WHITHER CRIMINAL CARTEL ENFORCEMENT IN THE EU?: A LAW AND ECONOMICS ASSESSMENT

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Abstract

Cartels have been a persistent problem in the European internal market and increasingly bigger cartels are being discovered by the Commission. This paper proposes that the appropriate means to optimally deal with these cartels requires the involvement of criminal sanctions against corporates and responsible executives. This is not a novel proposal in itself: the US has had criminal sanctions against cartels since over a century and the UK since a decade. But the unique regulatory and governance structure of the EU requires that such a proposal must have a stronger evidentiary basis and takes into account its governance structure.

This paper does so by, *first*, analysing statistics on cartel enforcement in the EU and the USA to display that fines have not been able to sufficiently deter cartels. *Second*, normative reasoning on the basis of the harm theory, morality of criminalisation, and public theory is employed to indicate that cartel activities are criminal in nature and that penalising them as such would not amount to overcriminalisation. *Third*, objective analysis is used to dissect the limitations of fines: that when used in isolation they do not target the wrong-doers, are sub-optimal, and impose social costs. *Fourth*, it is displayed that combining fines with criminal sanctions can help us redress these issues and improve the deterrence levels significantly. *Lastly*, three key principles are proposed to ensure that such a proposal takes into account the varying graveness of cartel activities, and is in sync with EU's rule of law and governance structure, and the Commission's leniency programme.

JEL classification: K14; K21; K42; D61; D63

Keywords: Cartel Enforcement, Competition Law, Antitrust, Criminalisation, Corporate crimes, European Commission, Optimal Deterrence.

Authorship Declaration

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I acknowledge the supervision and guidance I have received from Prof. DDr. Peter Lewisch. This thesis is not used as part of any other examination and has not yet been published.

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"Our competitors are our friends; our customers are the enemy"

- Ringleader of a certain Cartel, quoted by OECD[1]

[1]. Introduction

In this paper, I shall argue that criminal sanctions should be introduced in the European Union to effectively tackle and deter Cartel activities. The word 'Cartel', popularized amongst the masses through crime dramas, often evokes strong public sentiments. Given the existence of crime and drug cartels, the word carries an intense negative baggage. Corporate cartels too are affected by this perception. They are often depicted in popular media as a sign of a supposedly decadent corporate culture which has permeated our society.[2] 'The Informant', a Hollywood blockbuster, depicted the story of the Lysine Cartel as a notorious corporate scheme and fraud upon the people, ending with white-collar executives being imprisoned.[3] Such depiction in popular media have weighed in on public opinion. Many believe that cartel activities are akin to public fraud, constituting a public welfare crime and evil of the highest order.[4] The US Supreme Court did not mince words, when it referred to cartels as the supreme evil of antitrust.[5] The OECD too has pushed for criminalisation of hard-core cartel activities for decades.[6]

As per some scholars, like Milton and Sokol, criminalisation of individuals involved in cartel activities is a must given that it has the probability of creating indefinite deterrence and provide a reasonable alternative to ever burgeoning fines.[7] On the other hand, an equally large number of scholars argue that cartel activities should not be criminalised. Lewisch argued that

[1] OECD, HARD CORE CARTELS 5 (2000)
[2] A Stephan, *'The Battle for Hearts and Minds': The Role of the Media in Treating Cartels as Criminal*, in CRIMINALISING CARTELS 129 (2011).
[3] Sarah Riddell et al., ANTITRUST IN POP CULTURE (2017).
[4] CRIMINAL ENFORCEMENT OF ANTITRUST LAWS: THE U.S. MODEL (T.O. Barnett, United States Department of Justice, 2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model.
[5] Verizon Communications v. Law Offices of Curtis Trinko, 124 S. Ct. 872 (2004).
[6] OECD, *supra* note 1.
[7] Elliot Milton, *Putting the Price-Fixers in Prison: The Case for the Criminalisation of EC Competition Law*, 5 HIBERNIAN LAW JOURNAL 159 (2005); Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 WILLIAM & MARY LAW REVIEW 1545 (2019).

criminal sanctions should only be used as an ultima ratio, that is when other legal and institutional remedies fail to accomplish the required levels of deterrence effectively.[8] In case of cartels, given the enforcement options available, Prof. Lewisch found it unnecessary to advocate individual criminal sanctions. Another set of scholars have relied on moral grounds to argue that cartels deserve criminal punishment, as they involve a high level of deceit.[9] They are countered by others who believe that introduction of subjective morality in antitrust will undermine its rational basis in law and economics.[10]

This paper seeks to present a perspective on this debate by making use of economic analysis and available statistics. The big question, which this paper seeks to address, is whether the current cartel enforcement mechanism in the EU, based on ever increasing amount of corporate fines is sufficient and justified, or must we introduce a criminal enforcement mechanism to supplement the deterrence framework. The allied questions which concern the paper are: *first*, whether criminal sanction of individuals involved in cartel activities is theoretically and morally justified?; *second*, how will criminal sanctions improve the deterrence effect?; and third, how do we structure a possible criminal enforcement model and what basic principles must be followed?

In pursuance of these questions, the paper first starts with a comparative study of the divergent approaches to criminalisation of the cartel offence taken by various jurisdictions. The focus is on the law as it is in the US, the UK and the EU. This section also defines what is meant by the words 'cartel activities' and 'criminal liability' in the context of this paper.

In section 3, a survey of the data on cartel-busting in the EU and the USA is undertaken. The aim of this survey is to understand if there has been sufficient deterrence through the fine-based model used in the EU. The fact that new cartels are being discovered frequently even as the size of fines keeps on growing is often highlighted as a proof that the current model may not be

[8] Peter Lewisch, *Enforcement of antitrust law: the way from criminal individual punishment to semi-penal sanctions in Austria*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT 303 (2006).
[9] Angus Macculloch, *The Cartel Offence: Defining an Appropriate "Moral Space"*, 8(1) EUROPEAN COMPETITION JOURNAL 73, 93 (2012).
[10] Brent Fisse, THE PROPOSED AUSTRALIAN CARTEL OFFENCE: THE PROBLEMATIC AND UNNECESSARY ELEMENT OF DISHONESTY (Legal Studies Research Paper No 06/44, Sydney Law School, 2006).

optimal.[11] This paper takes a deeper look at this argument by looking at three statistics: number of cartel decisions adopted by the EC; the cumulative amount of fines being imposed; and number of cartel investigations in the US. This analysis forms the basis of a claim that fines have not been creating optimal deterrence.

Section 4 tackles the question of whether cartel activities are a crime. It involves dealing with the question of what is a crime and when are criminal sanctions truly justified. After all, overcriminalisation is never a good option, and if there is a doubt as to the necessity of criminal sanctions, it is better not to criminalise the activity.[12] In this section, making use of theories on criminal justice, the paper shows that cartels constitute a criminal offence because they cause harm to the society at large, there is public opinion in favour of criminalisation, and that there is sufficient moral reasoning to justify criminal sanctions.

Section 5 provides objective justifications for criminalisation. This is done by showing that exorbitant fines are not ideal deterrence tools as they do not target the actual wrongdoers, can never be optimal, and are socially-undesirable. This section further shows that criminal sanctions can help us stop the fines juggernaut and instead implement a less-costly and effective tool of deterrence.

Section 6 grapples with the challenges which can arise with criminalisation and proposes three basic principles which must be followed in such a process. It first highlights various types of cartel activities which must be dealt with through different measures. Then is stresses the importance of procedural fairness and a need to create a criminal cartel enforcement system which is independent of the European Commission. Lastly, it discusses the importance of a leniency programme which is interlinked with leniency applications to the Commission.

[2]. A Divergence the Size of the Atlantic: The US and the EU Approach to Cartels

[11] Katalin J. Cseres et al., *Law and economics of criminal antitrust enforcement: an Introduction*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT 1-2 (2006).
[12] Paul J. Larkin, *Public Choice Theory and* Overcriminalization, 36(2) HARVARD JOURNAL OF LAW & PUBLIC POLICY 715, 760 (2013); Duol Kim & Iljoong Kim, *Trade-offs in the allocation of prosecution resources: an opportunity cost of overcriminalization*, 47(16) APPLIED ECONOMICS 1652, 1669 (2015).

European countries and the USA, both at the forefront of cartel enforcement, have a surprisingly major divergence when it comes to the use of criminal sanctions. On one side of the Atlantic, in the US, participating in Cartel activities constitutes a major antitrust crime and has been so for almost a century. Over 246 individuals were convicted for cartel-related crimes in the 2000-2010 decade.[13] In the 2011-2020 decade, over 350 individuals have been charged for engaging in Cartels.[14] On the other side, in Europe however, criminalisation of individuals and firms engaged in Cartels has been lacklustre.[15] In the UK, even though criminalisation of Cartels has been a priority, success has been limited (as of now, only 1 proper conviction and 1 plea-deal has been achieved).[16] In *Water Tanks* cartel case (2015), executives accused of Cartel crimes were acquitted by the jury, exposing the dilemma of whether there is sufficient public disapprobation against cartel activities.[17] To enhance the effectiveness of the cartel offence, the country has made amendments to the definition of the offence by removing an element of dishonesty, elevating it to the standards of strict liability.[18]

In the European Union ('EU') criminalisation of cartels has largely been absent. Some member states like Greece[19], France[20], Romania[21], and Denmark[22] do criminalise various cartel

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[13] Beryl Howell, SENTENCING OF ANTITRUST OFFENDERS: WHAT DOES THE DATA SHOW? (2010), https://www.ussc.gov/sites/default/files/pdf/about/commissioners/selected-articles/Howell_Review_of_Antitrust_Sentencing_Data.pdf.

[14] US Department of Justice, CRIMINAL ENFORCEMENT TREND CHARTS (16 November 2021), https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

[15] Keith Jones & Farin Harrison, *Criminal Sanctions : An overview of EU and national case law*, CONCURRENCES (N° 64713), http://awa2015.concurrences.com/articles-awards/business-articles-awards/article/criminal-sanctions-an-overview-of-eu-and-national-case-law.

[16] In 2017, a conviction was achieved in the *Precast Concrete Drainage Products*, CE/9705/12; and between 2003-12 only 1 conviction in the Marine Hose cartel case was achieved as part of a plea deal - *Regina v. Whittle*, [2008] EWCA Crim 2560; *U.K. Imposes First Criminal Sentences On Cartel Participants*, CLEARY GOTTLIEB (July 2, 2008), https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/uk-imposes-first-criminal-sentences-on-cartel-participants.pdf.

[17] *The future of the criminal cartel offence in the UK*, NRF (Jan., 2021), https://www.nortonrosefulbright.com/en/knowledge/publications/51dd9da8/the-future-of-the-criminal-cartel-offence-in-the-uk.

[18] Conor Swaine, *Criminalising Competition Law: The Struggle for Real and Effective Enforcement in Ireland and beyond within the Reality of New Globalised European Order* (2007) 14 IRISH JOURNAL OF EUROPEAN LAW 203.

[19] Art. 44, Greek Law 3959/2011.

[20] Art. L420-6, French Commercial Code 2008.

[21] Art. 63, Romanian Competition Law no 21/1996.

[22] Andreas Christensen & Kristen Helms Skov, *Increased Use of Personal Fines in Denmark for Competition Law Violations*, ANTITRUST ALLIANCE, http://antitrust-alliance.org/increased-use-of-personal-fines-in-denmark-for-competition-law-violations/.

activities, but rarely use these laws to imprison executives.[23] Other states like Germany, Hungary, Poland, and Italy continue to have laws criminalising bid rigging, a form of cartels wherein state resources are abused.[24] These laws, however, are rarely put to use to imprison individuals.[25] It can safely be concluded that the settled position in the EU is to deter and punish cartels through fines and private enforcement[26], and criminal charges are not prominent in the equation. Article 101(1) TFEU prohibits various cartel activities. It reads, "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*" shall be void. Specifically prohibited practices include price-fixing, production controls, market sharing, and collusion to exclude competitors. The European Commission (EC or the 'Commission') is the primary watchdog implementing the law, and has used increasingly larger fines to deter cartels.[27] As provided under the *Fining Guidelines* (2006), a fine of up to 10% of total global turnover may be imposed on the delinquent companies.[28]

Private enforcement has also been made a possibility after the CJEU judgement in *Courage*[29] and was also made relatively easier through the Damages Directive 104/EU/2014 and is developing as a key deterrence.[30] Over 58 damage awards have been handed by the National Competition Authorities to claimants in over 299 claims filed.[31] As can be observed in the figure below, this rise has been nothing sort of sensational. The rise of private enforcement, nonetheless, has not improved deterrence as it has presented a Catch-22 situation with respect to leniency, which

[23] Peter Whelan, *Antitrust Criminalization as a Legitimate Deterrent*, in THE CAMBRIDGE HANDBOOK OF COMPETITION LAW SANCTIONS (2021); Jones & Harrison, *supra* note 15.
[24] Sec. 298, German Criminal Code; Art. 353, Italian Criminal Code; Art. 305, Polish Penal Code (1997); and Art. 296/B, Hungarian Criminal Code (1978).
[25] Jones & Harrison, *supra* note 15.
[26] Hans Ullrich, *Private Enforcement of the EU Rules on Competition – Nullity Neglected*, 52 INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW 606, 635 (2021).
[27] Mario Mariniello, *Do European fines deter price fixing?*, VOXEU (Sept. 22, 2013), https://voxeu.org/article/do-european-fines-deter-price-fixing.
[28] Philippe Chappatte and Paul Walter, *The Cartels and Leniency Review: European Union*, THE LAWS REVIEWS (Feb. 1, 2022), https://thelawreviews.co.uk/title/the-cartels-and-leniency-review/european-union.
[29] *Courage and Crehan*, C-453/99 (2001).
[30] Caterina Migani, *Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement*, in GLOBAL ANTITRUST REVIEW 81-111 (2014); Marco Botta et al., PRIVATE ENFORCEMENT OF EU COMPETITION LAW: THE IMPACT OF THE DAMAGES DIRECTIVE (2018).
[31] Jean-François Laborde, *Cartel Damages Actions In Europe: How Courts Have Assessed Cartel Overcharges*, CONCURRENCES (Sept. 2021), https://www.concurrences.com/en/review/issues/no-3-2021/pratiques/102086.

forms the backbone of detecting cartel cases.[32] Since those undertakings which disclose cartel activities under a leniency programme would still be subject to private claims, the rise of private claims has seen a concomitant decline in leniency applications.[33] As per a report, the number of leniency applications have declined from, "*from 46 in 2014, to 32 in 2015, to 24 in 2016, to 18 in 2017, and to 17 in 2018*".[34] Thus, in one way or the other, it is fines, whether through public or private enforcement, which are central to cartel enforcement in the EU.

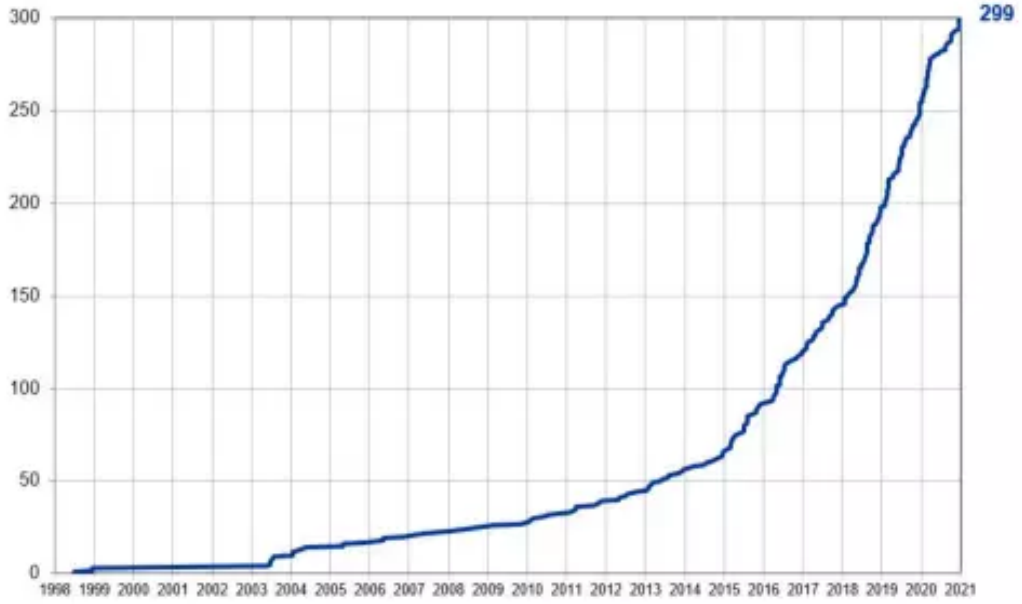

Figure 1[35]

[2.1]. Defining Cartel Activities and Criminal Liability

Before we move any further, it is pertinent to clarify what is meant by 'cartel activities' in this paper. In the author's view, cartel activities include both, the actual anti-competitive collusion by firms and the preparatory activities undertaken by the agents of these firms. Thus, when the paper talks about criminalisation of cartel activities, it refers to both corporate criminal liability and criminal liability for responsible executives. Both these liabilities are interlinked, given

[32] Cécile Aubert et al., *The Impact of Leniency and Whistle-blowing programs on Cartels*, 24 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 1241 (2006).
[33] Lena Hornkohl, *A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds*, KLUWER COMPETITION LAW BLOG (Feb. 18, 2022), http://competitionlawblog.kluwercompetitionlaw.com/2022/02/18/a-solution-to-europes-leniency-problem-combining-private-enforcement-leniency-exemptions-with-fair-funds/.
[34] *Rating Enforcement*, in GLOBAL COMPETITION REVIEW (2019).
[35] Laborde, *supra* note 31.

corporate firms after all are non-living legal individuals. Criminal liability of corporates is satisfied through the identification doctrine, which involves identifying the individuals responsible behind the actions of the firm or those who are the 'directing mind and will' behind the concerned decisions.[36] Corporate criminal liability, albeit, can also give rise to a broader responsibility for the directing minds as it also entails vicarious liability.[37] Even if it does not have any direct consequences on the non-guilty executives, the mere process of trial can entail reputational costs for the top white-collar executives whose firms are involved in cartels, pushing them to reform their internal monitoring systems. This may be illustrated by the Indian case of *Sunil Bharti Mittal v. CBI*, which was a corporate criminal liability case for corruption.[38] Mr. Mittal, a billionaire businessman was subjected to questioning and court appearances by way of being the CEO of a telecom company, even though there was no direct evidence of his involvement in corruption.

It is also necessary to remark at this stage that the concept of corporate criminal liability has not evolved in the EU to the extent it has in common law countries. In common law, the historical development of corporate criminal liability was a natural consequence of misfeasance rulings in cases like *Queen v. Great North of England Railway Co*. (1846).[39] By 1909, the United States Supreme Court had already held a corporation liable for criminal conduct in the *New York Central & Hudson River Railroad Co. v. US* case.[40] In European countries, however, the principle of '*societas delinquere non protest*' was still in application until late 80s.[41] This principle implies that societies or legal bodies cannot commit crimes. While that principle has since been abandoned and some countries have already introduced criminal liability for corporates[42], many countries are yet to introduce laws on corporate criminal liability. Germany, for instance, has published a draft

[36] Stephen Yoder, *Criminal Sanctions for Corporate Illegality*, 69 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 40 (1978).
[37] UK Law Commission, CORPORATE CRIMINAL LIABILITY: AN OPTIONS PAPER (2022).
[38] AIR 2015 SC 923.
[39] 115 Eng. Rep. 1294 (Q.B. 1846); V.S. Khanna, *Corporate criminal liability: what purpose does it serve?*, 109(7) HARVARD LAW REVIEW 1477, 1534 (1996).
[40] 212 US 481 (1909).
[41] L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80(7) MICHIGAN LAW REVIEW 1508, 1528 (1982).
[42] Gert Vermeulen et al., LIABILITY OF LEGAL PERSONS FOR OFFENCES IN THE EU (2012); B.F. Keulen & E. Gritter, *Corporate Criminal Liability in the Netherlands*, in CORPORATE CRIMINAL LIABILITY (2011); James Gobert & Ana-Maria Pascal, EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY (2011).

Corporate Sanctions Act introducing criminal liability, which may become a law soon.[43] Further, the European Public Prosecutor's Office (EPPO), the world's first supranational public prosecutor's office, started its work in 2021 and is tasked with investigating corporate financial offences. Thus, imposing corporate criminal liability for cartel delinquency in the EU may be difficult but is certainly possible.

[3]. The State of Cartels in the EU

For any argument for a change in the enforcement model to stand, it is pertinent to establish that the current model is unable to achieve optimum control over the malignant activities. While the next section would detail why Cartels are problematic and how optimum deterrence of them may be achieved, this section focuses on current statistics related to cartel operations in the EU. The three statistics which we are concerned with are: *first*, number of cartel decisions adopted by the Commission; *second*, the cumulative amount of fines being imposed; and *third*, number of cartel investigations in the US.

The first statistic is that of the number of cartel decision adopted by the Commission. It is important because it would tell us if the current enforcement system is helpful in reducing the number of cartels in existence. If the number of cartel decisions being adopted is stagnant, it may lead to two alternative conclusions: *first*, it may mean that the number of cartels being prosecuted is stagnant because of an improvement in the rate of detection, even as the number of cartels in existence has reduced. Afterall, as the Becker model has proven with simplicity, the incentive to commit a crime is a result of the net benefit (B) the criminal derives after deducting the expected cost of punishment (C) combined with the probability of detection (P).[44] If this number is positive than crimes would continue unabated. To create optimal deterrence, the following result must be obtained: $0 > (B - PC)$. Thus, it is very probable that a stagnant number of cartels being prosecuted is a sign that the number of cartels have reduced due to optimal deterrence as a result of high fines and increased detection rates. This argument, however, would be deficient if it can be shown that

[43] Emmanuelle Brunelle et al., *Global Enforcement Outlook: Europe's evolving corporate criminal liability laws*, FBD (Jan. 25, 2022), https://riskandcompliance.freshfields.com/post/102hh57/global-enforcement-outlook-europes-evolving-corporate-criminal-liability-laws.

[44] Nuno Garoupa, *Economic Theory of Criminal Behavior*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 1280-1286 (2018).

there has been no concrete change in rate of detection. In that case, a second conclusion would be more logical: that there has been no significant reduction in the number of cartels in existence.

The data is consistent with this analysis. After an initial spike in the number of decision adopted in the 2000s, the number of decisions being adopted has more or less stagnated around 30 decisions every five years, as can be observed in Fig. 2 below.[45]

Period	Decisions
1990 -1994	10
1995 - 1999	9
2000 - 2004	29
2005 - 2009	33
2010 - 2014	31
2015 - 2019	26
++2020-2022++	14

Figure 2

One may also observe that the number of decisions being adopted peaked in the 2005-2009 period, and have since been on a gradual decline. This may be explained by the fact that after a temporary rise in number of leniency applications, which gave a significant boost to cartel detection, detection has been on decline.[46] During 2002-2005, over 2/3rd decisions were based on leniency application.[47] The leniency regime has experienced a significant slowdown since then.[48] While a host of reasons including the risk of spillover effects and introduction of the marker regime in 2006 are blamed, the disjunction with the 2014 damages directive, as mentioned in the

[45] European Commission, STATISTICS ON CARTEL CASES, https://ec.europa.eu/competition-policy/cartels/statistics_en.
[46] Andrew Amos, *Impact of the European Commission's Leniency Policy in Relation to Cartels*, NEW JURIST (Aug. 12, 2016), https://newjurist.com/impact-of-the-european-commission-leniency-policy-in-relation-to-cartels.html.
[47] H.W. Friederiszick & F.P. Maier-Rigaud, *The Role of Economics in Cartel Detection in Europe*, in THE MORE ECONOMIC APPROACH TO EUROPEAN COMPETITION LAW 179 (2007).
[48] Johan Ysewyn & Siobhan Kahmann, *The decline and fall of the leniency programme in Europe*, CONCURRENCES (2018), https://www.cov.com/-/media/files/corporate/publications/2018/02/the_decline_and_fall_of_the_leniency_programme_in_europe.pdf.

introduction, is seen as the primary reason behind the decline of leniency.[49] This is clearly observed in the falling numbers of decisions being adopted and supports the possibility that the probability of detection remains low, and number of cartels in existence continue to be stagnant.

This argument is also supported by economic analysis. A study of the birth and detection cycles of all cartels convicted in the EU between 1969 and 2007 showed that over these decades the detection rate averaged to about 12.9-13.3%.[50] The report found that despite changes in cartel enforcement regulations cartels continued to exist without significant reduction in their numbers. They found that stricter fines and better detection merely changed the number of years a cartel remains in existence, making shorter periods of collusion more attractive. In another study, of cartels convicted in the EU between 1975 and 2009, it was found that despite rising fines, the number of cartels in existence has been plentiful and cartelisation remains a profitable proposition.[51]

Another study, by *Levensetin* and *Suslow*, looked into Cartel stability. On the basis of cartel lifetimes and collusion profitability studies, they found that cartels are very agile socio-economic institutions, which are able to counter changes in legal scenario by adjusting collusion agreements, improving monitoring mechanisms, and adjusting cartel life cycle.[52] In another study, they also argued that cartels in some industries persist in a recurring manner in short intervals, making it even more difficult to detect them.[53] These studies combined with the data that the Commission continues to prosecute a more or less stagnant number of cartels, despite rising fines, shows that deterrence of cartelisation has not seen a gradual improvement. In terms of the Becker equation, the probability (P) has remained unchanged and rising fines (C) has not generated much marginal deterrence due to cartel profitability.

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[49] *Id*.
[50] Emmanuel Combe et al., CARTELS: THE PROBABILITY OF GETTING CAUGHT IN THE EUROPEAN UNION (BEER paper n° 12, 2008).
[51] Emmanuel Combe & Constance Monnier, *Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement*, 56(2) *The Antitrust Bulletin* 235, 275 (2011).
[52] Margaret C. Levenstein and Valerie Y. Suslow, *What Determines Cartel Success?*, 44(1) JOURNAL OF ECONOMIC LITERATURE 43, 95 (2006).
[53] Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard To Do: Determinants of Cartel Duration*, 54 JOURNAL OF LAW & ECONOMICS 455 (2011).

Period	Cumulative Fines (in Billion Euros)	Average Fines per Delinquent Undertaking (in Million Euros)
1990 -1994	.34	1.83
1995 - 1999	.27	6
2000 - 2004	3.1	19.9
2005 - 2009	7.8	39.2
2010 - 2014	7.6	42.3
2015 - 2019	8.2	76.6

Figure 3

The second key statistic is that of fines. An ever increasing amount of fine would be a clear indication that the deterrence is just not strong enough if despite increased fines similar numbers of cartels are being detected. This is how the second statistic of the total fine being imposed becomes relevant. We have already seen that number of cartels convicted is stagnant, the fines however have increased by leaps and bounds.[54] If studied in 5 year periods, the fines increased from just over 300 million Euros in the 1990-94 period to over 3 billion Euros in the 2000-2004 period: a ten-fold leap.[55] In the 2015-2019 period, it further increased to 8 billion Euros, an impressive 2.5 fold move. This was the highest 5 yearly fine imposed in the EU. The USA in contrast imposed around 4.5 billion dollars fine in the same period.[56] These numbers look even more glaring when we take into account the fine imposed per undertaking. In 1990-94, it was under 2 million Euros, increasing to 20 million Euros in 2000-2004. It again doubled to 40 million Euros in 2010-2014, and redoubled to 80 million Euros during 2015-19. Thus, there is no denying that the size of fines in the EU have been increasing exponentially, consistent with the Becker theory that fines should be set to maximum possible penalty to achieve most cost-effective deterrence.[57]

[54] Florian Wagner-von Papp, *Compliance and Individual Sanctions in the Enforcement of Competition Law*, in COMPLIANCE AND INDIVIDUAL SANCTIONS FOR COMPETITION LAW INFRINGEMENTS (2016).
[55] European Commission, STATISTICS ON CARTEL CASES, https://ec.europa.eu/competition-policy/cartels/statistics_en.
[56] US Department of Justice, CRIMINAL ENFORCEMENT TRENDS CHARTS (2021), https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.
[57] Mitchell Polinsky and Steven Shavell, *The optimal use of fines and imprisonment*, 24(1) JOURNAL OF PUBLIC ECONOMICS 89, 99 (1984).

However, as has been established, larger fines have not led to a decrease in the number of cartels in existence, bringing into question the policy of placing sole reliance on fines.

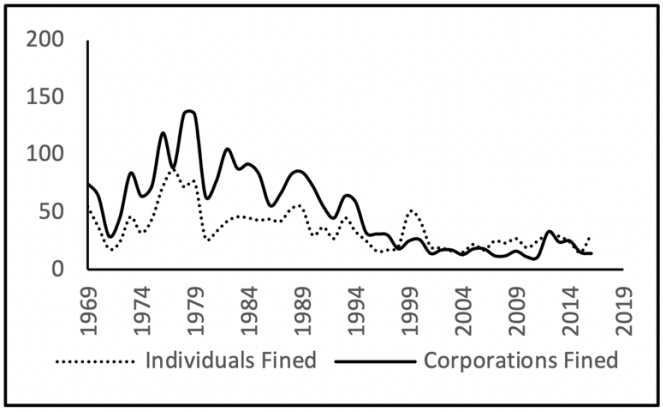

Figure 4[58]

The third statistic of note is that of the number of cartel investigations in the US. Since the paper seeks to propose that criminalisation of cartels should be undertaken, it is pertinent to display that the US has a better functioning deterrence system. While it is impossible to tell with certainty if the number of cartels in the US are in decline, but a good measure of the same is the number of cartel investigations being undertaken. The number of cartels prosecuted has shown an erratic but observable decline. While in 2012 over 16 firms were prosecuted, by 2018 it was down to 5. Similarly, the number of individuals charged has come down from 63 in 2012 to the range of 25-30 in 2018-2021 period. Similarly, a decline in the total penalty imposed has been observed. After peaking in 2015 to over 3.6 billion dollars, total fines and penalties imposed on cartels has not crossed 500 million dollars in any year, and has even been as low as 67 million dollars in 2018.

As one can observe in the Fig. 4 above, this trend is also observable in longer time-frames. The total number of individuals and corporations convicted has been in a precipitous decline after peaking in the 1970s.[59] These statistics can lead to two possible conclusions: one that probability of cartel detection has fallen, leading to reduced prosecutions and fines; or that the level of detection is the same or better but the number of actual cartels have reduced due to improving

[58] *Id*.
[59] Vivek Ghosal & Daniel Sokol, *The Rise and (Potential) Fall of U.S. Cartel Enforcement*, 2020 UNIVERSITY OF ILLINOIS LAW REVIEW 471 (2020).

deterrence. Since no significant policy change has taken place to justify the first conclusion, it makes for a valid claim that the deterrence against cartels has been increasing due to increased use of criminal penalties against individuals involved in cartels.

Taken together, these three statistics tell us a lot about the state of cartels in the EU. They continue to exist without much deterrence emanating from the rising fines, whereas in the USA, there has been a marked decline in the number of cartels, possibly due to criminal sanctions. This conclusion provides a very good reason for us to re-examine the current enforcement system and determine if it can be modified to include criminal sanctions in the form of individual fines, probation, reprimands, and in a worst case scenario, imprisonment. But to make an effective proposal on imprisonment, two hurdles must be crossed: *first*, a normative one, displaying that criminal sanction for cartel activities is justifiable; and *second*, an objective one, displaying that imprisonment can actually alter the deterrence level and that a further increase in fines is not optimal.

[4]. Can criminal sanctions for cartel activities be normatively justified?

In this section, the paper would display that criminalisation of cartel can be normatively and morally justified. Criminal justice scholar Bill Stuntz, a long-time critic of overcriminalisation and regulatory crimes, has justly argued that criminalisation should not be a recourse for mere regulatory offences but only for 'core' harm based offences.[60] To achieve the high-threshold of justifying the criminalisation of cartel activities, we must thus prove harm and display that such harm attacks the very 'core' of our being. For this, we must search for answers in the philosophy of criminal law and find out what makes crime a crime, and if cartel activities fit the bill. To start with the 'Harm Principle', as remarked by JS Mill, "*the only purpose for which power can be rightfully exercised over any member of a civilized community*, *against his will, is to prevent harm to others*".[61] It is no doubt then that criminal justice systems in most societies seek to control behaviour which may cause harm to others.[62] Societies proceed with an assumption that as a whole they want less incidents of certain harmful activities. Any individual who engages in such an

[60] D.C. Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ (2012).
[61] JS Mill, ON LIBERTY 223–4 (1859).
[62] Antony Duff, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 87 (2007).

activity then is deviant from social norms. Criminal procedure seeks to ensure that such deviant individuals are approbated so as to deter them and others from engaging in such activities in the future.[63]

This discussion points us towards an observable reality: *crimes are those activities which a society considers to be deviant and seeks to punish, in order to control individuals who plan on committing such activities*. However, this proposition has one difficulty: how do we identify if a certain activity is actually considered deviant enough by the entire society so as to be deserving of criminal sanctions? With some activities like murder or theft, which are so shocking that almost the entirety of a society considers them as deviant, it is easy to find an answer. The source of such shock lies not in morality but in the fact that such activities have visible victims. This generates a fear amongst individuals that they could also be victims of such activities.[64] No society faces trouble raising the consensus to criminalize such activities.

Such a straightforward analysis may not, however, be possible for activities which do not have a visible victim or are victimless – like cartelisation. These activities do not generally shock the entire society. For instance, we do not criminalise public smoking even though we are aware of the huge social costs they impose on the society, as the moral shock is absent. Thus, normative justification of criminalisation requires harm, but it also needs something more than that. Two things can be highlighted in this regard: *first*, actual public opinion; and *second*, an abstract element of injustice.

The second element was highlighted by JS Mill when he argued that the society feels compelled to criminalise a harm only when, "*means have been employed which is contrary to the general interest to permit—namely fraud or treachery, and force*".[65] This abstract element came out even better in Rawls' 'veil of ignorance'. He used a hypothetical 'veil of ignorance' to identify what restrictions would generally be accepted by most humans in a given society, in a hypothetical pre-moral position if we were to be ignorant of the situations of our socio-economic existence.[66]

[63] Mathieu Deflem, *Deviance and Social Control*, in THE HANDBOOK OF DEVIANCE 34 (2015).
[64] Robert Nozick, ANARCHY, STATE AND UTOPIA 65-71 (1974).
[65] Mill, *supra* note 61.
[66] John Rawls, A THEORY OF JUSTICE (1999).

According to this understanding, an activity would deserve criminal sanctions if it were to not just be harmful but also unjust and fraudulent. Using this understanding as the backdrop, this section proffers three arguments: *first*, cartels cause harm; *second*, there is sufficient public disapproval to criminalise it; and *third*, cartel activities involve an element of injustice and fraud.

[4.1]. Cartels Cause Harm

Cartels impose outsized costs on the society. These costs are much larger than what we can ever recover from the responsible firms.[67] There are two limbs to this argument: *first*, the welfare loss imposed by cartels is larger than the profits they may gain; and *second*, in any case the profits earned by cartels as a whole tend to be much larger than the fines currently being imposed on them.

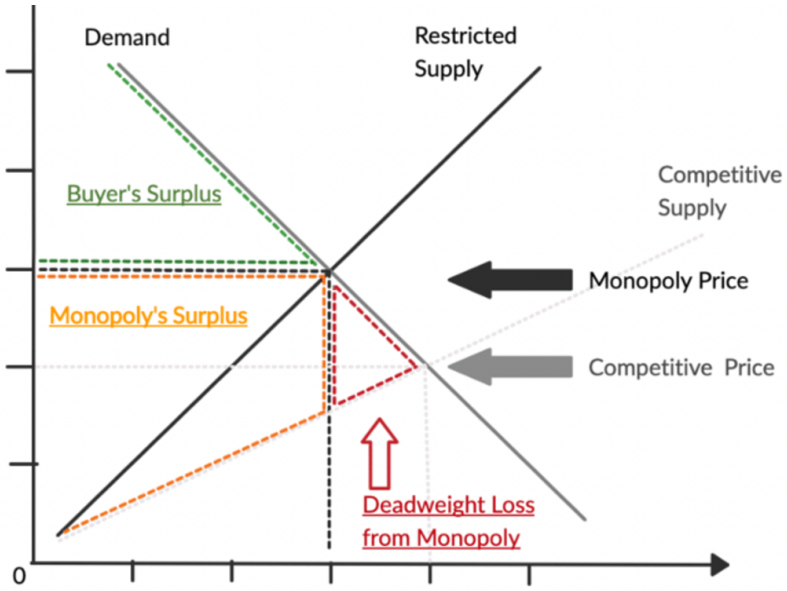

Figure 5[68]

Cartels cause immense loss of welfare to the broader society. In simple terms, cartelisation is an attempt to raise the market prices to monopoly levels, away from competitive levels, even as oligopolistic number of firms exist. As can be observed in Fig. 5 above, this helps transfer wealth from the consumers (and at times, from the government) to the cartelising firms. However, when this transfer takes place, deadweight loss is generated, which is a cost borne by the society at

[67] G.J. Werden & M.J. Simon, *Why Price Fixers Should go to Prison*, 57 ANTITRUST BULLETIN 569, 577 (1987); CORPORATE GOVERNANCE AND COLLUSIVE BEHAVIOUR (Paolo Buccirossi and Giancarlo Spagnolo, CEPR Discussion Paper No. DP6349, 2007).
[68] J.W. Coleman, *State Energy Cartels*, 42(6) CARDOZO LAW REVIEW 2233, 2284 (2020).

large.[69] In economic terms, this is the cost of foregone consumption by consumers. It also includes two other costs. One is the cost of maintaining the cartel and coordinating its organisation.[70] The other cost is that of the loss to dynamic efficiency of the cartelised industry.[71] After all, if the firms are able to cartelise and increase their income without being subjected to competitive forces, they are very likely to spend less on innovation and research, and dynamic improvement of their competitive abilities. These three costs taken together represent wasted resources that could have been used efficiently.

In reality, however, this deadweight loss is much larger because of the scarce resources a society has. This scarce resource has to be allocated to various economic activities and cartels distort this allocation, leading to an allocative inefficiency.[72] When prices of a certain product increase, the society has to forego the consumption not only of that product but also of other products. This is especially true if the product which is subject of cartel prices is an essential product or has limited price elasticity. In that case, it is impossible to forego its consumption, distorting resource allocation in a significant way. A case of note is that of the European Truck Cartel which, over the course of 14 years, worked to increase the prices of trucks which is the very basis of road transport industry and the demand for which is not very elastic. This cartel ended up distorting the entire economy by increasing the cost of commercial transport and by limiting the resources available to invest into other productive sectors. As per one study, it caused allocative and deadweight losses to the tune of 15.5 billion Euros, this is in addition to the additional profits the firms must have earned through the overcharge.[73] The fines on the other hand amounted to

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[69] George Symeonidis, *Profitability and Welfare: Theory and Evidence*, 145 JOURNAL OF ECONOMIC BEHAVIOR & ORGANIZATION 530, 545 (2018); The OECD best summarised this economic argument in its report on Hard Core Cartels, *supra* note 1: "*Cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises price above the competitive level and reduces output. Consumers (which include businesses and governments) choose either not to pay the higher price for some or all of the cartelised product that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects harm efficiency in a market economy*."

[70] M. Schiffbauer and S. Ospina, *Competition and Firm Productivity*, 10/67 INTERNATIONAL MONETARY FUND WORKING PAPERS (2010).

[71] P. Aghion et al., *Competition and Innovation: An Inverted-U Relationship*, 120(2) QUARTERLY JOURNAL OF ECONOMICS 701, 728 (2005).

[72] A.C. Harberger, *Monopoly and Resource Allocation*, 44(2) AMERICAN ECONOMIC REVIEW 77, 87 (1954); H. Leibenstein, *Allocative Efficiency and X-Efficiency*, 56 AMERICAN ECONOMIC REVIEW 392, 415 (1966).

[73] Christian Beyer et al., *The Welfare Implications of the European Trucks Cartel*, 55 INTERECONOMICS 120, 126 (2020).

2.93 billion Euros.[74] While private damage claims are still being made in the courts, they are unlikely to account for the entire welfare loss suffered by the society. And this is a case entailing the biggest fine ever imposed by the Commission on a Cartel. In other cases, it is possible that the gap between fines and damages imposed and welfare loss caused is even bigger.

This second argument goes a step further and claims that it is not just that we are unable to impose enough fines on cartels to cover the net welfare loss, but that the fines do not even neutralise the profits earned by cartels as a totality. While some of the top cartels like the Truck Cartel had overcharges of approximately 10%[75], most cartels have much larger overcharges. Two sample cases are that of the global citric acid cartel and the global graphite electrode cartel, both fined by the EC in 2001.[76] The first, as per the OECD, "*raised the prices by as much as 30% and collected overcharges estimated at almost $1.5 billion*"; and the second, "*raised the price of graphite electrodes 50% in various markets, and extracted monopoly profits on an estimated $7 billion in world-wide sales*".[77] Was the Commission able to get this extra profits back in the form of fine? The citric cartel paid a fine of merely 135 million euros and the electrode cartel a fine of 218.8 million euros.[78] These fines in no way recover the estimated profits that these firms were able to earn.

If we were to extend this discussion and look not just at individual cartel profits, but profits of all the cartels as a whole, they are going to be much larger. Most studies put the detection rate of cartels at approximately 15-25%. In the context of EU, Combe, Monnier and Legal estimated the rate of detection to be between 12.9 and 13.3%.[79] In the American context, Bryant and Eckard estimated the probability of detection to be between 13 and 17%.[80] Ginsburg & Wright estimate

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[74] *Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel*, EUROPEAN COMMISSION (July 19, 2016), https://ec.europa.eu/commission/presscorner/detail/ro/IP_16_2582.
[75] *Trucks*, CARTEL DAMAGE CLAIMS, https://carteldamageclaims.com/cases/on-going-cases/.
[76] OECD, *supra* note 1.
[77] OECD, *supra* note 1.
[78] *EU fines price-fixing citric acid cartel*, FOOD NAVIGATOR (July 18, 2008), https://www.foodnavigator.com/Article/2001/12/06/EU-fines-price-fixing-citric-acid-cartel; *Commission fines eight companies in graphite electrode cartel*, EUROPEAN COMMISSION (July 18, 2001), https://ec.europa.eu/commission/presscorner/detail/en/IP_01_1010.
[79] Combe, *supra* note 50.
[80] P.G. Bryant & E.W. Eckard, *Price Fixing: The Probability of Getting Caught*, 73(3) REVIEW OF ECONOMICS AND STATISTICS 531, 536 (1991).

the detection rate to be around 25% in both the EU and the US.[81] Assuming that around 1/4th of all the cartels are detected and that the Commission is barely able to fine these cartels around 50% of the additional profits they earned, cartels as a whole are able to get away with 7/8th of the additional profits they earn.

Connor and Lande have estimated that cartels overcharge anywhere between 28 and 54 percent.[82] Smuda, on the other hand, presented a more conservative mean of 20.7%.[83] Combe and Monnier agree with a similar rate of 20% overcharge.[84] Going with the conservative estimate of 20%, it can be claimed that cartels as a whole make the society pay approximately 17.5% extra for the goods and services offered by cartelised industries.[85] This is a rather big number and causes incalculable harm to the society at large. A lot of everyday people have less money than they would, each time they engage with one of the cartelised firms. This is not very different from being defrauded at the hands of a multi-level marketing scheme or a securities fraud. This harm, however, is victimless, and thus, may not appear as shocking as someone being murdered or someone being defrauded. It does not result in consequences like people losing their life deposits due a security fraudster, and hence, and does not easily fall in the bracket of criminal activities. But does the general public agree with such an assessment? Or do they see cartel activities as akin to other categories of crime?

[4.2]. Public Opinion

The second limb of the normative justification is to show that there is sufficient public resentment against cartel activities to justify their criminalisation. After all, it is what the society at large thinks of an activity which provides a basis for its criminalisation, even if such an assessment may not always be correct (e.g. criminalisation of homosexuality, of marijuana

[81] Douglas Ginsburg and Joshua Wright, *Antitrust Sanctions*, 6(2) GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES (2010).
[82] J. Connor & R. Lande, *How High Do Cartels Raise Prices?*, 80 TULANE LAW REVIEW 513 (2005); J. Connor, *Overcharges: Legal and Economic Evidence*, 22 RESEARCH IN LAW AND ECONOMICS 59 (2007).
[83] E. Combe & C. Monnier, *Fines Against Hard Core Cartels in Europe: The Myth of Over-Enforcement*, 56(2) ANTITRUST BULLETIN 235 (2011).
[84] F. Smuda, *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, 10(1) JOURNAL OF COMPETITION LAW AND ECONOMICS 63 (2014).
[85] 17.5% is derived by multiplying 20% overcharge with 7/8 probability that they would get to keep the overcharge.

consumption, and of refugee influx).[86] While the number of surveys are limited in number, a major study conducted by the US-based Centre for Competition Policy in 2014 studied public opinion in four jurisdictions: the US, Germany, the UK, and Italy.[87] It found that a large majority of the public across these four jurisdictions agreed with the following assessments: *first*, they agreed that secretive collusion by cartelists has a negative consequence on consumers by leading to increased prices; *second*, they opined that secretive price fixing was immoral, dishonest, and criminal; *third*, they were of the understanding that price fixing practices are widespread across business sectors; *fourth*, they agreed that cartel activities must be punished in some form; and *fifth*, individuals involved in price fixing deserve some form of criminal punishment.[88]

The more or less consistent results across the four countries was shocking as they are different stages of criminalising cartels: while the US has done so for a century, the UK is still making an attempt to effectively criminalise, and Germany and Italy do not criminalise general cartel activities. Take for example, a question on whether cartelisation is a more or as serious an offence compared to pure criminal fraud or theft. Across the four jurisdictions, over 90% of the people agreed with this statement.[89] The only explanation may be an instinctive human thought process and social conditioning, which identifies dishonesty and deception as a major delinquency. Another study which was conducted in the Netherlands, also found that cartel activities were seen as serious offences by the Dutch public. Most of them were aware that cartels are illegal, considered them to be immoral, and agreed that they have negative effect on social welfare.[90] On the basis of these studies, it is safe to assume that the public opinion favours some form of criminal sanctions for cartelists. However, further sociological research in this regard may be required to concretize this claim. In any case, our normative argument has a third and stronger pillar to stand on: that cartels are vehicles of injustice in our market-based societies.

[4.3]. The Abstract Element: Are Cartels Unjust?

[86] H.M. Hart., *The Aims of the Criminal Law*, 23 LAW & CONTEMPORARY PROBLEMS 401 (1958); Jerome Hall, PRINCIPLES OF CRIMINAL LAW 157 (1947).
[87] Andreas Stephan, SURVEY OF PUBLIC ATTITUDES TO PRICE FIXING IN THE UK, GERMANY, ITALY AND THE USA (Centre for Competition Policy, Working Paper No. 15-8, 2015).
[88] *Id*.
[89] Stephan, *supra* note 87.
[90] P.T. Dijkstra & L.v. Stekelenburg, *Public Attitude in the Netherlands towards Cartels in Comparison to Other Economic Infringements*, 17(3) JOURNAL OF COMPETITION LAW & ECONOMICS 620, 641 (2021).

Posner has argued that we cannot allow abstract moral reasoning to draft antitrust laws. According to him, it would lead to antitrust's collapse into, "*a weak field, a field in disarray, a field in which consensus is impossible to achieve in our society*".[91] However, criminalisation cannot be based simply on law and economics, it has to be complemented with a moral reasoning. As per Simester and Von Hirsch, criminal law 'speaks with a moral voice.[92] Prof. Lewisch has also argued that criminal sanctions are "*the most powerful and most harmful legal remedy available*" and should be reserved as an *ultima ratio*.[93] This section would show that significant injustice is meted out by cartel activities and they carry an extraordinary level of dishonesty. Influence is drawn from the moral limits to criminal law as can be gleaned from the works of Mill and Rawls, as mentioned earlier, and of Feinberg, who has displayed that only those harms which affect our most fundamental interests are chargeable with criminal law's coercive powers.[94] While it may be argued that non-criminal institutional remedies can help protect the interests subverted by cartel activities, this paper shall present arguments to the contrary. This section has three bases: *first*, cartel activities are inherently deceptive and fraudulent; *second*, cartel activities affect the most fundamental element of our society: free market; and *third*, criminal sanction is necessary to appropriately penalise, as fines and damages can only satisfy a section of the affected individuals.

[4.3.1]. Cartels are inherently deceptive and fraudulent in nature

This is what most people surveyed in the studies mentioned in section 4.2 believe. That is a reasonable public opinion because usually the cartel offence arises out of an urge to steal, deceive, and cheat. As Blackstone noted in his commentary, "*an unlawful act is consequent upon such vicious will*".[95] Scholars identify two constituents to inherent wrongfulness of an activity: culpability and the nature of the activity.[96] Culpability refers to the degree to which the perpetrator is delinquent and their state of mind when they committed the questionable actions. Nature of the activity refers to the immoral content of the activity itself and if on its own it is dishonourable.

[91] R.A. Posner, *Law and Economics Is Moral*, 24 VALPARAISO UNIVERSITY LAW REVIEW 163, 166 (1990).
[92] A.P. Simester & A.v. Hirsch, CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALIZATION (2011).
[93] Lewisch, *supra* note 8.
[94] Joel Feinberg, HARM TO OTHERS 11 (1984); Also see, Joel Feiberg, OFFENSE TO OTHERS (1985).
[95] Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUMBIA LAW REVIEW 55 (1933).
[96] Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses - A Comment on Dotterweich and Park*, 28 UCLA LAW REVIEW 463 (1981).

On culpability of the individuals involved, there is no doubt that those engaging in cartels are not gullible or uninformed individuals. They are not tricked or coerced into taking part in elaborate negotiations, brainstorming the numbers, implementing an organisation-wide pricing policy, and swearing into an oath of secrecy.[97] They are more often than not highly-paid and well-advised individuals with a choice not to engage in an activity that causes society-wide harm. The presence of intent, free will to steal, and cause harm makes those engaging in cartel activities culpable. A host of similar activities, whether it be securities fraud or embezzlement or bribery, are all criminalised and there is little evidence that cartel conspiracies are any different. In fact, there is ample evidence from many cartel prosecutions that cartelists go through significant troubles to devise sinister schemes to avoid detections and disrupt potential investigations.[98] Strategies such as hiring cryptographers and experts to advise on undetectable price-fixing or bid-rigging designs are common.[99] Thus, it can be said that there is sufficient culpability of the actors of a cartel scheme.

Coming to the nature of the activity itself, some have argued that cartelisation is nothing more than "*aggressive business behavior*".[100] Kadish argues that the nature of cartel activities lacks the immoral content which core crimes carry. It is not akin to theft as the victims are not subjected to a feeling of having lost their possessions. It is not similar to robbery as there is no use of force. Unlike most crimes, there is no invasion into bodily privacy or physical safety.[101] However, the deficit in these arguments is that the ambit of core crimes is broader than those where the victims are a subject of mental or physical trauma. Since industrial revolution, almost all societies have deemed it just to criminalise many victimless crimes which have broad welfare consequences.[102] In common law countries, the emergence of corporate criminal liability and culpability of

[97] OECD, *supra* note 1, at 15; OECD, FIGHTING HARD CORE CARTELS: HARM, EFFECTIVE SANCTIONS AND LENIENCY PROGRAMMES 8 (2002) [which noted cartel members' efforts to keep their activities secret, their burning bid files in bonfires and hiding computer files in eaves of one employee's grandmother's house].
[98] Christopher Harding & Jennifer Edwards, CARTEL CRIMINALITY: THE MYTHOLOGY AND PATHOLOGY OF BUSINESS COLLUSION 20 (2015).
[99] M.B. Clinard & Richard Quinney, CRIMINAL BEHAVIOR SYSTEMS (1967).
[100] S.H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 UNIVERSITY OF CHICAGO LAW REVIEW 423, 429 (1963)
[101] *Id*.
[102] K.A. Swanson, *Mens Rea Alive and Well: Limiting Public Welfare Offenses-In Re C.R.M.*, 28 WILLIAM MITCHELL LAW REVIEW 1265, 1267 (2002); Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 UNIVERSITY OF LOUISVILLE LAW REVIEW 1 (2007).

responsible officers was a natural progression of the strict liability principles which had emerged in the 19th century.[103] While Europe did not see a similar exponential growth in welfare crimes in the early days, here too a host of corporate activities affecting social welfare are criminalised.[104] White-collar crimes of corruption or money laundering do not have an immediate victim either but have been deemed to be criminal.[105]

The most recent welfare crime, still in evolution, is the environmental crime.[106] The Commission has already submitted a proposal on "*the protection of the environment through criminal law and replacing Directive 2008/99/EC*" to the European Parliament. There is no immediate victim of manipulating the emissions of vehicles you make or of causing deforestation in a region. But we still deem the negative effects of these practices on the society to be high enough to make them immoral and criminal.[107] In fact, most corporate practices affecting the environment are done with the same pursuit as those for cartel activities: bigger profits. Thus, this paper proffers that the nature of the proposed Cartel offence is similar to other welfare crimes already on the statute books. By transferring wealth, by leaving a lot of people poorer, by reducing consumption opportunities, by disturbing resource allocation in the economy, by harming honest businesses, by promoting a corporate culture where sinisterism and conspiracies are rewarded, by abusing state resources, by creating unfair rules in the market, and most importantly, by intently deceiving the general public, the nature of the cartel offence is inherently immoral, unjust and deserves our social disapproval.

[4.3.2]. Cartel activities affect the most fundamental element of our society: free market

While in the economic analysis of law criminalisation is often thought of as a tool to create deterrence, the apparent purpose of criminalisation is much larger. Historically, criminal sanctions

[103] S.M. Wolf, *Finding An Environmental Felon Under The Corporate Veil: The Responsible Corporate Officer Doctrine And RCRA*, 9(1) JOURNAL OF LAND USE & ENVIRONMENTAL LAW 1, 58 (1993); For e.g., see, *Regina v. Woodrow*, [1846] 153 ER 907 (adulterated tobacco); *R v. Stephens*, (1884) 14 QBD 273 (river obstruction).
[104] Nicholas Lord et al., EUROPEAN WHITE-COLLAR CRIME: EXPLORING THE NATURE OF EUROPEAN REALITIES (2021).
[105] Karin van Wingerde and Anna Merz, *Responding to Money Laundering across Europe: What We Know and What We Risk*, in EUROPEAN WHITE-COLLAR CRIME: EXPLORING THE NATURE OF EUROPEAN REALITIES 103, 122 (2021); Nicholas Lord et al., *Corruption and Comparative Analyses across Europe: Developing New Research Traditions*, in EUROPEAN WHITE-COLLAR CRIME: EXPLORING THE NATURE OF EUROPEAN REALITIES 55-72 (2021).
[106] *The EU steps nearer to tougher regime to fight environmental crime*, Osborne Clarke (Jan. 11, 2022), https://www.osborneclarke.com/insights/eu-steps-nearer-tougher-regime-fight-environmental-crime.
[107] Michael G. Faure & Günter Heine, CRIMINAL PENALTIES IN EU MEMBER STATES' ENVIRONMENTAL LAW (2022).

were seen as retributive: an eye for an eye, a tooth for a tooth.[108] Recent scholars see its right purpose to be reformatory, to ensure that the deviant individuals are reformed before re-joining the society.[109] Taken together, whatever the rightful purpose be, criminal justice systems in modern society are meant "*to apply the rule of law as a means of providing social stability*".[110] Social stability is what concerns most people when they think of crimes. This stability is specific to each society and its physical, temporal, and moral situation.[111] Social stability in post-industrial societies, as per Hayek, is a result of market competition and network coordination.[112] Durkheim too argued that social cohesion and cooperation is a result of the division of labour and presence of market forces.[113] Adam Smith's indivisible hand also refers to market forces as the primary tool of social organisation today.[114] As Ross theorized in 1907, a variety of economic sins were bound to emerge in post-industrial society and have to be treated with the same attitude as we dealt physical harms.[115] Taken together, the work of these theorists and many others support a claim that the market and its competitive forces are essential to our social stability and any attempt to subvert them should be treated with utmost reaction.

However, competitive markets are not just essential from a sociological point of view. If looked at from the perspective of justice and fairness too they are important as they are an essential redistributive mechanism. Free markets, by creating opportunities, by providing choice, and by creating competitive prices ensure that people can exchange their intellect, resources and abilities at the best possible prices. Looking at it through Rawls 'Veil of Ignorance' one could pose a question as to whether one would want to be on the losing side (whether as a consumer or a firm not participating in the cartel) if the market is unfair and uncompetitive. The obvious answer would be that every person behind this veil would support the protection of the voluntary nature of the transaction, unadulterated by price-fixing practices. However, Rawls' theory has a higher element:

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[108] BOOK OF EXODUS, 21:23–27.
[109] Attapol Kuanliang, *Reformatory Movement*, in THE ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (2014).
[110] R.D. Hunter & M.L. Dantzker, CRIME AND CRIMINALITY: CAUSES AND CONSEQUENCES 13 (2012).
[111] S. Trevaskes et al., *Stability and the Law*, in THE POLITICS OF LAW AND STABILITY IN CHINA 1-18 (2014).
[112] Jack Birner & Ragip Ege, *Two Views on Social Stability: An Unsettled Question*, 58(4) AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 749, 780 (1999).
[113] Émile Durkheim, THE DIVISION OF LABOUR IN SOCIETY (1893).
[114] Emma Rothschild, *Adam Smith and the Invisible Hand*, 84(2) AMERICAN ECONOMIC REVIEW 319, 322 (1994).
[115] E.A. Ross, SIN AND SOCIETY: AN ANALYSIS OF LATTER-DAY INEQUITY (1907).

it seeks to balance the need for liberty and the attainment of equality.[116] The free market ensures, to a certain extent, this goal of attaining equality. Cartels affect this fundamental element of our social stability by creating hidden rules and in the process hurt the process of ensuring fairness and justice. This provides a very strong normative justification for their criminalisation.

[4.3.3]. Fines and damages satisfy only a section of the affected individuals

Lamond has noted that criminal law is ideal for sanctioning those wrongs that the community as a whole is responsible for punishing.[117] This is the case when the victims of a crime are not able to seek justice on their own.[118] For example, one of the reasons we treat murder as a crime affecting the society at large is because the victims are not around to seek justice for themselves. This is also the case with cartel activities. While it is possible for victims to seek restitution through private enforcement, more often than not this is a very unlikely possibility for the majority of the victims. As van den Bergh has noted, the collective action problem is a major hurdle.[119] The loss to victims is widely spread and there is insufficient incentive on individual to bring costly suits.[120] Further, most victims lack the sophisticated economic evidence required to display that they have suffered injury.[121] In such a scenario, the benefits of private enforcement are not internalised by the victims. As such, the only option is to seek a social recourse to ensure that such activities are effectively deterred and sanctioned. While fines are a mechanism, as displayed in Section 1, they have not been very effective. In the next section, the paper will also argue that corporate fines have significant limitations as a standalone penalty and must be complemented with individual and corporate criminal sanctions.

[5]. The Limitations of Corporate Fines

That fines have not been deterrent enough has already been displayed in Section 3. In this section, the paper shall assert that corporate fines have certain inherent limitations as a deterrence

[116] Lars Lindblom, *In Defense of Rawlsian Fair Equality of Opportunity*, 47(2) PHILOSOPHICAL PAPERS 235, 263 (2018).
[117] G Lamond, *What is a Crime?*, 27(4) OXFORD JOURNAL OF LEGAL STUDIES 609, 621 (2007).
[118] T.S. Ulen, *The Economics of Corporate Criminal Liability*, 17(4) MANAGERIAL AND DECISION ECONOMICS 351, 362 (1996).
[119] R. Van den Bergh, *Private enforcement of European competition law and the persisting collective action problem*, 20(1) MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 12, 34 (2013).
[120] Andreas Stephan, *Does the EU's Drive for Private Enforcement of Competition Law have a Coherent Purpose?*, 37(1) UNIVERSITY OF QUEENSLAND LAW JOURNAL 154, 168 (2018).
[121] Botta, *supra* note 30.

function. It shall also propose that a combination of fines and criminal sanctions would provide the best possible deterrence effect. These arguments shall have three components: *first*, that corporate fines do not target the actual wrongdoers; *second*, that to achieve optimality fines would have to be much larger than they currently are and reach a socially-undesirable level; *third*, criminal sanctions will add an incalculable value to deterrence and limit the need to enlarge fines to socially-undesirable levels.

[5.1]. Fines and Skewed Corporate Governance: An Agency Problem

The current enforcement model of progressive fines does not take into account the issue of inferior corporate governance.[122] Most corporations are managed by a set of executives who are agents of the shareholders, the actual owners. While elaborate rules on corporate governance are in place, the presence of the agency problem is widespread and corporate governance issues are common.[123] As Clarke has shown, corporate governance rules are essentially cyclical and misplaced incentives due to self-interest of the agents find one way or the other to creep into the governance institutions.[124] Power is inherently asymmetric in bureaucratic contexts and the same is true for corporate enterprises.[125] This gives rise to moral hazards as there might be sufficient motivation for the agents to resort to anti-competitive practices, even though they might be aware that if detected it may impose costs on the firm and the owners.[126] These may be the result of managerial incentive schemes like annual profit-related bonuses or economic cycles, as there may be an incentive during economic downturns to engage in cartels to improve the baseline.[127] There is also a possibility of corporate corruption through way of personal kickbacks for taking part in cartels.[128]

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[122] Buccirossi & Spagnolo, *supra* note 67.
[123] Florence Thépot, THE INTERACTION BETWEEN COMPETITION LAW AND CORPORATE GOVERNANCE - OPENING THE 'BLACK BOX' 2019).
[124] Thomas Clarke, *Cycles of Crisis and Regulation: the enduring agency and stewardship problems of corporate governance*, 12(2) CORPORATE GOVERNANCE 153, 161 (2004).
[125] David Band, *Corporate governance: Why agency theory is not enough*, 10(4) EUROPEAN MANAGEMENT JOURNAL 453, 459 (1992).
[126] C. Argenton & EEC van Damme, OPTIMAL DETERRENCE OF ILLEGAL BEHAVIOR UNDER IMPERFECT CORPORATE GOVERNANCE (TILEC DISCUSSION PAPER NO. 53, 2014).
[127] Cseres, *supra* note 11.
[128] Andreas Stephan, *Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures*, 37(2) JOURNAL OF LAW AND SOCIETY 345, 367 (2010).

The true perpetrator of cartel activities thus are the managers who do not usually own the company or own a miniscule part. Of all the listed companies in the world, only 7% shareholding belongs to strategic individuals and corporate executives.[129] They, however, have an overwhelming majority of the decision making power. Their practices may often escape the monitoring mechanisms. In such a scenario, simply relying on corporate fines is inappropriate as it sanctions the owner-shareholders and not the managers. This is becoming especially problematic due to increasing public shareholding of corporations.

Today, 56% of shareholding in all publicly listed companies world over is owned by institutional investors (incl. pensions funds, mutual funds, insurance companies etc.) and governments, which are indirectly funded by the general public.[130] Another 27% is directly owned by retail investors and other free-floats.[131] Thus, any fine imposed on corporations, if it is actually optimal, is indirectly a fine on the general public owners but for the fault of their agents. This does not allow for the sanction to be internalised by the actual doers, limiting its deterrence effect.[132] What makes the problem worse is that voting power in most corporations is concentrated in the hands of promoters and founders, with spread-out retail and minority investors having limited control over company affairs.[133] This problem is also aggravated by the fact the corporations have limited ability to punish executives.[134] These individuals are often protected with the help of elaborate contracts, wherein not only is dismissal difficult but also comes with high costs to the corporation.[135] While the shareholders may take punitive or preventive action against the management in the form of shareholders litigation seeking damages or by firing the management. However, shareholder damage suits continue to remain a rarity in Europe and have found limited

[129] OECD, OWNERS OF THE WORLDS LISTED COMPANIES 11 (2019).
[130] *Id*.
[131] OECD, *supra* note 129.
[132] Argenton & van Damme, *supra* note 126.
[133] Dennis Leech, *Shareholder Voting Power and Corporate Governance: A Study of Large British Companies*, 27(1) NORDIC JOURNAL OF POLITICAL ECONOMY 33, 54 (2001).
[134] R.H. Lande & J.M. Connor, *Cartels As Rational Business Strategy: Crime Pays*, 34 CARDOZO LAW REVIEW 427 (2012).
[135] Ulen, *supra* note 118.

success.[136] This is due to entrenched executive power and inter-connected power relations. As such, an argument that shareholders can easily sanction executives lacks a water-tight reasoning.

[5.2]. Truly optimal fines would be socially undesirable

Optimality of fine refers to a state when each additional euro of fine results in more than a euro worth of benefit for the society at large. This means that fines would be optimal only when the expected punishment can completely neutralise the expected gain.[137] Since the expected punishment is the cost of sanction multiplied by the probability of getting caught, the actual cost of sanction must be equal to expected gain divided by the probability of getting caught.[138]

To illustrate,

> Expected gain: 100 Euros
> Expected cost of punishment (if probability of getting caught is ¼): Sanction * 1/4.
> Sanction is optimal when
> Sanction x ¼ = 100 Euros => Sanction = 100 x 4 => 400 Euros.

While it is impossible to measure the exact gain an average cartel makes and the probability of their detection, various scholars have made an attempt. As per Wils, the expected gains of a Cartel are around 20% of their actual mark-up over the course of 5 years, which is equivalent to 50% of their annual turnover; and the probability of detection has an upper-limit of 33%.[139] Thus, according to this calculation optimal fines should be somewhere around 150% of annual turnover. As per Werden, the probability of detection is around 25%, thus, increasing the optimal fines to 200% of annual turnover.[140] As has already been displayed in Section 4.1, detection rates were pegged at 15-25% by most studies. Thus, it can be concluded that an optimal fine would be equal

[136] Klaus Hopt, *Modern Company Law Problems: A European Perspective Keynote Speech*, OECD (2001); Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 BROOKLYN JOURNAL OF INTERNATIONAL LAW 843 (2012).
[137] K. Yeung, *Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective*, 23 MELBOURNE UNIVERSITY LAW REVIEW 440, 449 (1999).
[138] Whelan, *supra* note 23.
[139] Wouter Wils, *Is Criminalization of EU Competition Law the Answer?*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT 60-109 (2006).
[140] G. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5(1) EUROPEAN COMPETITION JOURNAL 19, 24 (2009).

to 200% of annual turnover: an exorbitantly large and undesirable amount of fine. Already the current cap of 10% of annual turnover is seen by many as unreasonable.[141] Further, there are concerns of many productive companies heading to bankruptcy because of enlarging fines.[142] It is one of the key reasons behind capping fines at the level of 10% of the turnover or lower, which is not enough to deter cartel activities.

[5.3]. Criminal sanctions will help cap fines at socially-desirable levels

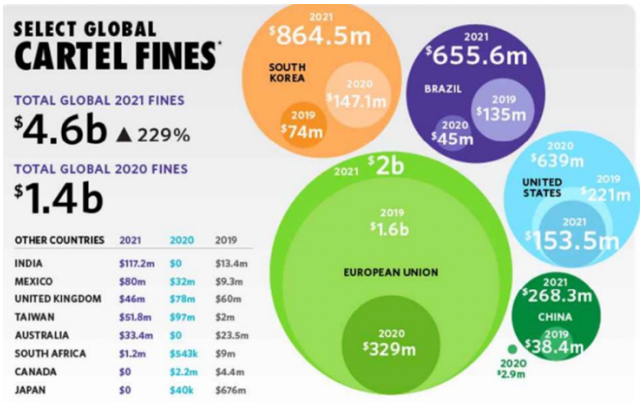

Figure 6[143]

As can be observed in Fig. 6, the fines in the EU are already leaving behind the rest of the world by a huge margin and are constantly rising. They are, as this section has shown, of limited versatility. Even though the Beckarian modelling would show that fines can indefinitely be raised, our socio-economic realities and need for stability require that the fines should have a reasonable limit.[144] Albeit this reasonable limit may not be enough to deter, given that the expected benefits of cartelising are much higher and also because the source of the implicated activities (executive-agents) and the landing of the fine's impact (shareholder-owners) do not overlap. In such a scenario, complementing fines with criminal sanctions would allow us to significantly improve the deterrence effect of the cartel enforcement system in the EU.

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[141] Jones & Harrison, *supra* note 15.
[142] Bruce Wardhaugh, CARTELS, MARKETS AND CRIME: A NORMATIVE JUSTIFICATION FOR THE CRIMINALISATION OF ECONOMIC COLLUSION 95-100 (2013).
[143] Morgan Lewis, GLOBAL CARTEL ENFORCEMENT REPORT 2021, https://www.morganlewis.com/pubs/2022/01/global-cartel-enforcement-report-2021.
[144] Paolo Buccirossi & Giancarlo Spagnolo, *Optimal Fines in the Era of Whistleblowers - Should Price Fixers Still Go to Prison?*, in THE POLITICAL ECONOMY OF ANTITRUST 81, 107-08 (2007).

While an argument may be presented that deterrence can also be created using personal administrative sanctions against the executives, instead of criminal sanctions, there are two obstacles to this argument. First, as mentioned earlier, the deterrence effect of criminal sanctions is indefinite, whereas administrative fines are easy to handle for highly places executives. This is especially true when they have the security of directors and officers insurance.[145] Second, fines on executives too would have to be prohibitively high for it to be effective, when it is possible that they may be adequately compensated for any fine by favourable employment contracts.[146] As such, fines alone may not be sufficient.

Criminal sanctions, as has been noted many times, have incalculable costs for most white-collared individuals. They entail costly restrictions on liberty, they have reputational costs, and they significantly affect career prospects. This means that the cost of punishment increases much beyond just the economic costs and creates a strong deterrence effect. In addition, criminal sanctions on the 'directing minds and will' who got the company into a cartel will ensure that the crime and punishment are congruent: the one who commits it is the one who is punished. This, on its own, will improve the deterrence. Further, as displayed in section 3, the US is already having a slow-down in cartel activities due to its penal sanctions. As per one study of antitrust practitioners in the US executives, the threat of imprisonment and criminal sanctions had the biggest deterrent effect on their clients. Fines, in fact, were the third main instrument, preceded by the threat of private damage suits. These facts, taken together, show that criminal sanctions make for an ideal tool to use and mere reliance on fines is not ideal.

[6]. The Challenge of Criminalisation: Laying Down Some Principles

The paper has up until this point tried to justify its hypothesis that criminalisation of cartel enforcement should take place. Often, however, when a strong policy proposal is made it is

[145] Nancy R. Mansfield, Joan T.A. Gabel, Kathleen A. McCullough, and Stephen G. Fier, *The Shocking Impact of Corporate Scandal on Directors' and Officers' Liability*, 20 U. MIA BUS. L. REV. 211 (2012)
[146] Peter Henning, *Why It Is Getting Harder to Prosecute Executives for Corporate Misconduct*, COLUMBIA LAW SCHOOL BLUE SKY BLOG (June 13, 2017), https://clsbluesky.law.columbia.edu/2017/06/13/why-it-is-getting-harder-to-prosecute-executives-for-corporate-misconduct/; James Stewart, *In Corporate Crimes, Individual Accountability Is Elusive*, THE NEW YORK TIMES (Feb. 19, 2015), https://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html.

pertinent to follow the principle of Occam's Razor. That is to say, we should use state power to restrict liberties only to the extent it is necessary, and in accordance with basic rule of law principles. If the restraints are too arduous, extreme, and common-place, it is very likely that good executives would avoid working within the EU and management quality may downgrade. Three principles can be highlighted in this regard.

First, that cartel crimes should not have an omnibus definition. Four different types of cartel activities can be identified and must be differentiated in how they are sanctioned[147]: first, one where the customer is duly informed about a price-fixing agreement. In such a case there is no crime because the intent to deceive is absent and there is no element of secrecy.[148] Second, where there is complete secrecy and a price-fixing agreement is carried out with mutual consent between various competitors. This certainly qualifies as a 'hardcore cartel' and those involved in negotiating the agreement deserve criminal sanctions of varying levels as per their role in the scheme. Third, where some of the competitors were forced to join the cartel through use of force, coercion or fraud. In this case, while the officials of the victimised company are free of any liability, the rest of the individuals have committed an even graver crime and deserve a higher degree of punishment. Fourth, one where a party was aware of the cartelisation but did not report it to the authorities.[149] Any attempt at criminalisation must be cognizant of the various cartel activities and accordingly create distinct categories of cartel crimes.

Second, criminalisation should have a strong basis in procedural fairness and cannot be implemented by the Commission. The Commission, given its administrative nature, lacks separation of powers.[150] It has legislative powers, investigative powers, and adjudicatory powers. This is not a particular problem with civil fines, but when it comes to criminal sanctions, a strict separation of powers in these 3 types of functions is important to ensure due process and justice.[151] Thus, any attempt at criminalisation at EU-wide level has to necessarily start at national levels, in

[147] *See*, *Norris v Government of the United States*, [2010] UKSC 9.
[148] *See for instance*, 'customer notification' exclusion in the UK law at Sec. 30, Enterprise Act (2002).
[149] Swaine, *supra* note 18.
[150] Bernhard Ganglmair & Andrea Günster, *Separation of Powers: The Case of Antitrust*, SSRN ELECTRONIC JOURNAL (2011).
[151] Cristina Teleki, DUE PROCESS AND FAIR TRIAL IN EU COMPETITION LAW 1-26 (2021).

accordance with due process and human rights standards.[152] This would be compliant with the Lisbon treaty, which to a great extent nationalised criminal enforcement measures.[153] The two processes of civil and criminal investigations may run parallelly but should be independent of each other.

One may argue that this leads to 'double jeopardy', since the same activity is being punished twice: once, an administrative penalty in the form of fine; and second, criminal penalty under national criminal laws. This is an important issue since it goes to the very root of due process and implicates Art. 50 of the Charter of Fundamental Rights of the European Union ("CFREU"), which protects against double jeopardy. The ECJ rendered a clear position on this matter this year in its simultaneous judgements in *bpost SA* v. *Commission*[154] and *Bundeswettbewerbsbehörde* v. *Nordzucker*.[155] It agreed that administrative actions under competition laws are covered under double jeopardy. However, it went on to hold that parallel proceedings under different legislations, having distinct but complementary objectives and processes do not violate double jeopardy.[156] Thus, a distinct, parallel, and complementary proceeding under national criminal legislations would not be give rise to the problem of double jeopardy.

Third, parallel investigations must have a mutually linked lenience programme. As has already been witnessed, the lack of a common leniency programme for private damages and public fines has reduced the number of leniency applications.[157] A similar outcome would result if leniency applicants do not get respite from criminal sanctions in addition to civil fines. This would plummet detection rates significantly since almost 2/3rd cartels are detected through leniency applications.[158] This is undesirable from a deterrence perspective, and hence, a leniency exception must be present in legislations criminalising cartel crimes.

[7]. Conclusion and Some After Thoughts

[152] Peter Whelan, THE CRIMINALIZATION OF EUROPEAN CARTEL ENFORCEMENT: THEORETICAL, LEGAL, AND PRACTICAL CHALLENGES 34-40 (2014).
[153] Peter Csonka & Oliver Landwehr, *10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?*, 4 EUCRIM 261-267 (2019).
[154] Case C-117/20 (2022).
[155] Case C-151/20 (2022).
[156] para 53-56, *bPost*, Case C-117/20; para 50-57, *Nordzucker*, Case C-151/20.
[157] *See* Section 2 above.
[158] Friederiszick & Maier-Rigaud, *supra* note 47.

There is no doubt that criminalisation is a double-edged sword. Every time we criminalise an activity we impinge on individual liberty and take a step closer to a police state. As Dr. Ferris in Ayn Rand's Atlas Shrugged observed, "*when one declares so many things to be a crime that it becomes impossible for men to live without breaking laws*".[159] This is not the proposal of this paper. Overcriminalisation comes with many costs for the society, whether it be the cost of maintaining prisons, of creating costly investigative agencies, and of the mental cost to individuals at risk of wrongful sanctions.[160] In some societies, where democracies are non-functional and police power lacks due procedure, a criminal sanction for cartels cannot normatively justified for the risk of wrongful prosecution would be too large.

That is not the case with the European Union. The courts are a powerful and effective check on the executive power. Procedural rights are strong and human rights standards at the pan-EU level are highly progressive. In such a scenario, an activity which is imposing great harms on the society, is challenging its very basis (of fair markets), and is morally unjust deserves to be duly punished. As has been displayed, fines alone have not sufficiently deterred cartel activities. A lot of planning and funds are being invested into creating effective and profitable cartel schemes. This must be stopped. Criminal sanctions, which are normatively justified for wilful and harmful activities like this, are the right tool. They would allow us to control the ever-rising fines which, as has been displayed in Section 5, are becoming socially undesirable by imposing high-costs on shareholder-owners and not effectively sanctioning the executive-agents.

The paper recognizes that this is not going to be an easy endeavour. As can be gauged from the British experience, criminal sanctions are not easy to implement. In fact, some countries like Austria, which had criminal sanctions for cartels abolished it due to practical difficulties in implementation. Unlike the USA, which has had cartel crimes since over a century and has the jurisprudence required to carry out due adjudication, European countries will face many legal and procedural obstacles. This becomes a bigger problem since criminalisation at the EU-wide level is only possible through consensus at individual country level. This is a tall-order and ridden with political challenges. However, practical difficulties have to be contented with when the question

[159] Ayn Rand, ATLAS SHRUGGED 411 (1957).
[160] Erik Luna, *The Overcriminalization Phenomenon*, 54 AMERICAN UNIVERSITY LAW REVIEW 703, 719–39 (2005).

is about hundreds of billions of Euros (if not trillions) worth of harm to the public and creation of an inequal market with unfair rules. "*A crime is born in the gap between the morality of society and that of the individual*", wrote the author Håkan Nesser.[161] This paper believes that such a gap exists in case of cartel crimes.

[161] Håkan Nesser, HOUR OF THE WOLF (1998).

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