appeal clearly articulated that the criminal cartel offence was not a discrete piece of legislation but rather, there existed an ‘inter-relationship between

³⁵⁵ Bruce Wardhaugh (2014) *supra* n. 147.

... the criminal offence ... and civil liability³⁵⁶ and further, that it clearly had always been the intention that such an inter-relationship would exist.³⁵⁷

*R v IB*³⁵⁸ was an interlocutory appeal as to the jurisdiction of the Crown Court to hear criminal cartel cases which arose in the course of the now infamous BA Executives case. The appellants were the four BA Executives and they attempted to argue that the criminal cartel offence was a ‘national competition law’ within the meaning of Council Regulation (EC) 1/2003³⁵⁹ (‘The Regulation’) with the effect that only a designated competition authority, the Office of Fair Trading at the material time, had the jurisdiction to enforce it. In making that argument, the appellants were attempting to establish that the effect of The Regulation was to deny the Crown Court the jurisdiction to hear the criminal case against the BA Executives, or impose any punishment as it was not the designated competition authority in the UK. This argument was rejected at first instance and again at appeal. In rejecting the argument, the Court of Appeal concluded that the offence was not, in fact, a national competition law within the meaning of The Regulation as it was not a means by which competition law was enforced against undertakings directly, which the Court concluded was the focus of The Regulation. The Court went on to state that the impact of the criminal cartel offence on the enforcement of competition law against undertakings was subordinate to its primary purpose of punishing individuals.³⁶⁰ They did however add that should they have determined that issue incorrectly, a possibility due to the ‘obscure’³⁶¹ meaning of The Regulation, the Crown Court was still not precluded from the enforcement of the offence as enforcement was not the ‘exclusive province of the designated national competition authority.’³⁶²

This case highlights two very important issues that are central to this chapter and the next; (1) the interconnected nature of the criminal and civil sanctions in the UK; and (2) the complex nature of the relationship between enforcement in the UK and the EU. In addressing the interconnected nature of criminal and civil enforcement of anti-cartel laws in the UK this chapter turns to regulatory mix theory. The regulatory mix literature provides some guidance

³⁵⁶ *R v IB* [2009] EWCA Crim 2575; [2010] 2 All ER 728, para. 22.

³⁵⁷ *Ibid.*

³⁵⁸ [2009] EWCA Crim. 2575; [2010] 2 All ER 728.

³⁵⁹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:001:FULL&from=EN>. Last accessed 20th February 2019.

³⁶⁰ *Ibid.*, para. 34.

³⁶¹ *Ibid.*, para. 30.

³⁶² *Ibid.*, para. 38.

on how to navigate complex regulatory spaces that use a varied enforcement toolkit in pursuit of a number of different policy objectives. Regulatory mix theory has a developed body of literature devoted to understanding the mechanics of complex regulatory spaces although, at the time of writing, there has been little engagement with regulatory mix theory in the competition law literature. Further, there has been a lack of ‘systematic enquiry concerning how ... instruments interact with each other and other forms of regulation’³⁶³ in anti-cartel enforcement literature. Failure to carry out such a systematic assessment of the dynamics of the regulatory space will make achieving an effective enforcement regime incredibly difficult. Regulatory mix theorists believe that ‘it is crucial to have a good overview of the generic forms of ... instrument, because the issue of choosing the appropriate combination is one of the most intricate and important’³⁶⁴ in order to create a coherent and effective regulatory strategy. The fact that, as has been the case for the criminal cartel offence, the ‘theoretical promise of a new policy instrument ... is rarely fully realised in practice’³⁶⁵ is arguably partially attributable to this lack of understanding or insight into how it operates within the regulatory landscape in which it inhabits.

Recent competition law scholarship has started to engage more with these concepts and Wardhaugh for example, identified the importance of engaging with and understanding the effects of complex regulatory arrangements, and criticised the approach adopted by the Government when reforming the criminal cartel offence;

‘... the reformed offence is ... an ad hoc addition to the UK’s competition regime. As an ad hoc response, it attempts to restore one difficulty with the competition regime without considering how this partial solution affects the regime as a whole by altering those incentives provided by other elements of the regime, or by considering how an alteration of the UK regimes may have with comparable regimes elsewhere.’³⁶⁶

³⁶³ Gunningham and Sinclair, ‘Regulatory Pluralism: Designing Policy Mixes for Environmental Policy,’ (1999) 21 Law & Policy 49.

³⁶⁴ Evert Vedung, ‘Policy Instruments: Typologies and Theories,’ in Marie-Louise Bemelmans-Videc, Ray C. Rist and Evert Vedung (eds), *Carrots, Sticks and Sermons: Policy Instruments and their Evaluation*, (London: Transaction Publishers, 2017) p.29.

³⁶⁵ Michael Howlett and Jeremy Rayner, ‘Design Principles for Policy Mixes: Cohesion and Coherence in “New Governance Arrangements”’ (2017) 26(4) Policy and Society 1.

³⁶⁶ Bruce Wardhaugh, ‘The Cartel Offence Within a “World Class” Competition Regime: an Assessment of the BIS Consultation Exercise and its Results’, *European Competition Journal*, 8.3 (2012) 573-588, at p.516.

He goes further and identifies that ‘the recent [CJEU] judgment in *Pfleiderer*³⁶⁷ and its fallout demonstrate that modifications to any aspect of the competition enforcement regime have consequences for other aspects [of that regime].’³⁶⁸ More recently Beaton-Wells, in the context of leniency regimes, laments that,

‘... the approach taken by authorities (and many commentators) to leniency policy adoption and review tends to be inward-looking, focused on the policy in a fairly discrete and isolate way and with a tendency to overlook or neglect deeper evaluation. More searching assessment of such policies would include consideration of the extent to which the policy has implications for or effects on other aspects of the overall system for enforcement and compliance.’³⁶⁹

She goes on to argue that the problem is not one isolated to the legal perspectives offered of antitrust regimes, but can be found in the economic research which closely informs and helps shape the how enforcement tools are viewed, assessed and implemented. She states that the economic research has also failed to explore the ‘impact of leniency policies in a broader policy setting, in which other interconnected aspects of enforcement are at work.’³⁷⁰

This chapter seeks to explore the literature concerning the various interactions that can occur in multi-tool, multi-policy regulatory responses and apply that knowledge to the anti-cartel enforcement approach in the UK. In doing so it is hoped that the importance of such scholarship to the field of modern competition law will be highlighted, and some of the causes of the underwhelming impact of the criminal cartel will be identified.

4.2. What are Regulatory Dynamics?

4.2.1. Introduction

³⁶⁷ C-360/09 *Pfleiderer v Bundeskartellamt* [2011] EUECJ.

³⁶⁸ Bruce Wardhaugh, *supra* n.147, at p.495.

³⁶⁹ Caron Beaton-Wells, ‘Leniency Policies: Revolution or Religion,’ in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), at p. 4.

³⁷⁰ *Ibid.*

Before exploring the issues in detail, it is important to first define the scope of the discussion. The literature on regulatory and policy mix theory is vast and diverse, and it is not the aim of this work to add to the theoretical aspects of those discussions, or on how to best create regulatory frameworks on a general level. This work aims to use the existing literature as a lens through which the regulatory choices of the anti-cartel regulatory space can be assessed. Some of that literature attempts to create paradigms which can be used in any field of regulation,³⁷¹ and this chapter aims to apply those paradigms to anti-cartel enforcement in the UK. To do this the chapter will examine the knowledge provided by the regulatory and policy mix literature and apply it to the peculiarities of anti-cartel enforcement in the UK. The purpose of doing so is to provide greater clarity as to the dynamics of the current system and the criminal cartel's place within it. It is hoped that this in turn, will help to identify areas or dynamics that can be improved in order to improve not only the impact of the criminal cartel offence on cartel activity, but the regime as a whole.

There has been, at the time of writing, little engagement in the antitrust literature with that literature which explores regulatory or policy interaction, and so the central concepts are identified below in order to provide context and aid in the analysis that will come later in the chapter.

4.2.2. Regulatory Space

Throughout this work the terms 'regulatory space' and 'regulatory landscape' have been used to describe the conceptual space in which the various elements of the governmental response to cartel activity inhabit. Regulatory mix theory goes further and provides a more in-depth explanation. Regulatory mix theory uses the term 'regulatory space' to describe 'a cluster of regulatory issues, decisions or policies that involve the interplay and competition between various interests.'³⁷² Typically that conversation relates to multi-jurisdictional or multi-level

³⁷¹ Gunningham and Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection', *Law & Policy*, 21 (1999) 49-76.

³⁷² The term regulatory space was first used by Hancher and Moran as an adaption of Crouch's use of the term 'policy space' in Hancher and Moran (eds) 'Capitalism, Culture and Economic Regulation' (Oxford University Press, 1989).

interactions,³⁷³ but as it is also used to describe the mapping out of complex legal interactions and as such, it provides a useful conceptual framework within which the discussion in this chapter can take place. Much of the literature dealing with public policy instrument mixes defines them as a ‘set of techniques by which governmental authorities wield their power’³⁷⁴ in attempting to achieve a defined outcome. Whilst a lot of that literature focuses on environmental protection, housing or agriculture, some of the theory will be useful in the context of anti-cartel enforcement in the UK from the perspective of this work, because all are attempting to understand and manage analogous complexities; ensuring the most effective combination of regulatory tools is employed for the purpose of attaining a specific objective. What that specified objective is, is not as important at this conceptual level, and so solutions enabled by regulatory mix theory and applied to environmental law, for example can, if done carefully, provide insight and potential conceptual solutions to be applied to anti-cartel enforcement.

This work then, has appropriated the term ‘regulatory space’ to refer to interrelationships in two ways. The first occurs on a more micro level in that it analyses the interplay between various state enforcement tools and the theoretical foundations of those tools, within the anti-cartel policy sphere in the UK. The second occurs in the more traditional macro level focus as it seeks to examine the interplay in a multi-territorial space which includes the UK and the EU.

The literature concerning 'regulatory space' also employs the terminology of 'legal pluralism' which itself can be employed in a variety of ways but includes 'metaphorical notions of space ... [and] has been defined as "legal systems, networks or orders co-existing in the same geographical space" or "social field."'”³⁷⁵ It is said that ‘[a]ny sort of “pluralism” necessarily implies that more than one sort of thing concerned is present within the field described. In the case of legal pluralism, more than one “law” must be present.’³⁷⁶ This generous definition can therefore be applied to the multi-layered, multi-instrumented approach employed to tackle cartel activity in the UK, as a Member State of the EU. It is in this context that the regulatory

³⁷³ For example, see Scott, 'Analysing regulatory space: fragmented resources and institutional design' (2001) Public Law 329; Lange, 'Regulatory spaces and interactions: an introduction' (2003) Social & Legal Studies 411.

³⁷⁴ Evert Verdung, 'Sticks, Carrots, Sermons: Policy Instruments and Their Evaluation,' (New Brunswick: New Jersey, 1998) p. 21-58.

³⁷⁵ Merry, 'Legal pluralism' (1988) Law and Society Review 869; Twining, 'Globalisation and Legal Theory' (Cambridge University Press: 2000) p.83.

³⁷⁶ Davies, 'Pluralism and Legal Philosophy' (2006) 57(4) Northern Ireland Quarterly 577.

pluralism of state interventions within the regulatory space of anti-cartel enforcement that this section should be read. The key concept therefore, is that of an interplay of connected mechanisms, a network or matrix of actions, the 'co-existence of legal orders'³⁷⁷ that are 'involved in the construction of what we can term "governable spaces."³⁷⁸

4.2.3. What is Regulation?

The regulatory space defined in the previous section refers to the conceptual legal space in which rules which seek to govern citizens' behaviour exist. Before the dynamics of those rules can be analysed, it is important to articulate what kind of rules they are. The literature uses the term 'regulation' in a relatively broad manner and so this following section aims to add some detail to that concept in order to provide additional context to the discussion. Regulation on a general level has been defined as:

‘Any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed back to the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or some other mechanism).’³⁷⁹

This definition, whilst providing another level of contextual understanding of regulation still requires more specificity to provide the clarity for, and scope of the discussion to follow. This can be achieved by looking at specific forms of regulation which can be subcategorised in the following ways:

‘As a specific set of commands- where regulation involves the promulgation of a binding set of rules to be applied by a body devoted to this purpose. An example would be the health and safety at work legislation as applied by the Health and Safety Executive.

As a deliberate state influence- where regulation has a more broad sense and covers all state actions that are designed to influence business or social behaviour. Thus,

³⁷⁷ Ibid.

³⁷⁸ Rose and Valverde, 'Governed by law?' (1998) 7(4) Social & Legal Studies 541.

³⁷⁹ Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) Public Law 329.

command-based regime would come within this usage, but so also would a range of other models of influence- for instance, those based on the use of economic incentives (e.g. taxes or subsidies); contractual powers; development of resources; franchises; the supply of information, or other techniques.

As all forms of social or economic influence- where all mechanisms affecting behaviour - whether these be state-based or from other sources (e.g. markets) - are deemed regulatory. One of the great combinations of the theory of 'smart regulation' has been to point out that regulation may be carried out not merely by state institutions but by a host of other bodies, and voluntary organisations.³⁸⁰

These definitions of different forms of regulation provide a more detailed explanation of the kinds of actions that can be taken by the State when governing its citizens' conduct. These definitions incorporate the variety of tactics available to the State, which include, inter alia;

- (1) the ability to command, where legal authority and the command of law is used to pursue policy objectives;
- (2) to deploy wealth, where fiscal incentives are used to influence conduct; and
- (3) to inform, where the strategic deployment of information is used to advance policy goals.³⁸¹

This division of responses into three categories is also present in much of the public policy mix literature,³⁸² albeit under slightly reformulated headings, but that bare largely similar characteristics. In some of the public policy literature it has been expressed in terms of the power exerted to induce or influence, that power being expressed in one of three ways; coercive power, remunerative power or normative power.³⁸³ Coercive power, it is said 'rests on the application, or threat of application, of physical sanctions...generation of frustration through restriction of movement; or controlling through force the satisfaction of needs.'³⁸⁴ Remunerative powers is defined as the 'control over material resources and rewards through

³⁸⁰ Barry Mitnick, 'The Political Economy of Regulation: Creating, designing, and removing regulatory forms' (Cambridge University Press: 1980), ch.1; Ogus, 'Regulation: Legal Form and Economic Theory' (Oxford University Press: 1994) Ch. 1.

³⁸¹ Hood, 'The Tools of Government' (Chatham House, London: 1986).

³⁸² Often referred to as 'policy portfolio' literature. See for example, Howlett (2011); Howlett and Lejano (2012).

³⁸³ Amitai Etzioni, 'Comparative Analysis of Complex Organizations' (Free Press, New York: 1975).

³⁸⁴ Ibid.

allocation of salaries and wages, commissions and contributions, “fringe benefits”, services and commodities.’³⁸⁵ Normative power is said to ‘rest on the allocation and manipulation of symbolic rewards and deprivations through employment leaders, manipulation of mass media, allocation of esteem and prestige symbols...’³⁸⁶ These definitions are too context specific to be of real use to this analysis; however, they have been adapted for more general theoretical use and redefined as three broad categories which sit nicely with the definitions described in respect of regulation discussed above, as ‘the stick’, ‘the carrot’ and ‘the sermon.’³⁸⁷ This close correlation between the two forms of literature, regulatory mix and public policy mix literature, allows for their pluralist use in this work. The basic point that all three descriptions agree upon is that all types of State deployed tool can be reduced into one of these three fundamental categories.

The concern of this section then, is to explore how these resources interact with each other in order to provide a basis for determining how those interactions can be best exploited for the creation of an anti-cartel regulatory space of optimal efficiency generally, and to attempt to identify failings of the exiting approach to section 188 in particular.

4.2.4. Different Types of Dynamics

The ‘Timbergen Rule’ states that the optimal ratio of tools to desired outcomes is 1:1,³⁸⁸ which simply means that one tool should, in a perfect world, be deployed to deal with only one problem. Timbergen himself however, acceded the point that ‘supplementary’ or ‘complementary’ tools would often be needed in the real world, to mitigate side-effects, or to reinforce a ‘primary tool.’³⁸⁹ Gunningham and Sinclair agree that the best strategy for effective enforcement means identifying and utilising ‘the strengths of individual mechanisms while compensating for their weaknesses through the use of additional and complementary

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Verdung (2017) supra n.363.

³⁸⁸ Jan Tinbergen, ‘On the Theory of Economic Policy’ (North Holland Publishing Company, Amsterdam: 1952).

³⁸⁹ Pablo Del Rio and Michael P. Howlett, ‘Beyond the “Timbergen Rule” in Policy Design: Matching Tools and Goals in Policy Portfolios’ (2013) Lee Kuan Yew School of Public Policy Research Paper No. 13-01.

mechanisms.’³⁹⁰ Howlett and Del Rio argue that in practice ‘the Timbergen maxim has little use in any but the most simple circumstances and types of mixes’³⁹¹ as it fails to take into account the ‘dimensions of likely conflicts.’³⁹²

Howlett and Del Rio identify two broad categories of interactions, those that occur horizontally which refers to the ‘relationship existing between tools within a single level of policy making’, and those which occur vertically. Horizontal interactions, they argue, ‘can be addressed in largely technical ways – so that, for example, some conflicts can be mitigated just by selecting certain instruments.’ Vertical interactions are more complex and refer to,

‘not just the number of instruments found in a mix, but also the number of goals they expect to address, the number of policy sectors they involve, and the number of governments active in these areas.’³⁹³

The increased complexity inherent in vertical interactions means that ‘technical analysis must be supplemented by other political, administrative and organisational logics.’³⁹⁴

Howlett and Rayner explain that policy mixes fail for one of three reasons which they call layering, drift and conversion.³⁹⁵ Layering is described as typically the most harmful to the creation of an optimal policy mix, and it occurs when new goals and instruments are added to a regulatory space without abandoning previous, and assumedly, unsuccessful ones.³⁹⁶ They argue that this leads to ‘incoherent goals and inconsistent mixes of tools.’³⁹⁷ The term ‘drift’ is used to describe the situation when the ultimate goals of the policy change over time, but the associates instruments employed remain unaltered.³⁹⁸ This again leads to a disconnect between the enforcement mechanism and the policy goal with the result that the tool is no longer the best tool for the job. The term ‘conversion’ refers to ‘the attempt to change the instrument mix

³⁹⁰ Gunningham and Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Policy* (1999) 21 *Law & Policy* 49

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ Michael Howlett and Jeremy Rayner, ‘Design Principles for Policy Mixes: Cohesion and Coherence in ‘New Governance Arrangements’ (2007) 26(4) *Policy and Society* 1.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

in a more tractable policy domain in order to meet new goals in a domain where change is blocked.³⁹⁹ Howlett and Del Rio then build upon this work to raise an important point which is not directly addressed by the discussion on vertical and horizontal interactions and way the layering, drift or conversion of those interactions can lead to the failure of a regulatory space. They explain that the multi-dimensional aspect of policy design and instrument implementation includes the evolution of a policy mix over time,⁴⁰⁰ and the impact that its use or misuse can have on its impact.⁴⁰¹

The consideration of regulatory dynamics in this chapter therefore, will include, 1) vertical interactions; 2) horizontal interactions; and 3) the impact of time.

4.3. Regulatory Interactions

In order to understand the regulatory dynamics of a complex regulatory space that has a complex policy portfolio and enforcement tool mix, the possible interactions that can occur within that regulatory space must be examined. First however, the degree of complexity of the space itself must be assessed. Howlett and Del Rio have constructed a basic table to help carry out this assessment. The table is replicated below.

Table 1

DIMENSIONS	TYPES							
	I	II	III	IV	V	VI	VII	VIII
Multiple Governments	No	No	No	No	Yes	Yes	Yes	Yes
Multiple Policies	No	No	Yes	Yes	No	No	Yes	Yes
Multiple Goals	No	Yes	No	Yes	No	Yes	No	Yes

Type I can then be described as a ‘simple single-level instrument mix’ or a ‘Simple Timbergen’ mix.

Type II is a ‘complex single-level instrument mix’ or a ‘Compound Timbergen’ mix.

³⁹⁹ Ibid.

⁴⁰⁰ Pablo Del Rio and Michael Howlett (2013) *supra* n.388.

⁴⁰¹ Ibid.

Type III is a ‘simple single-level policy mix.’
 Type IV is a ‘complex single-level policy mix.’
 Type V is a ‘simple multi-level instrument mix.’
 Type VI is a ‘complex multi-level instrument mix.’
 Type VII is a ‘simple multi-level policy mix.’
 Type VIII is a ‘complex multi-level policy mix.’

The table helps to illustrate the limitations of Timmerbergen’s assessments of regulatory mixes which fails to address the majority of potential mixes that can be created, and fails in fact, to consider the most complex regulatory mix which are the complex multi-level policy mixes which are by implication, the ones most in need of careful consideration. The distinction between instrument and policy mixes is also made clear. This distinction is not always observed in the literature but the instrument mixes utilise instruments in the pursuit of one policy whereas policy mixes see multiple interacting instruments across multiple policy areas. Literature on policy mixes ‘focus on interactions and interdependencies between different policies as they affect the extent to which policy goals are realised.’⁴⁰² Whereas instrument mix literature focuses on the interactions and interdependencies of enforcement instruments within a regulatory space. The complexity of a mix increases in line with the number of ‘dimensions’ that have multiple factors. For example, a mix that has no multiples (governments, policies of goals) is the simplest type of instrument mix. However, when a mix has multiples in each of the ‘dimensions’ articulated in Table 1. the interactions that occur will be both vertical and horizontal. In mixes which include multiple governments additional challenges must be faced, particularly when ‘responsibility for formulation, decision making and/or implementation falls on different levels of government’⁴⁰³ who may indeed, be pursuing or prioritising different policies and/or goals.⁴⁰⁴

Howlett and del Rio produced a table articulating the ‘spectrum of complexity’⁴⁰⁵ and the place each regulatory mix occupied upon it. That table is replicated below.

⁴⁰² Kieron Flanagan, Elvira Uyarra and Manuel Laranja, ‘Reconceptualising the ‘policy mix’ for innovation,’ (2011) 40(5) Research Policy 702.

⁴⁰³ Pablo del Rio and Michael Howlett, supra n. 388. See also, Angela Hull, ‘Policy Integration: What Will It Take to Achieve More Sustainable Transport Solutions in Cities?’ (2008) 15(2) Transport Policy 94; Flanagan et al (2011) supra n. 401.

⁴⁰⁴ Henrik Enderlein, Sonja Wälti, and Michael Zürn, ‘Handbook on Multi-Level Governance’ (Edward Elgar Publishing, 2011).

⁴⁰⁵ Pablo del Rio and Michael Howlett (2011) supra n. 388.

Table 2. Complexity Spectrum

Simple ----- Complex					
No Multiple Variables	One Multiple Variable	Two Multiple Variables – Single Goal	One Multiple Variables – Multiple Goals	Two Multiple Variables – Multiple Goals	Three Multiple Variables
Type I	Type III Type V	Type VII	Type II	Type IV Type VI	Type VIII

Assessing where of the spectrum of complexity a regulatory space occupies helps to illuminate the level of difficulty and therefore, care needed to ensure that interactions and interdependencies occurring within the space avoid inconsistency and incompatibility. Further, a truly ‘intelligent [policy] portfolio design’⁴⁰⁶ aims to not only avoid problems but aims to maximise the opportunities for creating beneficial effects. The tables produced by Howlett and del Rio provide a much needed starting point for analysing the complexity of regulatory spaces. Vertical interactions need careful prioritisation of actor, policy and goal in order to provide a clear framework within which all can harmoniously exist. The selection and employment of enforcement tools within that framework is one way in which harmony can be increased, or indeed destroyed. It is these horizontal interactions that this work is primarily concerned with when seeking to determine the place that the criminal cartel offence occupies within the anti-cartel regulatory space in the UK. It should be clear from the above however, that any assessment of such interactions cannot ignore the implications of the vertical interactions if a confused and underwhelming regulatory space is to be avoided.

4.3.1. Enforcement Tools

The regulatory mix literature identifies a number of interaction outcomes that can occur when multiple enforcement tools exist within a regulatory toolkit; (1) strong conflict, which occurs

⁴⁰⁶ Ibid.

when the addition of an instrument leads to the reduction of the efficacy of the existing instrument(s); (2) weak conflict, which occurs when the addition of an instrument leads to a positive effect on the combination as a whole, but that effect is less effective than when the instruments are used separately; (3) full complementarity, which occurs when the addition of a new instrument adds to the efficacy of the existing instrument; and (4) synergy, which occurs when the addition of a new instrument magnifies the impact of the existing instrument(s).⁴⁰⁷ Others maintain that the potential instrument dynamics can be classified as (1) inherently complementary; (2) inherently incompatible; (3) complimentary when sequenced; and (4) mixes whose complementarity is context specific.⁴⁰⁸ The type of outcome that will occur between enforcement instruments is heavily influenced by the vertical foundations of those tools (i.e. which government is employing them, for the attainment of which policy, for what goal).

Before it is possible to determine the outcome of instrument interactions, it is first essential to identify the types of instruments available for possible selection within a regulatory space, and the way in which they work. Such an examination will help to begin the process of eliminating inherently contradictory mixes of instruments, and will help to identify which enforcement instruments may work together to enhance the impact of a regulatory space.

4.3.1.1. Command and Control Regulation

Command and control regulation has been defined as the ‘exercise of influence by imposing standards backed by criminal sanctions.’⁴⁰⁹ This definition however, is arguably too restrictive as it excludes entirely, command and control regulation that may operationalise the function of a punitive sanction for the purpose of influencing behaviour, but that is not criminal in nature. Such sanctions are rare, but not unheard of, and should not be excluded automatically on this basis that the outcome of their use is, if not identical, very similar. The OECD, within the sphere of environmental policy, define command and control regulation as policy that ‘relies

⁴⁰⁷ Pablo del Rio and Michael Howlett (2013) *supra* n. 388.

⁴⁰⁸ Neil Gunningham and Darren Sinclair. "Regulatory pluralism: Designing policy mixes for environmental protection." *Law & Policy* 21.1 (1999): 49-76.

⁴⁰⁹ Baldwin, ‘Regulations after “command and control”’ in Keith Hawkins (eds) *The human face of law: Essays in honour of Donald Harris* (Oxford University Press, 1997).

on regulation (permission, prohibition, standard setting and enforcement)⁴¹⁰ rather than for example, ‘economic instruments of cost internalisation.’⁴¹¹ This definition is perhaps unhelpful as it has difficulty defining its own outer limits. O’Sullivan and Flannery provide a more contextual explanation of what is meant by command and control regulation when they state that under command and control ‘regulators fix standards ...(the command) and uses legislation to prohibit behaviour of the regulated entities which do not conform to these standards (the control).’⁴¹² It appears from this understanding of command and control regulation therefore, that it is the punitive nature of a mechanism that leads to its inclusion within the scope, as the main advantage of its use lies in the fact that the full strength of the law can be mobilised to impose a fixed standard of conduct.⁴¹³

This provides a usable definition for the purpose of this work because currently the main regulatory mechanisms employed by the State in response to cartel activity in the UK are punitive, if not always criminal, in nature. Each of those punitive responses attempt to articulate a threshold of acceptable conduct (participation in fair competition) and legislate for legal consequences when regulated entities (undertakings and now, natural persons) choose a course of action that falls below that standard (hard-core collusion). As shown in Chapter 3 of this work, regulatory responses such as these reflect utilitarian concepts of deterrence in that the threat of the legal sanction is used to compel the regulated entities to comply with the standard set by the State. It allows for the State to retain a great deal of power (or the perception of power) over the attainment of policy objectives. The benefits of this approach are the certainty for both the regulated in respect of their ‘compliance obligations,’⁴¹⁴ and the regulator in terms of their ‘operational parameters.’⁴¹⁵ Command and control regulation has the further benefit of demonstrating to the public that the State is working to eradicate behaviour that is contrary to the public interest.⁴¹⁶ Indeed, in certain circumstances punitive sanctions that are repeatedly employed in this manner can ultimately lead to an environment in which compliance

⁴¹⁰ OECD, Glossary of Terms. Available at: <https://stats.oecd.org/glossary/detail.asp?ID=383>. Last accessed 14th March 2019.

⁴¹¹ Ibid.

⁴¹² K. O’Sullivan and Darragh Flannery, ‘A Discussion on the Resilience of Command and Control Regulation within Regulatory Behaviour Theories,’ (2012) 1(1) *Journal of Governance and Regulation* 15.

⁴¹³ Parker, Braithwaite and Stepanenko, ‘ACCC Enforcement and Compliance Project: Working Paper on ACCC Compliance Education & Liaison Strategies,’ (2004) Centre for Competition and Consumer Policy, Australian National University.

⁴¹⁴ O’Sullivan and Flannery (2012), *supra* n. 411.

⁴¹⁵ Ibid.

⁴¹⁶ Parker, Braithwaite and Stepanenko, *supra* n.412.

by way of ‘moral suasion’⁴¹⁷ is achieved, and so reliance upon compulsion by way of legal sanctions is reduced. This was explored in Chapter 3 of this work which showed that this moralising impact of the law can be achieved when typically criminal sanctions, founded upon retributive theories of justice, can improve society’s voluntary compliance with the law. Therefore, the definition of command and control regulation provided by O’Sullivan and Flannery is broad enough to encapsulate both retributive and utilitarian examples of regulatory responses.

The disadvantages of command and control regulation are its inflexibility and its difficulty in responding to changes. A standard must be set for the regulation to work, and it may not be capable of accounting for peculiarities that could arise within specific regulated fields.⁴¹⁸ Additionally, because of the amount of time that it takes to identify and then rectify weaknesses within the regulation, command and control mechanisms can fail to respond to developments with the required speed.⁴¹⁹ As it relies upon State intervention, investigation and the judicial process it is also an inherently expensive option. This only becomes problematic however, when that expense is disproportionate to the benefits brought by that policy.

Whilst command and control regulation is considered beneficial for the certainty that it brings, a certain degree of control over the manner in which the regulation ultimately plays out is necessarily relinquished to the court system, and as a result a proportionate degree of uncertainty is introduced as a result.⁴²⁰ Any difficulties that arise in obtaining convictions together with ‘weak’ sanctioning can have a serious impact upon the beneficial impact that a regulation is able to achieve, which in turn has an impact upon the level of expenditure that can be justified. A further disadvantage of command and control regulation is the complexity of the legal rules that such regulation has a tendency to create. Not only does that complexity have an impact upon certainty, particularly in respect of compliance obligations, that in turn risks the ‘strangling of competition and enterprise’⁴²¹ as entities may shy away from opportunities because it is unclear whether they will fall within the scope of prohibited conduct. Highly complex command and control regulatory responses also reduce the likelihood of

⁴¹⁷ Gunningham and Sinclair (1999) *supra* n. 407.

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

⁴²⁰ Baldwin, *supra* n. 408.

⁴²¹ Harris and Milkis, ‘The politics of regulatory change: a tale of two agencies’ (Oxford University Press, 1996).

voluntary compliance by transferring the dissuasive compliance cost from the State to the regulated.⁴²²

4.3.1.2. Incentive Based Regimes

Incentive based regimes are the use of economic instruments to incentivise the regulated entities to conduct themselves in the desired way.⁴²³ This type of regulatory response is often referred to as ‘the carrot’⁴²⁴ or the ‘remunerative power’⁴²⁵ of those who employ it to assert influence. In this context, the State use financial incentives such as the imposition of positive or negative taxes or the deployment of grants, subsidies or licenses, in a coercive way.⁴²⁶ The types of economic responses available therefore, can be subdivided into two broad categories; positive incentives, and disincentives.⁴²⁷ Grants, soft loans and reduced subsidies are all examples of positive incentives, whilst taxes, fees and custom duties are examples of disincentives. Unlike command and control regulation that utilises pecuniary sanctions, economic disincentives do not seek to prevent a particular action, merely make it more costly and so dissuade or reduce participation in the targeted activity.⁴²⁸ This type of behaviour manipulation by the State has been incorporated into the anti-cartel enforcement space of the UK, through the creation of the leniency regime. The leniency programme relies heavily, although since the cartel offence no longer exclusively, on the theory that the State can coerce cartelists to admit their guilt and provide evidence of it, by exempting them from, or significantly reducing, the fiscal punishment they would otherwise suffer if caught.

This type of regulatory action is considered to be less expensive than command and control regulation although when detection and enforcement mechanisms are required to ensure compliance, then that is arguably not the reality. Incentive based regimes do however, mitigate the risk of capture, as a system for applying the incentive is set up and then an arms-length interaction with the regulated actors is created. Regulatory approaches that incentivise conduct

⁴²² Andrei Shleifer, ‘Understanding Regulation,’ (2005) 11(4) *European Financial Management* 439.

⁴²³ *Ibid.*

⁴²⁴ Marie-Louise Bemelmans-Videc, Ray C. Rist, and Evert Verdung. ‘Sticks, Carrots, Sermons: Policy Instruments and Their Evaluation,’ (New Brunswick: New Jersey, 1998)

⁴²⁵ Amitai Etzioni, ‘A Comparative Analysis of Complex Organisations,’ (MacMillan Publishing: New York, 1971) p.490.

⁴²⁶ *Ibid.*

⁴²⁷ Kieron Flanagan, Elvira Uyarra and Manuel Laranja, ‘Reconceptualising the ‘policy mix’ for innovation,’ (2011) 40(5) *Research Policy* 702.

⁴²⁸ Andrei Schleifer (2005) *supra* n.421.

through financial advantage fit within economic theories of law obedience; firms will carry out a cost versus benefit analysis of whether to take a particular course of action, and if that benefit outweighs the cost, they will comply. A very real disadvantage of incentive based regimes however, is that they risk adding further layers of complexity and bureaucracy to the areas in which they are applied.

A fundamental disadvantage of incentive based schemes is that there is a risk they will be perceived as a weak response to behaviour that is contrary to the public good and as such, socially harmful conduct is not being properly punished or condemned.⁴²⁹

4.3.1.3. Self-Regulation

Self-regulation is not an entirely precise concept but can be regarded as a 'process whereby an organized group regulates the behaviour of its members.'⁴³⁰ Typically this takes the form of industry level self-regulation and the setting of rules or codes of practice relating to the manner in which firms within the industry conduct themselves.⁴³¹ It is 'an attractive alternative to governmental regulation because the State simply cannot afford to do an adequate job on its own.'⁴³² One example can be seen in the international pharmaceutical industry where 'a number of the more reputable companies have corporate compliance groups, which send teams of scientists to audit subsidiaries' compliance with production quality codes.'⁴³³ Internal compliance may be able to more effectively route out problems for a number of reasons, the most obvious being proximity to the regulated behaviour and understanding of the regulated activities enabling the identification of potential problems to happen more quickly and more easily. Additionally, the non-adversarial nature of investigations arguably leads to better access to more information. Whilst it is the case however, that such internal or industry compliance programs 'are more capable, they are not necessarily more willing to regulate effectively.'⁴³⁴ This is the major weakness of self-regulation particularly where the sanctions for misconduct are high and the potential for detection by third parties is low. In these circumstances, regulated

⁴²⁹ Beckerman, 'Small is stupid: blowing the whistle on the Greens', (Duckworths: London, 1995).

⁴³⁰ Gunningham and Sinclair (1999) *supra* n. 407.

⁴³¹ *Ibid.*

⁴³² John Braithwaite, 'Enforced self-regulation: A new strategy for corporate crime control,' (1982) 80(7) Michigan Law Review 1466.

⁴³³ *Ibid.*

⁴³⁴ *Ibid.*

entities have an increased incentive to turn a blind eye to misconduct or even take measures to disguise it.

So whilst a voluntary program will stop many violations that cost the company money and others that are cost-neutral, the impact upon violations that are cost neutral or beneficial is less certain. A programme of self-regulation will halt some violations that benefit the company financially in the short-term, for the sake of the long-term benefit of fostering employee commitment to compliance⁴³⁵ however, those breaches which are cost-neutral or financially beneficial are more likely to be ignored. This is exacerbated in cases where the financial benefit to the company is very high, or long-term. Perhaps the most pertinent disadvantage of a system of self-regulation in the context of this work, is that it could only be realistically achieved when the conduct that such a system seeks to prevent, is limited to a definable groups of regulated entities. In the context of anti-cartel enforcement for example, the prohibited conduct (hard-core cartel agreements) is not limited to a particular market or type of business.

Braithwaite articulates a variation of self-regulation to address some of the flaws identified above, albeit one that he recognises some may regard as impractical; government enforced self-regulation.⁴³⁶ Under a system of government enforced self-regulation the corporations would be responsible for compiling a best-standards approach to their business activities that could be ratified by the relevant State regulator.⁴³⁷ This would then provide a standard by which their activities could be judged. Any deviation from the ratified best-standards would be a strong indicator of misconduct to be investigated by the relevant authority.⁴³⁸ Where appropriate a criminal sanction could be imposed for failing to report breaches of the best-standards, or attempts to ignore compliance directives.⁴³⁹ The advantage of this approach would be that the State regulator would be able to optimally deploy its limited resources by targeting the corporations that could be more clearly identified as being at high risk of breach. There are of course disadvantages of such a system which include, but are not limited to, the risk that corporations, as authors of the code of best-standards would be well placed to create compliance regimes that enabled them to obviate the letter of the law. Such an approach would also involve a high initial cost in creating and ratifying the compliance regimes which would

⁴³⁵ John Braithwaite (1982) *supra* n. 431.

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

most likely be passed on to the end consumer. Further, the independence of the internal or industry compliance regulators could not be guaranteed.

Whilst there could be some advantages to a system of government enforced self-regulation in some industry sectors, in the context of anti-cartel enforcement it is unlikely that such a system could be implemented to good effect. Firstly, the standard of the conduct required for legal obedience is already clearly defined. Secondly, the anti-cartel enforcement standards are applicable to all undertakings operating within the UK who may face very different circumstance rather than a discrete, easily defined market sector.

4.3.1.4. Voluntarism

Voluntarism in this context refers to the unilateral decision taken by firms to do the right thing. 'At a general level this category embraces voluntary agreements between governments and individual business that are a means of achieving improvements in behaviour which go beyond regulated requirements.'⁴⁴⁰ Often referred to as corporate social responsibility ('CSR') its exact definition has evolved over the years. The 'classical view of Adam Smith [was] of perfect markets and the "invisible hand"'⁴⁴¹ which have been said to be the 'core perception of business responsibility for the past three hundred years.'⁴⁴² Oliver Sheldon argued that it 'encouraged management to take the initiative in raising both ethical standards and justice in society through the ethic of economising.'⁴⁴³ Modern conceptions of corporate responsibility accept that companies must better understand and be aware of, the societies in which they operate.⁴⁴⁴ In its 'broadest sense, contemporary CSR represents companies' responsibility to improve all their impacts on society, when not required to do so by law.'⁴⁴⁵ In more practical terms however it can be regarded as excluding 'any corporate action resulting from compliance with legal prohibitions, as well as reactions to direct social pressures such as boycotts.'⁴⁴⁶ Engel asks whether it is 'desirable for corporations organized for profit voluntarily to identify and pursue

⁴⁴⁰ Ibid.

⁴⁴¹ Constantina Bichta, 'Corporate Social Responsibility: A role in government policy and regulation?' Centre for the Study of Regulated Industries, Report 16.

⁴⁴² Ibid.

⁴⁴³ Ibid.

⁴⁴⁴ Joerg Andriof, Sandra Waddock, Bryan Husted and Sandra Sutherland Rahman (eds), 'Unfolding Stakeholder Thinking,' (Greenleaf Publishers: Sheffield, 2017).

⁴⁴⁵ Constantina Bichta, *supra* n. 440.

⁴⁴⁶ Fejfar, 'Corporate Voluntarism: A Panacea or Plague – A Question of Horizon', *Delaware Journal of Corporate Law* (1992) 17(3) 859.

social ends where this pursuit conflicts with the presumptive share holder desire to maximize profits.⁴⁴⁷

The experience in the UK began with privatization programme adopted by the government in the 1980s which,

‘shifted public expectation of the private sector. Whilst until then, social objectives had been mainly the responsibility of government, the privatisation of gas, water and electricity introduced a new paradigm. It created public companies owned by shareholders pursuing the same kind of financial returns as in any other public company, but the companies had also clear social objectives.’⁴⁴⁸

In the UK, an initiative was taken by Business in Community called the Corporate Impact Initiative which is essentially a ‘framework for companies to measure and report on responsible business practices in the areas of market place, environment, workplace, community and human rights.’⁴⁴⁹ Given the voluntary nature of corporate social responsibility, how it fits in as a regulatory tool of the State may not be immediately obvious, but Reich argues that government should exert a degree of influence over business activities pursued for the benefit of society through for example, tax incentives or tax credits.⁴⁵⁰ This is because ‘CSR issues fall in the arena of public policy which is the primary government task.’⁴⁵¹

It is clear therefore, in the case of both self-regulation and voluntarism that there is an inherent belief that undertakings, by way of the individual agents that bind their actions, cannot be left without some degree of State oversight, to determine the best way to regulate their conduct in the best interests of society. An obvious conflict of those interests with those of the undertaking and its responsibility to generate profitability for shareholders, means that the impact of self-regulation and voluntarism can only go so far. This is particularly true when the financial gain for conduct harmful to society is high, the risks of getting caught are low, and perhaps most importantly, the harmful conduct is largely considered to be morally neutral. Together these

⁴⁴⁷ Engel, ‘An Approach to Corporate Social Responsibility’ (1979) Stanford Law Review 32.

⁴⁴⁸ Constantina Bitcha, *supra* n. 440.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Reich, ‘The New Meaning of Corporate Social Responsibility’ (1998) 40(2) California Management Review 8.

⁴⁵¹ Constantina Bitcha, *supra* n. 400.

create perfect conditions for firms to engage in illicit conduct and incentivise shareholders to either ignore the details of that prohibited conduct, or actively disguise it.

4.3.1.5. Information Strategies

Information strategies is a broad term that includes 'education and training, corporate ... reporting, community right to know and pollution inventories and product certification'⁴⁵² within the scope of its definition. Often however, information strategies play an ancillary or subordinate role to the use of one of the preceding regulatory mechanisms. They are meant by which those mechanisms are made more effective and are inherently complimentary to most, if not all of them. Nevertheless, it should be considered that there are instances where the promulgation of information may inhibit the operation of a particular regulatory tool, or aspect of it.⁴⁵³ A particular disadvantage of information strategies as a discreet regulatory tool is that for example, 'community right to know provisions, although they can be a potent instrument, provide no assurance that individual firms will actually improve their environmental performance.'⁴⁵⁴

4.3.2. Inherently Complimentary Tool Interactions and Anti-cartel Enforcement

The regulatory and policy mix literature shows that certain combinations of regulatory tools will be inherently complementary, inherently incompatible, complementary only when sequence, or only within a specific context. This is believed to be true 'irrespective of the specifics of the relevant ... issue or the prevailing political and cultural background.'⁴⁵⁵ The framework provided by the regulatory mix literature, it is believed, ensures that policy makers can confidently create regulatory spaces that abide by this combination guidance, in the knowledge that it will create an efficient or optimal governance.

⁴⁵² Gunningham and Sinclair (1999) *supra* n. 407.

⁴⁵³ For example, the CMA have been reluctant to provide information as to the number of cartel informants who have received a financial reward for providing information. For information regarding financial rewards for informants see,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf. Last accessed 15th September 2018.

⁴⁵⁴ Gunningham and Sinclair (1999) *supra* n.407.

⁴⁵⁵ *Ibid.*

Information strategies are considered to be complementary in almost all circumstances, as they enable actors to make rational decisions regarding which actions to take or not take. They can be designed in such a way as to ‘rectify or compensate’⁴⁵⁶ for the failing of other tools which, for the most part, rely in varying degrees, upon the dissemination of their success and/or their standards. In the context of anti-cartel enforcement, information plays a pivotal role, indeed it is the currency with which leniency is paid for, and which allows culpable offenders to escape any form of punishment, a situation that is unique in English criminal law. Information plays another crucial role to the success of the CMA’s enforcement actions. Publicising the successful sanctions and prosecutions is crucial to the creation of deterrence, and competition law advocacy is critical to creating an atmosphere of compliance, just as the publicity of its failures have arguably had the opposite effect. In the specific context of competition law, the dissemination of information of compliance parameters is particularly important as uncertainty can lead to legitimate business opportunities, beneficial to the consumer, being avoided for fear of overstepping the legal boundaries.

Voluntarism and self-regulation are both inherently complementary with command and control regulation because the command and control regulation creates a baseline,⁴⁵⁷ whilst voluntary measures are a commitment by firms to take additional steps above that baseline, and with self-regulation providing a means by which standards are monitored and enforced within the industry itself.⁴⁵⁸ Self-regulation is not a feasible option for anti-cartel enforcement as shown in the above discussion,⁴⁵⁹ but anti-cartel compliance regimes do represent a form voluntarism often seen in large corporations. Undertakings are not required by the regulatory framework that currently exists at the time of writing, to have compliance programmes in place, and failure to do so will not increase the level of fine awarded. They are entirely voluntary, although they are encouraged. They do however, represent a way in which organisations, often with complex management structures, are able to educate employees about what conduct is illegal, and how to detect any prohibited conduct should it occur.

The discussion above however, illustrates that without some form of State oversight, voluntary compliance programmes are unlikely to have a significant impact upon cartel activity. Were

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

⁴⁵⁹ See section: 4.3.1.3. Self-Regulation

they to be officially brought within the antitrust regulatory space by making voluntary compliance schemes a condition of corporate immunity,⁴⁶⁰ it would still be voluntary measure as firms would not be under a legal obligation to create a compliance programme, but would create an incentive that may entice undertakings, particularly large complex undertakings to take extra steps to ensure legal obedience.⁴⁶¹ Further, it could dramatically improve the impact of such programmes on the fight against cartel activity as they could be regarded as a public demonstration that the undertaking was committed to complying with competition law, thereby signalling to competitors that they will not engage in collusion, and it would help to foster a culture of compliance within the undertaking itself as the programmes would require employee training.⁴⁶² Were an undertaking to be found to have engaged in a cartel despite the existence of an internal compliance programme, it could represent a rebuttable presumption that the undertaking took all reasonable steps to ensure legal obedience, and that the cartel was the result of the rogue actions of an agent. If the presumption was not rebutted by evidence to the contrary, it could result in a reduction in the fine imposed upon the undertaking, and could be an aggravating factor in the prosecution of the rogue individual agent.

Supply-side incentives, such as tax concessions or soft loans, which are usually granted to policy preferred technologies or processes, are considered to inherently complement command and control regulation when that regulation targets performance standards related to those technologies or processes.⁴⁶³ Tax concessions on a particular technology that help to achieve

⁴⁶⁰For a full discussion, see Brent Fisse, 'Reconditioning Corporate Leniency: The Possibility of Making Compliance Programs a Condition of Immunity', Nov 2014, available at: https://www.brentfisse.com/images/Fisse_Compliance_Programs_as_Condition_of_Corporate_Immunity_2011_14.pdf. Last accessed 26th Jan 2016.

⁴⁶¹ The CMA has acknowledged the impact that pre-emptive action taken by undertakings to ensure compliance can have on their efforts to protect consumers from the harmful effects of cartels. As a result the CMA, together with the Institute of Risk Management (the 'IRM') published a short guide advocating for an organisational culture of compliance and ethical conduct. See, CMA and IRM, 'Competition Law Risk: A Short Guide, Version: 2.0.' Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/587464/cma-risk-guide-2016-revised.pdf. Last accessed 18th March 2019. The CMA have also articulated that they may take into account steps taken by undertakings to ensure obedience of competition law when calculating fines. See, CMA, 'CMA's guidance as to the appropriate amount of penalty,' 18th April 2018, CMA 73, para. 2.19. For further discussion see, Nathalie Jalabert-Doury, David Harrison and Jens-Peter Schmidt, 'Enforcers' Consideration of Compliance Programs in Europe: A Long and Winding – but Increasingly Interesting – Road,' (2015) 2 CPI Antitrust Chronicle 1. Available at: https://www.mayerbrown.com/-/media/files/news/2015/06/enforcers-consideration-of-compliance-programs-in/files/art_jalabert-harrison-schmidt_2015/fileattachment/art_jalabert-harrison-schmidt_2015.pdf. Last accessed 18th March 2019.

⁴⁶² For comment on why compliance programmes may not be effective in the fight against cartel activity, see, Andreas Stephan, 'Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels' (2009) CCP Working Paper 09-09.

⁴⁶³ Gunningham and Sinclair (1999) *supra* n.407, p.58.

a policy standard, will obviously complement the command and control regulation that determines and enforces that standard.⁴⁶⁴ The supply-side incentives provide an additional and importantly, financial incentive to meet a particular standard, whether it be performance or technology based. In some policy areas, the advantage of such a combination when referring to process-based standards may not be obvious because such standards do not necessarily require a change in technology for example, they emphasise the need to implement systems with the aim of preventing problems before they arise.⁴⁶⁵ Whilst the fit is not an easy one in the context of competition law, there is some potential to argue that process-based standards could possibly be utilised with regard to internal compliance procedures. It would however, be difficult to envisage a scenario where a subsidy, tax concession or soft loan could be used in this manner. There is the potential for a reduction in fine could be attributed to a guilty undertaking in accordance with the process-based standards should such internal compliance procedures be in place as discussed in respect of voluntarism above, however, given the diversity of market sectors with which competition authorities must concern themselves, it seems unlikely that a set of detailed process-based standards could or would be articulated by the CMA, upon which such financial incentives could definitively be based. The CMA have indicated that were appropriate, they may take the existence of such compliance programmes into account when calculating fines.⁴⁶⁶

The rationale for command and control regulation and broad-based economic instruments which target different aspects of a common problem is fundamentally different, however if used to target different aspects of a common problem, they could in fact be complementary.⁴⁶⁷ In environmental policy the phasing out of leaded fuel is a good example of this:

‘In Australia, all vehicles post-1985 were required to be fitted with catalytic converters that necessarily entail the use of engines that only operate on unleaded fuel (a conventional technology-based command and control measure). At the same time, the federal government introduced a (phased) price differential on the price of fuel such

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ The CMA state that ‘it will be for each undertaking to frame [sic] its own compliance activities in a way in which works for their business.’ CMA, ‘CMA guidance as to the appropriate amount of penalty: summary of responses to the consultation,’ 18th April 2018, CMA73resp, para. 2.21. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700560/summary_of_responses_penalties.pdf. Last accessed 19th March 2019.

⁴⁶⁷ Ibid, p.59.

that leaded fuel became more expensive than unleaded fuel (a broad-based economic instrument, in the form of a pollution tax). The reason these two radically different policy approaches complement each other is that by addressing different aspects of the same problem, they provide the market with mutually supportive signals...⁴⁶⁸

What makes them a complementary mix in this example, is that they are targeting ‘different but contributory aspects of the same problem.’⁴⁶⁹ The various tools in the antitrust enforcement package in the UK aim to target different but contributory aspects of the same problem; the individuals that implement the arrangements and the undertakings that profit from them, as well as compensating those who suffer as a result. However, it is not clear what form of broad based economic instrument could be utilised in order to target any one aspect of these aspects of the cartel problem. It does illustrate analogously however, that complex objective driven mixes, can be created to create a complementary and more effective regulatory response.

Complementarity is also achievable between liability rules and command and control regulation when the standard imposed by the regulation is different to that set by the liability rule.⁴⁷⁰ A minimum standard is created which when the need arises, can be escalated by the courts.⁴⁷¹ It is recommended that the substantive test for blameworthiness for each, is different with the liability rules relying upon a negligent or recklessness standard, for example. If however, the liability standard is higher in any way than that imposed by the command and control regulation ‘it undermines the notion that the regulatory system sets standards where the benefits are balanced against the costs...[and] the two systems would work at cross-purposes.’⁴⁷²

All of the regulatory relationships discussed so far, are inherently complementary when implemented correctly. These horizontal relationships should therefore, in theory allow for the creation of a system of multi-tooled enforcement in order to tackle an identified problem. The implementation of the tools and their enforcement over time, will play a significant role in ensuring that complementarity is achieved in practice and maintained long-term. Further, the implication of the above discussion is that the tools are being employed to achieve one policy

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ Gunningham and Sinclair (1999) *supra* n. 407.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

(or at least multiple complimentary) objectives. However, as the discussion in section 4.3. above showed, complex regulatory spaces often include multiple policies, some of which will be seeking to achieve wholly different objectives. This can have a trickle down effect upon the dynamics of the enforcement tools implemented in pursuit of those objectives, and so extra care must be taken to consider the tool interaction in light of the number of policy objectives and governmental actors, present.

4.3.3. Inherently Counterproductive Tool Interactions

Certain enforcement mechanisms are inherently counterproductive, and as such should be avoided because in practice the result of counterproductive interactions is that the impact of each mechanism is compromised by the existence and use of the other mechanism(s). This ultimately reduces the impact that not only the individual mechanisms have, but also the regulatory regime as a whole. The following discussion considers some of the inherently counterproductive tool interactions that may not be, *prima facie*, easily identifiable as such.

Command and control regulations and broad-based economic instruments which target the same aspects of a common problem can create inherently contradictory tool interactions.⁴⁷³ A lot of the performance-standard and technology-based standards imposed by command and control regulation in the sphere of environmental policy, for example, aim to achieve a specified outcome, often leaving little room for an independent assessment by individual firms. Economic instruments are usually utilised to do the opposite as they 'maximise the flexibility'⁴⁷⁴ available to firms when making decisions as how to reach a particular outcome. These are therefore clearly incompatible regulatory mechanisms for achieving a policy goal. Economic instruments seek to manipulate the principle that firms that can achieve a policy outcome most cheaply 'carry the greater share of the abatement burden. The result is that...for a given level of expenditure'⁴⁷⁵ a greater level of success is achieved with respect to whatever the particular policy goal is. Incentive based costs, in a way similar to that of the economic

⁴⁷³ Gunningham and Sinclair (1999), *supra* n. 407.

⁴⁷⁴ *Ibid*, p.61

⁴⁷⁵ *Ibid*, p.61. See also, Theodore Panayotou, 'Conservation of biodiversity and economic development: The concept of transferable development rights,' (1994) 4(1) *Environmental and resource Economics* 91.

instruments mentioned, seek to distribute regulatory costs amongst the regulated, with those able to bare the larger costs most efficiently bearing the larger burden.⁴⁷⁶ This then works to provide incentive for those firms to find innovative ways to meet the policy objective, which reduces the financial burden upon themselves. Liability rules would counteract this form of cost allocation and would undermine the incentive to innovate.⁴⁷⁷

The apparent incompatibility of certain regulatory tools can be mitigated or even avoided, if they are correctly sequenced.⁴⁷⁸ This is the case for example, when a particular mechanism is used only as a tool of last resort, when other mechanisms have failed to achieve the stipulated policy aim. Logically therefore, the most interventionist mechanism with the most severe consequence would be that last resort tool. Sequencing can also refer to the introduction of an entirely new regulatory tool to deal with a problem, where previous tools have been deemed to have failed.⁴⁷⁹ The regulatory mixes that are most likely to fit into this category involve an element of self-regulation. Typical examples are self-regulation and sequential command and control regulation or, self-regulation and sequential broad-based economic instruments.⁴⁸⁰ The definition of sequencing provided by the regulatory mix literature, at first instance, appears very similar to the evolution of anti-cartel enforcement in the UK where a criminal cartel offence was added to improve the deterrent impact of the anti-cartel regime when it was felt that a gap in deterrence existed. However, the practical implementation and enforcement of the offence has meant that in reality, the criminal offence has neither become a mechanism of last resort, used when all else has failed, and nor has it been able to deal with the identified gap in deterrence that it was implemented to plug.

The regulatory mix literature argues that it is often not possible to determine whether a particular mix of regulatory tools will be complementary or counterproductive without a consideration of their context, as has been done for the preceding discussions. This is the case for complex regulatory portfolios with multiple considerations. It is the position of this work that the dynamics of anti-cartel enforcement mechanisms cannot properly be understood and therefore, optimised without considering the vertical interactions. The interactions that occur within the antitrust regulatory space of the UK, are not limited simply to the types of instrument

⁴⁷⁶ Ibid.

⁴⁷⁷ Gunningham and Sinclair (1999) *supra* n. 407, p.65

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

used in the fight against cartels, the various competing policies and goals of each mechanism, as well as the various multiple government actors that are present, all add a level of complexity that has the potential to impact the efficacy of the overall regime. Further, the discussion in Chapter 3 of this work showed that the enforcement of the criminal cartel offence, or perhaps more accurately the lack of enforcement, has had an impact upon its ability to have an impact upon cartel activity. This is corroborated policy and regulatory mix literature which maintains that how mechanisms are used, and therefore how they evolve over time can have a significant impact upon the regulatory dynamics of a regulatory space.

4.3.4. Impact of Time

Regulatory spaces are not a static snapshot of time that exist in a vacuum. They develop and change as political, social and economic conditions change, and those changes can impact the effectiveness of the tools within that space. Kovacic explains that,

‘US experience indicates that the development of successful criminal antitrust programme is a cumulative process through which individual enforcement techniques are tested, implemented, and refined.’⁴⁸¹

This means that periodic review, analysis and adjustment are likely to be necessary in maintaining an impactful enforcement environment over time. This is particularly true of ‘some policy processes [which] simply take a long time to play out.’⁴⁸² When that is the case, every use of a particular tool ‘conditions and constrains the evolution’⁴⁸³ of the regulatory space which they inhabit. The manner in which the instruments are used in practice, can even lead to them losing their legitimacy and to them becoming disjointed from their original aims. This has been referred to an ‘exhaustion risk’⁴⁸⁴ and occurs when ‘policy regimes become self-undermining over time.’⁴⁸⁵ Damage to the effectiveness of an overall regime can occur when ‘interrelated policy regimes and component parts [are treated] in isolation from one

⁴⁸¹ William E. Kovacic, ‘Criminal enforcement norms in competition policy: Insights from US experience,’ in Caron Beaton-Wells and Ariel Ezrachi (eds) *Criminalising cartels: Critical studies of an international regulatory movement* (Hart Publishing: 2011) pp.45-73.

⁴⁸² Christopher Pollitt, ‘Time, Policy, Management: Governing with the Past’ (Oxford University Press: 2008)

⁴⁸³ Ibid.

⁴⁸⁴ Wolfgang Streeck and Kathleen Ann Thelan (eds) ‘Beyond Continuity: institutional Change in Advanced Political Economies’ (Oxford University Press: 2005) p.29.

⁴⁸⁵ Ibid.

another.’⁴⁸⁶ This can lead to ‘incomplete reform efforts with resulting poor outcomes at the macro, meso or micro-level.’⁴⁸⁷ Conversely, the perception of seemingly weak responses can be improved over time through effective, transparent and consistent implementation without any further need for legislative interference.

4.4. The Regulatory Dynamics of Anti-Cartel Enforcement in the UK

4.4.1. Introduction

The previous section of this chapter sought to understand the types of interactions that exist within a complex regulatory mix, and alluded to the nature of some of the specific enforcement instrument interactions that occur horizontally in the anti-cartel regulatory mix in the UK. This section uses the analysis in section 4.3. as a framework within which the various horizontal and vertical dynamics of the anti-cartel regulatory space in the UK can be examined in more detail. The process of so doing should highlight any inherently contradictory instrument mixes, or indeed those which have become contradictory over time given the manner of their implementation and/or enforcement, or any enforcement instruments that have become disjointed from the policy objectives that justify their use. Further, any instrument mixes that have not been maximised will be identified. Understanding the dynamics of anti-cartel enforcement will help to determine the place that the criminal cartel offence occupies within the regulatory space and may help to establish whether that place is contributing to the underwhelming impact that the offence has had to date. Further, examining where and why interactions have failed and succeeded will allow for a more meaningful discussion of how the overall impact of the regime can be improved through the exploitation of beneficial interactions and the avoidance of damaging ones.

There are a variety of perspectives that could provide the context for an assessment of a complex regulatory space, be it public versus private enforcement, or criminal versus civil enforcement, or even deterrence versus ‘other objectives’ perspective. This work however,

⁴⁸⁶ Jeremy Rayner and Michael Howlett. ‘Introduction: Understanding integrated policy strategies and their evolution’ (2009) 28(2) Policy and Society 99.

⁴⁸⁷ Ibid.

attempts to address the complex matrix of interactions, both vertical and horizontal, from a more neutral standpoint in order to allow for the full spectrum of considerations to be part of the analysis. It is hoped that in doing so, a more inclusive and therefore, arguably accurate picture is created of the regulatory dynamics that have been created to fight hard-core cartel activity in the UK.

In order to carry out the analysis of the UK's anti-cartel regulatory space the first step is to identify variables present as shown in section 4.3.⁴⁸⁸ above. This will clarify the degree of complexity of the regulatory space and identify its place upon the spectrum of complexity.⁴⁸⁹ This then provides the context for understanding the types of horizontal and/or vertical interactions that policy makers in the UK need to be aware of when regulating against cartels. The next step is to look more closely at the specific variables present at each level of the regulatory space, and to then consider the manner in which they interact. Finally, the horizontal interactions between specific enforcement mechanisms must be considered.

4.4.2. Howlett and del Rio's Interaction Matrix and the Anti-cartel Regulatory Space

In the Howlett and del Rio matrix above, three levels of interaction are identified; governmental, policy and goal. The degree of complexity within any regulatory space therefore, is determined by the number of variables identifiable at each level. For example, if there is only one governmental actor, one policy objective and one goal to be achieved, the result is a very simple single-level instrument mix in which there exists no room for incompatibility. If however, there are multiple government actors, multiple policy objectives and multiple goals a regulatory mix at the opposite end of the complexity spectrum has been created, a complex multi-level policy mix, in which contradictions are more likely and difficult to resolve. The following section therefore, examines the variables present in the anti-cartel enforcement regulatory space in the UK in order to identify its place upon the complexity spectrum.

⁴⁸⁸ See Section 4.3.

⁴⁸⁹ See **Table 2. Complexity Spectrum**, section 4.3.

4.4.2.1. *Government Actors*

Anti-cartel enforcement in the UK does not exist in an entirely discrete manner. It is influenced by the UK's current membership of the European Union. Competition law in the UK therefore, is underpinned by this relationship and the principles, objectives and political priorities of the EU, as well as being governed by the principles, objectives and political priorities of the UK. Competition law and the fight against cartel activity is a matter of exclusive EU competence, but as a result of Regulation 1/2003⁴⁹⁰ the enforcement of Article 101 TFEU has been put within the competence of the Member States. This 'uneven allocation of competence'⁴⁹¹ requires a complex regulatory design in order to work which includes National Competition Authorities ('NCAs'), who are ultimately responsible for the investigation and detection of anti-competitive conduct within their own jurisdictions.⁴⁹² The European Commission ('the Commission') remains at the apex of administrative enforcement of Article 101 TFEU, and retain the power to take over an investigation that has already been started by an NCA, thereby requiring that all other national investigations be put on hold.⁴⁹³ Nevertheless, the requirement that NCAs apply Article 101 TFEU when inter-Member State community trade could be affected, the Commission determines the legal standard by which agreements are judged, thereby ensuring consistency and legal certainty throughout the EU. In doing so, the EU is also limiting the autonomy of the Member States and creating a relationship of significant influence over more than just legal form.⁴⁹⁴

Present within the regulatory matrix of anti-cartel enforcement in the UK therefore, there is the European Commission, the UK Government and the Competition and Markets Authority. The ideological foundations of EU and UK competition law will influence the policy objectives

⁴⁹⁰ Council Regulation (EC) No.1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, 16 Dec 2002, OJ L 001. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R0001&from=EN>. Last accessed 20th March 2019.

⁴⁹¹ Dermot Hodson and Imelda Maher, 'Economic and Monetary Union: balancing credibility and legitimacy in an asymmetric policy-mix,' (2002) 9(3) *Journal of European Public Policy* 391.

⁴⁹² The EU recently enacted a Directive to improve the enforcement impact of Member State competition authorities. See, Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 11th Dec 2018, OJ L11/3. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0001&from=EN>. Last accessed 20th March 2019.

⁴⁹³ Regulation (EC) 1/2003, Article 11(6).

⁴⁹⁴ This in part is due to the duty of loyal or sincere cooperation in Article 4(3) TEU which requires that not only should Member States make sure they take steps to ensure the attainment of EU objectives, but that they also refrain from measures that may jeopardise those objectives. See Chapter 5 of this work for more discussion.

and political priorities of both governmental actors operating within the regulatory space, as well as the enforcement priorities and implementation record of the CMA. The criminal cartel offence requires a degree of prosecutorial discretion on the part of the CMA and that will (and has) had an impact upon the dynamics of the regulatory space of anti-cartel enforcement as it has developed over time.

It is clear from this brief discussion that there are multiple variables present at the governmental level of the Howlett and del Rio interaction matrix. The next step is to determine whether there are multiple policy objectives operating within the regulatory space in order to establish whether anti-cartel enforcement in the UK is a complex or simple, multi-level mix.

4.4.2.2. Policy Objectives

Despite competition law ‘one of the most important values of the European Union’,⁴⁹⁵ identifying all of the various policies that together make up competition policy, and identifying the primary unifying principles for them all is far from simple. The term ‘competition policy’ itself refers to a collection of sub-policies that work together to create a ‘competitive market.’ Competition law, which seeks to implement those policies, covers a range of activities from mergers, monopolies, cartels and State aid. Whilst each of these prohibitive activities is regulated by separate legislative mechanisms which are pursuing different policy objectives, ultimately they are all pursuing the same overriding objective of protecting competition for the purpose of protecting the consumer.⁴⁹⁶ Further, the CMA highlighted the practical implications of the enforcement priorities of a competition authority can expose the interaction that occurs in the real world between different competition policy tools, and can therefore have an impact upon the attainment of those separate policy objectives;

⁴⁹⁵ Oles Andriychuk, ‘Can We Protect Competition Without Protecting Consumers?’ (2009) 6(1) The Competition Law Review 77.

⁴⁹⁶ The CMA ‘work to promote competition for the benefit of consumers, both within and outside the UK. Our aim is to make markets work well for consumers, businesses and the economy.’ See, CMA, ‘What the Competition and Markets Authority does.’ Available at: <https://www.gov.uk/government/organisations/competition-and-markets-authority>. Last accessed 20th March 2019.

‘cartel enforcement and merger review are usually complementary. Since greater cartel enforcement will cause more companies to consider a merger as an alternative to collusion resulting in more potentially anticompetitive mergers.’⁴⁹⁷

The enforcement priorities of a competition authority can be influenced by the socio-political and economic climate at any point in time, as well as budgetary allocation of resources. If cartel enforcement is regarded as being weak, companies who may otherwise have been forced to consider merging to achieve their company objectives, may be enticed to engage in hard-core collusion instead. Whilst there is currently no mandatory notification required when mergers take place, ‘merging parties are encouraged to engage with the CMA at an early stage, particularly where the transaction may raise potential competition concerns in the UK.’⁴⁹⁸ Should the CMA’s recommendation to create mandatory notification be implemented it could have a significant impact upon cartel activity in the UK.⁴⁹⁹ It is beyond the scope of this work to consider the full impact of the interactions between the various competition law policies upon the cartel regime, but this again highlights the complex intricacies that are intrinsic within competition law enforcement.⁵⁰⁰

Despite the fact that competition law is as entrenched in both the UK and EU, some disagreement still exists as to the overriding policy objective that it should pursue and the

⁴⁹⁷ CMA, ‘The deterrent effect of competition authorities’ work: Literature review,’ 7 Sep 2017, para. 3.24.

Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642801/deterrent-effect-of-competition-authorities-work-lit-review.pdf. Last accessed June 2018.

⁴⁹⁸ CMA, ‘Guidance on the functions of the CMA after a ‘no deal’ exit from the EU,’ March 2019, CMA 106.

Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786749/EU_Exit_Guidance_Document_for_No_Deal_final.pdf. Last accessed 20th March 2019.

⁴⁹⁹ The Chairman of the CMA, recently outlined a summary of reform proposals that included the proposal to ‘require mandatory notifications of mergers above a certain threshold.’ He regarded this as necessary given the significant impact that the UK’s exit from the EU will have on the number of multi-jurisdictional mergers that the CMA will have to review, that would previously have been reviewed by the European Commission. See, CMA Correspondence, ‘Summary of proposals from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy,’ 25th February 2019. Available at:

<https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy/summary-of-proposals-from-andrew-tyrie-cma-chair-to-the-secretary-of-state-for-business-energy-and-industrial-strategy>. Last accessed 20th March 2019.

⁵⁰⁰ Some commentators question ‘why strategies of market dominance and concentration (mergers) which may achieve the same of comparable outcomes to “hard-core” cartels, do not attract the same degree of vilification and associated legal control’ particularly given that mergers may not only remove competition, but also competitors. See Caron Beaton-Wells, Christopher Harding and Jennifer Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?’ in Beaton-Wells and Tran (eds) *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Bloomsbury Publishing: 2015).

answer is largely dependent upon the ‘theoretical school’⁵⁰¹ that proponents follow, each producing potentially very ‘different conclusions as to which types of conduct should be subject to legal prohibition and what types of legal test should be applied to determine liability.’⁵⁰² The Chicago school ‘with its neoclassical price theory’⁵⁰³ for example, maintain that:

‘non-economic goals [have no] place in the application of competition policy, both because of their non-quantifiable nature, and because of the desirability of promoting efficiency as the sole goal.’⁵⁰⁴

In Europe however, consumer welfare, an economic goal, is considered to be of central importance. Indeed, former European Commissioner for competition policy, Neelie Kroes stated that,

‘Consumer welfare is now established as the standard the Commission applies when assessing mergers and infringements of the Treaty on rules on cartels and monopolies. Our aim is simple: to protect competition in the markets as a means of enhancing welfare and ensuring the efficient allocation of resources.’⁵⁰⁵

This has not always been the approach adopted in the EU however, and over the years some policy objectives have not been ‘rooted in notions of consumer welfare in the technical sense at all, and some were plainly inimical to the pursuit of allocative and productive efficiency.’⁵⁰⁶ Policy objectives, which can strongly influence the manner in which legislative mechanisms are employed and understood, are an ‘expression of the current values and aims of society and

⁵⁰¹ The most prominent ‘range from the Harvard school (Mason, Bain, Jayser and Tuner), with its largely structural theory of competition, the Chicago school (Stigler, Bork and Posner) with its neoclassical pricing theory, the post-Chicago school (Salop, Shapiro, Ordover and Williamson), with its strategic, game-theoretic theory of firm behaviour, and more recently the behavioural economics school (Sunstein, Gerla, Stucke and Tor), with its challenge to the rational assumptions that underpin other economic theories.’ Caron Beaton-Wells, Christopher Harding and Jennifer Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?’ *supra* n.499.

⁵⁰² Caron Beaton-Wells, Christopher Harding and Jennifer Edwards (2015) *supra* n. 499, n. p.241.

⁵⁰³ *Ibid.*

⁵⁰⁴ Mark Furse, ‘The Role of Competition Policy: a survey,’ (1996) *European Competition Law Review* 250.

⁵⁰⁵ Neelie Kroes, ‘European Competition Policy – Delivering Better Markets and Better Choices,’ 15th September 2015, Speech/05/512. Available at: http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm. Last accessed 20th March 2019.

⁵⁰⁶ Richard Whish and David Bailey, ‘Competition Law’ 7th edn (Oxford University Press: 2012) p.19.

[are] as susceptible to change as political thinking generally.’⁵⁰⁷ The very concept of the internal market for example, requires that all internal barriers to trade be dismantled.⁵⁰⁸ Competition law therefore, was one way in which the EU could prevent artificial barriers to trade and so, in the beginning, the creation, protection and maintenance of the internal market was an important policy objective of competition law. Now that the internal market is thoroughly matured and established, other objectives have taken a more prominent role. Even more recently, some have argued in favour of a shift towards ‘more of a focus on a total welfare model rather than a consumer welfare model’⁵⁰⁹ as a consequence of the 2008 global economic crisis, whilst others maintain that ‘the ultimate objective of ... intervention in the area of antitrust ... should be the promotion of consumer welfare.’⁵¹⁰

Consumer welfare itself is defined in terms of its ‘*outcomes* which are more important than the *process of competition*.’⁵¹¹ This utilitarian approach to competition policy is reflected in the fact that some would argue that ‘[f]ree competition is not an end in itself – it is a means to an end.’⁵¹² This perhaps starts to illuminate the strong relationship between competition law and the utilitarian enforcement mechanisms that it typically favours. Competition as a process deserved of protection however, is not without its proponents because ‘[v]igorous competition between firms is the lifeblood of strong and effective markets.’⁵¹³ Competition policy however, is nuanced enough to prevent it from being ‘seen as a zero sum game’⁵¹⁴ in that it is entirely possible to pursue one overriding objective whilst bringing about other ‘positive externalities.’⁵¹⁵

It can be said therefore, that at the very least competition law has at least one policy objective, which in Europe is broadly agreed to be consumer welfare. Anti-cartel law, which is a sub-set of competition law, therefore must contribute to the attainment of this overriding objective.

⁵⁰⁷ Ibid, p.20.

⁵⁰⁸ Ibid.

⁵⁰⁹ Phil Evans, ‘The Consumer and Competition Policy: welfare, interest and engagement,’ in Ariel Ezrachi (ed) *Research Handbook on International Competition Law* (Edward Elgar Publishing: Cheltenham, 2012) p.545.

⁵¹⁰ Philip Lowe, ‘The design of competition policy instruments for the 21st century – the experience of the European Commission and DG Competition,’ (2008) 3 Competition Policy Newsletter.

⁵¹¹ Oles Andriychuk (2009), *supra* n. 494.

⁵¹² Neelie Kroes, ‘“Free Competition” is not an end in itself...’ (2007) *Concurrences* No. 3-2007.

⁵¹³ DTI, ‘Productivity and Enterprise: A World Class Competition Regime’ July 2001, Cm 5233. Available at: <https://webarchive.nationalarchives.gov.uk/+/http://www.dti.gov.uk/ccp/topics2/pdf2/cm5233.pdf>. Last accessed 20th March 2019.

⁵¹⁴ Oles Andriychuk (2009) *supra* n. 494.

⁵¹⁵ Ibid.

Anti-cartel regulation however, particularly since the introduction of a criminal cartel offence, has its own policy concerns that, whilst arguably subordinate to the overriding policy objective of consumer welfare (as that is the primary concern of competition law) need to be counted when determining the number of variables present in the regulatory space for the purpose of the Howlett and del Rio complexity spectrum assessment. The most obvious policy addition to the regulatory space is of course criminal law policy.

As discussed in Chapter 2 of this work, the criminal law can be used in pursuit of either consequentialist or non-consequentialist objectives. Consequentialist objectives are essentially utilitarian and justify the use of criminal sanctions if such usage has beneficial future outcomes (deterrence, for example). In practice, the use of criminal sanctions for consequentialist purposes is tempered by the need that such sanctions be fair and justified, i.e. the condemned man has done something wrong. Criminal sanctions are therefore never appropriately imposed upon an innocent man purely for the purpose of creating future beneficial outcomes like deterrence. Non-consequentialist objectives justify the use of criminal law sanctions because harm done to society deserves to be punished, and in practice will result in some beneficial outcomes, even a certain degree of deterrence. In addition criminal policy, because of the very serious implications that criminal sanctions necessitate, must abide by fundamental concepts of both fairness and justice. This is implicit in the procedures and evidential burdens associated with the investigation and prosecution of criminal conduct.

Nevertheless, the criminal cartel offence was introduced as a mechanism by which the utilitarian objective of deterrence could be enhanced, but maintained that it was justified because cartel activity is morally blameworthy. However, the instrumentalist way in which the offence has been implemented would imply that the criminal cartel offence is not part of the wider criminal policy landscape. Nowhere is that more evident than in the dynamics that occur between the criminal cartel offence and the leniency programme that is so integral to the administrative regime.

The leniency programme is regarded as vital to the success of the administrative anti-cartel regime in the EU, and therefore the UK. The administrative regime is the primary mechanism by which the EU fights cartel activity, an area of exclusive competence for the EU. The importance of the Member States protecting the leniency programme cannot be understated. The creation of a criminal cartel offence within the Member States therefore, cannot jeopardise

the efficacy of the leniency programme and thereby, the enforcement of Article 101 TFEU, a fundamental legislative mechanism for protecting consumer welfare and the integrity of the internal market. Consequently, legislators in the UK were forced to create a means by which the immunities offered in the leniency programme for the administrative regime could be replicated for the section 188 offence. Had they not, the immunity from a fine for an undertaking would have lost its appeal as the individual agents of that undertaking would have instead be sent to jail. This resulted in the creation of ‘No Action’ letters which provide culpable cartelists with immunity from criminal prosecution if certain criteria are satisfied.⁵¹⁶ Legislators felt comfortable with allowing equally culpable offenders to escape prosecution for a criminal offence considered to be so grave that it allows for terms of imprisonment of up to 5 years, so that they would not be dissuaded from blowing the whistle on the cartels of which they had become a part. This is atypical for criminal law in the UK. The apparent cognitive dissonance of allowing a blameworthy participant escape any form of punishment despite having engaged in what is regarded as a serious and harmful criminal offence, was made practicable because of the instrumentalist manner in which the criminal cartel offence has been implemented in the UK. It has appropriated the moral language of criminal policy whilst simultaneously ignoring the normative nature of those sanctions. In so doing, it has also failed to adequately engage with the fundamental criminal policy considerations of fairness and justice.⁵¹⁷

These concerns are less problematic when considered from a purely utilitarian perspective, but when a predominantly utilitarian ideology is used to justify the creation of a criminal cartel offence, the question of under-enforcement becomes more relevant. When criminal sanctions are used simply as part of ‘the law’s continuum of deterrent threats’⁵¹⁸ arguably adding to the blurring of the distinction between civil and criminal law by ignoring the normative implications of the criminal law, it can lead to both ‘the overuse of criminal law outside its

⁵¹⁶ OFT, ‘Applications for leniency and no-action in cartel cases: OFT’s detailed guidance on the principles and process’ July 2013, OFT1495. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf. Last accessed 17th January 2019.

⁵¹⁷ Beaton-wells explains it as a ‘largely instrumental justification for criminalisation (that is, using criminal sanctions to bolster leniency policies), as distinct from a more normative justification (that is, using criminal sanctions to reflect and punish the harmful and delinquent nature of cartels),’ in Caron Beaton-Wells (2017) p.10.

⁵¹⁸ Robinson, ‘The criminal-civil distinction and the utility of desert,’ (1996) 76 Boston University Law Review 201.

traditional context, and its under-enforcement.⁵¹⁹ The risk of under-enforcement has indeed been played out in the context of the criminal cartel offence in the UK as a result of,

‘the tendency for enforcement agencies to rely principally on easier-to-prove administrative regimes and administrative sanctions, with criminal law being only used as a last and final resort.’⁵²⁰

Whilst it is proportionate for a criminal sanction to be reserved for only the most serious cases, as shown in Chapter 3 of this work, in order for it to be a deterrent, it must actually be used (and used successfully) in those serious cases. The deterrent threat cannot be fully realised if the certainty of detection, prosecution and sanction are low without the threatened sanction being raised to wholly disproportionate and unjust levels. In the context of the criminal cartel offence, it appears that even when serious cartels have been detected and the threshold for a criminal prosecution has been met, there is still a reluctance from the CMA to pursue criminal sanctions.⁵²¹ If the real world enforcement of the cartel offence implies that deterrence is not the primary focus, the dynamics of anti-cartel enforcement in the UK may be a serious problem:

‘perceived unfairness of unacceptable compromise in relation to leniency policies also has consequences for the readiness of members of the business sector to comply with cartel laws voluntarily. In particular, it may have adverse implications for normative compliance, where compliance is internalised by a sense of duty and does not require activation by some external force or pressure.’⁵²²

Further, from a purely retributive perspective, if cartel activity is so harmful as to deserve the imposition of a criminal sanction, its under-enforcement, together with the consistent enforcement of the administrative regime against undertakings, would seem to indicate that a considerable number of culpable cartelists are escaping the punishment that they deserve.

⁵¹⁹ Jones and Williams, ‘The UK response to the global effort against cartels: is criminalisation really the solution?’ (2014) *Journal of Antitrust Enforcement* 100.

⁵²⁰ *Ibid.*

⁵²¹ See for example: OFT Decision, CA98/02/2009, ‘Bid rigging in the construction in England,’ 21 September 2009 (Case CE/4327-04).

⁵²² Caron Beaton-Wells (2015) *supra* n.499, p.246.

The blurring of the lines between the criminal and civil law in respect of anti-cartel enforcement does not just occur on a theoretical level. The section 188 offence, as amended, introduces a range of potential defences to liability as a means of limiting the scope of the offence by carving out situations in which the offence would not apply:

- (a) Customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the products or services so affected;
- (b) In the case of bid-rigging arrangements, the person requesting the bids would be given relevant information about them at or before the time when the bid is made, or;
- (c) Relevant information about the arrangements would be published, before the arrangements are implemented.⁵²³

The idea is that arrangements that lack the clandestine characteristic of a traditional cartel and are made openly, will not be caught by section 188. The rationale for articulating the offence that way was that cartel arrangements that are made openly, where details are available to those affected by the arrangement allow consumers to inform themselves about the agreements and so can make an informed decision as to whether to contract with the cartelists or elsewhere.⁵²⁴ The type of agreements that would benefit from the carve out would be, for example, joint selling agreements like those used in professional sport for the sale of the collective sale of broadcasting rights for televised games. The idea is that only legitimate agreements could be discussed and implemented openly. Illegal agreements would be unable to benefit from the carve out because should such agreements be made openly in the manner envisaged by the Act, administrative sanctions by way of the Competition Act 1998, or indeed any other aspect of the anti-cartel enforcement quiver, would very quickly follow.

The contours of the newly amended criminal offence are therefore, defined by the existence of the civil penalties and could not operate in the intended manner on its own. In articulating the criminal offence in this way, the regulatory dynamics of anti-cartel enforcement have been further altered, and the relationship between the various enforcement mechanisms have become

⁵²³ Enterprise Act, s. 188A

⁵²⁴ Department for Business, Innovation and Skills, 'A Competition Regime for Growth: A Consultation on Options for Reform' (March 2011), para. 6.52, available at: http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-compliance-regime-for-growth-consultation.pdf

even closer. This could operate to the advantage of the overall regime. However, if one particular aspect of the regime operates in an appreciably under-whelming way, that close relationship could mean that the underwhelming enforcement of one mechanism could have a negative impact upon other mechanisms within the enforcement toolkit. This was explored in Chapter 5 of this work in respect of Article 4(3) TEU and the duty of loyal cooperation, and was played out in Sweden when the issue of cartel criminalisation was raised.

The Swedish Competition Authority, the Konkurrensverket (the ‘KKV’) acknowledged that hard-core anti-competitive agreements like those subject to criminal sanctions in the UK are not only economically harmful, but morally blameworthy. However, the Swedish Constitution places an absolute duty to prosecute criminal offences, upon the relevant authorities.⁵²⁵ This absolute duty therefore prevents Sweden from implementing a system of leniency that utilises immunity from criminal prosecution. The KKV concluded that a legislative mechanism that sought to punish individual cartelists criminally, without an associated leniency programme providing for such immunity would damage the pre-existing system of administrative fines in Sweden, and so could not be added to their anti-cartel regulatory landscape.⁵²⁶ Criminalisation was therefore, rejected.⁵²⁷ Interestingly, in a letter from DG Comp to the KKV dated the 29th April 2005, issues regarding the potentially negative impact of criminalisation upon anti-cartel enforcement practices against undertakings was alluded to. DG Comp states that there are three conditions which must be present in order for criminal sanctions to be an advantageous addition to an anti-cartel framework. The conditions were:

1. Far reaching investigative powers are needed to satisfy not only the higher evidential standard in criminal cases, but also the increased rights enjoyed by defendants in criminal proceedings;
2. The judiciary themselves must be willing to impose the sanctions provided for by the law

⁵²⁵ Swedish Code of Judicial Procedure, Chapter 20, section 6.

⁵²⁶ See, Interventions by Claes Norgren, Director General, Swedish Competition Authority, ‘Criminal Enforcement of Antitrust Laws,’ Fordham Law Seminar, New York, September 14 2006.

⁵²⁷ The Swedish Competition Authority also noted that another ‘ground for rejecting the idea [of immunity for culpable defendants] has been that the system would give the police and prosecutors the right to grant the relief. Such a power outside of the court system is seen as non-acceptable (sic).’ See, Interventions by Claes Norgren, Director General, Swedish Competition Authority, *ibid*.

3. An effective leniency programme that is applicable to both criminal and civil proceedings is required.⁵²⁸

It went on to say that a ‘failure to meet *any* of these conditions will in [its] view not only result in less efficient enforcement of criminal offences *but will also lead to under enforcement of the competition rules against companies*’ (emphasis added).⁵²⁹

In the UK, it remains to be seen whether all three of DG Comp’s essential criteria can be satisfied. Whilst it is clear that the UK has sufficient investigatory powers and procedural protections, along with a leniency programme that provides for immunity from criminal sanctions, it remains unclear whether the judiciary are prepared to impose the sanctions provided for by section 188. When able to impose sanctions free from the effects of a Department of Justice plea bargain, the UK judiciary have chosen only to impose suspended sentences.⁵³⁰

Competition policy in the UK is an amalgam of policies that at a minimum include consumer welfare, criminal policy and the policy objectives of the EU. This demonstrates that not only is the regulatory space in the UK multi-governmental, it is a multi-policy space and adds a further layer of complexity to the regulatory mix that can now be identified as a multi-government policy mix. As the degree of complexity grows, so do the opportunities for inconsistencies, particularly when the various elements contained within the policy mix are poorly understood or misused. This is perhaps most evident when the criminal policy aspect of the regulatory space is considered. This work agrees with those commentators who prescribe to the view that the way in which the cartel offence has been utilised in the UK,

⁵²⁸ DG Comp, Letter to Swedish Competition Authority, 29th April 2005. See [ANNEX 1: DG Comp letter to Swedish Competition Authority](#). As discussed in Chapter 5 of this work, any domestic measure of a Member State that risked the attainment of a Union objective, particularly one as fundamental as the protection of competition within the internal market, could amount to a breach of the duty of loyal cooperation contained in Article 4(3) TEU. When put into a practical context such as the Swedish example above, that could amount to an enforceable obligation to create a system of immunity from prosecution should a criminal sanction for individuals be introduced to a Member States’ domestic anti-cartel regulatory space.

⁵²⁹ Ibid.

⁵³⁰ Peter Nigel Snee, who pleaded guilty to a breach of section 188 Enterprise Act 2002, received 6 months imprisonment suspended for 12 months. His co-cartelists were acquitted at trial having pleaded not guilty. Barry Kenneth Cooper received a sentence of 2 years imprisonment, suspended for 2 years as well as a competition disqualification order for 7 years, having pleaded guilty.

‘in jurisprudential terms, ... reflects a tension between the resort to criminal law on the one hand for retributive or normative purposes and on the other hand for instrumental purposes. The result is inconsistency in policy and practice, and a strategy that may then be, to some extent, self-defeating.’⁵³¹

It is also perhaps an indication of the lack of serious engagement with the idea of creating a culture of compliance. The way in which ‘immunity policies ... reduce law enforcement to a “game” – the company that is first to “the confessional” wins, the winner takes all’⁵³², and as there is ‘no requirement to implement, improve, or update a compliance program’⁵³³ in order to benefit from immunity, ‘it is difficult to imagine how this scenario promotes respect for the law.’⁵³⁴

4.4.2.3. *Goals*

Given the complexity that is apparent from the preceding discussions, it is perhaps to be expected that anti-cartel enforcement in the UK is also seeking to attain multiple goals. It is clear from the pre-legislative discussions and CMA publications that the primary goal in the UK is that of deterrence as a means of reducing cartel activity. The civil regime which is the primary means by which cartels are dealt with, is also predominantly in the pursuit of deterrence. The criminal cartel offence was primarily introduced to enhance that deterrence, and the leniency programme was created (and protected) to improve detection rates, and therefore enable that deterrence. However, despite the UK’s almost singular pursuit of deterrence, it is not the sole goal of anti-trust enforcement. Unfortunately, whilst there has been explicit clarity as to deterrence being the primary goal of the administrative regime and the criminal offence, there has been arguably less clarity as to the direct and indirect goals of the other enforcement mechanisms. All of the enforcement mechanisms must be enforced in pursuit of direct goals that ultimately feed back into the overriding objective of competition law, and so must in some way, enhance consumer welfare. In so doing however, the use of an enforcement mechanism may have an indirect impact upon some ancillary goal.

⁵³¹ Caron Beaton-Wells (2015) *supra* n. 499, chapter 12, p.248.

⁵³² Caron Beaton-Wells, ‘Normative Compliance: The End Game’ (2012) 2 (1) *Antitrust Chronicle*.

⁵³³ *Ibid.*

⁵³⁴ *Ibid.*

An analysis of the enforcement tools within the toolkit will help to provide greater clarity as to the goals of they seek to achieve, both directly and indirectly. The least interventionist regulatory tool that the CMA have at their disposal are the advocacy and education information strategies. In the broadest sense competition advocacy is defined as:

‘all those activities conducted by the competition agency that have to do with the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with other government agencies and by increasing public awareness of the benefits of competition.’⁵³⁵

The direct benefit of advocacy work therefore, is to raise awareness as to the benefits of competition and thereby, educate individuals, undertakings and governments to help enable them to make pro-competitive choices. Therefore, advocacy has an important role to play in creating a culture of voluntary compliance with competition laws, which could be said to be the direct goal of such strategies. Indirectly, advocacy work of this kind also contributes to ensuring that society, and therefore the pool of potential jurors, are more aware of the harm done by anti-competitive conduct and regard interventions by the competition authorities as just, fair and necessary. The indirect goal therefore, is arguably is to contribute to the efficacy of the sanctioning of cartels, and the legitimacy of competition law actions. As well as this broad definition of the advocacy role of competition authorities, the CMA has a legal power to ‘provide information and advice on matters relating to any of its functions to ministers or other public authorities.’⁵³⁶ Given that the ‘scale of Government influence over markets and the potential for it to promote or harm the interests of present and future consumers is considerable,’⁵³⁷ the ability of the CMA to intervene, whether formally or not, with advice and recommendations is an important function. This is particularly true given that in ‘the real world “policy instruments” are, as a piece of social technology have a high degree of ... *interpretative flexibility* carrying quite different meanings from time to time.’⁵³⁸ The ability of the CMA therefore, to provide advice to the Government on the implications of their policy choices in

⁵³⁵ ICN, Advocacy Toolkit Part 1. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_Toolkit1.pdf. Last accessed 24th December 2018.

⁵³⁶ Enterprise Act 2002, s. 7.

⁵³⁷ John Kirkpatrick, ‘Making a case for competition in policymaking – lessons from CMA advocacy 2014 – 2018,’ (2018) 14(1) European Competition Journal 152.

⁵³⁸ Kieron Flanagan, Elvira Uyarra and Manuel Laranja, ‘Reconceptualising the ‘policy mix’ for innovation,’ (2011) 40(5) Research Policy 702.

the context of their current use, is an invaluable tool for the protection of competition and thereby, consumer welfare.

Third party damages claims play an important, although perhaps underutilised role in the anti-cartel regulatory space. They are principally compensatory in nature as they aim to allow those who have suffered economic harm as a result of a cartel, to be compensated for that harm. However, despite the fact that the CJEU in *Courage v Crehan*⁵³⁹ ‘highlighted the possibility for victims of antitrust violations to claim damages before national courts’⁵⁴⁰, and then in *Courage* and in Joined Cases C 295/04 to C 298/04 (*Manfredi et al.*)⁵⁴¹ the CJEU went on to acknowledge the risk that the lack of such a mechanism for individual victims of antitrust violations would pose to the effectiveness of the Treaty provisions, ‘most victims, particularly SMEs and consumers, rarely obtain compensation.’⁵⁴² The right to compensation, whilst being a right derived from EU law, is exercised and governed by national rules which ‘often make it costly and difficult to bring antitrust damages actions.’⁵⁴³ This has been addressed in the Damages Directive⁵⁴⁴ which seeks to harmonise the process of private actions for damages across the EU Member States after a 2004 Report found that they were in a states of ‘total underdevelopment.’⁵⁴⁵ The Damages Directive emphasises that:

‘The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim

⁵³⁹ Case C-453/99 *Courage Ltd. v. Bernard Crehan* (2001) ECR, I-6297.

⁵⁴⁰ Andrea Renda et al., ‘Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios: Final Report,’ Report for the European Commission, DG COMP/2006/A3/012, 21st December 2007, p.28. Available at:

http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf

⁵⁴¹ C- 295/04, 297/04 e 298/04 *Manfredi et al. v. Lloyd Adriatico assicurazioni Spa e Assitalia Spa* (2006) ECR I-06619.

⁵⁴² European Commission, ‘Actions for Damages: Overview’, Antitrust, accessed 28th April 2018. Available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

⁵⁴³ Ibid. The Commission sought to address this problem by introducing Directive 2014/104/EU on Antitrust Damages Actions which entered into force on 26 December 2014. Member States were required to implement it into their domestic legal systems by the 27 December 2016. Complimentary to the Directive, was the Recommendation on collective redress which invited Member States to introduce by 26 July 2015 collective redress mechanisms, including actions for damages.

⁵⁴⁴ Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 26 November 2014, OJ L349/1.

⁵⁴⁵ Ashurst, ‘Study on the conditions of claims for damages in case of infringement of EC Competition rules’, Brussels, 2004, 27.

compensation before national courts for the harm caused to them by an infringement of those provisions’,⁵⁴⁶

The EU is clearly therefore, stating that private enforcement of damages claims against undertakings for the harm caused by their collusion is a vital aspect of the fight against cartels, even though it is not a mechanism by which Article 101 TFEU is directly enforced against those undertakings.

In the UK there are a variety of ways in which victims of cartel agreements can seek redress in private actions. Broadly speaking they can be categorised as ‘follow-on’ actions that rely upon a UK or EU competition authority infringement decision as the basis for the action,⁵⁴⁷ ‘standalone’ actions, and actions for injunctive relief. In follow-on actions there is no need for the claimant to establish that an infringement has occurred, only that they have suffered damage as a result. The Consumer Rights Act 2015 (the ‘CRA 2015’) provided for ‘standalone’ actions which are not dependent upon a pre-existing infringement decisions and it is now the case that most:

‘significant competition cases today are hybrids... A typical case will have a follow-on element that relies on a pre-existing decision, but will also have a standalone element that adduces other evidence to establish a broader infringement that has been described in the decision.’⁵⁴⁸

Prior to the CRA 2015 the cost of a private action operated as a deterrent in cases where the harm suffered by individual victims was small and meant that the process of making a claim was not cost effective. This was despite that fact the collective harm of all the individual victims may have been significant. It was for this reason that the CRA 2015 introduced collective proceedings that enable a group of victims to claim for damages together.⁵⁴⁹

⁵⁴⁶ Damages Directive, Recital (3), supra n. 543.

⁵⁴⁷ Decisions of the CMA and the European Commission are binding. The decisions of other European competition authorities are not binding but will be considered persuasive by the UK courts.

⁵⁴⁸ Slaughter and May, ‘Private enforcement of competition law in the UK’, August 2017. Available at: <https://www.slaughterandmay.com/media/2534704/private-enforcement-of-competition-law-in-the-uk.pdf>

⁵⁴⁹ Competition Act 1998, s 47B (as amended by Schedule 8 Consumer Rights Act 2015).

Nevertheless, individual claimants have found it to be difficult to be classified as a group by the court for the purpose of a collective action in practice.⁵⁵⁰

As well as recognising the important role that private action claims for damages play in the fight against cartels, both as an instrument of corrective justice for harmed consumers, and as tool for ‘discouraging anticompetitive behaviour’⁵⁵¹ the European Commission also recognised the potentially harmful impact that an increase in damages actions could have on the leniency programme. The argument being that were victims able to rely on leniency statements in order to obtain damages for the harm that they suffered, it could deter cartelists from coming forward, thereby reducing detection rates and the efficacy of the administrative regime. This need to balance the interests of the victims of a cartel to obtain corrective justice against the interests of protective public enforcement of competition law via leniency programmes was articulated in the Damages Directive:

‘Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law... To ensure undertakings continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence.’⁵⁵²

When victims can obtain sufficient evidence to pursue a claim, there are further obstacles that ultimate consumers face when trying to obtain corrective justice. Quite often the claimant in a private action claim is not the end consumer but someone further up the supply chain, who has passed on the harmful cartel pricing to its own consumers. The defendant in a private action claim can rely therefore, on the ‘passing-on defence’.⁵⁵³ The problem for the ultimate consumer is that they are not a direct victim of the cartel but have still suffered as a result of its unfair and anticompetitive overcharge. The EU Damages Directive seeks to mitigate this

⁵⁵⁰ Gowling WLG, ‘Class Actions for Competition Law Infringements Come to the UK’ 30th September 2015. Available at: <https://gowlingwlg.com/en/insights-resources/articles/2015/class-actions-for-competition-law-infringements/>. Last accessed 24th December 2018.

⁵⁵¹ Green Paper, ‘Damages actions for breach of the [EU] antitrust rules’ COM (2005) 672, 19 December 2005, 3. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=en>. Accessed 1st May 2018.

⁵⁵² Recital (26), Damages Directive, *supra* n. 543.

⁵⁵³ Theon Van Dijk and Frank Verboven, ‘Cartel Damages Claims and the Passing-On Defence’ (2008) CEPR Discussion Paper No. DP6329.

problem by creating a rebuttable presumption that an indirect purchaser has suffered harm if they can ‘prove that an overcharge was suffered by a direct purchaser from whom [they] purchased the goods or services in question.’⁵⁵⁴ This may be simple when a case has been litigated in court and the defendant has been able to prove passing on as part of his defence, but as a significant number of private damages actions may well be settled out of court, this could arguably amount to a serious obstacle for end of line consumers who already suffer as a result of the ‘information asymmetry’⁵⁵⁵ that is at the heart of most antitrust actions.

So whilst consumer welfare is served by the creation of a competitive market on a general level, the leniency programme necessitates that those who have participated in cartels but who come forward, are not sanctioned proportionately to the harm that they have inflicted upon consumers. The leniency programme then goes on to limit the availability of information to those consumers for the purpose of private damages claims, further limiting the availability of corrective justice. This is then exacerbated by the challenges faced by consumers to whom the economic harm created by the cartels are passed on to (as illustrated above) in obtaining compensation for the actual harm they have suffered in specific cases. The impact of protecting the leniency programme therefore, may in practice serve to undermine aspects of consumer welfare as a policy objective.

The direct goal of competition disqualification orders is incapacitation as the court is obligated to make a disqualification order when the director against whom the order is sought has committed a breach of competition law, and that their conduct in so doing makes him unfit to be concerned in the management of a company.⁵⁵⁶ The determination of the court when an order is thus made, is that the subject of the order should be prevented from occupying a position of managerial influence over a company. The effect of such an order is to make it a criminal offence for the subject to, inter alia, be a company director for the duration of the ordered disqualification.⁵⁵⁷ The indirect effect of a disqualification order therefore, is the prevention of recidivism. Further, as discussed in Chapter 3 of this work, competition disqualification orders have been found to exert a powerful deterrent effect.⁵⁵⁸

⁵⁵⁴ Marc Israel, Charles Balmain, Mark Powell, Aqeel Kadri, ‘Competition Damages – UK implementation of the EU Damages Directive’, White & Case Publications, 27 January 2017. Available at: <https://www.whitecase.com/publications/alert/competition-damages-uk-implementation-eu-damages-directive>

⁵⁵⁵ Ibid.

⁵⁵⁶ Company Director Disqualification Act 1986 s 9A(1) – (3).

⁵⁵⁷ The maximum period of disqualification is 15 years by virtue of section 9A(9) CDDDA 1986.

⁵⁵⁸ For more discussion see, section 4.4.2.3.

The goals that can be identified as operating within the anti-cartel regulatory space in the UK therefore, are deterrence, presence of multiple goals again increase the level of complexity that is present in a regulatory space, and with it increases the likelihood that conflicts will occur. As was the case in the previous discussion about policies, the operation of the leniency programme creates a greater risk of such conflicts occurring. For example, if,

‘[c]riminalisation is borne of the view that cartel conduct is both seriously harmful and inherently delinquent, and hence warrants the most stringent and condemnatory response available to the state,’⁵⁵⁹

it is hard to reconcile this position with the granting of immunity to culpable defendants in exchange for information. Further, there is a view that leniency policies ‘impair the ability of private complainants to access [evidence, and so] seriously impair private litigants’ ability to pursue follow-on damages claims’⁵⁶⁰ thus diminishing the compensatory nature of anti-cartel enforcement mechanisms. In Europe for example, almost all stand-alone damage claims fail.⁵⁶¹ The proper functioning of the leniency programme thereby,

‘transgresses the principle of corrective justice (that injured persons be made whole and the one who caused the injury pays), as it allows a culpable person to avoid paying a pro rata share of damages...’⁵⁶²

The operation of a leniency programme which increases the likelihood and the number of civil actions yet diminishes the compensatory side of anti-cartel enforcement some may find difficult to ethically or practically justify.⁵⁶³ Further, despite all of the moral rhetoric that was employed to justify the addition of a criminal sanction to the legislative quiver in the UK, leniency plays a role in undermining that very aspect of its justification. These problematic aspects of the leniency programme are further compounded by the fact that it has been ‘repeatedly pointed out that leniency policies display a bias towards uncovering collusive

⁵⁵⁹ Caron Beaton-Wells (2015) *supra* n. 499, chapter 12, p. 234.

⁵⁶⁰ *Ibid*, p.266.

⁵⁶¹ *Ibid*.

⁵⁶² *Ibid*, p.268.

⁵⁶³ *Ibid*, p.267.

conduct close to breaking point, that is to say at the end of the life of a cartel.’⁵⁶⁴ In fact, a ‘dataset of European Commission cartel decisions between 1995 and 2012, established that over 3/4 of the leniency applications by first-in applicants took place after, not before, a cartel collapse.’⁵⁶⁵ This could be used to demonstrate that cartels are not being deterred, or even significantly de-stabilised by anti-cartel enforcement and that the enforcement bias should be more heavily in favour of compensating injured parties, and punishing wrongdoing. However, the leniency programme is a critical aspect of a successful administrative regime against undertakings, which is the primary means by which cartel activity is sanctioned in the UK and the EU. The Commission state that the ‘interests of consumers ... in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit [cartels].’⁵⁶⁶ The operation of the leniency programme therefore, is considered by the EU to be essential for the effective enforcement of Article 101 TFEU, and as discussed above in section ... , Article 4(3) TEU could be interpreted as a legal obligation for Member States to create and implement a similar leniency regime so far as their constitutional arrangements permit them to do so, rather than such a programme of leniency being merely a recommended best practice.

The above discussion illustrates that not only is the anti-cartel regulatory space in the UK a multi-level policy mix, but that given the number of goals it pursues, it is situated at the most complex end of the complexity spectrum articulated by Howlett and del Rio. The degree of complexity and the number of horizontal and vertical interactions, gives rise to a significant risk of challenging, potentially contradictory interactions to occur within the space. This is arguably exacerbated by the fact that currently, the anti-cartel regulatory space in the UK has failed to properly acknowledge and engage with the fact that mechanisms may pursue multiple goals but not in an equal manner. For example, the criminal cartel offence was introduced in order to increase the deterrent effect of not only the regime as a whole, but also specific tools within in. However, it serves another function related to its normative character, and that is to punish wrong-doing. This additional goal then leads to a third goal that is linked to the advocacy and educative function of the CMA and anti-cartel enforcement, and that is to act as

⁵⁶⁴ Caron Beaton-Wells (2015) supra n. 499, p.282-3. See also, Abrantex-Metz and Bajari, ‘Screen for Conspiracies and Their Multiple Applications, (2009) 24 (1) Antitrust 66.

⁵⁶⁵ Gartener and Zhou, ‘Delays in Leniency Applications: Is There Really a Race to the Enforcer’s Door?’, (2012).

⁵⁶⁶ Commission Notice on Immunity from Fines and reduction of fines in cartel cases, 2006, OJ C298/17. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC1208\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC1208(04)&from=EN). Last accessed 28th March 2019.

an educative mechanism that helps to create a culture of compliance. Whilst each of these goals plays an important function within the regulatory landscape, they are not of equal importance. The same can be said of administrative fines. Their primary function is to deter hard-core collusive conduct, but they have an additional function of disgorging the unjust enrichment that a successful cartel will inevitably benefit from. Private damages claims are principal compensatory but also have an impact on deterrence,⁵⁶⁷ and whilst director disqualification orders are principally used in order to incapacitate directors, they have been shown to also have a significant impact upon deterrence.⁵⁶⁸

4.4.3. Leniency

The operation of leniency programmes are considered by many to have ‘revolutionised’⁵⁶⁹ anti-cartel enforcement and to be integral to the effective enforcement of anti-cartel laws. The argument is that the success of Article 101 TFEU was in fact, ‘triggered, and is driven, by the introduction of leniency programmes, which have led to a flood of applications from undertakings willing to cooperate with the authorities in return for immunity or a reduction in fines.’⁵⁷⁰ Indeed, more ‘than 30 countries have criminalised cartel conduct in some form ... and the list appears to be growing.’⁵⁷¹ It is critical therefore, that this growing wave of leniency devotion is accompanied by a critical analysis of its effect upon the wider dynamics of anti-cartel enforcement in the context of a multi-level complex policy mix. This need is starting to be addressed in the academic literature and indeed, more recently there have been:

‘a number of published commentaries ... questioning the value of leniency policies, cautioning against over-reliance or myopia in their use, and drawing attention to the

⁵⁶⁷ In the USA treble damages mean that private damages claims have a much more significant deterrent effect. Treble damages has been rejected in the UK and the EU because of the significant risk that they pose in respect of over-deterrence. Unlike State enforced fines, the more successful private damages claims will lead to an increase in further claims leading to a near impossible task of calculating appropriate fine levels for the purpose of general deterrence.

⁵⁶⁸ CMA, ‘The Deterrent Effect of Competition Authorities’ Work: Literature Review’, 7 September 2017, at para. 4.66.

⁵⁷⁰ Cornelis Canenbley and Till Steinvorth, ‘Effective Enforcement of Competition Law: Is There a Solution to the Conflict Between Leniency Programmes and Private Damages Actions?’ (2011) 2(4) *Journal of European Competition Law & Practice* 315.

⁵⁷¹ Caron Beaton-Wells, Christopher Harding and Jennifer Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows,’ in Beaton-Wells and Tran (eds) (2015) *supra* n. 499.

potentially deleterious effects of such policies on private enforcement, criminal trials, and on engendering a culture of compliance amongst the business community.’⁵⁷²

The major failing of the leniency programmes, it is contended, is the ‘inward-looking’⁵⁷³ manner in which they are adopted and considered, focusing upon the policy of leniency in a ‘discrete and isolated way’⁵⁷⁴ that fails to engage with the wider implications of leniency and ‘neglects deeper evaluation’⁵⁷⁵ of its impact upon the entirety of the regulatory space in which they operate.

The term ‘leniency programme’ in the UK is a generic term that covers both leniency and immunity. The immunities can be divided into three categories; Type A, Type B, and Corporate Immunity. The leniencies can be divided into two categories; Type B and Type C.⁵⁷⁶

Type A Immunity

When granted, Type A immunity provides for total and automatic immunity from administrative fines and a blanket and automatic immunity from criminal prosecution for all cooperating current and former employees and directors. It can only be granted to the first undertaking to approach the CMA to provide evidence, and only when the CMA has not already opened an investigation into that particular cartel. In order to benefit from Type A immunity (or indeed any form of immunity), the undertaking must acknowledge that it was a party to a cartel, it must provide the CMA with all of the documents, evidence and information about that cartel, and provide complete and continuous cooperation until the conclusion of any action. Further, an undertaking cannot have been a coercive party within the cartel.

Type B Immunity

⁵⁷² Caron Beaton-Wells (2015) supra n. 499, p.4-5.

⁵⁷³ Ibid.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid.

⁵⁷⁶ CMA, ‘Applications for leniency and no-action in cartel cases: OFT’s detailed guidance on the principles and process’ July 2013, OFT1485.

Type B provides the same protection as Type A Immunity in terms of administrative fine, but is discretionary as opposed to automatic. It is available to the first undertaking to come forward to the CMA when the CMA has already opened an investigation. The undertaking must however, come forward before a Statement of Objections is issued. Once Type B Immunity has been granted a blanket immunity is provided for all current and former cooperating employees and directors.

Corporate Immunity

Corporate Immunity is available in the same circumstances as Type B Immunity, but for reasons of public interest, the CMA are unwilling to provide for a blanket immunity to all current and former employees and directors. Immunity for individuals can still be granted however, but it is at the discretion of the CMA.

Type B Leniency

Type B Leniency differs from Type B Immunity only in that it is discretionary in terms of the level of reduction from sanction that a qualifying undertaking can expect. Under Type B Immunity, once that immunity has been granted the undertaking will receive an automatic 100% immunity from administrative fine. In the case of Type B Leniency, that level is discretionarily awarded and can be anything up to 100% reduction. The CMA must be satisfied that value is being added to their investigation by the information provided. That value will be taken into account when the level of reduction in fine is calculated.

Type C Leniency

Type C Leniency is available to undertakings that are not the first to come forward to the CMA. The amount of reduction in fine that they receive is entirely at the discretion of the CMA and will be dependent upon the value that the information that they are able to provide, and is capped at 50%. Blanket immunity for current and former employees and directors is

unavailable, although it may be granted on a person-to-person basis. In practice however, the granting of individual immunity in Type C cases is unlikely.⁵⁷⁷

Leniency programmes have become a critical element of successful anti-cartel enforcement and ‘optimising the design and administration of leniency policies is therefore a key objective for competition authorities.’⁵⁷⁸ As they have evolved they have ‘proved to be a powerful law enforcement tool... [and] a commendable example of bold innovation in public administration.’⁵⁷⁹ The risk posed of poorly implemented leniency policies to effective cartel enforcement, or indeed consumer welfare has until recently, received significantly less attention, and recent ‘studies of cartel formation and operations have emphasised the adaptability and ingenuity of business managers in responding to ever more severe public enforcement campaigns against collusion.’⁵⁸⁰ Therefore, the continuous analysis and review of leniency programmes, and their impact upon the regulatory space in which they exist, must become a central feature of modern anti-cartel enforcement.

The basic principle is that leniency programmes lead to better detection and deterrence of cartels thereby reducing cartel activity, thereby increasing consumer welfare. However, it is claimed that in practice,

‘it is unclear whether they are actually increasing welfare by generating a strong deterrent, or whether they are actually reducing welfare through the larger administration and prosecution costs they generate, without any compensating increase in deterrence.’⁵⁸¹

Further, the fact that undertakings engage in cartels as a result of the actions of their agents means that ‘the threat underpinning most leniency policies – administrative fines against the undertaking – do not constitute a direct cost for these individual decision-makers.’⁵⁸² Indeed,

⁵⁷⁷ O’Kane and Nakhwal, ‘Cartel leniency in the UK (England and Wales): overview’, PLC, May 2013.

Available at: <http://uk.practicallaw.com/0-501-1833?source=relatedcontent>

⁵⁷⁸ Caron Beaton-Wells (2015) *supra* n. 499.

⁵⁷⁹ William E. Kovacic, ‘A Case for Capping Dosage: Leniency and Competition Authority Governance,’ in Beaton-Wells and Tran (eds) (2015) *supra* n. 499.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Catarina Marvão and Giancarlo Spagnolo, ‘What do we know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence,’ in Beaton-Wells and Tran (2015), *supra* n. 499.

⁵⁸² Andreas Stephan and Ali Nikpay, ‘Leniency Decision-Making from a Corporate Perspective: Complex Realities,’ in Beaton-Wells and Tran (eds) (2015) *supra* n. 499.

this remains the case even when a direct cost for individuals has been included in the threatened toolkit, but is not used by the competition authority who instead rely too heavily upon administrative fines directed at undertakings.

When placed within a regulatory space as complex and interconnected as the anti-cartel regulatory space, the effect upon the dynamics of the constituent elements must be a critical, and continuing part of the evaluation process. As has been the case in the UK, when criminal sanctions are introduced instrumentally in order to improve the leniency policy (despite the normative rhetoric employed by politicians and legislators to justify criminalisation) its risks undermining the moralising and educative effect of the criminal law. Therefore,

‘not only do ... leniency agreements bypass the usual institutions of justice, they also fail to fulfil the function of ‘explaining to the public’ that a wrong has been done and will be sanctioned.’⁵⁸³

This has a significant effect upon the impact that criminal sanctions can have on the creation of a compliance culture not so heavily dependent upon State intervention. Additionally, the application of leniency could be regarded as inconsistent with the compensatory function of private actions for damages,⁵⁸⁴ as well as failing to engage with the broader principles of corrective justice. Corrective justice in broad terms is ‘not merely concerned with ensuring that an injured person is made whole. It is also concerned with ensuring that the party who did the injuring pays.’⁵⁸⁵ Therefore, permitting a culpable undertaking from avoiding paying its pro rata share of the damages arising from its own involvement in the prohibited conduct, and ‘offloading a higher share of the damages to the other participants in the cartel’⁵⁸⁶ is an ‘aspect of corrective justice that is almost entirely neglected in contemporary antitrust discourse.’⁵⁸⁷

⁵⁸³ R. Williams, ‘Cartels in the Criminal Law Landscape,’ in Beaton-Wells and Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford, Hart Publishing: 2011), p.312.

⁵⁸⁴ For more discussion on the relationship between private actions for damages and leniency, particularly in light of the decision in the *Pfleiderer* case, see Angus MacCulloch and Bruce Wardhaugh, ‘The Baby and the Bathwater: The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy’ (2012) A paper prepared for the CCP Conference – 14th June 2012. Available at: SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089369. Last accessed 15th October 2018.

⁵⁸⁵ Daniel Crane, ‘Why Leniency does not Undermine Compensation,’ in Beaton-Wells and Tran (eds) (2015), *supra* n.499, p.268.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ *Ibid.*

If ‘cartel conduct is seriously harmful and inherently delinquent’ and thereby deserving of criminal punishment and condemnation, a leniency policy could still be regarded as legitimate and ‘morally defensible’ as an important tool for ensuring that cartels are detected and (most of) the wrongdoers punished. However, when used purely as a means of improving leniency policy for other elements of the enforcement landscape, the serious risks to the legitimacy of the offence should not be ignored. Criminal sanctions represent the most serious and interventionist action taken by the State and they should not be employed merely as a means of making other enforcement tools more effective. Jurisprudentially it creates a tension between the normative purpose and the instrumental implementation arising from ‘inconsistency in policy and practice, and a strategy that may then, to some extent, be self-defeating.’⁵⁸⁸ The devotion to leniency is exacerbated when the impact upon corrective justice in general, and compensation in particular are brought within the scope of consideration. It appears that the ‘momentum in Europe ... seems to lean in the direction of inducing co-operation to stimulate deterrence, even if it has adverse effects on private rights of action for compensation.’⁵⁸⁹ Given that unlike in America where private enforcement is deterrence focused, private enforcement action in Europe is ‘orientated towards compensation’⁵⁹⁰ the zeal for the current approach to leniency policy presents ‘an obvious conflict.’⁵⁹¹

4.4.5. Complexity of Anti-cartel regulatory dynamics: conclusions

It is clear from the preceding discussion that a complex multi-level policy mix has been created within the anti-enforcement regulatory space in the UK. This means that careful consideration of the potential implications of amendments and additions must be conducted in order to prevent inconsistencies and conflicts arising to the detriment of specific instruments within the enforcement environment, and indeed the overall regime. The goals and policies that are encapsulated in anti-cartel enforcement in particular, and competition policy in general are

⁵⁸⁸ Caron Beaton-Wells, Christopher Harding and Jennifer Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: happily Married or Uneasy Bedfellows?’ in Beaton-Wells and Tran (eds) (2015), *supra* n. 499.

⁵⁸⁹ Daniel Crane (2015) *supra* n. 584.

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

littered with potentially conflicting elements, and are therefore, one of the reasons anti-cartel policy was described as a paradox, at war with itself.⁵⁹²

The specific instruments that are utilised to achieve the goals in pursuit of the policies are therefore crucial if those inconsistencies are to be mitigated. A more thorough understanding of each of the goals, their primary, secondary and in some cases tertiary functions and how they each relate to the policy objectives, is needed. Further, a proper consideration of what those policy objectives are and from which level of government they come, is important if an accurate overall picture of the complex regulatory dynamics is to be mapped. Without such a detailed depiction of the enforcement environment it is unnecessarily difficult to identify the potentially contradictory elements, which in turn makes an already complex regulatory landscape even more difficult to navigate, and ensures that changes to aspects of the regime are done blindly and without a real understanding of their implications.

Understanding the multiplicity of each tool, and their hierarchy is important to creating an optimal enforcement environment. The compensatory goal of private actions together with the punitive element of the criminal sanction, are potentially contradictory to the deterrence goal of the administrative sanctions, so ‘unless mechanisms ... can be employed to resolve the conflict, antitrust systems will need to decide on the relative priority’⁵⁹³ of its goals. The preceding analysis of this work shows that, for example:

The primary, direct goal of the criminal cartel offence should be the punishment of the serious, criminal harm of a cartel for the policy objective of protecting promoting a just and fair society in which wrongdoers are punished. The secondary benefit of such an offence would be the moralising and educative effect of the offence which would aid in the policy objective of creating a culture of voluntary compliance which would see cartel activity reduced, thereby protecting consumers. The incidental benefit of the criminal cartel offence would be its deterrent value, that would induce some potential offenders to obey the law, thereby reducing cartel activity and protecting consumers.

⁵⁹² Robert H. Bork, ‘The Antitrust Paradox: a policy at war with itself’ (New York, Basic Books Inc. Publishers: 1978).

⁵⁹³ Ibid, p.270.

The primary, direct goal of the administrative sanctions is to deter others from engaging in hard-core collusion, thereby reducing cartel activity, protecting the competitive process and protecting consumers from the harm of cartels. The secondary benefit of the fines against undertakings is to disgorge them of their unfairly obtained cartel rents, thereby promoting a just and fair society where transgressors are prevented from financially benefitting from the fruits of their illicit behaviour. The additional benefit of the administrative regime is that it ensures the UK's compliance with its EU membership obligations.

The primary, direct goal of the competition disqualification orders should be the incapacitation of unfit directors, thereby protecting consumers from the harm they could otherwise be subject to. The secondary benefit of a CDO would be the deterrent effect of the imposition of the orders on others who may consider engaging in hard-core collusion, thereby reducing cartel activity and protecting consumers. The incidental benefit of such an order is that for the duration of the order, recidivism is reduced there again, protecting consumers from harm.

The primary, direct benefit of third party claims for damages should be corrective justice thereby allowing harmed individuals to claim compensation for the harm suffered, and promoting a just and fair society. The secondary benefit of these private actions is the deterrent value that they have. The incidental benefit of third party claims is the further disgorgement of cartel rents.

The primary, direct benefit of advocacy strategies is to educate as to the serious harm of a cartel and in so doing, improve society's normative commitment to obeying anti-cartel laws, for the purpose of improving the culture of compliance and so reducing cartel activity, thereby protecting consumers from harm. The secondary benefit of such strategies is that they boost the efficacy of the other more interventionist mechanisms thereby protecting consumers.

The above summary shows multiple policy objectives being addressed via multiple goals and using a variety of enforcement mechanism, but that ultimately each of them feed back into the overriding objectives of protecting consumers and promoting a fair and just society in which wrongdoing does not go unpunished. The current approach in the UK is based upon an almost

singular pursuit of deterrence, a deterrence that is arguably not being achieved, at the expense of other goals. This has arguably contributed to the failure to create a truly impactful regime. Any complex regulatory matrix that is too heavily weighted in favour of one particular element, risks damaging the impact of the other elements and the legitimacy of the whole regime and lacks the self-understanding required to identify and remedy any problems. Galloway argues that the,

‘enforcement strategy underpinning UK competition law is so heavily focused upon traditional deterrence theory, with the result that enforcement in practice has tended to resort to the use of the wrong enforcement tools at the wrong time.’⁵⁹⁴

In this way, Galloway argues that this blinkered desire to achieve deterrence results in a sub-optimal anti-cartel enforcement matrix as the full breadth of the available enforcement tools are not properly considered when the CMA are deciding how to deal with identified cartels, relying only on the administrative fines and in rare cases, the cartel offence.⁵⁹⁵ That is despite the fact that they themselves acknowledge that the threat of a competition disqualification order is considered to be a significant deterrent.⁵⁹⁶ Perhaps that is as a result of the lack of real discussion of the multifaceted functions that each mechanism within the matrix is capable of performing and the competition disqualification orders being seen as primarily a tool which incapacitates and prevents recidivism. This is exacerbated by the failure to acknowledge the impact that the passage of time has on the impact of any regime, and how the manner in which the mechanisms are employed by the relevant authority can help to mitigate problems in drafting, or indeed exacerbate them. Competition Authorities must not be afraid to engage in serious, periodic review, and governments must not be afraid to amend as required, based on those reviews. The creation of a sufficiently considered and robust legal framework provides room to making changes to policy or enforcement goals as required without having to alter the legal basis upon which they are built.

⁵⁹⁴ Jonathan Galloway, *Securing Legitimacy of Individual Sanctions in UK Competition Law*, World Competition 40, no 1 (2017): 121-158.

⁵⁹⁵ Ibid.

⁵⁹⁶ CMA, ‘The Deterrent Effect of Competition Authorities’ Word: Literature Review,’ 7 September 2017, at para.4.66.

4.5. Horizontal Instrument Interactions

The previous discussion considered the complexity of the anti-cartel regulatory space in the UK and looked at some of the vertical interactions that can add complexity to that space and the challenges that exist when attempting to ensure that they remain aligned over time. This section aims to consider the horizontal relationships that occur between specific instruments on a practical level in the context of anti-cartel enforcement in the UK. In order to do this, it is important to determine what kind of mechanism each individual tool is according to the descriptions provided in section 4.3.1 of this chapter. Once such categorisation has been achieved, a typology of regulatory enforcement mechanisms can be created for anti-cartel enforcement in the UK. This will then create a clear and uncomplicated view of the interactions that exist in this context, which in turns allows any conflicts to be more simply identified. This then make it possible to better address any serious conflicts, either by irradiating them of by mitigating them.

The most recognisable mechanisms are, of course, the prohibition contained in Chapter 1 of the Competition Act 1998, which represents the UK's commitment to sanctioning agreements described in Article 101 TFEU, and the criminal cartel offence as contained in section 188 of the Enterprise Act 2002 (amended by the ERR 2013). Other statutory tools include a competition disqualification orders by virtue of section 9A of the Company Directors Disqualification Act 1986, as inserted by section 204 of the Enterprise Act 2002. As previously mentioned there is also the availability of third party damages claims. These however, represent only the legislative mechanisms available for anti-cartel enforcement in the UK. In addition to these tools are the requirement that the CMA are advocates of rigorous competition, a duty that is to be fulfilled by publishing guidelines and papers, and by providing information regarding prosecutions and investigations.⁵⁹⁷ Internal company compliance regimes, advocated by the CMA, but which remain voluntary, are another aspect of attempts to create a culture of compliance, and are another element of anti-cartel enforcement regularity matrix. The leniency programme which links every legal antitrust mechanism, could also be considered as a tool in its own right; its importance being so great for modern day enforcement. A simplified enforcement typology has been created in **Table 3. Enforcement Typology** below.

⁵⁹⁷ Competition Act 1998, s 52; Enterprise Act 2002, s.6.

In that typology, the criminal cartel offence has been categorised as a piece of command and control regulation using the definition described in section 4.3.1.1. above. It is a clear example of the State’s attempts to influence behaviour by prescribing an acceptable standard of conduct, and backing that prescription up with criminal sanctions. The standard that the is being prescribed is conduct free of hard-core anti-competitive manipulation.

The Chapter 1 prohibition is slightly more challenging to definitively categorise. It could be considered as another example of a command and control regulation as there is not an absolute requirement that the sanction be criminal so long as it is punitive in nature. The sanctions that back up the acceptable standard in this case are administrative fines which are acknowledged as being ‘penal or quasi –criminal’⁵⁹⁸ even though they are ‘formally of an administrative nature.’ This is in part, due to the significant amount that the undertakings are routinely fined which in practice makes them punitive in nature.⁵⁹⁹ Indeed the CJEU stated that it was ‘both the deterrent effect and the punitive effect of the fines’⁶⁰⁰ which make their use justified. There is an argument however, according to the definition provided by Gunningham and Sinclair, that it is an incentive based mechanism. Gunningham and Sinclair describe three subdivisions within this form of regulatory action; broad-based economic incentives, supply side incentives, and legal liabilities.

Table 3. Enforcement Typology

	Command and Control	Incentive based regimes	Self-regulation	Voluntarism	Information Strategies
Criminal cartel offence	✓				

⁵⁹⁸ Caron Beaton-Wells, Christopher Harding and Jennifer Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?’ in Beaton-Wells and Tran (eds) (2015) supra n.

⁵⁹⁹ Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, [173]; Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-3255, [141]; Case C-289/048 *Showa Denko v Commission* [2006] ECR I-5859, [16].

⁶⁰⁰ Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-3255, [141].

Chapter 1 (and Article 101 TFEU)		✓			
CDO	✓				
Third Party Damages		✓			
Compliance Programmes				✓	
Advocacy and Education					✓
Leniency		✓			✓

The latter category is described as the imposition of after the fact financial penalties for a firm's past failures.⁶⁰¹ Administrative fines for undertakings engaged in cartel activity could therefore, fall into this category. The fact that the majority of cartel investigations that occur are as a result of leniency applications and evidence suggests that those applications relate to cartels that are already at the end of their life or that have already ceased to operate,⁶⁰² is an argument that in practice, behaviour is not being manipulated by punitive sanctions in the manner envisaged by command and control regulation. Indeed, in the vast majority of cases the fines provided for by the Chapter 1 prohibition will not be imposed until after the fact of significant cartel activity, perhaps indicating that rather than an example of a command and control regulation, it is a legal liability incentive based mechanism.

Despite the fact that the majority of cartel investigations start as a result of a leniency application, it is not the sole method of detecting cartels. In fact, the CMA has been clear that they are developing other detection techniques in order to reduce their reliance on the leniency

⁶⁰¹ Gunningham and Sinclair (1999) supra n. 362.

⁶⁰² Caron Beaton-Wells (2015) supra n.499.

programme.⁶⁰³ Therefore, the clear standard of conduct backed up by punitive sanctions, are perhaps indicative of the administrative fines being a command and control regulation. However, one important aspect of a command and control regulation is its ability to have an educative function that contributes towards creating a culture of compliance with the law. Despite the punitive nature of the sanctions imposed for it breached of Chapter 1 CA 1998 and Article 101 TFEU, there is little academic support for the idea that fines play a significant role in this aspect of anti-cartel regulation as a result of being regarded as morally neutral.

Unlike command and control regulations, economic incentives and disincentives do not actively seek to prevent a particular action. Their aim is to make to make the undesired conduct more costly to engage in and so to dissuade or reduce participation in it. This approach is clearly rooted in utilitarian ideology, like administrative action against cartels. Given that sanctions are imposed by the Competition and Markets Authority and not the judiciary as with the cartel offence, the State is able to retain an even higher degree of control over the enforcement of the administrative regime and thereby certainty over impact of the civil fines, and in theory exert varying degrees of dissuasive influence as needed. The conclusions of this brief analysis indicate that the Chapter 1 prohibition, despite its punitive nature, should be classified as an incentive based legal liability.

Competition disqualification orders operate in a manner most consistent with a command and control regulation. A clear standard of conduct exists and the disqualification order is imposed when the conduct of the subject of the order falls below that standard. It is punitive in nature so is consistent with the definition of a command and control regulation despite not being a criminal sanction.

Third party claims for damages are the next anti-cartel mechanism in the Enforcement Typology. Private damages actions cannot be considered to be command and control regulation because they are not pursued by the State. Parker, Braithwaite and Stepanenko argue that a command and control regulation is a public demonstration of the State working

⁶⁰³ Dr Michael Grenfell, 'UK competition enforcement – progress and prospects' Speech delivered on 9th November 2016. Transcript available at CMA: <https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-progress-in-enforcing-competition-law>. Last accessed 24th December 2018.

to eradicate harmful behaviour.⁶⁰⁴ The primary function of private damages claims in the UK is not to prevent cartel agreements in the way that a command and control regulation seeks to, but as a tool of corrective justice that also has acts as a disincentive, in the manner envisaged by incentive based economic instruments. However, the mechanism for obtaining third party damages is a manifestation of State power. Individuals are granted a legal right by the Government to seek compensation for harm they have suffered as a result of legally prohibited conduct. Further, they must go through an arm of the State, the courts, in order to obtain that compensation, and the promotion and protective of justice within society is a fundamental function of the State. Nevertheless, third party claims for damages are private actions that are not punitive, but compensatory in nature and so do not fall within the definition of command and control regulation.

Compliance programmes are by their very nature voluntary and so are easily to categorise. Their potential impact on the anti-cartel enforcement landscape is often overlooked, and not enough has been done to incentivise undertakings to engage with compliance programmes. Nevertheless, for the purpose of this chapter their categorisation is simple as they are entirely voluntary. They therefore, are an example of voluntarism. Advocacy and education strategies are similarly easy to categorise as information strategies.

Finally, it is necessary to discuss the role of the leniency programme as a mechanism for tackling cartels. As has been previously stated, the role that the leniency programme plays within the anti-cartel regulatory matrix is so crucial that it could be considered as an enforcement mechanism in its own right. The purpose of the leniency programme is not to prevent certain conduct but to incentivise cartelists to provide information about prohibited conduct in order to improve detection rates, and the quality of evidence required to impose sanctions. It is for this reason that it has been classified as both an economic based incentive regime and an information strategy. The economic approach to regulatory action fits with economic theories of obedience to the law, and with utilitarian theories of behaviour manipulation. The use of administrative fines together with the operation of a leniency programme are the two aspects of the anti-cartel law enforcement matrix that sit most compatibly with the utilitarian, deterrence focused enforcement policy adopted in the UK.

⁶⁰⁴ Parker, Braithwaite and Stepanenko, 'ACCC Enforcement and Compliance Project Working Paper on ACCC Compliance Education & Liaison Strategies', Centre for Competition and Policy, Australian National University,(2004).

The ant-cartel regulatory matrix is largely made up of command and control regulations and incentive based economic mechanisms. The voluntarism mechanism and the information strategies are arguable ancillary to a certain extent. Now that they have been categorised, it is possible to move onto the next step and explore their dynamics. Two command and control regulations seeking to achieve the same outcome are inherently complementary. The criminal sanction sits at the top of the enforcement pyramid, reserved for the most serious examples of collusion, whilst the CDOs have a much wider scope, are easier to establish because of lower evidential burdens and could be applied with much more frequency. According to the analysis of horizontal interactions in section 4.5. of this Chapter, the administrative regime provided for by the Chapter 1 prohibition, is inherently complementary to the cartel offence. This is true at the level of enforcement so long as the standard for determining the tort (liability rule) is lower or less stringent than the applicable command and control standard⁶⁰⁵ as is the case in this for the criminal cartel offence and the civil sanctions.

This creates a pyramid approach to anti-cartel enforcement as described by Braithwaite,⁶⁰⁶ and is considered to be one aspect of responsive regulation. It advocates for a system of enforcement whereby the least serious instances of prohibited conduct are dealt with by the least interventionist methods of enforcement. As the gravity of the conduct increases, so does the seriousness of the enforcement action chosen to deal with it. The approach to enforcement creates a pyramid because the number of serious cases will decrease proportionately to the increase in wrongfulness. The apex of the pyramid is reserved for the most serious conduct that is ‘genuinely criminal in nature.’⁶⁰⁷ Pyramid enforcement theory has been influential as it provides a mechanism by which the problem of how to choose between compliance and compulsion style enforcement.⁶⁰⁸ There are various advantages to utilising a pyramid enforcement paradigm, not least because it helps to create a perception of legitimacy⁶⁰⁹ for the

⁶⁰⁵ Gunningham and Sinclair, quoting Rose-Ackerman, ‘Altruism, nonprofits, and economic theory’ (1996) *Journal of Economic Literature* 701.

⁶⁰⁶ Braithwaite, Coglianese and Levi-Faur, ‘Can regulation and governance make a difference?’ (2007) *Regulation & Governance* 1.

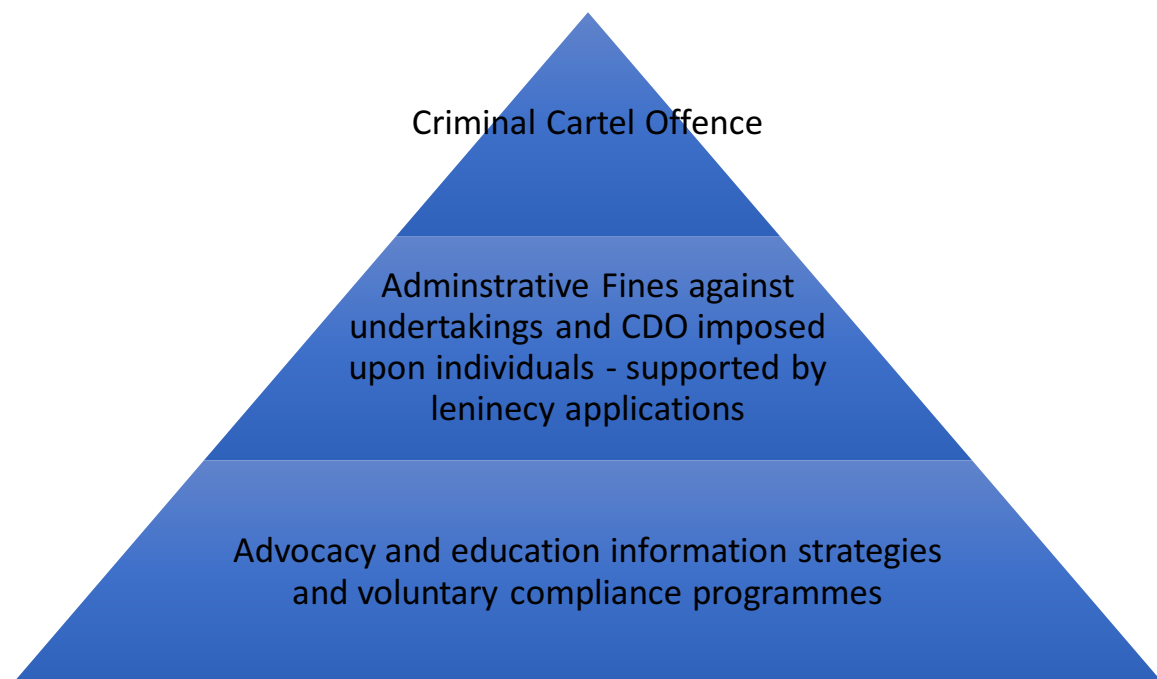
⁶⁰⁷ Comino, ‘The Challenge of Corporate Law Enforcement in Australia’ (2009) *Australian Journal of Corporate Law*.

⁶⁰⁸ Mancini, ‘Why was the enforcement pyramid so influential? And what price was paid?’ (2013) 7(1) *Regulation & Governance* 48.

⁶⁰⁹ The issue of legitimacy is an important one with this particular regulatory matrix because of the purely utilitarian manner in which the cartel offence has been deployed in practice. It is something that will be considered in more detail in chapter/section ... of this work. For further reading also look at, Jonathan Galloway, ‘Securing the Legitimacy of Individual Sanctions in the UK’ (2017) 40(1) *World Competition* 121.

regulatory environment in which the various enforcement tools operate. It does so by demonstrating a logical approach to enforcement tool selection and avoids the perception that there is no order or fairness in their use. When regulation is seen to operate in a way that enhances the appearance of legitimacy, ‘compliance with the law is more likely.’⁶¹⁰ This approach to enforcement recognises that not all contraventions of the law can in practice, be detected and punished and that compliance is a far more effective means of ensuring obedience of the law. Based upon the analysis of this work, an illustration of public anti-cartel enforcement in the UK as a pyramid enforcement strategy has been created below. The importance of targeting the individual agents who bind undertakings into prohibited cartels is reflected in the presence of CDOs alongside fines directed at those undertakings.

Figure 1. Pyramid of Public Anti-cartel Enforcement



One of the underlying principles of this approach to regulation is that all regulatory responses will on some occasion fail. One of the aims of an enforcement pyramid then is to create a framework in which regulatory responses can work together to mitigate the weaknesses in any one particular mechanism through the strengths of another. According to this approach:

⁶¹⁰ Ibid.

‘the naiveté of believing that firms will of what is “right” is covered by the cynicism of the deterrence model assumption that firms will do what is profitable however irresponsible. The weakness of the deterrence model - that it can be pointless to punish managers too incompetent to manage... - is covered by incapacitate remedies that remote these managers.’⁶¹¹

The interrelated nature of this system of enforcement means that compliance and compulsion strategies are not divided as in practice, they are inextricably linked. Therefore, any attempt to deal with them independently is ‘misleading.’⁶¹² The dynamics of the pyramid theory recognise that:

‘enforcement activity is effective when it leads to improved possibilities for compliance and compliance activities are generally only effective when they are backed up by, and indeed facilitated by, tough enforcement action.’⁶¹³

This sentiment was articulated by Sonya Branch in her speech at the Business Crime -2014 Conference in which she stated that,

‘As important as it is that we take strong enforcement action to protect consumers, the CMA needs ... to balance tough sanctions - where appropriate - with compliance and awareness-raising. This is why the CMA attached significance to our compliance initiatives.

...

As with enforcement, the CMA is looking to step to what we can achieve in this area, and to help promote a business environment in the UK with a ‘culture of compliance’. This includes drawing attention to the competition regime, assisting businesses in understanding what our enforcement work means to them, and increasing our own understanding of the drivers of awareness and compliance. The CMA recognises that most businesses and individuals want to comply with competition law - and we want to support them in doing so.

⁶¹¹ Parker, Braithwaite and Stepanenko, ‘ACCC Enforcement and Compliance Project: Working Paper of ACCC Compliance Education & Liaison Strategies’, Centre for Competition and Consumer Policy, Australian National University (2004)

⁶¹² Ibid.

⁶¹³ Ibid.

...

Another benefit of targeted compliance efforts of this kind is that - to the extent that any wrongdoing remains - we expect that new links and directed engagement with the industry will lead to new intelligence, and ultimately to further enforcement success, in something of a virtuous circle.⁶¹⁴

However, despite recognising the crucial importance of creating a culture of compliance that is not so heavily dependent upon compulsion to obey the law, the legitimacy issues created by building an enforcement matrix around a deterrence policy that relies very heavily on granting leniency and immunity to culpable defendants, have largely been ignored.

4.6. Conclusions

In determining that the anti-cartel regulatory space in the UK is a multi-level, complex policy mix, a number of fundamental things have been achieved. Firstly, it has explicitly highlighted that the response to cartel activity is highly complex, indeed, it was shown to be the most complex type of all the regulatory environments according to the regulatory mix literature. This assessment in turn, indicates the degree of care which must be taken when attempting to make changes, or additions, to the regulatory environment. The discussion in section 4.3. went on to show that there was cause for a complex, multi-level policy mix to in fact, be made even more complex. This occurs when 'responsibility for formulation, decision making and/or implementation falls on different levels of government.'⁶¹⁵ This is clearly the reality for anti-cartel enforcement in the UK as a Member State of the EU, where the EU have retained responsibility for the formulation of the civil regime for fighting cartel activity, but has, by way of Regulation 1/2003, delegated primary responsibility for the enforcement of that regime to the Member States. Further, the Member States retain responsibility for decision making and implementation of enforcement mechanisms that exceed the minimum standards required by the EU, for example, the creation of criminal sanctions. The requisite degree of care however,

⁶¹⁴ Branch, 'Competition, the revised cartel offence and the CMA - a new landscape', speech to the Business Crime - 2014 Conference. Available at: <https://www.gov.uk/government/speeches/sonya-branch-speaks-about-the-cartel-offence-and-the-cma>. Last accessed 24th December 2018.

⁶¹⁵ Pablo del Rio and Michael Howlett (2008) *supra* n.44.

was not taken when the criminal cartel offence was included within the regulatory landscape of anti-cartel enforcement, and thus therefore, the problems began.

The analysis of the regulatory dynamics of the anti-cartel enforcement space in the UK showed that the various enforcement mechanisms were not inherently contradictory. What can be extrapolated from this finding is that the failure of the criminal cartel offence to have an impact upon the reduction of cartel activity was not inevitable. Arguably, the root of the section 188 problem was the attempt to uncritically deploy it for traditional utilitarian motives. The stage was not properly set for the introduction of a criminal offence, and the ideological reasons for so doing, were wrong. What occurred therefore, was a hybrid of layering and drift as explained in section 4.2.4. Layering because a new instrument was added to the regulatory space without understanding what the achievable goal of that instrument was. The offence therefore brought with it an additional goal (compliance through normative education) without prior consideration of how it would co-exist with the pre-existing policies, goals and enforcement instruments. In addition, and as a result, drift occurred which meant that the cartel offence was not the best tool for the job of improving deterrence.

The almost stubborn focus upon deterrence meant that alternative and more appropriate cartel prevention strategies have been overlooked. The educative and moralising impact of a criminal sanction that taps into the moral wrongfulness of a cartel has already been addressed in Chapter 2 of this work. That moralising effect however, and its impact upon the creation of an environment in which individuals choose to comply with the law, could be complimented by compliance programmes. Compliance programmes are yet to be made a compulsory feature of anti-cartel enforcement and there are some who would argue that they would not work.⁶¹⁶ However, the potential impact of compliance programmes should not be overlooked, and not because of their potential to be used instrumentally, but because of their potential to reduce cartel activity normatively. As:

‘[f]rom an organizational perspective ... corporate crime results when managers take organizational needs and pressures into account when solving business problems or

⁶¹⁶ Andreas Stephan, ‘Hear no Evil, See no Evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels’ (2009) CCP Working Paper 09-09.

when managers act in accordance with the dominant culture of the firm, subunit, or team in which they work.’⁶¹⁷

Therefore, if a firm has made a clear and genuine commitment to legal obedience as evidenced by a competition law compliance programme, a cultural commitment to comply with the law emanates from the top down and a greater opportunity for normative acceptance of that compliance culture is created.

The failings of the criminal cartel offence have therefore, occurred because of a disconnect that starts at the ideological reasoning for adopting certain policy objectives, the goals which they can achieve, and ultimately the enforcement instruments chosen in pursuit of them.

⁶¹⁷ Sally S. Simpson and Nicole Leeper Piquero, ‘Low Self-Control, Organizational Theory, and Corporate Crime’ (2002) 36(3) Law & Society Review 509.

Chapter 5: The Loyalty Principle and the Criminal Cartel Offence

5.1. Introduction

The previous chapters have illustrated the complex regulatory dynamics that exist in the anti-cartel regulatory space in the UK, which must be understood as the regulatory space that is also affected by the UK's experience as a Member State of the European Union. This chapter focuses in on one particular complexity that arises specifically from that history and experience of membership, the principle of sincere cooperation contained in Article 4(3) TEU. In the field of competition law, which is a matter of exclusive EU competence under Article 3(1)(b) TFEU, the dynamics that are typically analysed are those which flow down from the EU to the Member States. However, the complex and interconnected matrix of anti-cartel enforcement, exemplified in a more limited fashion by the policy underpinning and operation of a leniency programme, mean that a more holistic analysis, including domestic regulatory elements alongside the broader EU framework, is necessary in order to more fully understand the regulatory dynamics at work in the anti-cartel regulatory space. This chapter therefore analyses the nature of the regulatory dynamics between criminal cartel enforcement in the UK and civil cartel enforcement in the EU, particularly considering any potentially negative impact upon the primary EU regime.

On 23rd June 2016 a referendum was held in the UK to determine whether it should remain a member of the European Union, and with a majority of 52% to 48%, the UK sadly voted to leave.⁶¹⁸ At the time of writing, and indeed immediately prior to submission of this thesis,⁶¹⁹ the UK has still failed to make clear what is intended for the future relationship with the EU. Nevertheless, the following discussion occurs within the context of the UK as a Member State

⁶¹⁸ BBC, 'Referendum Results.' Available at: https://www.bbc.com/news/politics/eu_referendum/results. Last accessed 10th March 2019.

⁶¹⁹ The legal mechanism by which Member States can leave the EU is contained in Article 50 TEU. It requires that the Prime Minister notify the European Council/Parliament of their intention to leave. Once this notification has been made, the remaining EU Member States and the Leaving State have 2 years to negotiate the separation and the terms of their relationship after the Leaving State has gone. Should it not be possible to come to an agreement at the end of the 2 years, the Leaving State simply ceases to be a Member State and reverts to World Trade Organisation rules should it wish to trade with the EU. The notification was made by Prime Minister Theresa May on the 29th March 2017. There has now been two extensions granted to the UK to prevent it leaving without a deal initially on the 29th March 2019 and subsequently on 12th April 2019. It remains unclear as to whether a deal can be arranged prior to the new deadline of 31st October 2019.

of the EU, which has informed and helped to determine its regulatory history and experience. Whilst the implications of the analysis of this chapter are less likely to be directly applicable to the UK once it has left the EU, this does depend upon the future relationship between the UK and EU, and in any case the history and experience of EU membership will undoubtedly affect many areas of regulation across the UK for many years to come. As such the analysis in this chapter may continue to be relevant to other regulatory spaces within the UK beyond competition law as well as within, and the experience ought to inform debate and analysis of competition regulatory regimes in some of the remaining 27 States, especially those with pre-existing criminal sanctions, or the jurisdictions who may consider introducing such sanctions in future.

As a current Member State of the EU, the UK is subject to certain legal obligations that inevitably influence and shape domestic competition law. Specifically, Article 3 of the Treaty on European Union (the ‘TEU’) requires that the Union shall establish an internal market.⁶²⁰ Protocol 27 to the TEU explains that this includes a ‘system of ensuring that competition is not distorted’⁶²¹ and that creating and maintaining a highly competitive market is an objective of the Union. The Modernisation Regulation EC 1/2003⁶²² (‘Regulation 1/2003’) decentralises the enforcement of competition law such that Member States are required to apply Union competition law, in the form of Articles 101 and 102 TFEU, when dealing with infringements of competition law within their own jurisdictions that may affect trade between Member States.⁶²³ In addition to these competition law specific obligations however, as a Member State, the UK is also subject to general principles of EU law.

This chapter focuses on one principle of EU law in particular, the duty of sincere cooperation in the attainment of Union objectives, enshrined in Article 4(3) TEU. This chapter aims to further analyse the interplay between UK domestic law and EU law in the regulatory dynamics of anti-cartel law in the UK, and its focus is partially motivated by the observation, left unexplored, by Joshua and Klawiter in 2001 when the criminal cartel offence had yet to make it onto the statute books. The co-authors reasoned that ‘adopting substantive national criminal

⁶²⁰ ‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, [and] a highly competitive social market economy...’ Article 3(3) TEU.

⁶²¹ TEU, Protocol (No 27) on the internal market and competition, OJ 115, 09/05/2008, P.0309.

⁶²² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p1)

⁶²³ Ibid, Article 3(1).

legislation that hampers the effectiveness of the [Union] legal regime could place a Member State in breach of its obligations under [Union] law.⁶²⁴ The implication of this statement is that if the operation of a criminal cartel offence jeopardises the effective enforcement of Article 101 TFEU it could result in the UK being in breach of its obligations under EU law, and in the context of the current analysis, specifically Article 4(3) TEU.

The decentralised enforcement of Article 101 TFEU by way of Regulation 1/2003 has meant that the Union objectives of protecting consumer welfare and the integrity of the internal market by way of a competitive market, have largely become the responsibility of the Member States. Article 4(3) TEU is one way in which the Union's interests can be safeguarded when Union objectives are placed in Member State hands. Indeed, Regulation 1/2003 could in fact, be regarded as a manifestation of Article 4(3) TEU within the specific context of competition law as it places an obligation upon the Member States to assist in the attainment of a competitive market by enforcing Article 101 TFEU when applying their own domestic competition laws.⁶²⁵ It also places a duty upon Member States to refrain from prohibiting conduct that would be permitted by Article 101 TFEU.⁶²⁶ However, Regulation 1/2003 only applies to mechanisms that fall within its scope; national competition laws. Article 4(3) TEU alternatively, has much wider scope and applies to all national legislation and Member State action. It states that:

‘Pursuant to the principles of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties. The Member States shall take all appropriate measures, general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.’⁶²⁷

This chapter explores the same issues that Joshua and Klawiter raised, albeit the focus in this chapter is specifically upon Article 4(3) TEU, thus considering whether a Member State can

⁶²⁴ Joshua and Klawiter, ‘Step Forward or Another Complication - The UK Criminalization Initiative’ (2001) 16(3) *Antitrust* 67.

⁶²⁵ Regulation 1/2003, Recital (6).

⁶²⁶ *Ibid*, Article 3(2).

⁶²⁷ Consolidated Version of the Treaty of European Union, Article 4(3), 2012, OJ, C 326, hereinafter TEU.

be in breach of its Union obligations, and the principle of sincere cooperation, through the valid adoption of national legislation within its own borders. The competence of the UK to adopt the criminal cartel offence is not in question. However, if the adoption of such legislation led, because of the complex regulatory dynamics of the regulatory space in which it now inhabits, and the frictions that occur within that space, to sub-optimal enforcement in the UK (i.e. reduced efficacy) and thereby in the EU, the question is whether that could lead to a breach of the UK's obligations to ensure the attainment of a Union objective.

When considering Article 4(3) TEU and its impact on upon the legislative autonomy of the Member States, it is important to have regard to Article 4(2) TEU. Article 4(2) TEU guarantees respect for and preservation of the sovereign identity of the Member States (the 'Identity Principle') and the general EU principle of proportionality. Article 4(2) TEU therefore acts as an addition restraint upon the exercise of Union competence.

This chapter will address two specific secondary research questions: (a) if the criminal cartel offence in the UK sufficiently weakened the efficacy of the UK administrative sanctions (by undermining the leniency programme, or causing unreasonable delays to civil investigations and/or decision making, for example), could that place the UK in breach of Article 4(3) TEU; and if so, (b) what action (if any) could be taken against the UK as a result?

5.2. Article 4(3) TEU: an introduction

Article 4(3) TEU has been referred to as the 'most important and dynamic single Article in the [EU] Treaty'⁶²⁸ having been a consistent feature of the Treaties since the European Coal and Steel Community (the 'ECSC').⁶²⁹ It is regarded so highly by some for three main reasons.⁶³⁰

⁶²⁸ General Report: 'The Duties of Cooperation of National Authorities and Courts and the Community Institutions under Article 10 E.C. Treaty', in XIX F.I.D.E. Congress (Helsinki, 2000), Vol. I, at. 373-426, p.

⁶²⁹ Marcus Klamert, 'The Principle of Loyalty in EU Law,' (Oxford University Press: 2014) p.10.

⁶³⁰ Others see Article 4(3) TEU as 'the sort of spiritual and essentially vacuous clause that is more commonly found in constitutional orders such as that of Nazi Germany or the Soviet Union.' See Ian Ward, 'A Critical Introduction to European Law', Cambridge University Press, 2003, p.65.

Firstly, as the Union acts primarily through national authorities,⁶³¹ anything that sets the parameters of the relationship between the Union and the bodies that carry out its work will of course be vital to the Union's success.⁶³² This is particularly crucial given that:

‘the Member States are much more likely, by accident or design, to interfere with the way [Union] laws and policies are intended to operate...[which] necessitates some principles limiting the extent of permissible interference.’⁶³³

Secondly, very little has otherwise been said about the relationship between the EU and those national authorities, which thus increases the prominence of Article 4(3). Most constitutional principles are derived from case law rather than the Treaties, unlike Article 4(3) TEU. Finally, Article 4(3) TEU is regarded as critical to the EU legal order because of its universality. It ‘applies to all national authorities, legislative, executive, administrative, and judicial, national, local and regional’.⁶³⁴ Temple Lang argues that:

‘[Article 4(3)] has already given rise to some of the most important principles of [Union] law, such as the duty and power of national courts to give effective protection to rights granted by [Union] law, the duty to give direct effect to directives against the State, the duty to interpret national laws so as to be compatible with [Union] law, the right to judicial review, and the duties not to interfere with the effectiveness of [Union] competition law or with the working of the common agricultural policy. It is the basis for the duty to avoid conflicts between national and [Union] decisions.’⁶³⁵

There has however, been a lack of ‘consistent and methodical’⁶³⁶ usage of Article 4(3) TEU and its previous incarnations by the CJEU and academics alike. The terms ‘loyal

⁶³¹ de Larragán, Javier de Cendra, ‘United we stand, divided we fall: The potential role of the principle of loyal cooperation in ensuring compliance of the European Community with the Kyoto Protocol’ (2010) 1 *Climate Law* 159.

⁶³² Marcus Klamert (2014) *supra* n 628.

⁶³³ John Temple Lang, ‘The duties of National authorities under Community constitutional law’, *European Law Review* (1998) 109.

⁶³⁴ *Ibid.*

⁶³⁵ John Temple Lang, ‘Article 10 EC–The Most Important “General Principle” of Community Law,’ in *General Principles of EC Law in a Process of Development*, (The Hague: Kluwer Law International: 2008) 75

⁶³⁶ *Ibid.*, p.1-2.

cooperation,⁶³⁷ ‘duty of loyalty,’⁶³⁸ and ‘sincere cooperation,’⁶³⁹ appear to have been used interchangeably,⁶⁴⁰ whilst the term ‘Loyalty Principle’ has emerged as a more inclusive phrase of general use.⁶⁴¹ This lack of terminological consistency has persisted despite its longevity within the EU legal order, and is compounded by the fact that it remains an:

‘under-researched subject in European Union Law...Despite its overwhelming importance for defining and shaping the fabric of [Union] law, the loyalty principle has not received the special attention it arguably deserves.’⁶⁴²

More recently the contours of sincere cooperation in the field of EU external relations have been explored in the academic literature,⁶⁴³ whereas the impact of Article 4(3) TEU and its predecessors, on the internal vertical dynamic as between the EU and its Member States, has still failed to attract the same level of academic scrutiny.⁶⁴⁴

Whilst the wording of the Loyalty Principle has remained largely similar to its most recent predecessor, the normative context has changed considerably as a result of its current location in the Treaty of the European Union,⁶⁴⁵ and its coupling with Article 4(2) of that Treaty which governs the protection for Member State constitutional identity (The Identity Clause).

5.3. The Evolution of Article 4(3) TEU

⁶³⁷ Case C-375/89 *Commission v Belgium* (Directive 76/491/EEC) [1991] ECR I-367, para.15.

⁶³⁸ Case C-459/03 *Commission v Ireland* (MOX Plant) [2006] ECR I-4635, para.168.

⁶³⁹ Joined Cases C-213/88 and C-39/89 *Luxemburg v European Parliament* [1991] ECR I-5643, para.29.

⁶⁴⁰ Marcus Klamert (2014) *supra* n. complete

⁶⁴¹ *Ibid.*

⁶⁴² *Ibid.*, p.1.

⁶⁴³ Much of the discourse in the field of EU external relations identifies a need for the Union to speak with a ‘single voice’ because ‘the polyphonic nature of the Union’s external action whose audibility ultimately depends on the degree of harmony achieved among its key players.’ See, C. Hillian, ‘Mixity and coherence in EU External relations: The significance of the “duty of cooperation”’ in C. Hillian and P. Kourakes (eds) *Mixed Agreements Revisited* (Oxford, Hart, 2010) p.87. The President of the European Council, Herman van Rompuy has said that he ‘prefer[s] to compare the European Union to a convoy’ connected under the waterline ‘economically and monetarily’ so that ‘[t]hey cannot sail away from the other just like that.’, Address to the College of Europe, ‘The Challenges for Europe in a Changing World’, Bruges, 25th February 2010. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113067.pdf. Last accessed 18th July 2017.

⁶⁴⁴ ‘German literature [however] has produced systematic and comprehensive studies on loyalty.’ Marcus Klamert (2014) *supra* n. 628.

⁶⁴⁵ *Ibid.*

Its first appearance in the Treaties in its modern form was in Article 5 of the Treaty establishing the European Economic Community (EEC) which stated that:

‘Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.’⁶⁴⁶

Temple Lang, in an article discussing the constitutional impact of Article 5 EEC, felt that the ‘implications extend much further than is generally realised.’⁶⁴⁷ He attributed this lack of understanding to the fact that it was a ‘general principle that [was] also expressed in special Articles to cover specific situations,’⁶⁴⁸ and as a result of that the CJEU did not always specifically refer to it as a basis for its decisions.⁶⁴⁹ He further felt that lawyers were dissuaded from relying upon it because of the generality of its drafting.⁶⁵⁰ Temple Lang goes on to highlight that the Court felt that,

‘the wording of the second and third sentences of Article 5 indicates that the duties of cooperation imposed on the Member States by that article may under certain circumstances *transcend specific legally binding duties laid down elsewhere*.’⁶⁵¹

Following Article 5 EEC, the Loyalty Principle found its home in the post-Treaty of Amsterdam Article 10 European Community Treaty (the ‘EC Treaty’) and was considered by some to be ‘one of the foundations of the Community legal order as a whole,’⁶⁵² if not one of

⁶⁴⁶ Treaty Establishing the European Economic Community, Art. 5, March 25th 1957.

⁶⁴⁷ Temple Lang, ‘Article 5 of the EEC Treaty: The Emergence of Constitutional Principles in the Case Law of the Court of Justice’, *Fordham International Law Journal*, Volume 10, Issue 3, 1986, p.5.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ For specific examples, see Klamart (2014) *supra* n.628, p.22-23.

⁶⁵⁰ *Ibid.*

⁶⁵¹ Case 231/83, *Centre Leclerc v Au Ble Vert*, 1985, ECR. (Conclusions of the Advocate General), *Comm. Mkt. Rep. (CCH)*, para. 14,111 as quoted in Temple Lang, *supra* n.12, p.6.

⁶⁵² See Opinion 1/91 *European Economic Area (I)* [1991] ECR I-6079, where the Court also refers there to ‘the very foundations of the Community’; H G Schermers, ‘Commentary on Opinions 1/91 and 1/92’ (1992) 29 *CMLRev* 991; A Dashwood, ‘The relationship between the Member States and the European Union/European Community’ (2004) 41 *CMLRev* 355 at 377.

the constitutional principles of the EC Treaty.⁶⁵³ The wording however, remained the same, with the obligations resting on the shoulders of the Member States.⁶⁵⁴ The CJEU jurisprudence on Article 10 EC ‘can be summarised by saying that national authorities and courts have a legal duty to make the Community legal system work in the way that it was objectively intended to work.’⁶⁵⁵ Casolari claims that in its current form, it ‘should in fact be capable of acting as a master key for the proper functioning of the EU legal order’⁶⁵⁶ given that the removal the pillar system has meant that Article 4(3) TEU now applies to all EU policy. It was not until the Loyalty Principle found its home in Article 4(3) TEU however, that the conversation became one in which obligations were placed not only upon the Member States, but upon the Union as well, and so for the first time it became ‘a two-way street...thereby codifying the Union’s previous case law.’⁶⁵⁷ Not only that, but it represented the express recognition of the existence of a general principle of loyalty in the primary law of the Union for the first time.⁶⁵⁸ Its positioning within the Treaty of the European Union which articulates the fundamental framework of the Union, rather than in the Treaty on the Functioning of the European Union, further concretises it as a critical aspect of Union integration. Unlike the doctrine of supremacy,⁶⁵⁹ Article 4(3) TFEU does not require there to be a conflict between EU and domestic law in order to be applicable, making it wider in scope and of more general application. Its ‘interplay with the principle of primacy [however,] clearly emerges from the *Costa v E.N.E.L.* ruling.’ In that case the CJEU stated that,

⁶⁵³ Hillion, *Mixity and coherence in EU external relations: the significance of the duty of cooperation*. Centre for the Law of EU External Relations (CLEER), 2009, fn.16.

⁶⁵⁴ Klamert maintains that a ‘reverse loyalty’ has been imposed upon the EU by the CJEU, that mirrors the obligations placed upon the Member States by Article 4(3) TEU. See Case C-2/88 *Imm. Zwartveld* [1990] ECR I-3365.

⁶⁵⁵ Temple Lang, ‘General Report: Duty of Cooperation’, The Report for FIDE Congress, Helsinki, 373-426. Hereafter, ‘The Helsinki Report.’

⁶⁵⁶ Casolari, ‘EU Loyalty After Lisbon: An expectation gap to be filled’, in “The EU After Lisbon” (2014) Springer International Publishing 93, p.105.

⁶⁵⁷ Previously the Court had recognised Article 10 TEC as providing for a two-way obligations. See *Luxembourg v Parliament* 230/81 [1983] ECR 255 at p.38; and C-2/88 *Zwartveld* [1990] ECR I-4405; and C-234/89 *Stereos Delimits v Menninger Bräu* [1981] ECR I-935, at p.53.

⁶⁵⁸ Federico Casolari, ‘EU Loyalty After Lisbon: An expectation gap to be filled’, in Lucia Serena Rossi and Federico Casolari (eds) *The EU After Lisbon* (Springer International Publishing: 2014) 93-133, p.105.

⁶⁵⁹ The doctrine of the supremacy (or primacy) of EU laws has been fundamental to the success of the Union since first being articulated by the CJEU in Case 26/62 *NV Algemene Transport en Expeditie Onderneming Van Gen den Loos v Netherlands administratie der belastingen* [1963] ECR 1. It requires that when a conflict with national law arises, European law obligations must be applied.

‘executive force of [Union] law cannot vary from one State to another in deference to subsequent domestic laws, **without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 ...**’⁶⁶⁰

In *Factortame*, the link between loyalty and the principle of direct effect was addressed when the Court stated that:

‘it is for the national courts, **in application of the principle of cooperation laid down in Article 5 of the EEC Treaty**, to ensure that the legal protection which persons derive from the direct effect of provisions of Community law.’ [emphasis added]⁶⁶¹

As Article 4(3) TEU can be regarded as ‘functional to ensuring some of the very foundations of the Union legal order (namely, the primacy, direct effect, and effectiveness of EU law)’⁶⁶² it would appear that the Loyalty Principle could ‘fall within the category of the *constitutional principles* elaborated by the Court of Justice in the celebrated *Kadi II* ruling.’⁶⁶³ Given its demonstrated importance and pedigree of the Loyalty Principle within the EU legal orders, its comparatively wide scope is unsurprising. The relationship between the EU and the Member States is a complex one, and one which is in a constant state of evolution. Arguably therefore, Article 4(3) TFEU must be articulated in such a way as to prevent its application becoming inadvertently limited, or compromised, over time.

5.4. Article 4(3) TEU in Practice

Whilst it is true that ‘the [Loyalty P]rinciple ... has many possible implications, some but not all of which can be foreseen,’⁶⁶⁴ it can be divided into two broad obligations. A positive obligation to help in the attainment of Union objectives, and a negative obligation to not hinder the attainment of those objectives.

⁶⁶⁰ Case C-6/64 *Costa v E.N.E.L.* [1964] ECR 593, 594.

⁶⁶¹ Case C-213/89 *The Queen v Secretary of State for Transport ex parte: Factortame Ltd and others* [1990] 3 CLMR 1.

⁶⁶² Federico Casolara (2014) *supra* n.657.

⁶⁶³ *Ibid.*

⁶⁶⁴ Temple Lang, ‘The Duty of Cooperation of National Courts in EU Competition Law,’ (2014) 17(1) *Irish Journal of European Law* 27.

In exploring the application of Article 4(3) TEU to the anti-cartel regulatory space, and dynamics at work, the central Union objective would be the creation and maintenance of the internal market (and thereby the protection of consumer welfare), and seeking to protect that objective from the harmful effects of cartels. The EU created Article 101 TFEU as the primary means by which this objective is to be achieved, and implemented Regulation 1/2003 to empower Member States to enforce Article 101 TFEU on the Union's behalf. The Leniency Notice was created an important way in which the enforcement of Article 101 TFEU could be made effective in practice.

In respect of the positive obligation that Article 4(3) TEU places upon the Member States to help in the attainment of enforcing Article 101 TFEU, the UK has taken all the required steps by implementing domestic legislation, in the form of the Competition Act 1998 and the creation of a programme of leniency to reflect the European Commission's Leniency Notice. The potentially challenging element of Article 4(3) TEU in the context of the current enquiry therefore, is the negative duty that it creates to refrain from any measure that could jeopardise the attainment of the objective outline above.

5.4.1. Duty to Refrain

The obligation for Member States to refrain from acting in a manner contrary to the Union objectives has changed little since its original inclusion in Article 5 EEC and then again in Article 10 EC. Where once it was the duty to 'abstain'⁶⁶⁵ is it now articulated as the duty to 'refrain from **any measure** that **could** jeopardise the attainment of the Treaty objectives.'⁶⁶⁶ This change in terminology may not be significant, or it could imply that with the increased scope of Article 4(3) TEU, it was thought that 'refrain' better articulated the duty to avoid taking actions that impede the Union's objectives, whilst also recognising that the duty is not absolute.

In the context of the present analysis therefore, this obligation amounts to a duty to refrain from any measure that could jeopardise the enforcement of Article 101 TFEU and, as the leniency

⁶⁶⁵ Whilst 'abstain' and 'refrain' are often interchangeable and overlap significantly in terms of their meaning, there are instances in which one would be used and the other would not. One might say they abstain from drinking alcohol to indicate a choice never to drink alcohol, whereas one might prefer to say that they refrain from drinking alcohol, just for the evening.

⁶⁶⁶ Article 4(3) TFEU.

programme is a particularly important element by which the anti-cartel dimension of Article 101 TFEU is operationalised, Article 4(3) TEU arguably pre-empts Member States from jeopardising the European Commission's leniency programme. This claim is corroborated by the language chosen to articulate the Loyalty Principle, which refers to 'assisting each other in carrying out the **tasks** which flow from the Treaties.'⁶⁶⁷ This would imply therefore, that Article 4(3) TEU 'should make it possible to reinforce the legal status of nonbinding instruments under EU law.'⁶⁶⁸, such as the leniency programme. In respect of Article 5 EEC, Article 4(3) TEU's predecessor, Temple Lang stated that he felt that this duty to refrain involved more than 'merely the avoidance of measures that formally conflict with Union rules, but also avoiding measure that interfere with their operation.'⁶⁶⁹ This, he goes on to explain, includes an obligation to avoid measures that negatively impact the 'practical effectiveness'⁶⁷⁰ of EU law and that should such a measure be adopted, the Loyalty Principle requires that the Member State authority must take 'whatever action is appropriate to eliminate the conflict.'⁶⁷¹ He bases his reasoning on the judgment of the Court in a competition law case, *Cullet v Centre Leclerc Toulouse*⁶⁷² where the Court stated:

'the rules on competition are concerned with the conduct of undertakings and not with the national legislation of Member States. However, as the Court has recently ruled in its judgment of 10 January 1985, in ... *Leclerc* ..., Member States are nonetheless obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.'⁶⁷³

It is clear from this ruling that the effect of Article 4(3) TEU goes further than just the prevention of newly implemented national measures that run contrary to the attainment of

⁶⁶⁷ Ibid (emphasis added).

⁶⁶⁸ Marcus Klamert (2014) supra n. 628.

⁶⁶⁹ Temple Lang, 'Article 10 EC – The Most Important "General Principle" of Community Law' in *General Principles of EC Law in a Process of Development* (The Hague, Kluwer Law International :2008) p.511.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

⁶⁷² Case 231/83, *Cullet v Centre Leclerc Toulouse*, [1985] ECR I-305148.

⁶⁷³ Ibid, para. 16-18 of the judgment.

Union objectives, but also allows for the Union to address measures already enacted, from remaining in force if they frustrate the realisation of Union goals.

Thus, Article 4(3) could arguably cover a situation where the enactment of a national measure that, in principle, poses no threat to the proper functioning of the Union in terms of the attainment of its recognised objectives, but through poor drafting, implementation or enforcement, the practical reality of the national measure puts the attainment of the objectives at risk.

The fact that the measure in question is a validly adopted legislative action is not an automatic bar to a finding of a breach of Article 4(3) TEU as the obligation is made upon ‘any measure’ and so wide enough as to capture legislation adopted in the Member States within its scope. Indeed, ‘lawmaking by national legislators ... is one of the prime targets of the obligations under Article 4(3) TEU.’⁶⁷⁴ That is the case even when Member States are acting ‘within their own sphere of sovereignty, obliging them to act in a manner to further the interests of the Union.’⁶⁷⁵

5.5. Article 4(2)

As highlighted in the introduction to this chapter, the grouping of Article 4(3) TEU together with Article 4(2) TEU has important normative significance. They embody two potentially polarising ideas; protection of Member State sovereignty, and a duty to sincerely work towards Union objectives. Article 4(2) TEU states that:

‘the Union shall respect the equality of the member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the state, maintaining law and order and safeguarding national security.’

⁶⁷⁴ Marcus Klamert (2014), *supra* n. 628.

⁶⁷⁵ *Ibid.*

There is therefore, an inherent tension between the two clauses as they seek to protect what could be considered, two opposing positions. Von Bogdandy and Schill argue however, that Article 4(2) TEU helps to reconcile:

'the categorical positions of the [CJEU] on one side which supports the doctrine of absolute primacy of EU law even over the constitutional laws of the member states, and that of domestic constitutional courts on the other, which largely follow a doctrine of relative primacy in accepting the primacy of EU law subject to certain constitutional limits.'⁶⁷⁶

The clause can thus be said to have a limiting effect upon the functioning of Article 4(3) TEU in that it delineates a line which must be respected by the Union when exercising its competences. It is articulated as an obligation upon the Union, in contrast to Article 4(3) TEU which in practice, creates obligations mostly for the Member States.⁶⁷⁷

The pre-Lisbon jurisprudence contains references to the idea of respecting the identity of the Member States. In *Commission v Luxembourg*⁶⁷⁸ for example, the Court stated that, 'the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order (as is indeed acknowledged in Article F(1) of the Treaty on European Union.' Now that this principle is articulated expressly in the post-Lisbon Treaty TEU it potentially gives rise to a more definite and justiciable issue.

Working Group V of the 2002-2003 European Convention provided clarification to what was to be meant by 'essential elements of national identities' which the Union must respect,⁶⁷⁹ and determined that it should include, not only fundamental structures and essential functions but also their 'basic public policy choices and social values.'⁶⁸⁰ Nevertheless, much of the academic literature expresses the opinion that Article 4(2) TEU should only be invoked in

⁶⁷⁶ Von Bogdandy and Schill (2011) 'Overcoming Absolute Primacy: respect for National Identity under the Lisbon Treaty,' (2011) 48 Common Market Law Review 1417.

⁶⁷⁷ The CJEU have also imposed a 'reverse loyalty' upon the EU that mirrors the obligation placed upon the Member States by Article 4(3) TEU, see Case C-2/88 *Imm. Zwartveld* [1990] ECR I-3365, and for discussion, Marcus Klamert (2014) *supra* n. 628.

⁶⁷⁸ Case C-473/93, *Commission v Luxembourg* [1996] ECR I-3207, para. 35.

⁶⁷⁹ European Convention, Final Report of Working Group V on Complementary Competencies, 14th November 2002, CON 375/1/02/REV, quoted in Federico Casolari (2014) *supra* n.657.

⁶⁸⁰ *Ibid.*

exceptional circumstances,⁶⁸¹ and only when not doing so results in a threat to the 'fundamental constitutional functions of a national legal order.'⁶⁸² Some do argue however, that it should be used as a 'mainstream tool' for changing the balance of existing EU legal doctrine in favour of Member State sovereignty.⁶⁸³ Whatever the position, Article 4(2) TEU was not created as a means by which Member States can set aside EU law, nor either as a 'derogation clause'⁶⁸⁴ but as a boundary to the power of the Union when carrying out its functions so that '[t]he effective implementation of common rules is to be balanced against the autonomy of the Member States.'⁶⁸⁵

In reality the 'duty to respect' does not amount to an absolute protection for Member State identity, and the fact that it is referred to as 'identity' rather than 'sovereignty' is demonstrative of this. Instead:

'when national identity is at stake, Article 4(2) requires that a proportional balance be found between the uniform application of EU law, a fundamental constitutional principle of the EU, and the national identity of the Member State in question.'⁶⁸⁶

Therefore, Union action against a national measure protected by Article 4(2) TEU (if determined to amount to disproportionate interference) could be regarded as sufficient as a matter of Union law for that Union interference to be determined unlawful, and for the CJEU to therefore strike it down.⁶⁸⁷

The burden of establishing that the Member State measure in question was a matter of its national identity so falls within the protection of Article 4(2) TEU rests upon the Member State seeking to invoke it. However, Article 4(3) TEU is 'adverse to the claim that the constitutional

⁶⁸¹ Federico Casolari, (2014) *supra* n. 657.

⁶⁸² *Ibid.* See also, Kumm and Ferres Comella, 'The primacy clause of the constitutional Treaty and the future of constitutional conflict in the European Union,' (2005) *European Union International Journal of Constitutional Law* 3; Besselink, 'National and Constitutional Identity Before and After Lisbon,' (2010) 6 *Utrecht Law Review* 36; von Bogdandy and Schill, 'Overcoming Absolute Primacy: respect for National Identity under the Lisbon Treaty,' (2011) 48 *Common Market Law Review* 1417.

⁶⁸³ *Ibid.* See also Guastaferrero, 'Beyond the *Exceptionalism* of Constitutional Conflicts: the *ordinary* functions of the Identity Clause,' (2012) 31(1) *Yearbook of European Law* 263.

⁶⁸⁴ *Ibid.*

⁶⁸⁵ Eleftheria Neframi, 'Duty of Loyalty: Rethinking its Scope Through its Applications in the Field of EU External Relations' (2010) 47 *Common Market Law Review* 323, p.327.

⁶⁸⁶ von Bogdandy, Armin, 'Founding principles' (2010) *Principles of European Constitutional Law* 11-54.

⁶⁸⁷ von Bogdandy, Armin, 'Founding principles of EU law: a theoretical and doctrinal sketch' (2010) 16(2) *European Law Journal* 95-111.

courts of the Member States are entirely sovereign on deciding Article 4(2).⁶⁸⁸ It is the role of the CJEU to articulate the ‘conceptual framework of what a Member State can determine to form part of its national identity,’⁶⁸⁹ however it cannot go on to decide the content of that identity.⁶⁹⁰ This provides sufficient room to enable respect for the plethora of constitutional realities of each of the Member States whilst retaining power to delineate the outer limit of the protection of Article 4(2) TEU.

It is possible therefore, to envisage a circumstance where a Member State accused of breaching Article 4(3) TEU with the consequence of the offending domestic measure being ruled incompatible with Union law, for the Member State to raise Article 4(2) TEU as a defence. However, in order to be able to do so the Member State would have to establish, the burden of proof being on them, that the national measure in question was necessary in order to respect its national identity. Further, the Identity Clause requires that the Member States’ national identity must be ‘construed as that of States that are members of the EU.’⁶⁹¹ This would seem to indicate that even if a Member State was able to bring a particular measure within the meaning of ‘national identity,’ were that to be wholly contrary to the fundamental objectives of the Union, it is unlikely that it would be able to afford itself of the protection offered in Article 4(2) TEU.

Whilst Article 4(2) TEU provides a limit to the ability of the Union to interfere in the domestic matters of its Member States, that limit is in itself constrained. Establishing that a matter is as such as to threaten national identity, means that Article 4(2) TEU is restricted in scope, for the obvious reason that otherwise it could in practice become a derogation clause. Article 4(3) TEU in contrast, has a far wider scope of application. It would itself be limited however, by the general principles of proportionality. There is relatively limited CJEU jurisprudence on the meaning of ‘national identity,’ particularly within the scope of Article 4(2) TFEU,⁶⁹² except to say that it can be used only when there is a ‘genuine and sufficiently serious threat to a fundamental interest of society.’⁶⁹³

⁶⁸⁸ von Bogdandy & Schill, S, ‘Overcoming absolute primacy: respect for national identity under the Lisbon Treaty’ (2011) 48(5) Common Market Law Rev 1417.

⁶⁸⁹ Ibid.

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid.

⁶⁹² Neil Murphy, ‘Article 4(2) TEU: A Blow to the Supremacy of EU Law’ (2017) 20 Trinity College Law Review 94.

⁶⁹³ Case C-208/09 *Sayn-Wittgenstein v Landeshauptman von Wein* [2011] ETMR 12.

5.6. The Loyalty Principle and the Criminal Cartel Offence

The European Commission itself identified that while criminalisation ‘can be an efficient tool to increase the effectiveness of enforcement,’⁶⁹⁴ there are some circumstances in which criminal sanctions for individuals can ‘achieve the opposite effect of what was intended, and lead to under-enforcement’⁶⁹⁵ and ultimately ‘fewer successful cartel investigations.’⁶⁹⁶ This section seeks to consider this idea more closely and to determine whether ineffective criminal cartel enforcement poses a real risk to the UK’s obligations under Article 4(3) TEU in conjunction with Regulation 1/2003.

As previously indicated, a focus for this enquiry is in relation to the European Commission’s leniency programme, which is considered key to successful anti-cartel enforcement, both in terms of civil and criminal measures. Cartels are notoriously difficult to detect without information being provided by a whistle blower. Leniency programmes are often considered to be the “cornerstone” of effective enforcement and without them, the efficacy of any regulatory structure would be greatly reduced. The result of a well implemented leniency programme is that both detection rates are improved, as is the quality of the evidence that is gathered as a result of the information provided, thereby improving the success of the investigation.

The enactment of criminal legislation for individuals who engage in cartel activity is in theory, unproblematic in respect of the UK’s relationship with the Union. Regulation 1/2003 makes it clear that the criminalisation of aspects of competition law ought to be able to be compatible with Union competition law. Article 5 specifically states that national competition authorities are permitted to impose ‘fines, periodic penalty payments or *any other penalty provided for in their national law.*’ Indeed various Member States have criminal aspects of their domestic competition regimes.

⁶⁹⁴ [Speech](#) by C. Madero Villarejo, Deputy Director General for Antitrust of DG Competition, Competition Law Conference – IBA/KBA, Introductory Remarks for Panel Session, Seoul, 28th April 2011. Available at: http://ec.europa.eu/competition/speeches/text/sp2011_05_en.pdf. Last accessed 17th August 2018.

⁶⁹⁵ Ibid.

⁶⁹⁶ Ibid.

The inquiry as to whether the measure in question merely ‘could’ jeopardise Union objectives, as opposed to requiring firm proof that it has jeopardised the attainment of an objective, does not appear to set a high bar for determining when a breach of Article 4(3) TEU has occurred. This is arguably particularly important when the Union competence in question is so fundamental to the foundational objectives of the Union itself.

5.6.1. Article 4(3) TEU: Jurisdiction and the Criminal Cartel Offence

The first most obvious hurdle to any such claim that the UK could be in breach of Article 4(3) TEU is that the cartel offence is criminal in nature and so then outside of the scope of Union competence, and thus not subject to the Loyalty Principle contained in Article 4(3) TEU. However, as early as 1978 the Court was making statements as to the reach of Union action:

‘In accordance with the principles of the precedence of [Union] law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable **any** conflicting provisions of national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measure to the extent to which they would be incompatible with Community provisions.’⁶⁹⁷

Despite not being explicitly mentioned, the Loyalty Principle is arguably echoed in the Court’s reasoning in that case. In the *Pupino*⁶⁹⁸ judgment the Court went even further and stated that:

‘It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial

⁶⁹⁷ Case C-106/77 *Simmmenthal* [1978] ECR, 629.

⁶⁹⁸ Case C-105/03 *Pupino* [2005] ECR I-5285

cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions.⁶⁹⁹

Therefore, it would appear that the criminal cartel offence would not automatically be excluded from the jurisdiction of Article 4(3) TEU solely because it is a national criminal law, if it did indeed have an impact upon the attainment of fundamental Union objectives. There is some reason to believe that the only measures that would be excluded from the application of Article 4(3) TEU would be those that the Member States could prove were within the meaning of Article 4(2) TEU.

However, the previous provision within Article 10 EC appears to have only been capable of being applied ‘in combination with some other rule of [EU] law which provides specific content to the general duty of cooperation’.⁷⁰⁰ The reasoning for this constraint was that it would not be practicable to consider a Member State bound to act or refrain from acting, by a provision like the then Article 10 EC, which is so general in application that it provides no practical guidance.⁷⁰¹ ‘It is always necessary [therefore] to identify some other rule of [Union] law or policy with which a national authority should cooperate: there cannot be a legal duty to cooperate except for some identifiable purpose.’⁷⁰² There is no reason why this position would have changed under the current Article 4(3) TEU. Indeed, given the increased scope and importance of the Principle, this requirement becomes all the more vital.

In the context of competition law this corroborating Union measure would arguably be Regulation 1/2003 which states that:

‘In order to establish a system which ensures that competition in the common market is not distorted, Articles [101] and [102] of the Treaty must be applied effectively and uniformly in the Community.’⁷⁰³

⁶⁹⁹ Ibid, para. 42.

⁷⁰⁰ Temple Lang, "Article 10 EC–The Most Important “General Principle” of Community Law." *General Principles of EC Law in a Process of Development, The Hague: Kluwer Law International* 75 (2008).

⁷⁰¹ Nefframi contests, however, that ‘era is [now] definitely over in which eminent specialists of EU law [can] affirm that the duty of loyalty is a general principle which is not sufficient to limit national rights, but expresses principles which are further specified elsewhere - and thus is not like to be invoked separately.’ *Supra* n. 648.

⁷⁰² Ibid.

⁷⁰³ Regulation 1/2003, Recital (1).

The Regulation goes on to articulate the Union's position in respect of national competition laws that seek to impose criminal sanctions upon individuals when it states that:

‘This Regulation does not apply to national competition laws which impose criminal sanctions on natural persons except to the extent that such sanctions are [a]⁷⁰⁴ means whereby competition rules applying to undertakings are enforced.’⁷⁰⁵

And further that:

‘In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and the courts of the Member States may apply such legislation on their territory.’⁷⁰⁶

Article 3 of the Regulation, which deals specifically with the relationship between Article 101 TFEU and national competition laws, goes on to add that: ‘**[w]ithout prejudice to general principles** and other provisions of [Union] law’ [emphasis added]⁷⁰⁷ Regulation 1/2003 does not ‘preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Article [101 TFEU].’⁷⁰⁸ Furthermore Recital (8) of Regulation 1/2003 states that it ‘does not apply to national laws which impose criminal sanctions on natural persons **except** to the extent that such sanctions are [a] means whereby competition rules applying to undertakings are enforced.’⁷⁰⁹ Put another way the Regulation could in theory preclude a national criminal sanction if it pursued the same objective as Article 101 TFEU, or alternatively would at the very least mean that the Regulation would apply to the use of criminal sanctions if it was a means by which rules against undertakings are enforced. In addition and more generally, whether the provisions pursue the same purpose or not, any criminal sanctions against natural persons must be also comply with the general principles of Union law, of which Article 4(3) TEU is one.

⁷⁰⁴ In *IB v R* [2010] Crim. L.R. 494, the Court of Appeal determined that ‘the’ should be replaced by ‘a’.

⁷⁰⁵ Regulation 1/2003, Recital (8).

⁷⁰⁶ Ibid, Recital (9).

⁷⁰⁷ Ibid, Article 3(3), emphasis added.

⁷⁰⁸ Ibid.

⁷⁰⁹ Emphasis added.

The issue as to whether the cartel offence fell within the meaning of ‘national competition law’ and thereby, was within the scope of Regulation 1/2003 was adjudicated upon in the interlocutory hearing *IB v R*.⁷¹⁰ In that case the Court of Appeal determined that as the criminal cartel offence is not a means by which Article 101 TFEU is **directly** enforced against undertakings, that for the purpose of Regulation 1/2003, it is not to be considered a national competition law and so is outside of its scope.⁷¹¹ The Court determined that the cartel offence pursued an objective that was predominantly different from that pursued by Article 101 TFEU. Unfortunately, the Court did not refer the point to the Court of Justice by way of the preliminary ruling procedure. Arguably however, given that undertakings are ‘fictional entities’ incapable of acting independently of their agents, who act on behalf of and bind their firms, State actions to prevent those agents from taking action that binds their firms into prohibited hard-core agreements is synonymous with taking action against the firms themselves. Therefore, if the criminal cartel offence was created as a means of deterring individual agents from engaging in cartel activity rather than, for example, the predominantly different purpose of punishing the inherent criminal harm of creating or engaging in a cartel, it is difficult to see why the criminal cartel offence would not be included within the scope of Regulation 1/2003, and also therefore, potentially precluded by it.

Nevertheless, should the criminal cartel offence rightly fall outside of the scope of Regulation 1/2003, it is still bound by the obligations contained in Article 4(3) TEU (as contextualised by the justiciable detail contained in Regulation 1/2003). Therefore, Article 4(3) TEU in combination with Regulation 1/2003 could give rise to justiciable obligations even when there is no direct substantive conflict between the national measure and the Union competition law.

A further difficulty that must be surmounted in considering the application of Article 4(3) in this context, is how directly the national measure in question must threaten to frustrate the attainment of the Union objective. In *Hasselblad (GB) Ltd v Orbison*,⁷¹² Orbison was being sued for defamation based upon the statements that he had made in a letter to the Commission claiming that Hasselblad had breached Article 102 TFEU (ex Article 85 EEC). In their judgment, the Court held that:

⁷¹⁰ [2010] Crim. L.R. 494.

⁷¹¹ *Ibid*, para. 33-36 (emphasis added).

⁷¹² 3 CMLR 540 (1984) 679.

[S]ince this country is a Member of the European Community, there is a public interest in ensuring that the Commission as the primary authority of the Community [in the sphere of competition law] should not be frustrated in [its duty] of enforcing compliance with Articles [101 and 102 TFEU]...Allowing the defamation claim to proceed would risk the flow of vital information to the Commission.⁷¹³

Temple Lang maintains that this ‘amounts to an argument that the Commission’s ability to obtain evidence should not be interfered with’⁷¹⁴ since that is the means by which enforcement of Article 101 TFEU is made effective, and thereby the Union objective of a competitive internal market is achieved, and consumer welfare protected. This case pre-dates the introduction of the Commission’s Notice on Leniency and so it could be said that the importance of the Commission’s ability to obtain evidence, particularly by way of the leniency programme, has if anything, only increased over time.

Given that the Commission now routinely imposes much higher fines than has previously been the case, the effects of leniency which reduces those fines would be frustrated if national competition authorities imposed sanctions contrary to the Commission’s approach to leniency.⁷¹⁵ Therefore, Article 4(3) TEU imposes a legal duty upon Member States to avoid such a result.⁷¹⁶ The result of *Hasselblad* seems to be then, that in order to assist the Union in the attainment of its objective of a competitive market and consumer welfare, the leniency programme, the evidence that it creates and the impact that the provision of that evidence has on the imposition of fines, are crucial to the Union being able to achieve its objectives. Arguably, therefore, Article 4(3) TEU, in practical terms in this context, requires that Member States refrain from adopting any measure that may jeopardise the working of the Commission’s leniency regime.

The *Hasselblad* case also seems to indicate that the link between the national measure in question and the threat that it poses to the leniency regime need not be direct so long as the impact is clear and tangible. The ruling in the *Hasselblad* case does not seek to alter the law on defamation, but to merely limit its use in the specific context of that case. The inquiry raised

⁷¹³ Ibid, p.692.

⁷¹⁴ John Temple Lang, ‘European Community Competition Law and Member State Action’ (1989) 10 New Journal of International Law and Business 114.

⁷¹⁵ Ibid.

⁷¹⁶ Ibid.

by Joshua and Klawait and their comments, appear to imply going one step further. Should the cartel offence be creating a situation that hinders the practical effectiveness of the Commission leniency regime sufficiently for it to breach Article 4(3) TEU, there may be cause to require that it be radically amended or even repealed. There is jurisprudence that supports the possibility that offending legislation may be required to be repealed in order to ensure compliance with Union objectives. In the second of the *'Fruit Trees'*⁷¹⁷ cases, the Court held that the Loyalty Principle created a legal duty upon Italy to formally repeal legislation that had been found to be impermissible by way of ex Article 10 EC.

However, in the more recent case of *Pfleiderer v Bundeskartellamt*⁷¹⁸, the CJEU held that the protection of the operation of the leniency programme was not absolute. In that case, the Bundeskartellamt (the German Competition Authority or 'the GCA') fined three European manufacturers of decor paper EURO 62 million for anti-competitive price agreements and artificially limiting supply. Pfleiderer, a customer who considered that it suffered adversely as a result of the agreements sought to obtain documents from the GCA in order to pursue a private damages claim. The documents sought included those obtained by way of an application for leniency. The GCA refused the application, a decision that was appealed by Pfleiderer. The CJEU were ultimately asked to clarify whether Articles 11 and 12 of Regulation 1/2003 prevented the sharing of information gathered by way of a leniency application. The CJEU held that there was no Union law that laid down a common rule as to the sharing of this type of documentation, and so it is for the Member States themselves to establish national rules on the issue.⁷¹⁹ The Court stated that despite the fact that allowing access to these documents may well diminish the effectiveness of the leniency regime and therefore, anti-cartel enforcement,⁷²⁰ this was insufficient to defeat the well established right of individuals to bring private damages claims for damages resulting from anti-competitive practices.⁷²¹ In fact, despite the obvious risk of 'suffocating both further public and private enforcement'⁷²² the European Commission

⁷¹⁷ Case 30/72 *Commission v Italy* [1973] E.C.R. 161, para. 11.

⁷¹⁸ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161.

⁷¹⁹ *Ibid*, para. 20.

⁷²⁰ *Ibid*, para. 26.

⁷²¹ See Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraphs 24 and 26, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 59 and 61.

⁷²² Stephan, Andreas, 'ECJ Ruling in Pfleiderer Heightens Concerns about Encouraging Private Enforcement' on Competition Policy Blog, www.competitionpolicy.wordpress.com, 23rd June 2011. Available at: <https://competitionpolicy.wordpress.com/2011/06/23/ecj-ruling-in-pfleiderer-heightens-concerns-about-encouraging-private-enforcement/>

have been eager to encourage private damages actions.⁷²³ This pro-consumer stance of the CJEU is in line with the overall Union policy objectives discussed in Chapter 3, but that might be at odds with more market-based theologies in some Member States.

5.6.2. EU Action in Cases of a Breach of Union Obligations

If the European Commission consider that a Member States has failed to satisfy the duty of sincere cooperation as contained in Article 4(3) TEU, there is a mechanism by which the Commission can seek remedies to address that failure. Article 258 TFEU states that:

‘If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.’

Therefore, if the European Commission had reason to believe that the detached and ineffective enforcement of the section 188 EA 2002 offence in the UK had resulted in a significant reduction in applications for leniency (because for example, rather than destabilize cartels, it had the opposite effect) or otherwise threatened the EU leniency programme, or another important aspect of the EU competition regime, then the Commission would be empowered to investigate and adopt a reasoned opinion on the matter, providing the UK and provide them with an opportunity to rectify the problem. If the UK disagreed, or failed to take action, the Treaty provides the Commission with the power to escalate the dispute and would allow the Commission to bring an enforcement action against the UK before the CJEU.

The Commission would then have to establish that the effect of the criminal cartel offence in the UK has to potential to jeopardise the effective enforcement of Article 101 TFEU by way of the Leniency Notice. It would be a novel use of Article 4(3) TFEU but given the apparent

⁷²³ The EU have implemented various measures to further improve the availability and ease with which third parties can bring claims for damages since the decision in *Pfleiderer*, primarily the Directive 2014/104/EU on Antitrust Damages Actions, but also the complementary Commission Recommendation on common principles for injunctive and compensatory redress collective redress mechanisms in Member States.

wide scope of the provision and the language used to articulate its outer limits, there does not appear to be any specific bar to an action of this sort, if indeed the operation of the criminal cartel offence had such an effect on the EU regime. Certainly the lack of appreciation of the broader regulatory dynamics in play at the time of drafting and subsequent amendment of section 188 EA 2002 fails to safeguard compliance with Article 4(3) TEU. As discussed in 5.1 above, the Loyalty Principle applies to ‘any measure’ that ‘could’ threaten the attainment of the Union’s objectives. Given that the generality of Article 4(3) TEU is arguably made justiciable by the detail provided by Article 101 TFEU and Regulation 1/2003, the remedial action required by the Commission, for example, could be to reformulate the section 188 offence so as to pursue a predominantly different purpose, or if the threat was considered significant enough, to repeal the criminal cartel offence all together.

In order to defend against such an action it would then be for the UK to establish that the section 188 (and the matter of its enforcement) was within the protection offered by Article 4(2) TFEU. In order to make this claim successfully, the UK would have to prove that the criminal cartel offence was part of ‘their fundamental structures, political and constitutional’,⁷²⁴ or alternatively, that it should be respected as an example of an ‘essential State function’⁷²⁵ which includes to ‘maintain law and order.’⁷²⁶ This in turn would require that the UK were able to establish that it was a matter of ‘basic policy choices and social values’⁷²⁷ in the UK. In determining if that were the case, the CJEU would have to ascertain whether Union interference with the criminal cartel offence would be a threat to the fundamental functions of the UK’s national legal order, or whether the UK’s interpretation of their national identity in this context would be wholly contrary to the fundamental objectives of the Union. Given that the Union foresaw the possibility of Member States introducing criminal legislation to combat anti-competitive conduct and in fact specifically dealt with the possibility arising in Regulation 1/2003,⁷²⁸ it would be incredibly unlikely that the creation of a criminal offence in the UK would be considered wholly contrary to the fundamental objectives of the Union. The CJEU would therefore have to determine whether the Commission’s proposed interference with the criminal cartel offence under Article 4(3) TEU amounted to a threat to the fundamental constitutional functions of the UK.

⁷²⁴ Article 4(2) TEU.

⁷²⁵ Ibid.

⁷²⁶ Ibid.

⁷²⁷ Casolari, Federico (2015) *supra* n. 657.

⁷²⁸ Indeed, many of the Member States have so legislated.

As mentioned above, the national identities of the Member States in the context of Article 4(2) TEU are not limited solely to laws of constitutional significance. This is implicit in the language adopted by the provision when it seeks to protect the ‘national identities’ of the Member States rather than their constitutional identities, or their sovereignty, for example. The right to legislate for the purpose of protecting law and order is a fundamental and essential State function. The question then would be whether the criminal cartel offence was an example of their basic policy choices and social values. The fact that the criminal cartel offence has been employed instrumentally as a mechanism for improving the deterrent function of anti-cartel enforcement in the UK would make a claim that it represented the social values of the UK difficult to establish. Further, given the rarity of its use, it would seem unlikely that it could be considered as essential to maintaining law and order in the UK. Whether therefore, its importance within the regulatory space of anti-cartel enforcement in the UK was sufficient in order for it to avail itself of the protection guaranteed by Article 4(2) TEU would be a matter for the CJEU to decide based upon whatever evidence was put before it. However, the reality of its ancillary use since its inception would indicate that when the competing interests of the protection of an essential Union objective are weighed against the national interest to legislate for the protection of law and order, in this specific context, remedial action to eradicate the negative impact of the criminal offence upon the operation of leniency, would not be considered wholly disproportionate.

5.6.3. Additional Obligations Arising out of Article 4(3) TEU

Article 4(3) TEU together with Regulation 1/2003 creates an obligation upon Member States to inform and consult the European Commission on any decision to introduce criminal sanctions.⁷²⁹ Such consultation would enable the Commission and the Member State to ensure that any criminal legislation adopted in the Member State was compatible with Article 101 TFEU and that it would not have a cooling effect upon potential leniency applicants. The UK satisfied this requirement. Margaret Bloom stated that they had ‘worked closely with the European Commission to ensure that the interface between [EU] and national law is carefully worked out’⁷³⁰ when introducing criminal sanctions, a fact that could be crucial when

⁷²⁹ *France v United Kingdom* 141/78 [1979] ECR 2923.

⁷³⁰ Bloom, Margaret, ‘Significant Step Forward: The UK Criminalization Initiative’ (2002) 17 Antitrust 59.

determining whether any ‘best-efforts’ obligation that may exist, has been satisfied. However it is notable that consultation with regards to the original drafting and introduction of section 188 EA 2002 would not necessarily protect the UK where it is subsequently the operation of the provision that creates concerns regarding jeopardising the successful attainment of the objectives underpinning the EU leniency programme, Regulation 1/2003 and Article 101 TFEU.

In the *Leclerc* judgment however, the Court was clear that Member States should not maintain in force legislative measures that may render the competition rules of the Union ineffective.⁷³¹ When viewed from the perspective of competition law which is ‘inherently evolutionary in nature,’⁷³² this may amount to a requirement to review the impact of enforcement practices on the efficacy of civil measures. Kovacic, when extrapolating from the experiences of anti-trust enforcement in the United States, argues that, ‘the experimental quality of competition policy demands that the agency periodically assess the effects of chosen policies.’⁷³³ Article 4(3) TEU could be a means by which the requirement to periodically review the effects of chosen policies becomes a legal obligation placed upon the Member States to ensure that the attainment of its fundamental objectives are not frustrated over time.

5.7. Conclusions

It is important to be clear that any action against a Member State by way of Article 4(3) TEU in the manner outlined above would be the first of its kind. Given the importance of the leniency programme to the effective enforcement of Article 101 TFEU however, combined with the fact that in practice, that enforcement is effectively left in the hands of the Member States, the Union must have a means by which it can require Member State interference, whether by ‘accident or design’⁷³⁴ to be remedied. Article 4(3) TEU could provide such a mechanism.

⁷³¹ Case 231/83 *Cullet v Centre Leclerc Toulouse* [19850 ECR I-305148, para. 16-18.

⁷³² Kovacic, ‘Criminal Enforcement of Competition Law: Implications of US Experience’ in Caron Beaton-Wells and Ariel Ezrachi (eds) *Criminalising cartels: Critical studies of an international regulatory movement* (Hart Publishing: 2011) p.37.

⁷³³ Ibid, para. 47, p.39.

⁷³⁴ John Temple Lang (1998) *supra* n. 632.

The close relationship that exists within the anti-cartel enforcement regulatory space between the UK and the EU means that the place which the criminal cartel offence occupies within the UK space, and the potential for it to affect the functioning of anti-cartel enforcement in the EU, should not be ignored. The experience of the UK in attempting (and failing) to create a criminal offence with any significant impact upon the objectives it was created to achieve, should serve as a warning to other Member States who may consider to legislating. The above analysis shows that in order to avoid the risk of breaching the duty of sincere cooperation contained in Article 4(3) TEU that any Member State must inform and consult the Commission of its intentions, and must, if so permitted by their constitutional arrangements, articulate any criminal offence so as to (a) protect the functioning of leniency provisions, and (b) pursue a predominantly different purpose than Article 101 TFEU. Article 4(3) TEU may also impose an obligation of periodic review which would help to prevent the frustration of Union objectives over time. As shown in Chapter 4, section 4.3.4. of this work, the passage of time and the enforcement of policy instruments can have a significant impact upon the overall impact of a complex regulatory space, arguably therefore strengthening the argument that Article 4(3) TEU creates an obligation for periodic review.

Whilst some would argue that Article 4(3) TEU should be ‘considered as containing principles governing interactions between the Union and national legal orders, which transform the status of sovereign States into that of Member States of the European Union,’⁷³⁵ its cohabitation with Article 4(2) TEU demonstrates, in fact, that the ‘EU is not interested in “Europeanising” the Member States.’⁷³⁶ The Loyalty Principle should be understood as a key part of a legal regime that ‘is one of the most remarkable phenomena in contemporary world politics’⁷³⁷ and as a mechanism for ensuring that the overriding policy objectives of the Union are not inadvertently frustrated through the actions of its Member States.

⁷³⁵ Neframi (2010) *supra* n.684.

⁷³⁶ Neil Murphy (2017) *supra* n. 691.

⁷³⁷ William Phelan, ‘Why do the EU Member States Accept the Supremacy of European Law? Explaining Supremacy as an Alternative to Bilateral Reciprocity.’ (2011) 18(5) *Journal of European Public Policy* 766.

Chapter 6. Improving the Anti-cartel Regulatory Framework: lessons from the law on market abuse

6.1 Introduction: framing the case study analogy

The previous chapters of this work sought to examine the theoretical justifications for criminalisation (Chapter 2); explore deterrence (and its alternatives) as cartel control measures within the context of the criminal cartel offence (Chapter 3); analyse the dynamics of anti-cartel enforcement in the UK and the place within which the section 188 offence occupies (Chapter 4); consider the potential implications of the criminal cartel offence on the UK's obligations owed to the EU by virtue of Article 4(3) TEU (Chapter 5). Together these chapters articulate the complexities of including atypical enforcement tools within an already complex regulatory environment, and the problems that inadequately considered implementation of new tools may have on the impact on that tool, and the regulatory matrix in which it is to operate. This chapter aims to build upon the findings of these preceding chapters in order to take a step towards devising solutions to the complex challenges that they have highlighted. This will then provide the basis upon which recommendations for improving the framework within which the fight against cartels takes place can be addressed in the next chapter. To achieve the objective of this chapter, the following analysis looks beyond the borders of competition law.

As discussed in previous chapters of this work, anti-cartel enforcement has a harmonised core as a result of the exclusive competence that the EU retains over matters of competition law⁷³⁸ within the internal market. Article 101 TFEU outlines the relevant law on collusion, and the jurisprudential development of Article 101 TFEU defines the parameters of the actions that are considered to be prohibited forms of agreement. The task of enforcing Article 101 TFEU however, became too much for the European Commission in a single market that was still growing (at the relevant time to 25 Member States, later to 28 with the accession of Bulgaria,

⁷³⁸ Member States are permitted to adopt legally binding acts within the field of competition law only 'if so empowered by the Union or for the implementation of Union acts. Article 3(1)(b) TEU, and Article 2(1) TFEU.

Romania and Croatia) and so the decision was taken to decentralise enforcement.⁷³⁹ Regulation 1/2003 was introduced therefore, to articulate the decentralised way in which those laws should be enforced by the Member States within their own jurisdiction,⁷⁴⁰ as well as outlining the powers that national competition authorities ought to have to achieve that enforcement. This meant that within the proscribed limits, Member States were permitted to adopt domestic legislation to tackle cartel activity in addition to Article 101 TFEU.⁷⁴¹ As a result, whilst competition law retained its harmonised core, idiosyncratic procedures and sanctions have evolved outside of that core, within the Member States' jurisdictions that nevertheless, remain inextricably linked to it. In practice then, despite the EU retaining exclusive competence over matters of competition law within the internal market, the system that has been created has some similarities to areas of competence that are shared between the EU and the Member States in that Member State rules and Union rules must find a way to cohabit the competition law regulatory space together. The challenge is to find the most beneficial way of achieving that cohabitation that does not undermine the overriding EU objectives and respects the autonomy and diversity of the (current) 28 individual Member States.⁷⁴²

The diverse nature of the legal systems of the Member States within the Union necessitated that they should be able to retain a degree of autonomy with respect to the implementation procedures necessary to enforce Articles 101 and 102 TFEU in accordance with their own constitutional requirements.⁷⁴³ This has meant that there now exists some idiosyncratic

⁷³⁹ For contemporaneous discussion of the need to decentralise the enforcement of Article 101 TFEU see, Alan Riley, 'EC Antitrust Modernisation: the Commission does very nicely – thank you! Part 1: Regulation 1 and the notification burden,' (2003) 24(11) European Competition Law Review 604, and Alan Riley, 'EC Antitrust Modernisation: the European Commission does very nicely – thank you! Part 2: between the idea and the reality: decentralisation under Regulation 1,' (2003) 24(12) European Competition Law Review 657.

⁷⁴⁰ The EU have recently sought to empower Member States further, to improve their effectiveness as enforcers of competition law. See, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper function of the internal market, OJ L11/3.

⁷⁴¹ Regulation 1/2003.

⁷⁴² The process of empowering the Member States to enforce competition law has had a significant impact upon enforcement of the EU competition rules, with enforcement 'now taking place on a scale which the Commission could never have achieved on its own. Since 2004, the Commission and the NCAs took over 1000 enforcement decisions, with the NCAs being responsible for 85%.' European Commission, 'Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market,' Brussels, 22nd March 2017, COME (2017) 142 Final, p.2.

⁷⁴³ This was alluded to in Regulation 1/2003, Recital (35) which states that the 'Regulation recognises the wide variation which exists in the public enforcement systems of the Member States.' However, it was in the recent Directive Proposal in which the European Commission acknowledged that there was 'untapped potential for more effective enforcement of the EU competition rules' and that 'Regulation (EC) 1/2003 did not address the means and instruments by which the NCAs apply the EU competition rules and many do not have the means and instruments to effectively enforce Articles 101 and 102 TFEU.' Ibid, p.2.

sanctions and procedures in the Member States that have evolved outside of that very harmonised core, but that nevertheless, remain inextricably linked to it, such as the UK's criminal cartel offence.⁷⁴⁴ In practice therefore, despite competition law being a matter of exclusive competence for the EU, Member State national rules and Union law cohabit the competition law space together, the challenge is to find the most efficient way for them to co-exist.

This chapter turns to the law on market abuse as one such area that has managed to navigate many of the same challenges that cartel regulation has faced and continues to face. Looking outside of competition law in an attempt to find ideas to solve the problems it currently faces is the practice of comparative law. Comparative law is essentially 'the attainment of knowledge of [a] legal system in order to enhance the understanding'⁷⁴⁵ of another. The process of comparing two legal systems can provide an 'untapped source for legal and conceptual solutions.'⁷⁴⁶ This can be particularly helpful when relatively new legislative functions are added to a regulatory landscape and there exists no internal reference mechanism for dealing with the challenges that arise as a result. Looking beyond the confines of competition law to analyse how similar problems have been overcome in other legal fields can help to create a more comprehensive understanding of those challenges and possible solutions that can be deployed to overcome them.

Opening up the conversation in an attempt to draw inspiration from beyond the narrow confines of a particular subject area or field of law, and potentially transferring successful aspects from one area of law to another, goes beyond comparison and becomes legal transplantation. There is much debate as to the utility of legal transplantation for the purpose of law reform, particularly when occurring between different legal jurisdictions,⁷⁴⁷ but there is less controversy surrounding its use as an academic tool for the purpose of finding new techniques

⁷⁴⁴ Another example can be found in Ireland. Article 34.1 of The Irish Constitution dictates that the Courts have sole and exclusive competence to administer justice. In the context of competition law this means that in practice fines can be issued against individuals or undertakings only after the conclusion of a criminal prosecution, and only by the Courts. Administrative bodies such as the national competition authority are not permitted to issue fines therefore, for breaches of the competition rules and are limited to be an investigatory role only. In Germany however, cartels are an administrative offence with the exclusion of bid-rigging which is criminalised by virtue of section 298 of the German Criminal Code.

⁷⁴⁵ Kai Schadbach, 'The Benefits of Comparative Law: A Continental European View,' [1998] 16 *University of Boston International Law Journal* 331.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ See for example, Otto-Kahn-Freund, 'On the Uses and Misuses of Comparative Law,' (1974) 37 *Modern Law Review* 1; Alan Watson, 'Legal Transplantation and Law Reforms (1976) 92 *Legal Quarterly Review* 79.

and ideas.⁷⁴⁸ This is particularly true when the legal areas that are the subject of comparison and transplantation exist within the same legal jurisdiction, largely because they occur within the same socio-economic and political landscape. It is this form of legal transplantation with which this work concerns itself. The examination of the laws on market abuse within the EU is not done with the aim of transplanting that regulation into the UK. It is done with the hope of stimulating new legal ideas for the purpose of generating new conceptual solutions for the challenges that anti-cartel regulation faces as illuminated in the preceding chapters of this work.

6.2 Market Abuse and Cartels

Currently, the areas of competition law that exist within the harmonised core have seen relative success in achieving some of the policy objectives outlined in previous chapters. For example, the existence of the leniency programme has had success in improving the detection rate of cartels, as well as improving the evidential quality of the investigations against the non-immunised cartels. However, when the theoretical foundations of enforcement such as deterrence,⁷⁴⁹ retribution, incapacitation and corrective justice are used to judge the harmonised administrative core together with the idiosyncratic outer elements (such as criminal sanctions and director disqualification orders) the system could arguably be considered to be inefficient at best, and dangerously incoherent at worst,⁷⁵⁰ and the inherent tensions within the regulatory dynamics begin to emerge more clearly.

Competition law is not alone in dealing with complex and multi-layered enforcement. In previous chapters of this work the example provided by the field of environmental law has provided some insights into how to effectively navigate complex regulatory dynamics in a

⁷⁴⁸ Kai Shadbach, (1998) *supra* n. 744.

⁷⁴⁹ ‘Over three quarters of the European Commission leniency applications by first-in applicants took place not before but *after* a cartel collapses; Nearly 40 percent of the applications by first-in applicants post-dated cartel dissolution by at least a year. More than half of the applications by first-in applicants arrived after the “dawn raids” by which time the [European Commission] was already aware of the cartels’ existence.’ Jun Zhou and Dennis L. Gärther, ‘Delays in Leniency Applications: Is there Really a Race to the Enforcer’s Door?’ TILEC Discussion Paper No. 2012-044, 10th December 2012. Available at:

⁷⁵⁰ As the discussions in Chapter 3 of this work have shown the argument that leniency programmes result in a ‘race’ ‘to confess in order to beat their fellow conspirators to the enforcer’s door’ are arguably not supported by the empirical evidence. Further, the deterrent value of the fines that are imposed in practice has been demonstrated to be severely limited making them a ‘mere tax’ at worst, or a somewhat effective retributive policy at best. See, Scott, D. Hammond, US Department of Justice, 2004; and Jindrich Kloub, European Commission DG Competition, 2001, quoted in ‘Delays in Leniency Applications: Is there Really a Race to the Enforcer’s Door?’ *ibid*.

general sense. The academic literature in the field of environmental law dealing with regulatory mix theory is far more developed than similar academic discussions that occur within the competition law literature at the time of writing, and so has been used in this work, as a guide for understanding the dynamics of anti-cartel regulation. The process of reaching outside of the confines of competition law therefore, has enabled this work to start to develop the academic understanding of regulatory mix theory as it applies to anti-cartel enforcement.

Nevertheless, the specific legislative solutions used in environmental law do not provide a useful comparator for competition law in general, or cartel prevention in particular, because the realities that they face in practice, and the context in which they occur, are far removed from those that anti-cartel regulation must address. This chapter therefore, seeks to utilise a comparative style analysis to illuminate how the challenges of complex regulatory dynamics discussed in Chapter 4, can be better navigated. To enable the identification of potential practical solutions to the highlighted problems, the comparator for that analysis must, as far as is possible, face similar (if not the same) challenges.

There are many consistent features shared between market abuse and cartels, and there are even, some would argue, areas of significant overlap. A recent example of such potential overlap can be seen in the manipulation of the London inter-bank offered rate ('LIBOR') which is the primary benchmark rate for short-term interest rates worldwide.⁷⁵¹ LIBOR is often referred to as 'the "world's most important number"' because it is used to set the interest rate for \$360 trillion worth of financial products worldwide, such as mortgage rates and car loans.⁷⁵² Each day a panel of banks answers a series of questions which allow the panel to estimate what they would be charged if borrowing money from other banks.⁷⁵³ Those estimates would then be submitted to the British Bankers' Association who would then calculate LIBOR.⁷⁵⁴

⁷⁵¹ For more information see, ICE Benchmark Administration, *ICE LIBOR*, https://www.theice.com/iba/libor?utm_source=website&utm_medium=search&utm_campaign=spotlight. Last accessed 14th February 2019.

⁷⁵² Jacob Hamburger, 'Crowding the market: is there room for antitrust in the market manipulation cases?' [2015] *International Trade and Regulation* 120.

⁷⁵³ See, Sharon E. Foster, 'LIBOR Manipulation and Antitrust Allegations,' (2013) 11 *DePaul Business & Commercial Law Journal* 291.

⁷⁵⁴ As a result of the LIBOR manipulation, the BBA no longer administers the rate. See, BBA Press Release, 'BBA to Hand over Administration of LIBOR to Intercontinental Exchange Benchmark Administration Ltd,' 17th January 2014.

Between approximately 2005 and 2010 ‘several panellist banks manipulated LIBOR by submitting artificial quotes to the BBA.’⁷⁵⁵ The internal manipulation occurred as a result of traders within the panellist banks convincing the LIBOR data submitters to move that bank’s estimate up or down.⁷⁵⁶ ‘External manipulation occurred when these requests were made on behalf of other traders at different banks.’⁷⁵⁷ In order to carry out the manipulation of LIBOR the traders involved in the conspiracy shared commercially sensitive material, ‘including confidential information about pricing, customer orders, and their net trading positions,’⁷⁵⁸ as and in so doing, colluded to circumvent ‘natural competition.’⁷⁵⁹ This enabled the banks to make huge profits at the expense of their own clients.⁷⁶⁰ Many of the practical steps taken to bring about the manipulation of LIBOR were the same, or very similar, to those which could be expected of a cartel, and therefore, the challenges that the respective authorities faced in detecting the illicit activities are themselves, very similar. It is these similarities that make market abuse regulation a good comparator for anti-cartel regulation, which as previously discussed in Chapter 3 of this work, can be summarised as:

1. the prohibited conduct is inherently secretive, often sophisticated, and very difficult to detect;
2. civil sanctions are perceived as being insufficient to adequately deter potential offenders;
3. there is a general societal ambivalence as to the moral wrongfulness of the conduct despite the very serious harm that it causes;
4. the conduct is subject to some degree of EU harmonisation; and
5. the regulatory toolkit of the competent authorities is not limited to criminal sanctions or administrative fines only, but includes alternative regulatory responses as well.

Market abuse regulation wrestles with near identical problems. The European Parliament recently took the step of implementing a Directive requiring that all EU Member States impose criminal sanctions for market abuse as a minimum standard as it was considered essential for

⁷⁵⁵ Jacob Hamburger, *supra* n. 751.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.*

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

⁷⁶⁰ See Taffet and Whitlock, ‘Antitrust and Financial Benchmark Litigation,’ December 2013, CPI Antitrust Chronicle.

a successful regulatory response to market manipulation.⁷⁶¹ This was despite the fact that administrative sanctions were already in place by virtue of the first Market Abuse Directive.⁷⁶² This chapter therefore, will look to how the EU managed to create of a regulatory framework that successfully provided for both administrative and criminal sanctions in the hope of identifying potential conceptual solutions that could aid in the improvement of the anti-cartel regulatory space in the UK, and thereby improve the impact of the criminal cartel offence upon the fight against cartels.

6.3. The Law on Market Abuse in the UK and EU

6.3.1. Introduction: What is Market Abuse?

Market abuse is a generic term used to describe ‘improper market behaviour.’⁷⁶³ The term covers both insider dealing and market manipulation. This improper market behaviour amounts to very serious practices that are considered to be amongst the primary causes of some of the colossal financial catastrophes to have occurred throughout history.⁷⁶⁴ Indeed some would argue that ‘no behaviour is a more potent enemy of market efficiency and [a] bigger destroyer of investor confidence than market abuse.’⁷⁶⁵ Both market manipulation and insider dealing are regarded as very harmful forms of economic behaviour.⁷⁶⁶ Market manipulation is achieved by creating false information to artificially alter prices.⁷⁶⁷ One example of such manipulation occurs when false information about the performance of the company is used to create a ‘misleading impression of its economic value, and therefore, a false market in the shares.’⁷⁶⁸ Another form of manipulation occurs when attempts are made to ‘create a

⁷⁶¹ With the exception of the UK and Denmark. Under the Lisbon Treaty certain EU countries are given the choice

⁷⁶² Directive 2003/6/ED of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 096, 12/04/2003.

⁷⁶³ Edward J. Swan and Jon Virgo, ‘Market abuse regulation,’ 2nd Edn (Oxford University Press: 2010) p.1.

⁷⁶⁴ Emiliós E. Avgouleas, ‘The mechanics and regulation of market abuse: a legal and economic analysis,’ (Oxford University Press Catalogue, 2005) p.3.

⁷⁶⁵ Ibid.

⁷⁶⁶ This view is not, however, universal. Prominent scholar, Henry Manne articulated his belief that insider dealing is, in fact, ‘desirable’, in his book, ‘Insider Trading and the Stock Market’ (The Free Press, New York: 1966).

⁷⁶⁷ Edward J. Swan and Jon Virgo, *supra* n.762.

⁷⁶⁸ Paul Barnes, ‘Insider dealing and market abuse: The UK’s record on enforcement,’ *International Journal of Law, Crime and Justice* 39(3) (2011) 174.

misleading impression of the market in the shares by simply repeatedly buying and selling them in order to raise the reports volume of trade in the shares.⁷⁶⁹ The ultimate effect of actions such as these is to ‘distort and undermine the market, thereby damaging the interests of its ordinary participants.’⁷⁷⁰

Insider dealing involves the taking advantage of ‘asymmetric information’⁷⁷¹ that puts the holder of that information in a privileged position in comparison to the public.⁷⁷² It occurs when trading in shares or securities is done by, or instigated by someone with knowledge of unpublished business data or information that would affect the price of the shares being bought or sold. Or more simply, insider dealing occurs when a person trades in ‘financial instruments when in possession of price-sensitive inside information in relation to those instruments.’⁷⁷³

The examples of serious market abuses are plentiful, perhaps one of the most well-known resulting in the collapse of Enron, a Texas-based energy firm. In just 15 years, Enron has managed to grow to be America’s seventh largest company. It employed over 21,000 staff and operated in more than 40 countries.⁷⁷⁴ However, it was a complex web of various forms of market manipulation and frauds that has created the firm’s success by keeping the company’s debts and losses out of its accounts.⁷⁷⁵ In 2002, as the depths of Enron’s deceptions finally became apparent, the firm went into bankruptcy in what was, at the time, ‘the world’s biggest ever corporate failure.’⁷⁷⁶ The resulting investigation led to 3 people being sentenced to terms

⁷⁶⁹ Ibid.

⁷⁷⁰ Ibid.

⁷⁷¹ Peter-Jan Engelen, ‘Structural Problems in the Design of the Market Abuse Regulations in the EU’ (2007) 19 *The Journal of Interdisciplinary Economics* 57.

⁷⁷² Edward J. Swan and Jon Virgo, *supra* n.762.

⁷⁷³ European Commission Press Release, ‘European Parliament’s endorsement of the political agreement on Market Abuse Regulation,’ 10th September 2013, Brussels. Available at: [http://europa.eu/rapid/press-release MEMO-13-774_en.htm](http://europa.eu/rapid/press-release_MEMO-13-774_en.htm). Last accessed 21st February 2019.

⁷⁷⁴ BBC News, ‘Enron scandal at a glance,’ 22 August 2002, Available at: <http://news.bbc.co.uk/2/hi/business/1780075.stm>. Last accessed 15th May 2018.

⁷⁷⁵ One of the ways in which the company manipulated its share value was to use ‘mark-to-marketing accounting’ which artificially inflated the appearance of the company’s profits. It would build an asset, for example, a power plant, and then immediately claim the projected profits, even though no actual profits had been made yet. If the revenue from the asset did not match the projected amount, instead of taking the loss, Enron would transfer the asset to an off-the-books corporation where the loss would go unreported. For more details and discussion see, ‘Enron Scandal: The Fall of a Wall Street Darling,’ Investopedia, 2nd December 2006. Available at: <http://www.investopedia.com/updates/enron-scandal-summary/>. Last accessed 15th May 2018.

⁷⁷⁶ *The Economist*, ‘The fall-out from Enron,’ 24th January 2002. Available at: <http://www.economist.com/node/954494>. Last accessed 18th May 2018. It is estimated that shareholders ultimately lost \$74 billion in the four years leading up to the bankruptcy and its employees lost billions in pension benefits. Since Enron there have been a number of corporate bankruptcies that have surpassed Enron as the largest corporate bankruptcies including Washington Mutual and the Lehman Brothers, which in turn

of imprisonment. In Europe, the collapse of Parmalat was considered to be ‘Europe’s Enron’.⁷⁷⁷ Parmalat was an Italian retailer of dairy and food, specialising in long-life milk. In the months prior to the collapse of the company they had reported global revenues of €7.5 billion.⁷⁷⁸ However, a complex array of ‘borrowings, false accounting, and misleading reports’ in a fraud involving transactions all over the world that concealed, from both investors and regulators, a debt of roughly €14 billion.⁷⁷⁹ Parmalat collapsed ‘virtually overnight’.⁷⁸⁰

Market abuse is a pervasive problem that is incredibly challenging to detect and prevent. Much like cartels the extent of market abuse is difficult to determine although some attempts have been made.⁷⁸¹ What is clear however, is that in both cases of market abuse and cartels, well educated citizens with an otherwise strong normative commitment to obeying the law, are engaging in seriously harmful economic conduct in a manner that the authorities find difficult to detect.

6.3.2. The Evolution of Market Abuse Regulation in the UK: a brief history

A series of financial scandals in the 1970s and early 1980s showed that the traditional self-regulation of financial services that had been prevalent suffered from ‘serious systemic weakness’⁷⁸² and left the UK financial markets exposed to abuse. Attempts had been made in 1977 and 1978 to implement laws in the UK that would deal with insider dealing, but it was not until 1980 that the first legislation to make insider dealing a criminal offence was

resulted in the Royal Bank of Scotland finding itself insolvent and having to rely upon the UK government to acquire 58% of the shares to avoid its otherwise unavoidable collapse. For discussion see, Gordon Rayner, ‘Banking Bailout: the rise and fall of RBS,’ *The Telegraph*, 20th January 2009. Available at: <https://www.telegraph.co.uk/finance/newsbysector/banksandfinance/4291807/Banking-bailout-The-rise-and-fall-of-RBS.html>. Last accessed 21st February 2019.

⁷⁷⁷ ‘Suing over spilt milk: the Parmalat scandal’ 24th June 2011, *World Finance*. Available at: <https://www.worldfinance.com/markets/the-parmalat-scandal>. Last accessed 17th November 2018.

⁷⁷⁸ Vincent Boland, ‘The saga of Parmalat’s collapse’ 19th December 2008. Available at: <https://www.ft.com/content/c275dc7c-cd3a-11dd-9905-000077b07658>. Last accessed 17th November 2018.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ *Ibid.*

⁷⁸¹ Some estimates have the suspected level of market abuse to be as high as 90% of looked at cases. The estimates are discussed in more detail in the following section of this chapter. See also, Paul Barnes, ‘Stock Market Efficiency, Insider Dealing and Market Abuse,’ (Gower, 2009), p.186; Ben Dubow and Nuno B. Monteiro, ‘Measuring Market Cleanliness’ (2006). Available at: SSRN: <https://ssrn.com/abstract=1019999>. Last accessed 17th November 2018.

⁷⁸² Emiliós E Avgouleas (2005) *supra* n. 763, p.308.

enacted,⁷⁸³ in the form of the Companies Act 1980. This was then later amended by the Company Securities (Insider Dealing) Act 1985. However, an over-dependence on the criminal sanctions and otherwise ‘inadequate enforcement because of regulatory fragmentation’⁷⁸⁴ meant that the regime was still considered to be ‘very ineffective.’⁷⁸⁵ This perception was reinforced by the lack of any successful prosecutions brought under the Act.⁷⁸⁶

The criminal sanction for insider dealing shared the regulatory space in the UK with a variety of regulatory responses available to the competent authorities. These included ‘supervisory and disciplinary powers enforceable against regulated firms and registered individuals employed by former self-regulatory organisations (later similar powers were granted to the Financial Services Authority in respect of authorized firms and persons approved to work within them’⁷⁸⁷).

Nevertheless, it was not until the European Union took steps to create some degree of harmonisation of insider trading laws that the UK’s ‘first major, and effective laws’ to prosecute insider dealing, in the form of Part V⁷⁸⁸ of the Criminal Justice Act 1993, occurred. The EU’s ‘Directive coordinating regulations on insider dealing,’ referred to as the ‘Insider Dealing Directive’⁷⁸⁹ was spurred on by the impending creation of the single integrated market by the end of 1992 by way of the Single European Act.⁷⁹⁰

⁷⁸³ Section 68 and 69 of the Companies Act 1980 made it an offence for a person with inside information (‘non-public information which affects the price of securities’) to deal in those securities or otherwise to encourage someone else to. It was also made it an offence to disclose inside information other than in the proper performance of employment, office or profession.

⁷⁸⁴ Emiliou E Avgouleas (2005) *supra* n. 763, p.308

⁷⁸⁵ Karen Harrison and Nicholas Ryder, ‘The Law Relating to Financial Crime in the UK’ (Ashgate Publishing Ltd: 2013) p.99.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ Emiliou E Avgouleas (2005) *supra* n. 763, p. 2.

⁷⁸⁸ A person commits insider dealing if he uses price sensitive information to:

(2)(a) encourage another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or, (b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

(3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

⁷⁸⁹ Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L 334 of 18 November 1989, pp.30-32.

⁷⁹⁰ Emiliou E Avgouleas (2005) *supra* n. 763.

The measures however, failed to shake off the perception of being sub-optimal, and were regarded as ‘ineffective [in some respects] and in others incomplete.’⁷⁹¹ This was as a result of a series of high-profile trials failing to obtain convictions which in turn ‘exposed weaknesses in the insider trading laws and attempts to criminalise improper market behaviour.’⁷⁹² Melanie Johnson MP, who was economic secretary to the Treasury at the time commented that financial markets are protected in two ways,

‘First, there are criminal regimes for market manipulation and insider dealing. These are both serious criminal offences...Secondly, there is the regulatory regime under which various regulatory bodies can take action against regulated persons for market abuse. However, there is a gap in the protections.’⁷⁹³

The Financial Services and Market Act 2000 (the ‘FSMA 2000’) added a civil offence to the enforcement mix to fill that gap, and thus complement the existing regulatory responses and criminal sanctions mentioned above.

The impact of the introduction of legislation upon instances of market abuse is difficult to empirically determine. This is exacerbated by the fact that, as is the case with cartels, it is almost impossible to empirically prove with absolute certainty, the true extent of the problem. Despite that being the case, attempts have been made to provide reliable estimates as to the true scale of market abuses in the UK. During the period between 2000 and 2005, Dunbow and Monteiro ‘looked at market cleanliness by assessing the rise and fall of share prices two days before information was released to the public. Significant changes ... were seen as evidence of some level of insider dealing.’ During the timeframe they considered ‘they found between 25 and 33 per cent of all merger bids involves statistically significant price changes in a two day window prior to the information being publicly known.’⁷⁹⁴

⁷⁹¹ Emiliós E Avgouleas (2005) *supra* n. 763, p.2.

⁷⁹² *Ibid.* “Notably the failure to sustain convictions against directors and financial advisors for improper conduct in connection with a rights issues in the *Blue Arrow* case (*R v Cohen* [1992] 142 NJL 1267); see further, the failure to make criminal allegations tick against Ernest Saunders in relation to suspected wrongdoing in respect of Guinness plc’s take-over of Distillers plc (*Saunders v UK* [1996] 23 EHRR 313).

⁷⁹³ Melanie Johnson MP, Standing Committee 1, 2 Nov 1999, HNISO, quoted in Emiliós E Avgouleas (2005) *supra* n. 763, p.3.

⁷⁹⁴ Harris and Ryder (2013) *supra* n. 784, p.97 referring to the work of B. Dubow and N. Moteiro, ‘Measuring Market Cleanliness,’ (2006) FSA Occasional Paper, March 2006, London: Financial Services Authority.

Others have estimated that when the period under review is two months prior to the announcement of information, the evidence indicates that statistically significant changes indicating some level of insider dealing are evident in more than 90 per cent of cases.⁷⁹⁵ Barnes goes on to say that when this is matched with the number of prosecutions, ‘there is only a one in 500 chance of being caught.’⁷⁹⁶ Sir Howard Davies alluded to the poor enforcement record in respect of financial market crimes in an annual lecture at the Securities Institute Ethics Committee:

‘I think we have to recognise, sadly, that the City’s image is not all it might be. There have been too many ‘accidents’ for that to be so ... There have been some prosecutions, certainly ... But the record in heavily contested serious fraud trials has, frankly, not been good. And remarkably few prosecutions have been brought for insider trading. There is a common perception, which is hard to dismiss, that City crime is simply not punished on the same basis as other forms of theft.’⁷⁹⁷

Despite that being the case, the introduction of the FSMA 2000 into the legislative landscape represented a major evolution in market abuse law in the UK. It created a new regulator, the Financial Services Authority (the ‘FSA’) and ‘changed the legal form and ambit of the UK’s market abuse regime radically.’⁷⁹⁸ It provided for a new market abuse offence and sought to address the perceived over-reliance on criminal sanctions by dealing with abusive market practices by way of regulatory sanctions. The FSA had 4 options for dealing with market abuse as a result of the FSMA;

1. initiate criminal proceedings
2. exercise powers contained in section 123 and impose a penalty, make a public statement or take disciplinary action
3. take another action, for example, the issuing of a restriction order requiring offenders to ‘disgorge ill-gotten gains’ to those injured by their conduct, by virtue of section 384, or
4. apply to the court for an injunction.

⁷⁹⁵ P. Barnes, ‘Stock Market Efficiency, Insider Dealing and Market Abuse’, Gower, 2009.

⁷⁹⁶ Ibid, at 186, referred to in ‘The Law Relating to Financial Crime in the UK’, p.98

⁷⁹⁷ Sir Howard Davies, then Chairman of the Financial Services Authority, ‘Are Words Still Bond: How Straight is the City?’, Securities Institute Ethics Committee: 3rd Annual Lecture, 2 Nov 1998.

⁷⁹⁸ Emiliós E Avgouleas (2005) *supra* n. 763, p.310.

In 2007 the global financial crisis started as a result of the undercapitalisation of the Western banking system, and triggered by the subprime mortgages of the United States. Some regarded it as a turning point in terms of how financial crimes would be dealt with.⁷⁹⁹ Further reform followed in 2012, the impetus for which came as a result of a number of high profile cases⁸⁰⁰ as well as the LIBOR manipulation scandal.⁸⁰¹

6.3.3. The Evolution of Market Abuse Regulation in the EU: a brief history

One of the foundational aspirations of the EU has always been the establishment of ‘one territory without any internal borders or other regulatory obstacles to the free movement of goods and services.’⁸⁰² The free movement of capital ‘underpins the single market and complements the other three freedoms.’⁸⁰³ Prior to the Single Market, the Treaty of Rome required that restrictions be removed ‘only to the extent necessary for the functioning of the common market.’⁸⁰⁴ Incrementally, further small steps were taken over time until the launch

⁷⁹⁹ Sarah Wilson, ‘The new Market Abuse Regulation and Directive on Criminal Sanctions for Market Abuse: European capital markets law and new global trends in financial crime enforcement’ ERA Forum (2015) 16 427-466.

⁸⁰⁰ Mathuas Siems and Natthijs Nelemans, ‘The Reform of the EU Market Abuse Law: Revolution or Evolution?’ (2012) 19 The Maastricht Journal of European and Comparative Law 195-205. See *Spectator Photo Group NV* where a company purchased its own shares and subsequently published new and positive results concerning its commercial policy; and *IMC Securities*, where it was held that trade-based market manipulation does not require that the price of the securities be kept at an abnormal or artificial level for a certain duration.

⁸⁰¹ LIBOR is the London inter-bank lending rate. ‘It is considered to be one of the most important interest rates in finance, upon which trillions of financial contracts rest.’ It is used to help determine the price of transactions but is also used as a ‘measure of trust in the financial system and reflects the confidence banks have in each other’s financial health...Every day a group of leading banks submits the interest rates at which they are willing to lend to other financial houses...Then an average is calculated’ and that is how LIBOR is set. The LIBOR scandal revealed that a number of banks had been submitting false figures and that ‘traders at several banks conspired to influence the final average rate that results, the official LIBOR rate, by agreeing amongst themselves to submit rates that were either higher or lower than their actual estimates.’ Business, ‘Libor: What is it and why does it matter?’, BBC NEWS, 3 August 2015. Available at: <http://www.bbc.com/news/business-19199683>. Last accessed 18th May 2018.

⁸⁰² European Commission, ‘The European Single Market.’ Available at: https://ec.europa.eu/growth/single-market_en. Last accessed 15th April 2019.

⁸⁰³ Dražen Rakić, ‘Free movement of capital,’ in *Fact Sheets on the European Union*, The European Parliament, October 2018. Available at: <http://www.europarl.europa.eu/factsheets/en/sheet/39/free-movement-of-capital>. Last accessed 14th February 2019.

⁸⁰⁴ Ibid.

of the Single Market, at which time the liberalisation of capital markets really began. This led to the introduction of the free movement of capital as a defined Treaty freedom.⁸⁰⁵

A common legal and regulatory framework is required for the good functioning of the internal market, and a properly functioning financial market is considered to be essential for economic growth. Financial integration within the EU has as its objective no ‘friction discriminating between economic players with regard to accessing or investing capital, particularly as a result of their geographic origin.’⁸⁰⁶ The increased ease with which financial services could be obtained across borders within the internal market however, led to not only an increased risk of abuse, but also an increased cost of compliance for businesses, and an increased possibility of rule conflict.⁸⁰⁷

In July 2000 the European Union Council of Finance Ministers (‘EconFin’) set up the Commission of the Three Wise Men on the Regulation of European Securities Markets (‘The Wise Men’) to produce a report that would identify failures and develop recommendations for a new regulatory process for the single financial market.⁸⁰⁸ The Wise Men, chaired by Alexander Lamfalussy, released their Final Report in February 2001 in which they articulated a new ‘four-level procedure for the adoption, implementation, transposition and monitoring of legislation’⁸⁰⁹ affecting the securities markets, ‘the Lamfalussy Process.’⁸¹⁰ A major objective of the new process was to enable a more rapid response to developments within the financial sector.

Level 1 refers to framework legislation which articulates the core principles essential to each proposal.⁸¹¹ Level 1 legislation therefore takes the form of directive or regulation. Level 2 the technical implementation measures are adopted through a procedure called the ‘comitology

⁸⁰⁵ Article 26(2) TFEU.

⁸⁰⁶ Elisabetta Gualandri and Alesandro Giovanni Grasso, ‘Towards a New Approach to Regulation and Supervision in the EU: Post-FSAP and Comitology’ (2006) MRPA Paper No. 1780. p.4. Available at: http://mpa.ub.uni-muenchen.de/1780/1/MPRA_paper_1780.p. Last accessed 14th February 2018.

⁸⁰⁷ Emiliós E Avgouleas (2005) *supra* n. 763, p.251.

⁸⁰⁸ Alma Pekmezovic, Gordon Walker and Mark Fox, ‘Reorganisation of market segments and transparency standards at the Frankfurt Stock Exchange: Part 1’ (2010) *Journal of International Banking Law and Regulation* 214.

⁸⁰⁹ European Commission, ‘Lamfalussy Report’ (2009), http://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm. Last accessed February 24th 2018.

⁸¹⁰ It was called the Lamfalussy Process after the committee chairman, Alexander Lamfalussy.

⁸¹¹ The Committee of Wise Men, ‘Final Report of the Committee’ p.22. Available at: http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf. Last accessed 3rd May 2018.

procedure'⁸¹² and involves 'fleshing out the bones' of the framework legislation.⁸¹³ The EU Securities Committee (the 'ESC') together with the Committee of European Securities Regulators (the 'CESR') to develop these implementing measures.⁸¹⁴ Level 3 requires EU regulators to draw up common guidelines, recommendations and standards in order to ensure consistent and equivalent transposition of Level 1 and 2 legislation at Member State level.⁸¹⁵ Finally, Level 4 requires that the Commission monitor compliance with EU legislation and take action when required in order to strengthen enforcement consistency across the Union.⁸¹⁶

As mentioned in the preceding section, the global financial crisis of 2008,⁸¹⁷ which ultimately led to a sovereign debt crisis,⁸¹⁸ was a significant event in terms of financial regulation in Europe.⁸¹⁹ The devastating effect of the crisis ushered the EU into a new phase of financial regulation,⁸²⁰ in which the Lamfalussy Process played a starring role. It was not only used in the drafting of the new Market Abuse Regulation and the Criminal Sanctions for Market Abuse

⁸¹² Ibid, p.24.

⁸¹³ Ibid, p.28.

⁸¹⁴ Both the ESC and the CESR are made up of representatives of the Member States, see p.30 of the Final Report.

⁸¹⁵ The Committee of Wise Men, 'Final Report of the Committee' supra n. 810, p.37.

⁸¹⁶ Ibid, p.40.

⁸¹⁷ 'On 15th September 2008 Lehman Brothers, the giant US investment bank, went bust. That was the moment when global financial stress turned into a full-blown international emergency.' It was called, by the Chair of the Federal Reserve (the central bank of the USA), 'the worst financial crisis in global history.' Ben Chu, 'Financial crisis 2008: How Lehman Brothers helped cause 'the worst financial crisis in history,' 12th September 2018, Independent. Available at: <https://www.independent.co.uk/news/business/analysis-and-features/financial-crisis-2008-why-lehman-brothers-what-happened-10-years-anniversary-a8531581.html>. Last accessed 14th February 2019.

⁸¹⁸ 'Bankers in the US had developed a lucrative business of buying up the US mortgages of poor Americans (known as "subprime"), packaging them together with better quality mortgages and selling them on as essentially risk-free assets known as mortgage-backed securities. When the US central bank raised the interest rates in 2006 many American homeowners started to default, house prices fell and these securities were revealed to be, in fact, very risky indeed and it was clear that there were considerable losses in the system.' The subprime mortgages revealed that banks had run down their capital reserves to a dangerously low level, and that the 'entire Western banking system was catastrophically undercapitalised and illiquid... In 2010 Andy Haldane, the chief economist of the Bank of England, estimated that the total cost of the crash in foregone economic growth was between \$60 trillion and \$200 trillion, or between one and five times the planet's GDP.' Ben Chu, 'Lehman Brothers helped cause 'the worst financial crisis in history,' 12th September 2018, The Independent. Available at: <https://www.independent.co.uk/news/business/analysis-and-features/financial-crisis-2008-why-lehman-brothers-what-happened-10-years-anniversary-a8531581.html>.

⁸¹⁹ For discussion see, Blanaid Clarke, 'Banking Regulation,' in William K. Roche, Philip J O'Connell and Andrea Prothero (eds) *Austerity and Recovery in Ireland* (Oxford: Oxford University Press: 2017) Ch.6.

⁸²⁰ Caroline Bergin-Cross and Finbarr Murphy, 'Financial Services Law in Ireland: Authorisation, Supervision, Compliance and Enforcement' (Round Hall Ltd: 2017).

Directive, it was also used to draft the MiFIDII⁸²¹ and the MiFIR.⁸²² It was felt that these new measures would help to further ensure the integrity of the financial services within the internal market, deepen the harmonisation of regulation, and restore consumer confidence. Interestingly they were ‘developed ... alongside other national and internationally co-ordinated initiatives...such as the Effective Markets Review.’⁸²³ This was in recognition of the breadth and depth of the factors that conspired to enable the crisis. The degree of interconnectivity of regulations within the legislative framework adopted to tackle financial crime, both in the EU and domestically is therefore high and complex. This will be considered in more detail in the following section.

6.4. Criminal Sanctions on Market Abuse

6.4.1. EU Competence over Criminal Matters

Prior to the entry into force of the Lisbon Treaty, the field of environmental law played a vital role in developing and defining the EU’s competence over criminal matters. Many had held the position that the EU lacked any competence over criminal matters but in the environmental crimes case⁸²⁴ it was recognised that ‘criminal law could fall with the EU sphere of competence if it was necessary for the full effectiveness of EU law.’⁸²⁵ It was a necessary step in terms of the success of the EU when tackling environmental crimes because ‘while the EU [was] increasingly defining the scope and parameters of regulatory goals, their implementation and enforcement primarily remain in the hands of the Member States.’⁸²⁶ The Court states that the

⁸²¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN>. Last accessed: 6th May 2018.

⁸²² Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJL 173 12.6.2015, p. 84-184. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.173.01.0084.01.ENG. Last accessed: 6th May 2018.

⁸²³ Martin Sandler, Matthew Baker, Andrew Tuson and Sara Evans, ‘The EU Market Abuse Regulation’ 2016 135 Compliance Office Bulletin 1-29.

⁸²⁴ Case C-176/03 *Commission v Council* [2005] ECR- 2005 I-07879.

⁸²⁵ Ester Herlin-Karnell, ‘Effectiveness and Constitutional Limits in European Criminal Law’ (2014) 5(3) New Journal of European Criminal Law 267-273.

⁸²⁶ Michiel Luchtman and John Vervaele, ‘Enforcing the market abuse regime: towards an integrated model of criminal and administrative law enforcement in the European Union?’ (2014) 5(2) New Journal of European Criminal Law 192-220.

general rule that criminal law or criminal procedure do not fall within the Communities competence,⁸²⁷

‘does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measure to relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.’⁸²⁸

So ‘despite the fact that law enforcement powers are considered to belong to the care of the nation-state (and EU law is therefore usually enforced by national authorities), those authorities and their powers are an essential part of the European legal order,’⁸²⁹ and so doctrines and now legislation, have developed over time to ensure a level of practical input over the attainment of its objectives. A clear example of this can be seen in respect of the Duty of Loyal Cooperation, which some argue is where the ‘principal of effectiveness is often held to stem from,’⁸³⁰ contained in Article 4(3) TEU as discussed in Chapter 5 of this work.

Some have argued that ‘the fight against financial crime was a legitimate objective for the European Union even before’⁸³¹ Article 83 TFEU. In Article 67(1-3) Treaty on the Area of Freedom and Justice (AFSJ) it states that ‘the Union shall endeavor to ensure a high level of security through measures to prevent and combat crime.’ Further, the ‘aims of the internal market and the AFSJ are also combined in Article 3 TEU which sets out the main goals of the Union. The link in the Treaties between regulation and enforcement is thus ensured.’⁸³²

⁸²⁷ Case 203/80 *Casati* [1981] ECR 2595, at para. 27; Case C226/97 *Lemmens* [1998] ECR I-3711, at para. 19.

⁸²⁸ Case C-176/03, *supra* n.164, at para. 48.

⁸²⁹ Michiel Luchtman and John Vervaele, ‘Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?’ (2014) 5(2) *New Journal of European Criminal Law* 192.

⁸³⁰ Ester Herlin-Karnell, *supra* n. 824.

⁸³¹ *Ibid.* See also, A. Sherlock and C. Harding, ‘Controlling Fraud within the EC,’ (1991) 16 *European Law Review* 21; John Vervaele, ‘Fraud against the Community’ (Kluwer Law International, 1992).

⁸³² Michiel Luchtman and John Vervaele (2014) *supra* n.828.

The pre-Lisbon Treaty competence of the EU in matters of criminal law was however, ‘ill defined...[and] fuelled a debate concerning the exact limits of competence.’⁸³³ The ‘innovation of the Lisbon Treaty ... does not consist in inventing a hierarchy of norms in European Law, but in the attempt to make it more visible through the formal distinction between legislative and non-legislative acts.’⁸³⁴ The Lisbon Treaty therefore, more clearly separates EU framework laws contained in the Treaties and implementing laws such as directives and regulations, from non-legislative acts such as decisions and opinions. In so doing, it provides a structural clarity that was previously missing.

Article 83(1) TFEU, a framework law, articulates the competence of EU in regard to the regulation of substantive criminal law and states that:

‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.’⁸³⁵

It goes on to then identify specific areas of law to which Article 83(1) TFEU is intended to apply.⁸³⁶ Article 83(2) TFEU then creates a much broader competence which is applicable when,

⁸³³ Ester Herlin-Karnell, ‘Effectiveness and Constitutional Limits in European Criminal Law’ (2014) 5(3) *New Journal of European Criminal Law* 267. For further reading on the nature of that debate, see for example, V. Mitsilegas, ‘The Transformation of Criminal Law in the Area of Freedom, Security and Justice’ (2007) 26 *Yearbook of European Law*; S. Peers, ‘EU Criminal Law and the Treaty of Lisbon’ (2008) 33 *European Law Review* 507.

⁸³⁴ Alexander Türk, ‘Lawmaking after Lisbon’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *EU Law After Lisbon* (Oxford University Press: 2012) p.66.

⁸³⁵ Article 83(1) TFEU, Official Journal 115 , 09/05/2008 P. 0080 - 0081. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12008E083>. Last accessed 18th March 2018.

⁸³⁶ They are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Article 83(1) TFEU.

‘the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.’⁸³⁷

It then states that when such a need arises ‘directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.’⁸³⁸ Put simply Article 83 TFEU enables the EU to establish minimum standards for the definition of criminal offences and sanctions in respect of serious crimes with a cross-border dimension when it is essential for the effective implementation of EU policy in areas that are subject to harmonisation. This therefore excludes areas that remain within the exclusive competence of the Member States, but includes within its scope, areas of exclusive EU competence and areas of competence that is shared between the EU and its Member States.

One of the crucial elements in determining when the EU can assume competence in criminal matters therefore, is the principle of effectiveness. The principle of effectiveness, as shown in the discussion in Chapter 5 of this work, is often regarded as the being derived from the more general duty of loyal cooperation contained in Article 4(3) TEU ‘and has played a crucial role’⁸³⁹ in shaping the contours of the effectiveness of EU law.’⁸⁴⁰ This is a position with which Herlin-Karnell agrees, stating that,

‘The principle of effectiveness has had a remarkable career in EU law...from the EU foundational cases [like] *Francovich*⁸⁴¹ [which] told us that state liability was inherent in the Treaty so as to ensure the full effectiveness of EU law...[to] more recent cases such as *Mangold*⁸⁴² and *Kükükdeveci*⁸⁴³ rulings [which] demonstrate that the force behind the doctrine of effectiveness is far from turned out and is still very much a living EU law concept.’⁸⁴⁴

⁸³⁷ Article 83(2) TFEU.

⁸³⁸ Ibid.

⁸³⁹ ‘For example it has given birth to the doctrine of indirect effect, state liability and also supremacy is embedded in “effectiveness” thinking.’ Temple Lang (below...swap citations round).

⁸⁴⁰ Temple Lang, ‘The Developments of the Court of Justice on the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC’, 31 Fordham International Law Journal (2008) 1483.

⁸⁴¹ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italian Republic* [1991] ECR I-5357.

⁸⁴² Case C-144/04 *Marigold v Helm* [2005] ECR I-9981

⁸⁴³ Case C-555/07 *Kükükdeveci* [2010] ECR I-5769

⁸⁴⁴ Ester Herlin-Karnell (2014) supra n. 832.

It is clear therefore, that the principle of effectiveness continues to be ‘one of the main drivers of EU integration.’⁸⁴⁵ In the context of market abuse therefore, in order for Article 83(2) TFEU to be the appropriate legal basis for the requirement of a criminal sanction at the EU level, it must be the case that the criminal sanction is essential for the effective implementation of a EU policy where harmonisation measures have already been adopted.⁸⁴⁶ The EU policy in question is the integrity of the proper functioning of the internal market through the protection of the integrity of the financial market in this specific context. Harmonisation measures already existed for this policy objective, and in particular market abuse, in the form of the 2003 Market Abuse Directive.⁸⁴⁷ Therefore, the two fundamental limbs of the Article 83(2) TFEU test was clearly satisfied. It must then be the case that criminal sanctions are *essential* for the *effective* implementation of the EU policy of ensuring market integrity which in turn helps to protect the internal market of the EU. In order to address that limb of Article 83(2) TFEU it is important to understand that some would argue that,

‘financial crimes together with organised crime have since the early days of the European Union constituted the main criminal law threat to the establishment of the internal market and have, until 9/11 when the fight against terrorism became a higher priority, formed the core of the European Union’s approach to criminal law.’⁸⁴⁸

The extent and scale of the global economic crisis ‘highlighted weaknesses in the EU’s supervisory framework, which fragmented along national lines despite...financial market integration.’⁸⁴⁹ It led to concerns as to whether MAD was effective and the ‘High-Level Group on Financial Supervision was set up to strengthen supervisory arrangements covering all financial sectors, with the objective of establishing a more efficient, integrated and sustainable European system of supervision.’⁸⁵⁰ The Group ultimately argued that a ‘sound prudential and

⁸⁴⁵ Ibid.

⁸⁴⁶ Ester Herlin-Karnell, ‘White-Collar Crime and European Financial Crises: Getting tough on EU market abuse,’ (2012) 37 European Law Review 481.

⁸⁴⁷ Directive 2003/6 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16.

⁸⁴⁸ Ester, *ibid.* See also, S. Peers, ‘EU Justice and Home Affairs’ (Oxford University Press: 2011) Ch. 1.

⁸⁴⁹ European Commission, ‘High Level Expert Group on EU financial supervision to hold first meeting on 12 November, Press Release Database, 11th November 2008, IP/08/1679. Available at:

http://europa.eu/rapid/press-release_IP-08-1679_en.htm. Last accessed 14th February 2019.

⁸⁵⁰ Ester Herlin-Karnell (2012) *supra* n.845.

conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes.⁸⁵¹

This ultimately led to the conclusion that MAD along with the ‘weak and heterogeneous’⁸⁵² sanctioning regimes of the Member States were not enough to protect the integrity of the financial market and thereby, the internal market itself. This in turn then to the creation of the new Market Abuse Regulation (MAR)⁸⁵³ and the Criminal Sanctions on Market Abuse Directive (CSMAD)⁸⁵⁴ which update the market abuse regime in the EU. They were developed ‘in line with other post-financial crises measures to regulate markets ... to tackle misconduct and restore market confidence.’⁸⁵⁵ MAR entered into force on the 2nd July 2014 although most of its provisions did not become law until the 3rd July 2016. As an EU regulation, MAR is directly effective in the Member States, unlike CSMAD which also became law on the 3rd July 2016. As a directive, CSMAD requires that Member States enact domestic legislation within their own jurisdictions to give effect to the goal articulated in the directive⁸⁵⁶ but only for the Member States that had opted in to its provisions which came into force in January of 2018.

The Regulation updated the law on market manipulation in order to tackle the advancements and changes that had occurred in the trading of securities since the original MAD, and also to cover certain activities that had previously been outside of the scope of the market abuse regime. The CSMAD obligated those Member States who had opted in, to criminalise intentional market abuse offences. The precise nature of the criminal sanctions that were to be created was left to each of the Member States so long as they are ‘effective, proportionate and dissuasive.’⁸⁵⁷

⁸⁵¹ The High-Level Group on Financial Supervision in the EU, a Report prepared for the European Commission, 25th February 2009, at para. 83. Available at: http://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf. Last accessed 14th February 2019.

⁸⁵² Ester Herlin-Karnell (2012) *supra* n. 845.

⁸⁵³ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

⁸⁵⁴ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).

⁸⁵⁵ Martin Sandler, Matthew Baker, Andrew Tuson and Sara Evans, ‘The EU Market Abuse Regulation’, *Compliance Officer Bulletin*, 2016, 135 (Apr), 1-29.

⁸⁵⁶ Europa, ‘Regulations, directives and other acts.’ Available at: https://europa.eu/european-union/eu-law/legal-acts_en. Last accessed 14th February 2019.

⁸⁵⁷ CSMAD, Article 6.

The reason that the changes to the market abuse regime were done by way of a regulation and a directive is that Article 83(2) TFEU only permits the approximation of criminal laws to be done by way of a directive. Directives require Member States to pass legislation in order to implement them. Imposing an obligation to create criminal sanctions by way of directive therefore, permits the Member States to create and implement criminal sanctions that satisfy their obligations to the EU whilst at the same time accounting for their domestic legislative and constitutional arrangements.

6.4.2. The Market Abuse Regulatory Space

The new market abuse Regulation and Directive adopted by the EU were not created in a vacuum. Much in the same way that anti-cartel enforcement operates within the wider regulatory landscape of competition, and thus must be compatible with the overriding policy goals and objectives of competition law in order to ensure coherence of the legal regime, MAR and CSMAD exist within the wider regulatory landscape of securities and financial services law. As shown in Chapter 4 of this work, the number of governmental actors, policy goals, legislative objectives and enforcement tools that cohabit a regulatory space will add to its complexities and will therefore, require a coherent framework within which they can co-exist. The greater the complexity, the more that is required to understand the dynamics of the regime, to ensure that the various elements within that regulatory space can operate in effectively towards the overall policy goals of the regime. The overall impact of the regime is critical, and is judged by how capable the regime, and the specific enforcement tools within it, are of achieving the outcomes that justify the interference with liberty that such enforcement, by necessity requires. In order to achieve that therefore, as demonstrated in Chapter 4 of this work, a relatively high degree of legal coherence is required.

It is worth noting at this point, that MAR and CSMAD are not alone in legislating for the protection of securities and financial services. The other main EU legislative acts in this regulatory landscape are the Markets in Financial Instruments Directive II⁸⁵⁸ (the ‘MiFID II’)

⁸⁵⁸ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

and the Markets in Financial Instruments Regulation⁸⁵⁹ (the MiFIR). ‘The general objective of improving investor confidence in the markets links MAR [and CSMAD] to MiFID II and MiFIR.’⁸⁶⁰ Indeed, certain elements within MAR and CSMAD rely upon definitions contained within the Markets in Financial Instruments Directive II (the ‘MiFID II’).⁸⁶¹

To create a framework capable of providing for such a complex regulatory landscape, that would be enforced across the majority of the Member States, it was vital that the EU allow for enough flexibility to be made available, whilst also not jeopardising the ability of the framework to deliver on its objectives. In the context of market abuse regulation for example,

‘Austrian constitutional law ... does not allow for *administrative* pecuniary sanctions of the amount provided for in the regulation. This is why Article 30(1) stipulates that Member States may decide not to introduce administrative sanctions for certain infringements, provided that those infringements are already subject to *criminal* sanctions in their national law.’⁸⁶²

The Directive and the Regulation are therefore very closely related as the ‘package ... introduces a dual regime (unless a state opts for criminal law alone)’⁸⁶³ and indeed the Directive itself states that its scope ‘is determined in such as away as to complement, and ensure the effective implementation’⁸⁶⁴ of the Regulation.

Given therefore, that civil sanctions are not obligatory where a criminal sanction exists, and criminal sanctions are indeed mandated, the minimum requirement for harmonisation under both the Directive and the Regulation is criminality for the specified conduct. Civil sanctions are additional although not compulsory. Nevertheless, the criminal sanctions are, as

⁸⁵⁹ Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012.

⁸⁶⁰ Deloitte, ‘The revised Market Abuse Directive and new Market Abuse Regulation: to what extent will the revised framework impact banks?’ 19th April 2016. Available at: <https://www2.deloitte.com/mt/en/pages/financial-services/articles/mt-banking-alert-024-revised-Market-Abuse-Directive-and-new-Market-Abuse-Regulation.html>. Last accessed 14th February 2019.

⁸⁶¹ For example, the MAR and CSMAD apply to financial instruments admitted to trading on a trading venue. The definition for trading venue is provided for by MiFID II.

⁸⁶² Michiel Luchtman and John Vervaele, ‘Enforcing the market abuse regime: towards an integrated model of criminal and administrative law enforcement in the European Union?’ (2014) 5(2) New Journal of European Criminal Law 192.

⁸⁶³ Ibid.

⁸⁶⁴ CSMAD, Recital (22).

highlighted above, intended to complement and assist the effective implementation of administrative sanctions which, one would assume as a result of more inclusive culpability requirements, lower evidentiary and procedural standards, civil sanctions will remain the primary mechanism by which market abuse is tackled in the Member States which provide for such sanctions.

This position is arguably corroborated by the stated objectives of both the Regulation and the Directive. The Regulation explains that ‘administrative sanctions and other administrative measures should be provided to ensure a common approach in the Member States **and to enhance their deterrent effect** (emphasis added).’⁸⁶⁵ The Directive however, states that criminal sanctions are essential for ‘**compliance** with the rules on market abuse’ because they,

‘demonstrate a stronger form of social disapproval compared with administrative penalties. Establishing criminal offences for at least serious forms of market abuse sets clear boundaries for types of behaviour that are considered to be particularly unacceptable and sends a message to the public and to potential offenders that competent authorities take such behaviour very seriously.’⁸⁶⁶

It would appear therefore that the articulated goal of the administrative mechanisms are compulsion based and primarily focused upon creating a deterrent effect, whereas the primary function of the criminal offences is routed in compliance theory with a strong focus on the educative role that criminal sanctions can have. This is perhaps as a result of the general view of white collar crime being ‘not real crime’ and is reflective of the fact that the criminal law instruments within the toolkit are unlikely to be the first choice for those agencies responsible for preventing market abuse.

In articulating the criminal law sanctions as a builder of normative compliance rather than the cornerstone of effective deterrence, the EU is arguably implicitly acknowledging that not all market abusers will be pursued with criminal sanctions despite the seriousness of the conduct. The EU is therefore, perhaps attempting to ensure that deterrence, and its empirical measurement, are not hampered by the anticipated infrequent use of criminal law sanctions. If

⁸⁶⁵ MAR, Recital (71).

⁸⁶⁶ CSMAD, Recital (6).

for example, criminal sanctions are lauded as the cornerstone of effective deterrence, the infrequent use of the criminal sanctions in the real world could arguably diminish how effectively the regime as a whole is regarded as an effective deterrent to acts of market abuse.

As shown in Chapter 3 of this work, the perception of a regime's efficacy plays a critical role in its ability to act as a deterrent for those considering engaging in prohibited conduct. Deterrence is created not merely by the appearance of an offence in the statute books, but as a result of a chain of factors working together to enable the legislative threat to create a real world deterrent effect, and the successful investigation, prosecution and sanction of those who break the law are vital. If it is envisaged that there will be relatively few examples of market abusers being successfully prosecuted and imprisoned, then it is arguably wise of the EU to frame civil sanctions as the cornerstone of effective deterrence in order to preserve the perception of the overall regime as an effective deterrent to market abuse.

6.5. Lessons from the Market Abuse Experience

There are clear parallels between the market abuse regulatory space in the EU and the anti-cartel enforcement regulatory space in the UK. Conceptually however, the fact that the emphasis of the criminal sanctions for market abuse is upon its educative role as a crime reduction tool places it in a stronger enforcement position than the criminal cartel offence which has been framed as a deterrent. This role reversal in the competition regime, as compared to the market abuse one, plays a role in the perception that the regulatory toolkit for anti-cartel enforcement is not having a significant impact upon the deterrence of cartel activity. The perception of the effectiveness of a legislative regime is an important component of creating a deterrent effect because it is the subjective assessment of that regime, carried out by those who may consider breaching it, that plays a critical role in determining whether or not they will be deterred by it. The educative role of a criminal sanction as a compliance former however, is less reliant upon real world examples of successful prosecutions, and so can serve in this function quite successfully even in an environment where prosecutions are sporadic.

Fully harmonised criminalisation of hard-core cartels across the EU would face challenges analogous to those faced in the context of market abuse in respect of Austria. This is because of the constitutional arrangements of certain Member States, Sweden in this particular context. The Swedish Constitution does not allow for the grant of immunity to a defendant suspected of committing a criminal offence. The creation of immunity from criminal prosecution in order to protect the efficacy of civil leniency is therefore constitutionally prohibited. Without a complimentary criminal immunity the effect of a criminal sanction for cartel abuse would have a disastrous effect upon the efficacy of administrative leniency, and so in the specific legal landscape of Sweden, a criminal cartel offence could not be sustained.⁸⁶⁷

In the case of market abuse the problem was that the constitutional arrangements of Austria did not permit for civil sanctions of the level required by harmonisation. The Commission was able to overcome the hurdle presented to it by Austria's constitutional requirements by enabling Member States to adopt a singular criminal regime rather than the dual criminal/civil regime, should that be necessary in order to satisfy the requirements of minimum harmonisation. If a similar approach were to be adopted in respect of hard-core cartels, minimum harmonisation would have to be civil sanctions as is currently the case, with criminal sanctions being required only if permitted by the constitutional arrangement of the Member States. If criminalisation became subject to EU harmonisation by virtue of Article 83(2), a nuanced approach to the regulatory dynamic specific to criminalisation, leniency and civil sanctions would have to be used. Were it not possible to create such a delicate dynamic capable of protecting the functioning of the leniency programme, criminalisation would not be desirable as it would create a self-defeating enforcement environment. It is for this reason for example, that the disclosure of certain documents and leniency statements is blocked under the Damages Directive.⁸⁶⁸ Were such documents able to be disclosed for the purpose of private enforcement actions it would alter the cartelists' evaluation of whether or not they should make an application for leniency and could therefore, negatively impact the operation of the leniency programme. This concern is articulated in the Directive:

⁸⁶⁷ For fuller discussion, see section 4.4.2. Additionally, the creation of a criminal cartel offence in this particular legal context could in theory amount to a breach of Article 4(3) TEU. See Chapter 5 for further discussion.

⁸⁶⁸ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>.

‘Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed.’⁸⁶⁹

That would in turn lead to a negative impact on the success of the system of administrative sanctions that are the primary enforcement mechanism within the EU, diminishing the overall public enforcement of cartels. The Directive therefore exempts both leniency statements and settlement submissions from the requirement that evidence be disclosed for the purpose of private enforcement actions.

Given that administrative actions against cartels as well as actions for damages have been subject to EU harmonisation, in the new post-Lisbon landscape, the question of whether harmonisation of criminal sanctions for cartels could occur is arguably more topical.

6.6. Conclusions

The EU considers both the protection of competition within its borders and the integrity of the securities and financial market as essential to the creation and maintenance of the internal market. Significant harmonisation steps have been taken in both regulatory landscapes when the EU have regarded it as essential for these fundamental Union policy objectives. However, the scale and effect of the global financial crisis provided the impetus for the EU to perform a significant and large scale overhaul of the securities and financial services legislative landscape. It meant that an opportunity arose for a top-to-bottom assessment of the framework could take place and wholesale reform could be achieved, in a clear and structured way. The result was the creation of a framework that was much better able to accommodate all of the various elements that must co-exist in that regulatory space. In contrast, anti-cartel enforcement in the UK has not faced a catastrophic event that redefined the way in which cartel activity was to be tackled. As a result the evolution of the laws and the framework has been much more gradual and piecemeal. Without an external event forcing a full re-evaluation of

⁸⁶⁹ Ibid at Recital (26).

that evolution it has arguably meant that the anti-cartel enforcement landscape, in the UK where dual enforcement has been created, there is not the same clarity in the framework that has been created to sustain anti-cartel enforcement.

The analysis of the market abuse regime in the EU has shown that over-reliance on one aspect of an enforcement tool kit can lead to significant weaknesses in a policy achievement. The specific challenges faced by criminal enforcement (higher standard of evidence and procedural rules for example) mean that a regulatory response that relies solely or predominantly on criminal sanctions will fall far short of achieving criminal policy outcomes (moral condemnation, deterrence, punishment of wrongdoing). However, a regulatory response that relies solely or predominantly on civil sanctions may suffer the same problems (no moral blameworthiness is communicated, deterrence is limited and punishment of wrongdoing is limited to undertakings and not the individuals directly responsible for implementing the cartel). The use of additional mechanisms can go a long way to compensating for the particular failures of primary enforcement mechanisms, but as the number of mechanisms within a regulatory space is increased, so does the complexity of the regulatory dynamics. This is further compounded by a multitude of policy objectives and institutional actors.

The reformulating of the EU's response to market abuse in the wake of the global financial crisis as showed that in complex and highly inter-connected regulatory spaces a comprehensive engagement with policy objectives, instrument goals and dynamics is required if an effective enforcement environment is to be created. This corroborates the findings of Chapter 4 of this work in which a review of the existing literature showed that there is a real and vital need to address and explicitly deal with each of these elements, as well as the various institutional interactions, in order to achieve an optimal regulatory dynamic capable of achieving stated objectives. In this type of complex regulatory space, the genesis of market abuse regulation in the UK demonstrated that a regulatory dynamic that is dependent upon criminal sanctions will be ineffective, whilst the genesis of market abuse regulation in the EU demonstrated that a dynamic which is too reliant upon administrative penalties can also result in disastrous weaknesses. This over-reliance on one mechanism within the regulatory enforcement space together with an inadequate engagement of policy objectives and goal objectives, further diminishes the ability of the framework to create an environment in which effective mechanism dynamics can be achieved, or indeed, even properly assessed over time.

The example of the market abuse regulatory response arguably demonstrates that when such holistic investigation does take place, that results in a clear articulation of policy principles, instrument goals and mechanism dynamics, that the diversity of the political and legal realities of the Member States are not a barrier to implementing cohesive and in-depth harmonisation within a regulatory environment that is complex and highly interconnected.

As was done in the market abuse regime, clearly stating a connection between the mechanism and the goal it is seeking to achieve not only adds additional clarity but can help to ensure that all of the specified goals are being addressed. This is particularly useful in complex regimes where there are a multitude of goals, policies and mechanisms. It is the case that mechanisms may have an impact on more than one of the stated goals and in this case, it is the position of this work that the primary, secondary and tertiary goals should be articulated as such.

Once a framework has clearly stated the policy objectives of the regime, linked those objectives to the goals of the mechanisms that have been chosen to achieve them, a clearly ordered structure has been created within which the dynamics can be more easily assessed to ensure that an optimal enforcement environment has been created. It also permits a periodic assessment of the performance of each mechanism within the regime and their ongoing dynamics as a whole in order to better address any weaknesses that may develop over time.

Chapter 7. Conclusions

This thesis has sought to consider the place of the criminal cartel offence within the anti-cartel regulatory space that has been created in the UK, as a Member State of the European Union. As has been shown, the inclusion of a criminal sanction within a traditionally administrative regime brings with it challenges and complexities that if not addressed directly, can make a challenging to enforce sanction, considerably more so. This work has sought to examine whether the place that the criminal cartel offence has been forced to occupy, and the dynamics that its conclusion has created within the wider regime, have played a significant role in the underwhelming enforcement impact of the section 188 offence.

In order to address this primary question, a series of secondary research questions have been identified in Chapter 1 of this work, and addressed in the subsequent chapters. The following list provides a very concise summary of the issues contained within those research questions and the chapters in which they are addressed in the thesis:

- 7.1. Chapter 2 of this work analyses the theories of punishment that legitimized the criminal cartel offence when it was originally created, and how these theories fit within the wider competition law policy landscape of anti-cartel enforcement.
- 7.2. Chapter 3 examined deterrence as the long preferred cartel reduction tool of anti-cartel enforcement in the UK. In doing so it addressed whether it should be the primary crime control objective of the criminal cartel offence.
- 7.3. Chapter 4 used regulatory mix theory to identify the dynamics of the anti-cartel enforcement regulatory space in the UK since the inclusion of a criminal offence.
- 7.4. Chapter 5 examined the bilateral obligations contained in Article 4(3) TEU and the impact that those obligations have on the UK as a current Member State of the EU, and the UK's sovereign right to create and implement criminal sanctions for individuals who engage in cartel activity. It then considered what potential impact the recorded underwhelming enforcement of a criminal sanction within the UK have upon the obligations owed to the EU as a result of the highly interconnected dynamics of anti-cartel enforcement, highlighted in Chapter 4.

- 7.5. Chapter 6 uses a comparative legal analysis to determine whether the experience of the dual enforcement regime for market abuse, described as analogous to cartel activity, can illuminate conceptual solutions that could improve the impact of the criminal cartel offence in particular, and/or the anti-cartel enforcement regime as a whole.
- 7.6. This chapter concludes by articulating a series of recommendations based upon the analysis of the preceding chapters, that could enhance the regulatory framework of anti-cartel enforcement in the UK and improve the impact of the criminal cartel offence upon the fight against cartels. It also provides insight for other Member States who may seek to add criminal sanctions to their anti-cartel toolkit in the future.

7.1. Theories of Punishment and the Criminal Cartel Offence: conclusions

The first step in the process of understanding the place of the criminal cartel offence within the wider anti-cartel regulatory landscape has been to examine the justifications for its creation. This is important because,

‘[i]f we do not know what we are trying to achieve when we punish people, we are in a poor position to assess whether the means we are taking to those ends are effective or inappropriate.’⁸⁷⁰

Chapter 2 showed that despite the fact that the articulated primary purpose of the section 188 was to create a serious deterrent effect, the original inclusion of ‘dishonesty’ as the substantive test for the offence meant that it did not fit within the utilitarian theoretical perspective on punishment upon which deterrence theory is built. Utilitarian theories of punishment, typical to competition law, focus on the prevention of future crime and do not seek to justify the imposition of punishment upon a moral judgement of the wrongfulness of the conduct. The formulation of the offence as a dishonest one imported an element of retributive theory to a regulatory landscape unaccustomed to such normative thinking. There was no meaningful exploration of the impact that retributive considerations would have upon the dynamics of on

⁸⁷⁰ Bill Wringer, ‘An Expressive Theory of Punishment’ (Singer: 2003) p.3.

the wider anti-cartel enforcement regulatory space particularly given the central role that leniency plays within that space. The utility of immunising culpable undertakings from fines in exchange for otherwise unobtainable information is clear. The argument in favour of allowing culpable defendants to escape punishment for seriously harmful and morally condemnable conduct in exchange for information, is less so. The UK had therefore, introduced new complexities into the enforcement landscape without considering what those complexities were or how they would affect the regime as a whole.

The impact upon the dynamics of enforcement caused by the inclusion of a criminal offence were only considered from a procedural and evidential perspective. The relationship between the mechanisms within a regulatory space dominated by deterrence theory, and a new mechanism which was more opaque in its theoretical foundations, but which seemed to want to engage with other crime control methods, was not confronted.

By failing to consider the available theoretical foundations for crime control mechanisms in general, and retributive theories on criminal sanctions in particular, the important role of the criminal law as a moral educator was left untapped. The existing literature shows that this function of the criminal law is particularly important when atypical enforcement mechanisms are implemented, especially when they represent a significant shift in the sanction level that has historically been the case. This point was further supported in the conclusions drawn in Chapter 6 based upon the examination of the dual enforcement regime utilised for market abuse within the EU. The discussion in that chapter showed that in complex economic crimes that are difficult to detect and therefore, are rarely prosecuted, a criminal sanction is more likely to be effective as an influence upon the creation of a culture of compliance, than it is as an impactful deterrent. This is further corroborated by the analysis in Chapter 3 of this work which showed that for a real world deterrent effect to be created, a real threat of successful prosecution must exist and be communicated via a record of successful prosecutions.

This failure to engage with the retributive reality of a crime framed as a dishonest one, and the impact that it had upon the dynamics of the regime, meant that when the time came to amend the offence, the beneficial aspects of a retributive offence outline in the above paragraph and articulated in Chapter 2 were not even a consideration. The removal of the dishonest element meant bringing criminal enforcement of cartels in line with the rest of the regime, and was a more honest representation of the instrumental way in which the authorities wished to employ

the offence. However, in so doing, instead of creating a more comprehensive enforcement environment in the UK, what has been created is an enforcement environment that is less comprehensive as it is less capable of addressing and therefore, confronting the variety of influencing factors that could lead an otherwise law abiding citizen to break the law. It meant that not only was the critical educative function of the offence ignored, but now has been lost as a potential crime control mechanism and as a driver of voluntary compliance.

The deficiencies that were present and which contributed to the initial underperformance of the criminal cartel offence as originally drafted,⁸⁷¹ were mindlessly reproduced.⁸⁷² No attempt was made to clarify the role that the criminal cartel offence would play as a criminal sanction in its own right, or how it was hoped that it would interact with the rest of the enforcement toolkit. These deficiencies were compounded by the fact that no consideration was given to how the removal of a the substantive test with roots in retributive theory, would impact the theoretical foundations of the offence. Removing dishonesty from the definition of the section 188 offence fundamentally changed the nature of the offence and the place it therefore, occupied within the anti-cartel regime.

The focus stubbornly remained on the cartel offence's impact upon deterrence with no consideration was given to the other crime control functions that a criminal cartel offence could have. Nevertheless, the amendment process continued to fail to engage even with deterrence theory resulting in little explanation being provided as to how the removal of dishonesty would improve the impact of the section 188 on deterrence, except to say that it would make it easier to prosecute. As shown in the discussion contained in Chapter 3 of this work, successful prosecution is but one link in the chain of successful deterrence. This has been examined in Chapter 3 of this work and will be addressed in the following section. Suffice to say at this point however, that even though the justification for removing dishonesty was anchored to the desire to improve the prosecutability of the offence, there have been more successful 'legacy' cases brought under the old section 188 offence, than there have been under the new reformulated cartel offence.

⁸⁷¹ These deficiencies were not just limited to those which are examined in this work, but include the 'legitimacy defects of the criminal cartel offence' as explored by Galloway, 'Securing the Legitimacy of Individual Sanctions in the UK,' (2017) 40(1) World Competition 121.

⁸⁷² Robert Bork in his seminal work, 'The Antitrust Paradox: A Policy at War with Itself' (Basics Books, Inc., New York, 1978) remarked that, '[i]n all kinds of political weather the machinery of antitrust enforcement grinds steadily on, mindlessly reproducing both the policy triumphs and disasters of the past.' p.4.

The section 188 offence did however, represent a significant step forward in addressing the gap of enforcement that exclusive reliance upon an administrative regime focused upon undertakings only, had created. It demonstrated a recognition of the reality of the relationship that exists between individuals and undertakings. It is a legal fiction to treat an undertaking as able to make decisions and take actions independently of the individuals who actually make the decisions and take the actions that the law attributes to the undertaking. The criminal cartel offence therefore, places within the scope of the law, those individuals who in reality create and maintain the cartel. There has been a lack of in-depth consideration of this agency principle in the competition law enforcement space with the Court of Appeal in *R v IB* going so far as to say that the criminal cartel offence was ‘not a competition law’ within the meaning of Regulation 1/2003 because it was not a means by which undertakings were pursued for breached of cartel law. As has been shown however, the UK are attempting to use the threat of criminal sanctions in an instrumental way as a means of improving enforcement of anti-cartel laws against undertakings, the claim being that it incentivises more leniency applications. The result however, has been that very few individuals are actually being punished for their role in creating those cartels even when fines have been successfully levied against the undertakings that they represent, and there is limited empirical evidence to suggest that the criminal cartel offence has caused a ‘rush to the enforcer’s door.’⁸⁷³ The focus of enforcement against individuals should however, be shifted from its narrow focus on deterrence and the impact that a criminal sanction could have upon ‘the calculation taken by the agents who act on behalf of and bind firms,’ and moved to targeting and punishing the criminally blameworthy element of the agents’⁸⁷⁴ behaviour in creating the cartel, a more inclusive regulatory spectrum would be created. That spectrum would more accurately reflect the diverse motivations that lead to undertakings, by way of their agents, entering into hard core collusive agreements.

7.2. Deterrence and the Criminal Cartel Offence: conclusions

Deterrence has always been the primary focus and justification for the creation of a criminal cartel offence in the UK. This was despite the fact that claims that the mere existence of the

⁸⁷³ Caron Beaton-Wells, *Criminal Sanctions for Cartel Conduct: The Leniency Conundrum* (2017) 13(1) *Journal of Competition Law & Economics* 125

⁸⁷⁴ Jonathan Galloway, ‘Securing the Legitimacy of Individual Sanctions in UK Competition Law’ (2017) 40(1) *World Competition Law* 121.

section 188 offence would be sufficient to deter individuals from engaging in cartel activity were simply wrong, and the predicted 6 to 10 prosecutions a year had failed to transpire. Nevertheless, deterrence remained the policy objective of the cartel offence when a decade of underwhelming enforcement of section 188 and the collapse of the trial against the BA Executives led to the conclusion that the criminalisation of cartel activity needed to be amended.

The amendment of the offence concentrated on how the inclusion of dishonesty had made section 188 harder to prosecute.⁸⁷⁵ It was assumed therefore, that removing dishonesty would lead to more prosecutions which would in turn create the perception that cartelists were more likely to be caught and punished,⁸⁷⁶ a fundamental link in the creation of an effective deterrent. No further investigation of deterrence theory was carried out. Chapter 3 of this work showed however, that in order for that deterrent effect to be created in practice, and thereby be effective as a crime control mechanism, there are other links within that chain that must also be addressed, and the particular challenges and complexities of the prohibited conduct will help to determine which links within the chain of deterrence for that specific offence, are likely to require additional caution.

It appeared that the UK had attempted to transplant the kind of deterrence theory applicable to administrative sanctions, uncritically and without examination, to a criminal law sanction that was (or should have been) pursuing a predominately different purpose than the administrative regime. Further, it failed to acknowledge the complex variety of factors that motivate individuals to obey the law or not. Chapter 3 therefore examined deterrence theory as a method of crime control within the context of anti-cartel enforcement, as well as considering other crime control functions that could have been employed in the fight against cartels. The analysis showed that whilst certainty of prosecution plays an important role in creating an impactful deterrent effect capable of reducing cartel activity, the actual enforcement strategy of the OFT, and now the CMA showed that in practice, the authorities are unlikely to pursue a criminal investigation no matter what the definition of the offence. Further, deterrence theory as applied to cartels shows that certainty of detection is the greatest hurdle to be overcome with there

⁸⁷⁵ BIS, *A Competition Regime for Growth: A Consultation on Options for Reform*, Government Response to Consultation (BIS/12/512) 12th March 2012. Available at: <http://www.gov.uk/government/publications/growth-competition-and-the-competition-regime-government-response-to-consultation>.

⁸⁷⁶ Jonathan Galloway, *supra* n.873.

being very little empirical evidence to support the view that the creation of a criminal offence has caused a significant increase in the number of people and undertakings seeking to provide information to the CMA in exchange for immunity. The analysis of Chapter 3 also demonstrated that certainty of sanction, the one aspect of criminal cartel deterrence that would appear to be within the scope of section 188 to influence, found that in reality, without the aid of sentencing guidelines the courts have shown no appetite to impose the kind of sanctions that would be necessary to create any appreciable deterrent effect.

The chapter showed therefore, that by deterrence theory's own standards, the cartel offence, with its low detection rate and even lower prosecution rate, combined with a 'lukewarm' judicial response to significant prison sentences, is very unlikely to lead to a deterrent effect sufficient enough to justify the creation and maintenance of a criminal cartel sanction in the UK. In such circumstances, it is difficult to see how in those very rare prosecutions that do result in a term of imprisonment can be considered a fair and just outcome when that sentence is justified in terms of deterrence, but nobody is being deterred.

The chapter therefore, turned to alternative crime control mechanisms that could be relied upon to justify the existence of a criminal sanctions for individuals who create cartels. This analysis showed that criminal prohibitions play an important role in the creation of a culture of voluntary compliance, not induced by fear but motivated by the desire to obey the law. In contrast to deterrence theory, the moralising function of the criminal law is not so heavily dependent upon continuous and consistent prosecutions to articulate its message. In the context of a complex economic crime that is difficult to detect and punish, and that is not the subject of strong societal disapproval, a moralising education could play a critical role in protecting consumer welfare and the competitive process from the serious harm created by cartels.

The paradox of a typical individual carteliser is their previous strong commitment to obeying the law. A cartel offence framed in such a way as to illuminate the serious criminal harm of a cartel to the those individuals who are in a position to create them, may help to close the gap in their normative commitment to legal obedience. The analysis of Chapters 2 and 3 show that whilst moves have been made in the right direction by bringing the individuals ultimately responsible for the cartel within the scope of the law, the narrow focus on its role as a deterrent has significantly diminished its ability to have any impact upon the fight against cartels. It also paved the way for the removal of the one aspect of the offence's definition that could have

been capable of tapping into the moralising function of the criminal law that in the long term, could have played a significant role in creating a culture of voluntary compliance.

A careful enforcement strategy targeting examples of clear harm could have helped to ‘foster a hardening of attitudes’⁸⁷⁷ towards cartel activity that had not existed prior to the EA 2002. Further, an offence, defined in such a way as to clearly articulate the criminal harm and moral blameworthiness of a cartel would have helped to address the fact that as compared to traditional crimes that a jury may be more aware of, cartels are much more ‘contingent and ambiguous.’⁸⁷⁸ This would have had the further benefit of clarifying the place that the cartel offence was to occupy within the wider anti-cartel regulatory framework, which would in turn have helped to identify and navigate any regulatory incompatibilities that may arise as the result of including new and atypical enforcement mechanisms within the toolkit.

7.3. Anti-cartel Regulatory Dynamics and the Cartel Offence: conclusions

The analysis contained in Chapters 2 and 3 of this work not only addressed the specific concerns summarised above, they highlighted the degree of complexity that exists within the regulatory space of anti-cartel enforcement. Further, they showed that the UK Government failed to explore or even provide a rudimentary identification of those complexities. The inclusion of an enforcement mechanism with somewhat unclear theoretical foundations and potentially contradictory policy objectives added more confusion to an increasingly complicated regulatory space. Together these issues played a crucial role in the creation of an underwhelming criminal offence, and its later (ineffective) amendment.

Chapter 4 utilised regulatory mix literature to provide one lens through which the anti-cartel regulatory space could be examined. The literature provided a conceptual understanding of the interactions that occur within complex regulatory mixes in general, which illuminated the dynamics of the anti-cartel regulatory space in particular. The analysis showed that the

⁸⁷⁷ Ibid.

⁸⁷⁸ Caron Beaton-Wells, C. Harding and J. Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?’ in *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (C. Beaton-Wells & C. Tran eds, Hart Publishing, 2015).

criminal cartel offence, implemented properly should have been a positive addition to the enforcement toolkit. It broadens the scope of anti-cartel enforcement action and inherently addresses the agent-principle relationship and the factual reality that it is the individual agents that create the cartels for which the undertakings as a whole have traditionally been solely punished. Further, its inclusion within the enforcement toolkit reflects the scale of seriousness of cartel activity and the variety of factors that motivate individuals and undertakings to break the law. However, the chapter also showed that a fundamental lack of clarity as to the theoretical basis for action, combined with a lack of understanding of which policy objectives can be realistically achieved by which enforcement tools, meant that what should have been an inherently complimentary regulatory mix has become incompatible in areas where no such incompatibility need exist.

Exploring the regulatory mix literature and applying it within the context of anti-cartel enforcement in the UK highlighted the importance of engaging with, and clearly articulating the theoretical bases for State action and ensuring that policy objectives and ultimately, enforcement tools can be traced back to their ideological foundations. Further, it creates a framework within which enforcement action can legitimately exist, and which can be used to ensure that such legitimacy is not eroded over time. It provides a standard against which enforcement action can be judged, and helps to identify gaps and inconsistencies before they are able to damage the perception and legitimacy of any one tool in particular, or the regime as a whole. The chapter showed that there was nothing inherently contradictory in adding a criminal offence to a regime previously reliant upon administrative sanctions only, but that the confused regulatory dynamics that were created by a failure to engage with the theoretical justifications for the tools within the enforcement toolkit, along with the enforcement strategy that was employed, has led to at best, a contradictory regulatory space, and at worst an ineffective one. Further, the almost absolute focus upon deterrence as the mechanism for reducing cartel activity has meant that often, the wrong tool is used at the wrong time, indeed,

‘Scholarly evidence and regulatory best practice suggests that regulators should generally use mixes of regulatory styles or strategies to improve compliance, rather than relying on deterrence alone.’⁸⁷⁹

⁸⁷⁹ Gunningham and Grabosky, ‘Smart Regulation: Designing Environmental Policy’ (Oxford University Press: 1999)

7.4. Ineffective Criminal Cartel Enforcement and Article 4(3) TEU: conclusions

The early chapters of this work demonstrated the underwhelming enforcement of the criminal cartel offence, and its causes. They further showed the intricacies of anti-cartel enforcement and the connection between the criminal and civil regime. The importance of the relationship between the UK and the EU on the formulation and enforcement of competition laws within the UK's own jurisdiction was also highlighted in these early chapters. Chapter 5 brings together each of these strands of discussion. It explores one particular unexplored facet of the relationship between the UK and the EU in the context of anti-cartel enforcement, and the potential problems that the underwhelming enforcement of the UK criminal cartel offence could have upon the obligations placed upon the UK by virtue of Article 4(3) TEU and the enforcement of the civil cartel regime contained in Article 101 TFEU.

An examination of how this principle has been applied throughout the history of the EU has shown that whilst it has given rise to some of the most important legal principles in operation in the EU today, it is too wide in scope to be justiciable on its own. It must be used in combination with an additional rule of EU law that can provide sufficient clarity to create an actionable obligation or right. In the context of the competition law that additional detail is provided by Regulation 1/2003 which requires that Article 101 TFEU must be effectively enforced within the Member States' own jurisdictions. Article 4(3) TEU requires that Member States must refrain from any measure that could jeopardise the attainment of the Union's objectives. Taken together with Regulation 1/2003 therefore, this amounts to an obligation that Member States must refrain from any measure that could jeopardise the enforcement of Article 101 TFEU, and thereby the functioning of competition within the internal market.

The potential for a breach of Article 4(3) TEU arises therefore, when a measure adopted in the Member States could jeopardise the enforcement of Article 101 TFEU. The effective enforcement of Article 101 TFEU is now largely down to the domestic authorities of the Member States who account for 85% of enforcement action since Regulation 1/2003 mandated decentralised enforcement. The enforcement of Article 101 TFEU is made effective in practice

by the operation of the programme of leniency that encourages cartels to come forward and provide sufficient information to the relevant authorities to enable them to detect and sanction cartels. The leniency programme was protected in the UK when the criminal cartel offence was created, by the creation of no-action letters which provide immunity from criminal prosecution.

However, some have argued that by raising the stakes, instead of destabilising cartels the UK have provided them with greater incentive to policy their illicit agreements.⁸⁸⁰ Further, if the enforcement of the criminal cartel offence is so remarkably underwhelming that it diminishes the perspective of the capabilities of the CMA as an investigatory body, it could lead cartels to believe that without coming forward, the authorities stand little chance of detecting or punishing them. The enforcement record of the criminal cartel offence could have indeed created this perception. Particularly, when it appears from the outside at least, that the CMA have adopted enforcement strategy that only includes the criminal cartel offences in exceptional circumstances, given that they continue to administratively sanction cartels but very rarely prosecute the individuals who created them. Add to this the new cartel offence and its ‘obtaining legal advice’ defence which as shown in the analysis of Chapter 2 of this work defeats the purpose of the offence and ‘creates an absurdity that runs counter to effective legal policy.’⁸⁸¹ If together these problematic issues accumulated and resulted in a reduction in the number of leniency applications made in the UK because of an increased belief that the CMA as a whole, were ineffective it could reduce the efficacy of the enforcement of the civil regime within the UK as cartels may be emboldened to not come forward. Were that to be the outcome, it could result in a reduction in the efficacy of the enforcement of Article 101 TFEU in the UK.

The degree of impact upon the efficacy of Article 101 TFEU that poor enforcement of the criminal cartel offence need have in order to be considered a breach of Article 4(3) TEU and Regulation 1/2003 is not definitively laid out in the jurisprudence of the CJEU. However, as protection of competition and the prevention of artificial barriers to trade within the internal market are fundamental principles of the EU, there is strong reason to believe that the threshold for their protection would not be unduly high. Indeed, there is judicial precedent for the requirement that that national legislation already in force, that ‘may’⁸⁸² render EU competition

⁸⁸⁰ Caron Beaton-Wells (2015) *supra* n. 877.

⁸⁸¹ Andreas Stephan, ‘The UK Cartel Offence: a purposive interpretation?’ (2014) *Criminal Law Review* 879.

⁸⁸² Case 231/83 *Cullet v Centre Leclerc Toulouse* [1985] ECR I-305 148.

rules ineffective should not be ‘maintained in force.’⁸⁸³ The impact that this has upon the place which the criminal cartel offence occupies within the anti-cartel regulatory space in the UK cannot be underestimated. Competition law is an area of exclusive competence for the EU. The Member States therefore, in recognition of the importance of competition and the necessity that its laws be applied consistently across the Union, bestowed upon the EU the power to determine how that is to be achieved. By way of Regulation 1/2003 limited scope to legislate for and enforce competition law was granted back to the Member States. Therefore, any actions taken by them are limited to that which is articulated in Regulation 1/2003 and must be viewed within the wider context of the overriding competition law objectives of the EU. Regulation 1/2003 states that national laws that pursue a predominantly different purpose are not within its scope, and a criminal offence that sought to pursue the criminal harm of cartel activity could be so excluded. The instrumental use of a criminal offence directed at inducing cartelists to come forward and make leniency applications, which would in turn increase the enforcement of Article 101 TFEU, makes the conceptual distinction much more difficult to maintain. The assessment of the regulatory dynamics carried out in Chapter ... of this work showed that a criminal sanction, properly designed, implemented and enforced is not inherently contradictory to the objectives of the EU and Article 101 TFEU. Nevertheless, the poor enforcement of such a mechanism, should it amount to a threat to the objectives of the EU described above, could if that threat was serious enough, amount to a breach of Article 4(3) TEU.

The application of Article 4(3) TEU is tempered to a degree by Article 4(2) TEU which requires, *inter alia*, that the EU respect the national identities of the Member States and their essential State functions required to maintain law and order. This was clarified to include their basic public policy choices and social values. In theory therefore, this should include within the scope of Article 4(2) TEU a Member State making a determination that an action is contrary to the social values within its jurisdiction, and taking a policy decision to criminalise that action. However, in the context of the criminal cartel offence, the manner in which the UK have defined and applied the law makes it more difficult to sustain an argument that it was done within the scope of protecting the UK’s social values. The section 188 offence, particularly since its amendment has been applied in a way that strongly suggests a utilitarian rationale that is not concerned with morality or social values. There has been no attempt to

⁸⁸³ Ibid.

engage with traditional criminal policy considerations that would most commonly be associated with the criminalisation of conduct, and there was an explicit rejection of the one element of the original offence that would indicate that the cartel offence was focused upon addressing social values in the UK.

Should an argument be put forward that the drafting of, and enforcement of the criminal cartel offence in the UK was so poor as to amount to a threat to the effective enforcement of Article 101 TFEU, and thereby a breach of Article 4(3) TEU, it would be a novel use of the provision. There is no existing judicial precedent to provide guidance on the likely outcome of such a claim. Nevertheless, what this example demonstrates to the UK and any other Member States who may wish to include criminal sanctions for cartel activity within their own jurisdictions, is that whilst national criminal laws may technically be outside of the scope of EU law in respect of cartels, the highly interconnected dynamics of anti-cartel enforcement means that in practice, concern must be had for the impact that enforcement of such legislative action could have on their overriding obligation to the EU to effectively enforce competition law in the manner that the EU see fit.

7.5. The Market Abuse Experience and Anti-cartel Enforcement: conclusions

Market abuse and cartels share a variety of attributes, and the authorities charged with detecting and punishing those who engage in them face a variety of the same challenges. Like cartels, market abuse is difficult to detect, difficult to prove, and results in serious economic harm. Like cartels, market abuse has been subject to a high degree of harmonisation in the EU. Unlike cartels however, that harmonisation includes the requirement that Member States provide for criminal sanctions for those individuals found to have engaged in market manipulation and insider dealing. Given the diversity of legal and constitutional arrangements across the EU Member States, creating a regime for fighting market abuse within the internal market, that ensures consistency and that utilises both civil and criminal sanctions, is a challenge that the EU managed to overcome with the introduction of the new Market Abuse Regulation and the complementary Criminal Sanctions for Market Abuse Directive. Chapter 6 of this work therefore, examined the evolution of market abuse regulation in the EU in search of conceptual solutions to the problem of creating a dual enforcement regime capable of fighting complex

economic crime, that could be work to improve the regulatory framework of anti-cartel enforcement in the UK, and thereby improve the impact of enforcement actions in the fight against cartel activity.

The analysis confirmed that in the case of complex economic conduct, over-reliance upon one method of enforcement will lead to weaknesses that can be exploited by those who would seek to unfairly game the system. The evolution of market abuse regulation in the UK shows that over-reliance on criminal sanctions ultimately created a weak and ineffective regime incapable of adequately facing the challenges posed by market manipulation and insider dealing. The evolution of market abuse regulation in the EU showed that over-reliance upon a civil regime also created exploitable weaknesses.

The global financial crisis of 2008 caused the EU to re-evaluate the system for fighting market abuse because of the weaknesses to the system that the crisis revealed. As a result, the whole of the market abuse regime was addressed and a top to bottom amendment of the pre-2008 regime occurred. This allowed the EU to create a comprehensive and coherent regime capable of addressing the problems that the 2008 crisis highlighted, and flexible enough to be future proof, so far as it is possible to be. The result was the Criminal Sanctions for Market Abuse Directive alongside the new Market Abuse Regulation. A system of dual civil and criminal enforcement was therefore, created, and one that obligated the Member States to legislate for criminal sanctions for those found to have engaged in the proscribed conduct. The EU made use of the Lamfalussy Process when creating the new CSMAD and MAR as a means of ensuring that what they created was a clear and structured framework, anchored to the theoretical principles that justified the chosen enforcement action, and that was capable of taking account of the diversity of legal and constitutional arrangements of the Member States.

Chapter 6 showed that when attempting to prevent complex and harmful economic conduct a comprehensive legal response is required. One that is capable of engaging with multiple policy objectives that reflect and acknowledge the varied motivations and contributing factors that play a part in otherwise law abiding citizens to commit seriously harmful, ultimately criminal acts. More than that however, it demonstrated that in order to do that successfully, clarity between theoretical motivating factors and enforcement tools is established and maintained. The review of the market abuse regulation experience in the EU has shown that when theory is treated an integral part of the legislative process, the end result is much more comprehensive

and, it is hoped, impactful in practice. It confirmed the findings of chapters 2 and 3 of this work, that when care is taken to anchor policy choices and enforcement tools clearly to their theoretical foundations avoidable contradictions are indeed avoided, and complex regulatory spaces can be navigated with much more ease.

There has been no one cataclysmic event in the history of anti-cartel regulation in the UK that would cause a wholesale review of the regulatory and enforcement choices that have been taken. However, the gradual decline of the criminal cartel offence, combined with the impetus that Brexit could represent,⁸⁸⁴ may prove to be sufficient motivating factors to cause the UK to undertake the desperately needed re-evaluation of the criminal cartel offence and its place within the wider anti-cartel regulatory landscape.

7.6. Recommendations

The analysis of this work has repeatedly shown that over-reliance upon one enforcement mechanism, inadequate engagement with the theoretical foundations of those enforcement mechanism, and insufficient clarity as to policy objectives seeking to employ those mechanisms is damaging to a complex regulatory space. That is particularly true when that regulatory space has been created in order to detect, deter, and punish complex and seriously harmful economic behaviour. In the UK, a failure to understand this has led to the creation of a response to cartels with a regulatory framework and enforcement strategy that ‘is very heavily focused upon traditional deterrence theory, with the result that enforcement in practice has tended to resort to the use of the wrong enforcement tool at the wrong time.’⁸⁸⁵ Further, as discussed in Chapter 4 of this work,⁸⁸⁶ business managers have shown ingenuity and adaptability in ‘responding to ever more severe public enforcement campaigns against collusion.’⁸⁸⁷ It is important therefore, that legislators and even more crucially, enforcement agencies shown the same level of ingenuity and adaptability in their fight against cartel activity.

⁸⁸⁴ CMA – SFO recommendation.

⁸⁸⁵ JG

⁸⁸⁶ Cross reference to leniency section in chapter 4.

⁸⁸⁷ William E. Kovacic, *supra* n.

The UK anti-cartel regulatory space does provide for a collection of enforcement tools capable of creating an impactful response to the fight against cartels, and flexible enough to allow for the type of reflexive enforcement that is needed to deal with the problem of hard-core collusion orchestrated by determined and adaptable business leaders. It provides for a selection of enforcement mechanisms that could represent the variety of policy objectives and ideological concepts that are required for a comprehensive regulatory response to the harm caused by hard-core collusion. The addition of sanctions aimed at the individuals who create the cartels does have the potential to close an important gap in the pre-2003 legislative landscape. However, what the current regulatory space lacks is the requisite cohesion and structure that is crucial for a complex regulatory environment. Enforcement tools have not been implemented with the proper clarity as to which policy objective they have been employed to fulfil and that is in part, due to a lack of understanding as to the theoretical foundations of the policy objectives being pursued. There is a disconnect in the regulatory dynamics of anti-cartel enforcement at the moment that has allowed for complementary mechanisms to in fact, be implemented in a way that diminishes the impact of the criminal cartel offence in particular, and perhaps the anti-cartel regime as a whole. This lack of cohesion has meant that with each evolution of anti-cartel enforcement in the UK, inconsistencies have been reinforced and as a result, the current place that the criminal cartel offence occupies within that space is contradictory and will, in its current form, continue its slow decline. The lesson provided by the analysis of market abuse regulation is that a clearly defined approach, grounded in a proper understanding of theory to which policy objectives are linked, and upon which enforcement action is based can create a regulatory environment capable of providing for a complex, enforcement tool rich legislative response. Whilst ‘competition policy, grounded in [economic] theory in practice is effectively the daily work of competition agencies,’⁸⁸⁸ that understanding of theory must go deeper if criminal policy is to be included within the enforcement toolkit, and more importantly, have an impact.

In order to improve the impact of anti-cartel enforcement in the UK therefore, the ideological basis for anti-cartel enforcement must be clearly articulated from the start. All policy objectives and thereby, enforcement tools should emanate from that point. The overriding policy objective of competition law, as discussed in Chapter 4 of this work is that of consumer

⁸⁸⁸ William Kovacic, Hugh M. Hollman and Patricia Grant, ‘How Does Your Competition Agency Measure Up?’ (2011) 7(1) *European Competition Journal* ...

welfare.⁸⁸⁹ Anti-cartel enforcement goals should therefore, feed back into this overriding objective. The objectives of criminal law, as the examination in Chapter 2 showed, can be broadly separated into those pursuing utilitarian objectives and those pursuing retributive ones. The analysis in Chapters 2 and 6 of this work demonstrated that while the pursuit of utilitarian objectives is possible and desirable for the civil sanctions within the anti-cartel regime, it is a much less impactful objective for a criminal sanction for individual cartelists. Retributive theories of criminal punishment therefore, should be the primary focus of a criminal sanction in this specific context. The analysis of regulatory mix theory showed that multiple policy objectives are possible and even advantageous, nevertheless, the primary purpose of the enforcement tool should be the grounds for which it is chosen so as to ensure that it fits within the regulatory structure being created. The enforcement tools chosen to implement those policy objectives should then, reflect this primary function. These recommendations, whilst directed at the anti-cartel enforcement space in the UK, can be of use to other Member States that may wish to add criminal sanctions for individuals who engage in cartel activity within their own jurisdictions. The four step process articulated here can help illuminate potential conflicts that may arise within the structural limits of what is achievable given their own legal and constitutional limits, thereby helping to significantly reduce the risk that poor implementation and enforcement of a criminal offence could pose to their obligations under Article 4(3) TEU.

In practice in the UK the above recommendations require that the civil regime utilises the utilitarian mechanism of deterrence in order to pursue the competition law objective of preventing cartel activity, and thereby protecting consumers. As this work has shown, optimal deterrence is not achievable by fines alone however, and so should be supported by other enforcement tools within the toolkit. The deterrent objective of the administrative sanctions can be supported by the use of competition disqualification orders, which research has shown is an effective deterrent for the individuals who create cartels. As a civil remedy, they do not face the same procedural and evidential challenges as a criminal sanction for cartels and so could be implemented and enforced with much greater frequency. The secondary function that the administrative sanctions can achieve is the redistribution of cartel rents through fines, and the secondary function that the competition disqualification orders can achieve is

⁸⁸⁹ This is the position that the CMA have recently articulated as being at the ‘heart’ of competition law in the UK. See, CMA Press Release, ‘Reforms proposed to put consumers at the heart of UK competition regime,’ 25th February 2019. Available at: <http://www.gov.uk/government/news/reforms-proposed-to-put-consumers-at-the-heart-of-uk-competition-regime>. Last accessed 6th March 2019.

incapacitation and thereby, a reduction in future cartel activity.⁸⁹⁰ The criminal sanction for individual, as has been shown, should pursue retributive crime control objectives in order to close the gap in the commitment to legal obedience that cartelists appear to otherwise have, and in order to help to build a culture of compliance not so reliant upon legal compulsion in the future. This in turn helps to achieve the overriding competition law goal of consumer welfare by working towards the goal of reducing cartel activity over time. Further, in order to avoid the harmful layering effect identified in Chapter 4 of this work, the criminal cartel offence should abandon the pursuit of deterrence.⁸⁹¹

In order to achieve this the criminal cartel offence would need to be amended again. The potentially disastrous ‘obtaining legal advice’ defence should be removed, and the new definition of the offence must be able to define its own outer limits without the need to rely upon the civil regime.⁸⁹² Most importantly of all, it should be defined in such a way as to reincorporate an element of moral blameworthiness that goes to the heart of the criminal harm of a cartel. A criminal cartel offence that operates to punish the criminal harm of a cartel would not be as reliant upon frequent enforcement for its core objective to be achieved, as is currently the case for a criminal sanction that aims to deter. It would continue to be reserved for the most egregious examples of cartel activity, supported by sentencing guidelines. This would help to ensure that terms of imprisonment were actually implemented in practice, would provide certainty, and would help to reinforce communication of the seriousness of the offence. Any gap in enforcement action against individuals that remained as a result of the relatively low number of prosecutions that experience would dictate should be anticipated, would be filled by the use of competition disqualification orders. The work has shown that the most impactful enforcement action is that which is directed at individuals, it is therefore crucial that tools that can be enforced frequently (the competition disqualification order) and those which can punish the very serious, morally blameworthy harm that cartels create (the criminal cartel offence).

The successful aspect of the criminal cartel offence is the recognition of a need for comprehensive cartel enforcement to target the individuals who create the cartel and bind their

⁸⁹⁰ The disqualification orders can also help to prevent recidivism.

⁸⁹¹ See, Chapter 4, section 4.2.4.

⁸⁹² Earlier in this work it was shown that the contours of the criminal cartel offence as it currently stands are defined, in part, by the fact that cartelists will not openly make hard-core anti-competitive agreements, as is permitted by section 188 because to do so would invite civil sanctions by way of the Competition Act 1998.

undertakings to prohibited agreements. It recognised a significant gap in enforcement that existed and is supported by the academic literature from a variety of sources. To rearticulate the offence so as to re-engage with retributive rationale will help to re-establish the place which the cartel offence occupies within the anti-cartel regulatory framework and define it as an enforcement tool in its own right. A criminal offence anchored directly to both the criminal policy objectives and ideological foundations that justify intrusion into individual liberty, and to the competition law objectives of the landscape in which it must exist will help to ensure that it is able to have a greater, and more appreciable impact on the fight against cartels. This must of course, be reinforced by an enforcement strategy in the CMA that understands the intricate balance of anti-cartel enforcement, and that is not itself dominated by traditional concepts of deterrence. As it currently stands, the place that the criminal cartel offence occupies within the wider anti-cartel regulatory space in the UK is confused and contradictory. It was created in the hope of filling a gap in deterrence, when what was required of it was to fill a gap in enforcement. This work has shown however, that unless steps are taken to further amend the offence, the gap will remain as wide as it ever was.

ANNEX 1: DG Comp letter to Swedish Competition Authority

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EUROPEAN COMMISSION
Competition DG

Director General

(PL 138/2005)

KONKURRENSVERKET	
2005-04-29	
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Brussels
COMP/A4/MJ

29.04.05 D 002280

Mr. Claes Norgren
Director-General
Swedish Competition Authority SE-
103 85 Stockholm
Sweden
Also by fax: + 46 8 245543

Subject: Swedish legislative proposal to criminalise cartel offences
Your letter of 18 March 2005

Dear Claes,

Thank you for your letter of 18 March 2005, in which you inform us of the report and proposal from the legislative committee concerning a legislation model for criminalising cartel offences, as well as your already undertaken and envisaged actions in response to that report.

We are grateful to be given the possibility to assist you in this manner by providing our view on the issues raised in your letter. We understand from discussions between our services that you are concerned about the implications which the proposal would have on your enforcement activities (notably the success of your leniency program) as well as the cooperation within the ECN. We understand and share your concerns in this respect. As previously discussed we would have no objections should you decide to integrate the attached comments in your envisaged reply to the public consultation. My services of course remain at your disposal for any further questions you may have.

Best regards,


Philip Lowe

Cc: Gianfranco Rocca, Emil Paulis, Kris Dekeyser, Maria Jaspers Dir. A

ANNEX

DG COMPETITION'S REPLY TO QUESTIONS RAISED BY THE SWEDISH
COMPETITION AUTHORITY WITH REGARD TO SOU 2004:131**Background and introduction**

The Swedish Competition Authority ("KKV") has provided DG Competition with a copy of the report "*Konkurrensbrott – en lagstiftningsmodell*" (SOU 2004:131, "the Report") and has asked us to provide our opinion on three issues of particular relevance for the Commission and for the European Competition Network. We welcome this opportunity to clarify our position concerning the scope of Council Regulation 1/2003¹ and the rights and obligations laid down in that Regulation.

We understand that the legislative model drawn up by the Committee suggests that any person entering into an agreement that is prohibited under section 6 of the Swedish Competition Act or Article 81 of the EC Treaty and which implies that companies at the same production or trade level set selling prices, restrict or control production or divide up the market shall, if the agreement was designed to seriously impede, restrict or distort competition in the market, be sentenced to prison for anti-competitive crime. We understand that crime as being based on a (be it implicit) finding of an infringement of Article 81 EC by the undertaking. The authority responsible for the investigation and criminal proceedings should be the Economic Crimes Bureau ("EBM") which should however not be given any role within the framework of co-operation under Council Regulation 1/2003. The Committee considers instead that KKV is best suited to meet the obligations imposed on Swedish competition authorities within that framework.

We strongly support any measure undertaken at Community or national level that will increase the possibilities to detect and punish cartels. We believe that introducing criminal sanctions on individuals for violation of competition rules helps achieving that aim. In our view, there are however three main conditions that need to be met.

First, the investigative powers of the authority must be more far-reaching than in an administrative system because of the higher standard of proof and the rights of defence enjoyed by individuals in criminal proceedings. Secondly, there must be a readiness of the judicature to actually impose sanctions provided for by the law. Lastly the criminalisation must be accompanied by an efficient leniency program covering both individuals and undertakings, which will enable the authorities to uncover secret cartel arrangements. A failure to meet any of these three conditions will in our view not only result in a less efficient enforcement of the criminal offence but will also lead to under-enforcement of the competition rules against companies.

It is therefore with great concern that we note the obvious consequences which the current proposal would have for the Swedish leniency program. It is no secret that the Commission's leniency program has proven to be a formidable tool to detect and prosecute cartels. We firmly believe that the existence of a leniency program also destabilises existing cartels and prevents the establishment of new cartels. We have every reason to believe that also the Swedish leniency program (which is more or less identical

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1.

to the Commission's program) has the potential to achieve the same result, provided that it is combined with a readiness of the judiciary to impose adequate fines on the undertakings.

Question 1: How would the proposed criminalisation of Article 81 EC affect the application of Regulation 1/2003? What could be the consequences?

Council Regulation 1/2003, which entered into force on 1 May 2004, was designed to ensure that all cases concerning agreements or practices affecting trade between Member States would become subject to the mechanisms of cooperation inside the Network. For that reason, it obliges the national competition authorities and courts to apply Community law whenever the practice or behaviour may affect trade between Member States. The only exception to that obligation provided for in the Regulation is when national bodies apply national merger control laws or apply national laws that "*predominantly pursue an objective different from that pursued by Article 81 and 82 of the Treaty*" (Article 3 section 3 of the Regulation). The Committee would not seem to argue that the objective behind the anti-competitive crime would be different from that pursued by Article 81 EC. On the contrary, the new criminal provision is directly based on Article 81 EC (and its equivalent under the Swedish Competition Act) and the sanctioning of individuals would appear to be a means to influence the behaviour of the undertakings. Despite this, the Committee argues that it is uncertain whether the EBM would indeed apply Article 81 EC when it is acting under the anti-competitive crimes provisions. In that respect, it quotes recital 8 of the Regulation which states that the Regulation "*does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced*". It further notes that a possible interpretation of this recital would be that the Regulation would not be applicable when natural persons are subject to criminal sanctions for Article 81 infringements if there is also a form of sanction by which undertakings can be fined.

We fail to find any support for such conclusion in the Regulation. It is clear, not at least from Article 12(3) of the Regulation, that the Regulation covers also sanctions imposed on natural persons for breaches of Article 81. The fact that there would exist an alternative possibility to impose similar or different sanctions for an Article 81 infringement would appear to be irrelevant for the issue whether an authority is enforcing Article 81 or not. In this respect we would also note that the criminal investigation might apparently also result in sanctions directed towards the undertaking itself, such as the possibility to declare the proceeds from anti-competitive crimes forfeit and/or to impose a special fine (*Sw: företagsbot*).

We would have no reason to doubt that the EBM will apply Article 81 EC whenever the authority acts under the proposed anti-competitive crime provisions. We will consequently regard the authority as a competition authority within the meaning of the Regulation and expect the EBM to comply with the obligations under the Regulation that corresponds to its functions (see below).

Question 2: How would a criminalisation of Article 81 EC as proposed by the Committee affect the consistent application of Article 81 EC? What would be the consequences?

As stated above, EBM would be regarded as a competition authority and would therefore need to comply with the mechanisms put in place in Regulation 1/2003 to safeguard a

consistent application of Article 81 EC. This includes an obligation to inform the Commission in writing before or without delay after commencing the first formal investigative measure. (Article 11(3)). Article 11(4) of the Regulation also establishes a consultation obligation regarding all decisions by Member States' authorities aimed at terminating or penalising an infringement of Article 81 EC.² We would assume that the EBM would fulfil its consultation obligation in a similar way as the KKV is doing in cases where it does not take a decision on its own, i.e. by consulting the Commission on the draft summons application at least 30 days before the application is filed with the Court. If the Commission would disagree with the suggested course of action, it will enter into bilateral discussions with the EBM and may, if no solution can be found, make use of its possibility to initiate proceedings under 11(6) of the Regulation and thereby relieve the EBM from its competences.

Question 3: How would the proposed criminalisation affect the Swedish Competition Authority's possibility to participate in the ECN network?

Participating in the ECN means an obligation to inform the Commission at the outset of proceedings (Article 11(3) of Regulation 1/2003) and a possibility to exchange information with other Network members and to use that information in evidence (Article 12 of Regulation 1/2003). The Member states have agreed to make information provided under Article 11(3) available and easily accessible to the whole Network. In practice, these obligations are satisfied by completing and uploading a form in a database on the common intranet. The Commission Notice on cooperation within the Network of Competition Authorities (the "Network Notice") prescribes that information provided in the context of a leniency application is not used by another authority as the basis for starting an investigation under Community or under national law.³

The possibility to exchange and use in evidence information gathered by another Network member (Article 12 of Regulation 1/2003) also applies to information that has been submitted by a leniency applicant or obtained during an inspection (or other fact-finding measures) which have been carried out as a result of the leniency application. The Network notice contains safeguards to ensure that such information will not be exchanged under Article 12 unless the applicant has given its consent, the receiving authority has received an application relating to the same infringement from the same applicant or the requesting authority has committed itself in writing to the transmitting authority that the information cannot be used by that authority to sanction any (legal or natural) person covered by the leniency decision.⁴

The national competition authorities, which are not as such bound by the provisions in the Network Notice, can sign a statement declaring that they will abide by these

² For further explanation on the Article 11(4) obligation, see the Explanatory Memorandum of the proposal for a Council Regulation on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty and amending Regulations (EEC) No 101/68, (EEC) No 2988/74, No 4056/86 and (EEC) No 3975/87, COM(2000) 582.

³ See paragraph 39 of the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 3.

⁴ See paragraphs 40-41.

principles, including the principles relating to the protection of leniency applicants.⁵ Until the moment the authority has signed this statement, it will not be informed of the investigative measures undertaken by other competition authorities.

The reply to the above question on the possible consequences for KKV's participation in the Network will therefore depend on whether the EBM would sign the statement.

The KKV has signed the statement and has therefore today full access to the information available in the Network, including notably the common intranet and databank that constitute the back-bone of the Network cooperation. We understand that the current proposal is to impose a legal obligation on the KKV to report information it has in its possession to the EBM, unless it would be prevented from doing so under Article 28 of the Regulation. However, since both the KKV and the EBM will be regarded as competition authorities within the meaning of the Regulation (and subject to the same professional secrecy rules), Article 28 can never be an obstacle to exchange information between the two authorities. The KKV would consequently be under a national obligation to report to the EBM as soon as information it has received through the Network indicates the existence of an anti-competitive crime under the new provision.

If EBM decides to also sign the statement, the reporting obligation imposed on the KKV under national law would have no consequences for the KKV's participation in the Network. Should, however, the EBM decide not to sign the statement, the KKV would no longer be able to abide by the principles they have agreed to comply with in the statement. The consequence would be that the KKV will, as the only national competition authority within the Network, no longer have access to the common intranet and databank services and to those parts of meetings within the ECN forum where sensible data and information concerning leniency related information are exchanged and discussed.

Moreover, it is highly unlikely that any of the Member States operating a leniency program (currently 17) or the Commission would be willing to jeopardize the success of the individual programs by submitting under Article 12 any information that has been triggered by a leniency application to KKV, if the authority is not able to make a binding commitment that such information will not be forwarded to the EBM. Taking into account that the overall majority of all cartel investigations within the Community have either been initiated through an immunity application or have at least triggered subsequent leniency applications after the authority has started its investigation, the inability to receive and use such information will have obvious consequences for the enforcement activities in Sweden.

It goes without saying that the above outlined possible consequences of the criminalisation proposal would have serious implications for KKV's possibilities to participate in the ECN and to make use of the mechanism within that Network to detect and punish cartels and other infringements.

⁵ The joint statement is set out in the Annex to the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 3. A list of the authorities that have signed the statement is published on the website of the European Commission.

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