The EU prohibition on cartel activity can be found in the Treaty on the Functioning of the European Union Article 101(1), a provision of EU law that is enforced by the European Commission and the national competition authorities and courts of the EU Member States. While the Commission can impose fines on undertakings for violating the cartel prohibition, it cannot impose criminal sanctions. This is in line with the general legal European culture concerning the enforcement of cartel law. Indeed, within Europe there is a tradition of avoiding the use of personal criminal punishment (which in this article is defined restrictively as the imposition of a custodial sentence) to enforce cartel law. Over the last decade or so, however, things have started to change. In particular, considerable debate has been fostered concerning the employment of criminal cartel sanctions and the subjecting of convicted cartelists to time in prison as punishment for their actions.

A number of institutions have contributed to this debate, including the Competition Committee of the Organization for Economic Co-operation and Development (OECD) and the Antitrust Division of the U.S. Department of Justice. The OECD, for example, in its “Second Cartel Report,” advised its Member States (the majority of which are EU Member States) to consider: (a) introducing and imposing antitrust sanctions against natural persons; and (b) introducing criminal sanctions in cartel cases in jurisdictions where it would...
be consistent with social and legal norms. The DOJ, through its policy speeches, has consistently communicated the message that “the most effective deterrent for hard core cartel activity, such as price fixing, bid rigging, and allocation agreements, is stiff prison sentences.” Due in part at least to these particular efforts, as well as the efforts of a number of academics, it seems that “[c]ountries in virtually every region of the world” have criminalized cartel activity. Europe is no exception and some EU Member States have indeed criminalized their cartel prohibitions or seriously thought about doing so.

The “European cartel criminalization debate” has raised a number of controversial and difficult issues. These issues include: the necessity and the appropriateness of personal criminal antitrust sanctions; the potential for differences in attitude concerning the criminality of cartel activity; the impact of human rights on the achievement of the objectives of cartel criminalization; the competence of EU-level institutions to mandate the use of

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10 See, e.g., Donald I. Baker, An Enduring Antitrust Divide Across the Atlantic over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists, 5 EUR. C OMPETITION J. 145 (2009); Andreas Stephan, Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain, 5 C OMPETITION L. R EV. 123 (2008).

11 See, e.g., S. Parkinson, C RIMINALIZING CARTELS, supra note 8, at 217.
individual criminal sanctions;\textsuperscript{12} the effect of cartel criminalization on the exchange of information within the European Competition Network;\textsuperscript{13} the international aspects of antitrust criminalization (e.g., extradition);\textsuperscript{14} and the potential for the development of an international consensus on the criminality of cartel activity.\textsuperscript{15} In addition, a number of papers have been published which either describe the specifics of the criminal antitrust regime in a given jurisdiction\textsuperscript{16} or detail how and why a particular criminalized cartel regime has failed to meet its objectives.\textsuperscript{17} There are also some country-specific reports which, by providing some detail on how future criminal enforcement can be improved, offer useful insights for other European jurisdictions that are contemplating criminalizing cartel activity.\textsuperscript{18}

Unfortunately, what appears to be missing from the current literature is a systematic, detailed analysis of the extent of one important practical challenge of European antitrust criminalization: the identification of important enforcement strategies that help to ensure the criminal cartel regime is effective in practice. With some notable exceptions,\textsuperscript{19} the vast majority of the literature examining the practical aspects of the criminalization debate comments on the practical problems inherent in a given criminal cartel regime. Relatively little room is reserved for a more generally applicable analysis of the requirements of a successful criminal cartel regime, including the articulation of the impor-

\textsuperscript{12} See, e.g., Gurgen Hakopian, Criminalisation of EU Competition Law Enforcement—A Possibility After Lisbon?, 7 COMPETITION L. REV. 157 (2010).

\textsuperscript{13} See, e.g., Peter Whelan, Cartel Criminalisation and Due Process: The Challenge of Imposing Criminal Sanctions Alongside Administrative Sanctions Within the EU, 64 N. IR. LEGAL Q. 143, 149–54 (2013).

\textsuperscript{14} See, e.g., Mark Furse, Issues Relating to the Enforcement and Application of Criminal Laws in Respect of Competition, in HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST 466 (Philip Marsden ed., 2006).

\textsuperscript{15} Ariel Ezrachi & Jiøí Kindl, Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus, in CRIMINALISING CARTELS, supra note 8, at 419.

\textsuperscript{16} See Nonthika Wehmhorner et al., Part III: Country Experiences with Criminal Law Sanctions, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, supra note 6, at 217.

\textsuperscript{17} See, e.g., Mark Furse, The Cartel Offence—“Great for a Headline But Not Much Else”?, 32 EUR. COMPETITION L. REV. 223 (2011).


tant enforcement strategies in this context.20 Given that a failure to understand and respond to the practical challenges of European antitrust criminalization may result in a criminal regime that is unworkable (with the inevitable negative cost and reputation implications), this situation is regrettable and should be rectified.

This article aims to contribute to the literature on European antitrust criminalization by analyzing important enforcement strategies that can be employed to ensure that the criminal cartel regime achieves its objectives in practice. Part I focuses on the strategic issue of ensuring sufficient support from important stakeholders in the cartel criminalization project. The general public, potential jury members, and the judiciary represent the problematic stakeholders that are examined. In particular, this section articulates the main difficulties regarding stakeholder support and the strategies that can be adopted to deal with these particular difficulties. Part II examines the institutional design of a criminal cartel regime. Specifically, it examines the strategic issue of which entity/entities should exercise the investigative and/or prosecutorial functions in a criminal cartel regime. Part III focuses on the concept of international cooperation. It considers the importance of such cooperation for those criminalized regimes that are serious about tackling the most harmful cartels, the difficulties engendered in this context by criminal antitrust enforcement, as well as strategies that can be adopted in order to overcome these difficulties.

I. THE ISSUE OF STAKEHOLDER SUPPORT

It is undeniable that stakeholder support is vitally important to the success of any cartel criminalization project. Merely securing agreement among competition law academics and lawmakers that cartel activity should be criminalized (in order to achieve deterrence or retribution) is not enough, as “broad community support” is vital in this context.21 Without such support, the criminal cartel regime may suffer from insufficient resources or the phenomenon of nullification (whereby those tasked with finding a violation of the criminal law, in particular juries, acquit defendants who they believe have committed an offense on the basis that such law-breaking does not merit criminal punishment).

20 See, however, the treatment of this issue in Peter Whelan, The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges 260 (2014) [hereinafter Whelan, The Criminalization of European Cartel Enforcement].

21 David King, Criminalisation of Cartel Behaviour 1, 1, 27 (New Zealand Ministry of Econ. Dev. Occasional Paper 10/01, Jan. 2010); William E. Kovacic, Competition Policy and Cartels: The Design of Remedies, in Criminalization of Competition Law Enforcement, supra note 6, at 41, 41–42.
A. DIFFICULTIES IN CONTEXT

Securing support for cartel criminalization is difficult due to the nature of cartel activity itself. Specifically, the harm due to cartel activity is often “diluted” across many different victims, the individual loss due to cartels may be minimal in comparison with the aggregate loss, and it may be difficult to determine the identity of those who have suffered losses. If cartel activity is therefore perceived as a “victimless crime,” it can be very difficult to engage the general public concerning cartel crime, especially if the media is uninterested. The potential result of all of this could be a low level of public support for the existence of criminal sanctions for cartel activity.

In addition, in front of the public, cartelists may try to rationalize their conduct as an economic activity that was undertaken to achieve desirable social objectives, for example, the protection of employment. Moreover, admiration for success at business has the potential to reduce any movement towards reproach of cartelists for their cartel activity. No one would deny that cartel activity is not as concerning to members of society as violent crimes, such as murder, rape, or burglary. Cartels “simply do not yet give rise to the personal horror that we equate with so many other criminal acts against people and property” and, consequently, decent coverage of criminal cartel trials may be difficult to secure in news media. If the process of criminalization is a top-down process as opposed to a bottom-up one, support will be particularly difficult to secure.

There may be a further problem regarding the securing of public support for cartel criminalization in that exemptions (or more accurately “exceptions”) may be technically available currently under national or European law for

24 The extent of political support may also be negatively affected if there is a low level of public support for cartel criminalization. This could result in less robust investigative powers being granted to the enforcement agencies and/or fewer resources being dedicated to criminal cartel enforcement.
26 Harding, supra note 3, at 199.
27 King, supra note 21, at 14.
28 Louise Castle & Simon Writer, More than a Little Wary: Applying the Criminal Law to Competition Regulation in Australia, 10 Competition & Consumer L.J. 1, 23 (2002). However, see the discussion in Maurice E. Stucke, Morality and Antitrust, 2006 Colum. Bus. L. Rev. 443, 500.
29 According to Harding, the movement towards the criminalization of cartel activity in Europe is a top-down process. See Harding, supra note 3, at 200.
cartels that create net benefits for the economy. While EU law is unlikely to provide such an exemption for “hard core” cartel activity, a cartelist could legally argue that a cartel should be exempt from the prohibition in Article 101(1) TFEU by virtue of its fulfilment of the criteria in Article 101(3) TFEU. The immorality of cartel activity is unlikely to be unequivocal in the minds of the public when there is the possibility of a legal exemption for a given cartel. The mere existence of Article 101(3) TFEU facilitates the problematic perception that the EU competition law rules are about “satisfying somewhat technical and arcane regulations rather than about preventing conspiracies that cost EU consumers large amounts of money.” Admittedly, however, the extent to which the public would in practice take note of the technical subtleties in the structure of Article 101 TFEU is far from clear. Consequently, this particular problem with securing public support for cartel criminalization should not be overstated.

While all types of legal systems can be affected by a lack of public support, those legal systems which employ trial by jury in criminal cases are the most vulnerable as weak public support for cartel criminalization will result in weak support among jury members. If jury support is weak, jury nullification could occur. Mark Clough referred to this problem when he noted that criminalization will “bring competition law into disrepute, not only in this country [the United Kingdom] but in the rest of Europe, if the criminalization doesn’t work, because juries have not yet been educated to consider cartels to be the equivalent of theft.” All jurisdictions that employ trial by jury should have in place strategies to avoid nullification if an effective project of cartel criminalization is to be created.

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30 See, e.g., TFEU, supra note 1, art. 101(3); see also INT’L COMPETITION NETWORK (ICN), DEFining HARD Core CARTEL Conduct: EFFECTive INstitutions, EFFECTive PenaltiES, Report to the Fourth ICN Conference 13 (2005) [hereinafter ICN, DEFining HARD Core CARTEL Conduct], www.icn-bonn.org/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf.
32 See Stucke, supra note 28, at 527.
33 Massey, supra note 22, at 32.
35 This is especially true in cartel cases. According to Warin et al., even in the United States (where strong support for criminalization appears to exist) the fact that defendants in criminal antitrust cases (with a conviction rate of 49%) fare better at trial than other criminal defendants (with a conviction rate of nearly 80% in fraud trials) is due in part to the fact that “juries may view antitrust offenses as less contemptible than other crimes.” F. Joseph Warin, David P. Burns & John W.F. Chesley, To Plead or Not to Plead? Reviewing a Decade of Criminal Antitrust Trials, ANTITRUST SOURCE (July 2006), at 1, 1–2, 4, www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jul06_Warin7_20f.authcheckdam.pdf.
In addition, it might be difficult to ensure judicial support for criminal cartel sanctions: judges may be reluctant to impose custodial sentences for economic crimes committed by “respectable” members of society. This attitude represents the “compliance model” of enforcement, a model which is based on the assumption that corporate offenders and traditional offenders differ: corporate offenders engage in “otherwise socially productive activities and are capable of being socially responsible.” This particular model of enforcement is “premised on cooperative models of persuasion, education, strategies of self-regulation and the belief that prosecution should be a last resort.”

The reluctance of the judiciary to impose custodial sentences can be seen in all jurisdictions where criminalization has occurred. In Ireland, for example, a recently criminalized jurisdiction, “hesitation to convict and imprison corporate offenders still exists,” as demonstrated by the judiciary’s relatively lenient treatment of cartelists. In Japan, “courts have assessed fines and imposed prison sentences, but no one has actually served any prison time yet as a result of a competition law conviction because the sentences have been suspended.” Even the United States initially had issues concerning the imposition of custodial sentences for cartel activity. In the 1980s, imprisonment was seen an “inferior penalty” due to judicial reluctance to impose such punishment.

If considerable judicial reluctance persists, a credible threat of actual imprisonment will fail to materialize and the long-term deterrent effect of the criminal cartel law may not amount to very much. Furthermore, the objective of retribution would not be achieved if the judiciary refuse to impose upon convicted cartelists sentences that are commensurate with both the gravity of

38 Id.
the actual or potential harm caused by their actions and the degree of their culpability in engaging in cartel activity.

B. STRATEGIES TO OVERCOME THE DIFFICULTIES

The strategies designed to secure sufficient stakeholder support should aim to: (1) create considerable public support for the existence of criminal cartel sanctions; (2) avoid jury nullification from becoming a noticeable feature of the criminal cartel regime; and (3) overcome judicial hesitancy concerning the imposition of custodial sentences on convicted cartelists.

1. Criminal Cartel Sanctions and Support from the General Public

One must engage in well-resourced educative efforts that underline the negative qualities of cartel activity in order to secure support from the general public for an anti-cartel regime. According to the OECD, “Improving public knowledge about the nature of [cartel activity] and the harm that it causes would bolster popular support for more effective action against it.”44 More specifically, “Regulators have to be able to develop an effective outreach programme to the media, political class, and public to explain why price-fixing is so damaging and why heavy penalties are required.”45

There are a number of different ways of conducting such educative efforts, including workshops, public awareness campaigns, news releases, television interviews, and media publicity.46 As far as the criminal cartel regime is concerned, however, one must demonstrate not only that cartel activity can be socially harmful (and should therefore be sanctioned), but also that one can construct a robust normative justification for custodial sentences for cartel activity. In particular, one must convince citizens that cartel criminalization ensures that they (as consumers) receive significant benefits, benefits that cannot be obtained in the absence of criminal sanctions.

An important (and arguably unique) aspect of any educative drive regarding the need for criminalization would be the articulation of the moral wrongfulness of cartel activity. This would be the case irrespective of whether deter-

rence or retribution is the underlying theoretical justification. The reason for this is that the general population may well believe that there should be some link between a crime and morally wrongful behavior; and, if so, the public may not react well to legislative initiatives that can be interpreted as moves towards “over-criminalization.” Or looked at from a different perspective: it may be easier to get people to accept criminal cartel sanctions when—in addition to demonstrating that they are needed to ensure deterrence of harmful behavior—such sanctions are directed towards those who have done something that is “morally wrong.”

Given this context, some may argue that, irrespective of their extent, future educative efforts are inherently limited: there could be a problem with “sticky norms” in some European jurisdictions when it comes to conceptualizations of the moral wrongfulness of cartel activity. This problem of resistance to change can occur when there is a wide disparity between the views of the criminal law and those of society in general as regards the moral character of a given conduct. It is submitted that the issue with “sticky norms” may not be overly problematic, even in those jurisdictions with an apparent cultural propensity towards collusion. This is so for two reasons. First, if cartel activity is widespread in a country, it does not necessarily follow that all citizens actually condone such behavior; all it means is that *businesspeople* either: (a) do not see anything wrong with such behavior; or (b) they know others would perceive it as wrong behavior (if they understood what collusion involves) but they have not internalized the norm themselves. In other words, in such countries a *social* (as opposed to a *business*) norm does not necessarily exist concerning the acceptance of cartel activity. If so, there will be no social norm that is “sticky.” Second, the conceptualization of cartel activity as “morally wrongful” does not depend upon the creation of new social norms; rather, it can apply the concept of cartel activity to *already established* norms. The norms against cheating, deception, and stealing are likely to be widely accepted by European citizens, even if they do not necessarily refrain in every instance from their violation. These norms are certainly not as controversial as other potential norms, such as those relating to sexual or religious practices. So what would arguably be at issue in those jurisdictions with a cultural propensity towards collusion is not a substitution of one newly-created moral norm for another one, but rather the employment of an already established, accepted norm to interpret the desirability of certain harmful practices.

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The educative efforts noted above should continue throughout the development of the criminalized regime, in recognition of the fact that it can take a considerable period of time to develop a norm accepting the existence of criminal cartel sanctions. The timing of the introduction of criminal sanctions also needs to be correct in order to secure considerable support for the criminalization project. Indeed, “Timely intervention is crucial; otherwise, a vicious circle is created; the lack of moral condemnation of cartel activity reinforces itself through the lack of educational efforts or through the unavailability of information regarding enforcement activities.”

A general competition culture needs to be in place prior to criminalization, and any attempt to introduce criminal sanctions without the existence of that competition culture will surely be perceived as “premature,” particularly by industry lobbies. What is important is that the measures in a civil competition regime “should be given time to prove their worth before a decision is taken on criminalization.” The input of experts in competition law, as well as the general opinion of the public (obtained through representative surveys), is vital in order to determine whether such a competition culture exists prior to criminalization. The input of experts in particular is also important in drafting a criminal competition law which would be capable of achieving the support of the wider public: their input may help to ensure that the criminal cartel offense actually “captures the criminality” of cartel activity.

What needs to be ensured here, then, is an open, well-publicized consultation on cartel criminalization prior to the adoption of criminal cartel sanctions (or indeed prior to the final decision by policymakers that the adoption of such sanctions would be the best way forward for a given competition regime). This consultation should ideally involve the publication of a detailed discussion document (created by a competent entity that has recognized expe-


54 For an example, see CARON BEATON-WELLS ET AL., REPORT ON A SURVEY OF THE AUSTRALIAN PUBLIC REGARDING ANTI-CARTEL LAW AND ENFORCEMENT (Dec. 2010).
rience in drawing up detailed reports, such as a national law reform commission or equivalent) that sets out the justifications for criminalization as well as any drawbacks or challenges. The publication of this discussion document should be the start of a process that:

- encourages submissions on the discussion document from the “epistemic” competition law community and from the wider public;
- allows for the later publication of a draft bill containing the criminal cartel offense (if criminal sanctions have been decided upon) which has been influenced by the informed submissions received and international best practice;
- provides opportunities to comment on the draft bill and any later amendments; and
- encourages interested parties to provide “evidence” to parliamentary committees during the bill’s passage through parliament.

The publication of all relevant documents and submissions on a special micro-website that is regularly updated throughout the process would also be an idea to consider. This type of process (or something similar) would help to establish some public support for criminalization prior to its occurrence and would make it less likely that a criminal cartel offense would be created that would not be accepted by the general population.

Unfortunately, this strategy has not always been adopted by regimes contemplating cartel criminalization; in fact, it seems that a number of jurisdictions that have recently criminalized cartel activity (or that have reformed their criminal cartel laws) have been somewhat deficient in their approach to public consultation and to the fostering of public debate on cartel criminalization.\(^55\) The notable exception to this trend is New Zealand, where the consultation process\(^56\) and the official documents informing that process\(^57\) have been particularly robust and professional.\(^58\)

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\(^57\) See, e.g., King, *supra* note 21.

\(^58\) Interestingly, after initially deciding to criminalize cartel activity (and after drafting a bill containing criminal cartel sanctions), the New Zealand legislature recently “backed off” on this key change to its antitrust enforcement regime. See Hamish Rutherford, *Price-Fixing Executives Will Not Be Subject to Jail Terms After Government U-Turn*, STUFF.CO.NZ: BUSINESSDAY (Dec.
Following criminalization, the actual securing of prosecutions is clearly central to the creation and maintenance of support for cartel criminalization.59 In order to overcome any potential limitations due to the nature of cartel activity, the authorities must act carefully and sensibly in their prioritization strategies regarding criminal antitrust prosecutions. The early cases in particular are very important, as they may set sentencing precedents.60 For Andreas Stephan, there are two key elements to a clever strategy of gaining public support: (a) an initial focus on public procurement involving bid rigging; and (b) an initial focus on cartels selling to final consumers. For him:

[p]ublic procurement cases involving bid rigging provide a useful way of side-stepping the victim hurdle faced in most cartel cases. As taxpayers, every reader and viewer automatically becomes a victim paying artificially inflated prices. The direct victims—especially schools, hospitals and the military—are also more likely to capture the popular imagination and spark public outrage. . . . Cartels selling to final consumers are also likely to be more newsworthy; members of the public can immediately identify the products, the companies involved and can even determine whether they are potential victims.61

As noted by Stephan himself, sufficient support for this type of strategy can be found in the U.S. antitrust cases involving bid rigging in the supply of milk to school children and in the supply of equipment to the military,62 cases which helped to foster current U.S. public support for criminal antitrust punishment.63

This strategy also appears to have been adopted in Germany, where the specific offense of bid rigging has been created.64 Indeed, as some have acknowledged, there is a very good reason to start the process of antitrust

8, 2015), www.stuff.co.nz/business/74871045/Price-fixing-executives-will-not-be-subject-to-jail-
terms-after-Government-u-turn.


60 Calvani & Calvani, supra note 19, at 137.

61 Andreas Stephan, “The Battle for Hearts and Minds:” The Role of the Media in Treating Cartels as Criminal, in CRIMINALISING CARTELS, supra note 8, at 381.


63 See William E. Kovacic, Criminal Enforcement Norms in Competition Policy: Insights from US Experience, in CRIMINALISING CARTELS, supra note 8, at 45.

64 See STRAFGESETZBUCH [STGB] [PENAL CODE] (Ger.), § 298, translation at www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf. Of course, this strategy alone will not ensure an effective criminal cartel regime, as the German experience itself demonstrates. For criticism of cartel criminalization from a prominent German antitrust official, see Konrad Ost, From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence, 5 J. Eur. Competition L. & Prac. 125 (2014); see also Econ. & Social Res. Council Ctr. for Competition Pol’y, Is the Head of Germany’s Bundeskartellamt Right to Suggest Criminal Law Sanctions Are Too Severe for Cartels?, COMPETITION POL’Y BLOG (Nov. 24, 2014), www.competitionpolicy.wordpress.com/2014/11/24/is-the-head-of-ger
criminalization with an offense focused on bid rigging: “In the case of public procurement, the tax-payers’ money and usually large stakes are involved.”65 Obtaining public money through rigged bids is an activity that is easily regarded by society as “contemptible.”66 If a decision is made not to restrict the definition of cartel activity in the criminal legislation to bid rigging, it is still vitally important to choose the right cases.67 The criminal cartel enforcers should not “debase the currency”: they should only pursue “serious cases where serious penalties are appropriate.”68

While determining what is “serious” is a complex endeavor, it would no doubt involve inquiries regarding the importance of the market involved for consumers, the culpability of the accused, the extent to which the accused attempted to disguise her conduct, the overall value of the market concerned, the percentage of the market affected by the cartel, the alleged price rise (in percentage terms), etc. The creation of a formal list of prioritization criteria or principles could be useful in ensuring the focus on “serious” cases is maintained. Care must be taken when a strategy of selective enforcement is pursued, however. As Christopher Harding and Julian Joshua are quick to point out, “a distinction should be drawn between a selective enforcement policy, on the one side, and one that is vacillating and uncertain, on the other side.”69

In order to avoid the perception that one’s enforcement policy is “vacillating and uncertain” rather than merely “selective” and focused on “serious” cartel activity, one should be acutely aware of the “dangers of loss of credibility” that may occur when an enforcement agency clearly determines that a cartel is serious (by, for example, taking administrative enforcement action against it) “yet gives no explanation, or an unconvincing explanation, for not bringing criminal proceedings.”70 Clear explanations regarding prioritization in practice are required in order to prevent any negative perceptions of the competition law community or of the wider public.

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65 Florian Wagner-von Papp, What If All Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany, in CRIMINALISING CARTELS, supra note 8, at 157.

66 See William E. Kovacic, Competition Policy and Cartels: The Design of Remedies, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, supra note 8, at 52.


68 Calvani & Calvani, supra note 19, at 138.

69 CHRISTOPHER HARDING & JULIAN JOSHUA, REGULATING CARTELS IN EUROPE 339 (2d ed. 2010).

It is also important to ensure that publicity is created when criminal cartel convictions are obtained. After each successful criminal cartel trial, the antitrust enforcers should prepare and release detailed press releases and appear on television and radio if possible, in the process explaining the nature of cartel activity, the holding of the criminal court, and the benefits for consumers of the criminalization policy. A former DOJ official, in arguing that publicizing convictions is one of the “seven steps to better cartel enforcement,” posits that one should not forget “that criminal anti-cartel enforcement is a government function, and government resources are always scarce. Antitrust enforcers should not be shy about publicizing the fact that anti-cartel enforcement is, on a dollar-for-dollar basis, among the best uses of law enforcement resources from the standpoint of consumer welfare.”

Publicizing successful criminal cartel cases also helps to achieve deterrence: it brings home to potential cartelists the fact that detection and successful prosecution will be a possible outcome of their decision to engage in cartel activity. It also serves a retributive function: by highlighting the existence of the criminal judgment, the enforcer helps to facilitate the communication of society’s disapproval of the convicted cartelist’s conduct that is inherent in the conviction (if it is justified upon the basis of retribution).

2. Jury Nullification and Its Avoidance

In a small number of EU Member States (most notably, Ireland and the United Kingdom) serious criminal offenses are usually tried in front of a jury drawn from the general population. The above-noted strategies to obtain general public support for criminal cartel sanctions are therefore of obvious relevance to the creation of a strategy to ensure that jury nullification is not a significant feature of the criminalized regime: educating the general population about cartel activity inevitably involves educating the applicable jury pool about cartel activity, and thereby provides scope to reduce the potential for jury nullification. Correctly drafted criminal cartel offenses can also help to reduce the scope for jury nullification, particularly if one ensures that the definition of the offense does not require the jury to rely upon their views of the moral wrongfulness of cartel activity. In addition, there are a number of other mechanisms that can be used to reduce the possibilities for jury nullification.

71 Kovacic, supra note 49, at 422.
73 Id.
74 Cf. Clough, supra note 34, at 305.
First, the criminal court should have adequate powers to assist the jury in understanding complex issues that can arise in a cartel case. In Australia, for example, Section 23EC of the Federal Court of Australia Act 1976 empowers judges “to order such things as it thinks appropriate in the circumstances to be given to the jury to assist the jury to understand the issues during trial.”75 What is very important in the context of a criminal cartel trial is the production of a “roadmap” that will help jury members to understand and appreciate the significance of the evidence as it is presented.76

This lesson has recently been taken on board in Ireland.77 On July 3, 2012, the Irish Minister for Jobs, Enterprise, and Innovation signed a commencement order bringing into effect Section 10 of the Competition Act 2002. Section 10 allows for certain documents to be made available to juries in competition cases (such as transcripts of opening and closing speeches, transcripts of the judge’s charge to the jury, and any charts, diagrams, graphics, schedules, or agreed upon summaries of evidence produced at the trial). This step arguably reduces the potential for jury nullification in future cases in Ireland because any confused juror may seek the benefit of Section 10 of the Competition Act 2002: the trial judge now has the power to make available documents which help to reduce a juror’s possible confusion.

Model jury instructions for criminal cartel cases could also be created to reduce the potential for jury confusion.78 These instructions could focus on various issues, such as the content of the criminal cartel offense, what needs to be proven, what does not need to be proven, and the applicable standard of proof.79

Second, choosing the correct type of case is also of importance in avoiding jury nullification. Prosecutors should understand that the prosecution of bilateral cartels where one side goes free due to a grant of immunity and the other is prosecuted (perhaps due to being slow, rather than unwilling, to cooperate) may present particular difficulties. If a jury has to decide on whether a cartel offense has been committed, nullification may occur in such cases if the jury feels that it would be unfair to impose punishment on only one side of the

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76 Id.


79 For an example of model jury instructions, see ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES (2009).
Bilateral cartels with a successful immunity applicant therefore do not present the best type of cases to be prosecuted in front of a jury. Admittedly, bilateral cartels can have a significant impact on consumer welfare, and a prosecution policy that effectively provides criminal immunity for such cartels would be deficient. That said, prosecutors need to be careful with such cases and only prosecute them when leniency information can be corroborated from other sources, the cartel conduct is clear and unambiguous, or it is immediately obvious that the accused appreciated the criminal nature of her conduct by, for example, engaging in active efforts to disguise the conduct. Bringing cases where there is an actual effect in the market (e.g., a price rise) which is unequivocally due to the cartel, even when such an effect does not need to be proven in order to establish commission of the cartel offense, can also help to overcome the jury’s hesitancy to convict in cartel cases.

Third, and finally, an option that could be employed to deal with jury nullification would be the abolition of trial by jury altogether for cartel offenses. This option is clearly the nuclear option. Assuming that it was not deemed to be unconstitutional or in violation of fundamental human rights, this option would have to be implemented by legislation. There is precedent in the United Kingdom for such a move. However, given the difficulties experienced by the UK Government when it tried to ensure the adoption of legislation bringing into force Section 43 of the Criminal Justice Act 2003, it is clearly a challenging option to pursue in practice. In particular, the advantages of the system of trial by jury may be perceived by lawmakers to be such that its abolition for certain offenses would not be fair to the criminal accused. Furthermore, where legislation does provide for the possibility of trial by jury to be circumvented, judicial interpretation of the relevant legislation may be overly restrictive, thereby reducing the attractiveness of this potential solu-

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83 See Criminal Justice Act 2003, pt. 7 (Eng.).
84 Section 43 of the Criminal Justice Act 2003 would allow for the prosecution to apply to a judge of the Crown Court for a criminal trial relating to certain fraud offenses to be conducted without a jury. For this provision to enter into force, a statutory instrument needs to be adopted, subject to an affirmative resolution by each House of Parliament. Criminal Justice Act 2003, § 330(5)(b). This has not occurred to date, despite the Government’s best efforts.
85 On the advantages (and disadvantages) of trial by jury, see, for example, MALCOLM DAVIES, HAZEL CROALL & JANE TYRER, CRIMINAL JUSTICE 314–19 (4th ed. 2010).
86 See, e.g., JSM v. R [2010] EWCA Crim 1755; KS v. R [2010] EWCA Crim 1756. These judgments concern the interpretation of Section 44 of the Criminal Justice Act 2003 (which allows for criminal trials to be conducted without a jury when there is a danger of jury tampering).
tion to the issue of jury nullification. Consequently, this option is not likely to be enthusiastically pursued by policymakers.

3. Overcoming Judicial Reluctance

As with jury nullification, the strategies designed to achieve general public support for cartel criminalization are also important in overcoming judicial reluctance to impose custodial sentences upon convicted cartelists: judges are consumers after all and benefit from a robust approach to cartel law enforcement; appreciating this fact helps to strengthen their resolve to deal severely with such activity when individuals have been found guilty of criminal cartel offenses. There is an additional strategy that can help to foster judicial acceptance of the need for custodial sentences; it involves the use of “signaling” the need for custodial sentences to the judiciary by the legislature.

One way of signaling the need for custodial sentences is through the creation of a relatively high maximum custodial sentence that can be imposed for cartel activity. A maximum sentence of, say, five or seven years might perform this particular function, particularly if it is accompanied by educative efforts directed at the public (and therefore, in part at least, at the judiciary). If, following the conviction of a number of individuals for cartel activity, the judiciary remain reluctant to impose custodial sentences, the legislature could raise the maximum sentence in order to signal its disapproval of the sentencing record of the court and to signal further the need for significant custodial sentences. The approach adopted by the legislature in Ireland followed this strategy. On July 3, 2012, the Competition (Amendment) Act 2012 came into effect in the Republic of Ireland, which increased the maximum custodial sentence from five years to ten years. The Competition (Amendment) Act 2012 also provides that Section 1(1) of the Probation of Offenders Act 1907—which allows a court to find the facts proven and nonetheless dismiss the charge at issue—shall not apply to criminal cartel offenses in Ireland. A number of cartelists convicted of offenses under the Competition Act 2002 had previously received the benefit of the Probation of Offenders Act 1907 and none had actually served a custodial sentence, although a number of indi-

87 See generally Whelan, Strengthening Competition Law Enforcement in Ireland, supra note 77. In addition, Canada has recently introduced legislation restricting the sentencing discretion of judges by removing their ability to impose non-custodial conditional sentences for individuals convicted of cartel activity. See Stefano Berra, Prison Made Mandatory for Canadian Antitrust Convicts, GLOBAL COMPETITION REV. (Nov. 21, 2012); see also Safe Streets and Communities Act 2012 (Can.). (This move can also be understood as a form of signaling on behalf of the Canadian legislature to the Canadian judiciary.)

individuals had received suspended sentences. The Competition (Amendment) Act 2012 can easily be interpreted as an attempt by the Irish legislature to perform a signaling effect towards the Irish judges, who are being encouraged to be stricter in future in the sentencing of cartelists.

Admittedly, there are limitations to this type of signaling by the legislature. For a start, in the absence of mandatory sentences, there is no obligation on the judiciary to actually take heed of the encouragement of the legislature. Second, merely increasing the maximum sentence for a criminal cartel offense does not provide judges with any formal framework according to which they can determine the custodial sentence to impose upon convicted cartelists. A stronger form of signaling can be adopted to overcome these drawbacks: the use of (cartel-offense-specific) sentencing guidelines, such as exist in the United States. When these sentencing guidelines are mandatory, rather than discretionary, their effect is strongest. Until the Supreme Court ruled otherwise in January 2005, the U.S. federal courts for a number of years had treated the U.S. Sentencing Guidelines as mandatory, a fact that helped to overcome initial judicial reluctance to impose custodial sentences for cartel activity. As explained by Joshua:

By identifying the conduct as meriting imprisonment, the [U.S.] legislators altered the previously deeply-engrained view of many judges that the defendants appearing before them were not criminals but the type of person they would meet at the country club or charity fundraiser. With the judges having no choice but to hand down jail terms, public, legal and business circles came more readily to regard the conduct in question as unalloyed criminality.

The use of mandatory sentencing guidelines is not without its own problems, however. As the experience of the United States demonstrates, mandatory guidelines may not be constitutionally acceptable in some jurisdictions. Added to this is the fact that they may cause judicial resentment, in particular due to the significant interference with judicial independence that

89 On this practice, see Curtis & McNally, supra note 39.
90 For examples of how these guidelines can operate in practice, see Paul K. Gorecki & Sarah K. Maxwell, Alternative Approaches to Sentencing in Cartel Cases: The European Union, Ireland and the United States, 9 EUR. COMPETITION J. 341 (2013).
93 Baker, supra note 10, at 160.
such guidelines represent. That said, if a jurisdiction wishes to implement mandatory sentences (and is not legally prevented from doing so), it needs to be very careful. If the penalties imposed are very high from the outset, and sufficient education about the nature of cartel activity has not been provided, one risks engendering some of the disadvantages associated with “over-criminalization,” as well as potential inefficiencies in the enforcement regime. If such an option is decided upon, it is preferable therefore to increase the penalties slowly but surely; this would at least allow some time for acceptance of a criminal cartel law to develop within society. Importantly, such acceptance is more likely when a gradual toughening of criminal cartel sanctioning occurs within the context of the implementation of a more robust approach to the enforcement of “white collar” crime more generally. Indeed, as corporate executives go to jail for various non-antitrust offenses, it may become more acceptable and be perceived as less anachronistic when it comes to the pursuit of criminal justice for cartel activity. The United States again provides a good illustration of this approach: in that jurisdiction increased criminal cartel punishment occurred alongside a general toughening of the criminal prosecution of executives for various non-antitrust offenses.

A compromise solution to the problem of ineffective signaling would be the creation of discretionary sentencing guidelines. These types of guidelines would not cause the judiciary as much concern as mandatory guidelines as, quite clearly, they do not restrict their independence in sentencing to anywhere near the same extent as the latter do. Importantly, empirical evidence—admittedly from the United States rather than Europe—supports the view that judges tend to “respond to vocal congressional sentiment for changing the harshness of sanctions even if such changes are not mandated.” If this phenomenon is present in Europe, then discretionary guidelines on sentencing ranges could serve their signaling purpose without acting as an inappropriate restriction of judicial independence.


99 Cohen, supra note 96, at 44.
Of course developing such guidelines is not likely to be without difficulty. Clearly there is a tension between “too much predictability and too much fettering of the discretion of the Courts.” What is crucial is that the balance is correct, so that “the sentencing guidelines or methodology provides a reasonably acceptable framework within which sentences are determined while at the same time leaving the court sufficient flexibility to reflect the facts of the case.” Provided that they can achieve such a balance, discretionary guidelines could also help to build support for the criminal competition regime more generally, as they reduce the potential for convicted individuals to complain to the media about the arbitrary nature of any punishment imposed by a court. Indeed, an absence of such guidelines can lead to frustrations with a system that can be interpreted as “unclear and, more importantly, subjective or arbitrary.” The ability of such guidelines to help to create legal certainty should be appreciated. It is submitted that other jurisdictions across Europe that are considering introducing criminal cartel sanctions should give serious thought to the idea of introducing discretionary sentencing guidelines for criminal cartel cases if they wish to use their best endeavors to ensure that judicial reluctance does not undermine the objectives of cartel criminalization.

II. THE ENFORCEMENT AGENCIES AND THEIR DESIGN

It is axiomatic to state that, for cartel criminalization to be effective in practice, sufficient resources need to be expended on the creation of the criminal antitrust enforcement agencies (or criminal units within existing agencies) and that the annual budget for criminal cartel enforcement should be adequate in order for the agencies to meet the relevant criminal law enforcement objectives. Indeed, where antitrust criminalization has failed in the past one can often detect a failure to resource adequately the relevant enforcement agen-

101 Id.
103 The Irish competition authority (formerly “The Competition Authority,” now “The Competition and Consumer Protection Commission”), in advocating the adoption of such guidelines in Ireland for criminal cartel offenses, has been keen to point out that such guidelines can help to provide legal certainty to the general public and competition law practitioners: THE COMPETITION AUTHORITY (IR.), PUBLIC CONSULTATION ON THE OPERATION AND IMPLEMENTATION OF THE COMPETITION ACT 2002 (S/07/008) ¶ 2.47 (Dec. 2007) (Competition Authority Submission to the Department of Enterprise, Trade and Employment), www.ccpc.ie/sites/default/files/S_07_008%20Competition%20Act%202002.pdf. The Irish legislature has refused to adopt such guidelines to date. See Calvani & Carl, supra note 18, at 320.
104 Wils, supra note 6, at 87.
cies. The focus in this article, however, is on the institutional design of a well-resourced criminal cartel regime, as an inefficient or unorganized enforcement agency can significantly hinder the criminalization effort no matter how well-funded.

There are four important strategic questions that need to be answered when designing a criminal cartel enforcement entity in a given jurisdiction. The first is whether an existing competition authority (which is responsible, say, for the investigation of administrative competition law offenses, including abuse of dominance) should exercise the investigative function in a criminal cartel regime. Assuming that the answer to the first question is in the positive, the second question is whether the competition authority should share the investigative function with another special/general agency. Assuming again that the answer to the first question is in the positive, and irrespective of the answer to the second question, the third question is whether the competition authority should also be able to prosecute a cartel offense. Assuming that the answer to the third question is also in the positive, the fourth and final question is whether it should exercise its prosecutorial function alone or in conjunction with another special or general prosecutor. The answers to these questions are by no means obvious, as each approach has its own particular advantages and disadvantages.

A. FIRST QUESTION: SHOULD THE COMPETITION AGENCY INVESTIGATE CARTEL CONDUCT?

There are clear advantages to allowing the (traditionally administrative) competition agency to exercise the investigatory function in a criminalized cartel regime. That agency’s extensive knowledge and experience of economics, the general operation and structure of cartels, and the law of cartels would be obvious assets for an agency which is tasked with fulfilling the investigative function of a criminal cartel case. So too is the agency’s presumed knowledge of the harmfulness and seriousness of cartels and its dedication to ensuring that markets work well for consumers. An agency’s experience with running a successful administrative leniency program would also be beneficial for a criminal cartel investigator, particularly given the need for a criminal immunity program for cartel activity. Indeed, if the agency has exercised administrative functions for quite a number of years, and therefore has ac-

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105 Even in the United States, there were enforcement failures in the early days of the development of the criminal antitrust regime due to a lack of resources. See Furse, supra note 8, at 55.


107 On the need for a criminal immunity program if cartel criminalization is to be successful, see Whelan, The Criminalization of European Cartel Enforcement, supra note 20, at 232 (ch. 9).
quired significant experience in anti-cartel enforcement, there is a firm case for advocating for their involvement in the investigation of a criminal cartel. In fact, some have argued that it is essential that the administrative agency has an “established track record in civil enforcement, merger control and, where possible, in market studies and a sustained flow of outputs in each area” before even contemplating exercising a criminal investigative function.\textsuperscript{108} By taking this advice, the competition authority is “more likely to have a sufficient base of experienced and skilled staff to enable it to take on costly criminal work.”\textsuperscript{109} The stronger the “track record” established by the competition agency, the stronger is the case for its involvement in the investigative function.

Admittedly, there are important procedural differences between an administrative investigation and a criminal one, differences that are driven by divergent human rights standards in the respective enforcement proceedings.\textsuperscript{110} Consequently, and irrespective of the enforcement experience of the administrative agency, there would be an obvious need for detailed training in criminal procedural law prior to the creation of the criminal investigative function. Staff would also need to be trained in the use of novel criminal investigative techniques (such as, for example, the use of covert surveillance). A thorough understanding of the legal restraints operating when such techniques are employed would need to be established in the agency. One should understand here too that, in comparison to cases involving abuse of dominance or anticompetitive mergers, criminal cartel cases should generally be staffed with fewer economists and more individuals with specialist investigative skills and prosecutorial experience:

Good cartel cases may be difficult to investigate, but the facts cannot be complicated. Cartel cases that depend on subtle linkages and a vast amount of evidence are hard to bring and harder to win. What is required is a mating of good criminal investigative talent and prosecutorial skills. Thus the skills of detectives and prosecutors with experience in embezzlement cases are likely to be more valuable than those with experience in abuse of dominance matters.\textsuperscript{111}

An agency may well decide to recruit experienced criminal investigators as part of its investigative staff, but, in response to this, the argument could be made that “to import criminal investigators would not only be divisive and

\textsuperscript{108} John Fingleton, Marie-Barbe Girard & Simon Williams, The Fight Against Cartels: Is a ‘Mixed’ Approach to Enforcement the Answer?, in ANNUAL PROCEEDINGS OF THE FORDHAM COMPETITION LAW INSTITUTE 2006, supra note 34, at 22 (footnote omitted).
\textsuperscript{109} Id.
\textsuperscript{110} Whelan, Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off, supra note 11.
\textsuperscript{111} Calvani & Calvani, supra note 19, at 139.
undermine the morale of the present investigative complement, it would also be disjointed and lack continuity within the” respective competition agency. 112 Whether this would occur in a given agency would be for the management to determine, but outside recruitment would certainly be a possible option. Any additional training or additional staff recruitment may well be costly and certainly will take time to become effective, but it should be understood that any cartel criminalization project would be “a long-term, front-end loaded investment.” 113

Fostering cooperation with the police is also important if a competition law enforcer is to become an effective criminal law enforcer. 114 In Ireland, for example, the Competition and Consumer Protection Commission investigates criminal cartel activity and has understood the need for cooperation with the Irish police; in fact it has embedded members of the police within its structure. 115 This strategic decision—in addition to a number of others, such as the decision to recruit forensic investigators as part of its cartel investigation teams—has helped the Irish competition authority to prosecute successfully a significant number of criminal cartel cases. 116 Of course, if administrative competition powers will continue to be exercised by the criminal cartel agency, it is imperative too that additional mechanisms be put in place to ensure that the rights of the accused are protected without a noticeable negative impact upon the overall effectiveness of the competition regime apparatus. 117

An additional issue in this context is the fact that the introduction and maintenance of criminal cartel sanctions may require a significant change of attitude on the part of the competition authority and its individual officials. The relevant authority and its officials will in all likelihood have been dedicated to the use of financial sanctions against cartelists prior to criminalization. Indeed, publicly they are very likely to have espoused the deterrent effect of their cartel investigations and the importance of imposing financial sanctions to deter cartel activity. Some officials may even have publicly advocated

113 See Andreas P. Reindl, How Strong Is the Case for Criminal Sanctions in Cartel Cases?, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, supra note 6, at 115.
114 Of course cooperation with the police may also be necessary in order to perform administrative investigatory functions, such as conducting dawn raids. See, e.g., ICN, DEFINING HARD CORE CARTEL CONDUCT, supra note 30, at 39.
117 See Whelan, Cartel Criminalisation and Due Process, supra note 13.
against the use of criminal cartel sanctions. In Germany, to take an example, both the President and the Vice President of the Federal Cartel Office (Bundeskartellamt) have indeed publicly argued against the necessity of cartel criminalization, with the former in particular stating that “[i]n Europe, there’s simply no consensus that something like this should be punished as a crime . . . . A cartel violation is rarely a crystal clear matter like a theft—the lines are often blurred, so that’s not something where we should use the severe weapons of criminal law.”

When these attitudes are entrenched it becomes extremely difficult to motivate the authority to take on the role of criminal investigator. In such a situation, to convince the competition authority to take on a role in the criminal enforcement of competition law one might even have to get them to accept that what they have been proudly doing for many years—imposing cartel fines—has not achieved its objectives. Depending of course on the characters of the officials involved, this could prove too much for advocates of cartel criminalization. In any case, advocates of cartel criminalization should be conscious of this potential problem. In particular, they should make an effort to point out to such officials that the imposition of custodial sentences upon individual cartelists should not be understood as a substitute for financial sanctions against firms. Indeed, if there is an absence of non-criminal competition law sanctioning of firms, then firms would have the incentive to encourage cartel activity among their employees, to reduce or eliminate any monitoring activities, or to deal lightly with any employee transgressions. As Baker notes, corporate fines “are necessary to give the enterprise a serious stake in educating, supervising, and monitoring employee performance.” Such fines, then, help to motivate competition compliance programs within firms and in doing so can help competition authorities to achieve the objective of deterrence. Non-criminal enforcement of cartel prohibitions can and should act as a complement to custodial sentences. If the move to cartel


120 See Baker, supra note 42, at 699.


122 Barry J. Rodger, Competition Law Compliance Programmes: A Study of Motivations and Practice, 28 WORLD COMPETITION 349, 358 (2005). Criminalization can also impact compliance programs. See, e.g., FURSE & NASH, supra note 82, at 117 (ch. 7).

123 For an analysis of how administrative and criminal cartel regimes can work effectively alongside one another, see, for example, Whelan, Cartel Criminalisation and Due Process, supra note 13.
criminalization in a given jurisdiction inevitably involves genuine, public acceptance of the complementary aspect of non-criminal antitrust enforcement, competition law officials may be more willing to give cartel criminalization a chance to demonstrate its merits: they may come to view it as a logical, useful addition to their toolbox rather than as a criticism of their enforcement record to date.

B. SECOND QUESTION: SHOULD THE COMPETITION AGENCY SHARE THE ROLE OF INVESTIGATING CARTEL CONDUCT?

Given the steep learning curve that would be facing a competition agency taking on a criminal investigative function for the first time, there is a supportable case for allowing another experienced criminal enforcement agency to provide additional help with criminal investigations to the competition agency. For example, in the United Kingdom it was proposed in the 2001 Hammond and Penrose Report that criminal cartel investigations would be undertaken by the Office of Fair Trading (OFT) “under the guidance and direction of an SFO [Serious Fraud Office] case controller who would be experienced in criminal law.” The advantage of this approach is that the “domain-specific expertise and experience” of the competition agency can be combined with the considerable criminal investigative experience of another specialist agency. In the early days of criminal cartel enforcement such guidance could ensure that mistakes are not made by the competition agency that would not be made by a seasoned criminal investigative body, thus helping to ensure that any existing public and political support for criminal cartel enforcement is not lost through embarrassing, unprofessional actions of the competition authority. In addition, the experienced criminal investigative body may have particular specialist knowledge (e.g., about financial markets or the operation of the Stock Exchange) or skills (e.g., dealing effectively with forensic accounting) that may be lacking in the competition agency.

Admittedly such an approach can result in conflict if the competition authority displays a different enforcement culture than the other agency or if its caseload priorities diverge from those of its counterpart. The input of an addi-
tional agency could also complicate the operation of any criminal immunity program. But by putting a formal agreement in place concerning the respective investigative roles of the competition agency and the other special or general agency and by clearly allocating responsibility for the operation of the immunity program, one can reduce somewhat the potential for conflict. Joint programs for competition authorities and prosecutors to discuss cooperation on cartel cases also have potential to improve the relations between the respective agencies.

C. Third Question: Should the Competition Agency Prosecute Cartel Conduct?

Whether a competition authority should be allowed to exercise the prosecutorial function is a more difficult issue. A number of arguments in favor of allowing it to exercise that particular function can be found in the literature. The first is that the competition authority would be more likely to be dedicated to prosecuting cartel activity than a general public prosecutor’s office. Indeed, “It is quite natural for an antitrust authority to set anti-cartel enforcement as a top priority, but not as natural for criminal authorities that usually are involved with the investigation of other serious crimes to do the same.” This negative effect has in fact manifested itself in criminalized cartel regimes where general prosecutors were responsible for criminal cartel enforcement. One of the reasons for the failure of criminal antitrust enforcement in Austria (a failure that would lead to eventual decriminalization), for example, was the fact that the efforts of the relevant prosecutors were completely insufficient, due mainly to a general lack of interest in criminal cartel enforcement and a realization that taking such cases involves the accumulation of human capital that, given the low number of criminal cartel cases, would not be of much use in future. Likewise, in the Netherlands, when cartel activity was a criminal offense, public prosecutors “did not seem to show much interest in the enforcement of competition rules.” All that is required for a criminal cartel case to get pushed down even further in the pile in the public prosecutor’s office is a serious violent crime, like a murder or a

128 For an example, see Memorandum of Understanding Between the Competition and Markets Authority and the Serious Fraud Office (Apr. 29, 2014).
130 Bid rigging would remain a criminal offense, however.
131 Peter Lewisch, Enforcement of Antitrust Law: The Way from Criminal Individual Punishment to Semi-Penal Sanctions in Austria, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT, supra note 6, at 297.
132 Pieter Kalbfleisch, Criminal Competition Law Sanctions in the Netherlands, in Criminalization of Competition Law Enforcement, supra note 6, at 313.
rape. \(^{133}\) When the prosecutor only has the function of prosecuting cartel cases, this effect would not occur.

A second reason advanced is that, quite apart from their dedication to criminal antitrust enforcement, general prosecutors—at least initially—may feel ill-equipped to take on cartel cases due to their unfamiliarity with competition law issues and therefore may be more cautious in bringing cases. \(^{134}\) This type of hesitancy was also one of the reasons for the failure of cartel criminalization in the Netherlands. \(^{135}\) The third reason for involvement of the competition authority (which is responsible for the investigation of cartel activity) in the exercise of the prosecutorial function is the desire to ensure the operation of an effective criminal immunity program. \(^{136}\) A system guaranteeing conditional immunity in the context of criminal cartel enforcement may be difficult to put in place when the investigating antitrust authority (i.e., the body receiving the immunity application) is not the body which will be making the final prosecutorial decision. When the investigating authority is also the prosecutorial authority it is easier to provide such guarantees, as the coordination of immunity programs and decisions to prosecute between two separate agencies will not be needed. \(^{137}\) This is to the benefit of the number of immunity applications submitted and, consequently, of the detection rate of cartel activity, and hence explains the desire in some quarters to ensure that the competition authority exercises the prosecutorial function.

The final reason as to why it might be a good reason to allow the competition authority to exercise the prosecutorial function has to do with the assumed political independence of the competition authority. The point here is that “there might be concerns that a government could instruct a public prosecutor not to pursue a case, whereas it might not have such an authority over an independent competition agency.” \(^{138}\)

There are two clear disadvantages, however, to involving a competition authority in the prosecution of criminal cartel cases. The most obvious one is the competition authority’s lack of expertise in prosecuting criminal cases in court. While such expertise could be acquired, it “may not always be cost effective to build up staff for prosecution of criminal cases, especially if it is

\(^{133}\) See John Fingleton, Criminal Enforcement—The Irish Experience, in Competition Law Yearbook 2002, supra note 34, at 309.

\(^{134}\) See Baker, supra note 121, at 10.

\(^{135}\) Kalbfleisch, supra note 132, at 313.

\(^{136}\) See Baker, supra note 121, at 10.


\(^{138}\) OECD, Cartels: Sanctions Against Individuals, supra note 106, at 28.
expected that there will not be many such cases.”139 The criminal case pursued by the then OFT against individuals involved in the fixing of fuel surcharges on long haul flights demonstrates well the problem of lack of prosecutorial experience.140 In that particular case, the OFT in failing to discharge its obligations of disclosure to the criminal accused, as well as its “general deference to resistance” from counsel of the successful leniency applicant (Virgin Atlantic) to disclose witness interviews and other materials held by the leniency applicant, “committed an error unlikely to be seen from a seasoned criminal prosecutor.”141 Although the OFT was quick to admit its mistakes and to learn from them,142 its failure to secure convictions in this case clearly had a negative impact upon its reputation as a serious and competent criminal antitrust enforcer,143 a fact admitted at the time by the OFT itself.144

Another reason to keep the (investigating) competition authority away from the prosecutorial function is to ensure that bias does not creep into the system. Dividing the investigative and prosecutorial functions provides “checks and balances.” Wouter Wils notes that when different enforcement functions are exercised by one agency, “prosecutorial bias” can occur due to: (a) confirmation bias; (b) hindsight bias and the desire to justify past efforts; and (c) the desire to show a high level of enforcement activity.145 If, however, the investigating competition authority must convince a public prosecutor to go forward with a case, this arrangement may “limit criminal cases to those where criminal prosecution is really warranted,”146 thereby avoiding this problem.

D. FOURTH QUESTION: SHOULD THE COMPETITION AGENCY SHARE THE ROLE OF PROSECUTING CARTEL CONDUCT?

If the competition authority is provided with the ability to prosecute criminal cartel cases, a final decision needs to be made regarding the prosecutorial function: should it be shared with another special or general body? In the early days of criminal cartel enforcement, oversight and technical assistance from a more seasoned prosecutor could also be helpful, provided that a close

139 OECD COMPETITION COMMITTEE, SANCTIONS AGAINST INDIVIDUALS, supra note 137, at 24.
141 Nicholas Purnell et al., Criminal Cartel Enforcement—More Turbulence Ahead? The Implications of the BA/Virgin Case, 2010 COMPETITION L.J. 313, 325.
142 See OFT (UK), PROJECT CONDOR BOARD REVIEW, supra note 124.
143 See Furse, The Cartel Offence, supra note 17.
144 OFT (UK), PROJECT CONDOR BOARD REVIEW, supra note 124, at 9.
146 OECD COMPETITION COMMITTEE, SANCTIONS AGAINST INDIVIDUALS, supra note 137, at 24.
working relationship can be established without causing friction between the two prosecutors. The fact that there would be a possibility for a more experienced prosecutor to take on a cartel prosecution (after the investigation by the competition authority is completed) is certainly advantageous in that it could avoid a situation where the competition authority finds itself out of its depth when faced with an increasingly complex and difficult case. The creation of detailed cartel law-specific case selection criteria applicable to the more experienced prosecutor could help to ensure that a decision about the more appropriate prosecutor could be taken at an early stage of the investigation.\textsuperscript{147} An early decision about the more appropriate prosecutor would reduce the potential for later disruptions and delays (particularly given that the prosecutor would be required to have an excellent qualitative command of the facts of the complex, difficult case and a detailed understanding of the credibility of witnesses, and the strengths and weaknesses of the available evidence). The major disadvantage with the existence of two prosecutorial bodies is the increased difficulty of operating a criminal immunity policy which guarantees immunity from prosecution to the individuals who meet the relevant criteria.

\section*{III. THE NEED FOR INTERNATIONAL COOPERATION}

European jurisdictions that wish to operate an effective criminal cartel regime should be advised that their vision for criminal antitrust enforcement should ideally extend beyond their national borders and become international in scope, at least in the long term. The reason for this is that the most harmful of cartels will often themselves to be international in scope, and for cartel law enforcement to have an effective impact upon such cartels, an international approach is warranted.

It is accepted that a “common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately.”\textsuperscript{148} It is often extremely difficult to take enforcement action against such a cartel without cooperation from the antitrust authorities located in other jurisdictions.\textsuperscript{149} Indeed, following a deepening of international cooperation in competition law over the last couple of decades,\textsuperscript{150} it is now widely accepted that cooperation between jurisdictions is central to an effective anti-cartel pol-

\begin{enumerate}
\item\textsuperscript{147} See, e.g., id. at 96.
\item\textsuperscript{148} James M. Griffin, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the ABA Section of Antitrust Law, 48th Annual Spring Meeting, An Inside Look at a Cartel at Work: Common Characteristics of International Cartels 10 (Apr. 6, 2000), www.justice.gov/atr/file/518506/download.
\item\textsuperscript{149} See Maria Luisa Tierno Centella, An Optimal Enforcement System Against Cartels, in THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES 497, 498 (Iaonnis Lianos & Iaonnis Kokorris eds., 2010).
\item\textsuperscript{150} See Terry Calvani, Conflict, Cooperation, and Convergence in International Competition, 72 ANTITRUST L.J. 1127 (2005).
\end{enumerate}
icy, particularly if one is concerned about tackling international cartels. Such cooperation can take many forms, including the coordination of surprise inspections, the exchange of information, the provision of enforcement advice, the exercise of positive comity, the collection of evidence, and the interviewing of individuals. Given that cooperation between national bodies can clearly “enhance the prospects of catching and successfully prosecuting” those engaged in international cartel activity, it should be no surprise that there have been a number of relatively successful multilateral initiatives to encourage cooperation between competition authorities, the most obvious one being the creation of the International Competition Network (ICN) in October 2001.

The criminalization of cartel activity brings with it particular disadvantages regarding the need for cooperation and the desire of other non-criminalized jurisdictions to provide such cooperation when the incarceration of individuals remains a possible outcome of enforcement proceedings. Joshua explains the predicament eloquently in commenting on the initial proposal for the adoption of a criminal cartel offense in the United Kingdom. After noting that global cartels do the most damage to the UK economy and that international cartel members are likely “to ‘deep-six’ any evidence in the United Kingdom or meet only abroad,” he states:

Given the incomprehension generated in many European countries at the idea of jailing price-fixers, there is not likely to be a rush of support at official level for conducting evidence searches for the British authorities in a cartel case. And nothing is likely to inflame national sensitivities more than attempts to investigate suspected crime inside its territory without going through the local authorities. It is a criminal offence in some countries for foreign investigators to attempt to conduct inquiries or gather evidence. Even such an innocuous-seeming act as interviewing a witness without official permission can result in arrest, deportation and denial of further assistance.

155 Joshua, supra note 52, at 240.
156 Id. at 241.
This situation, if unchecked, would not bode well for the successful operation of a cartel offense: “it would make a nonsense of the law if [cartelists] could avoid detection by meeting or keeping all the evidence abroad.”\textsuperscript{157} In addition to this is the problem of prosecuting overseas executives. Where criminal cartel sanctions do not exist in the jurisdiction where the overseas executive is located, there will be no chance of extradition, as this invariably requires “dual criminality,” i.e. that the alleged conduct be a crime in both the requesting and requested state.\textsuperscript{158} Furthermore, given the fact that in a criminalized cartel regime the potential punishment of a convicted cartelist is a period of time in prison, it is unlikely that such executives will self-surrender (from a regime where there are no criminal cartel sanctions). If the executive is located in another EU Member State, one might be tempted to consider whether the European Arrest Warrant would be of help in securing personal jurisdiction over the individual.\textsuperscript{159} Unfortunately, as it currently stands, that particular instrument of EU law would not be of any help to the criminalized regime: with the exception of a number of generic offenses (which do not include cartel activity), “dual criminality” is also required in both the requesting and the requested Member State.\textsuperscript{160} Admittedly, the list of offenses for which dual criminality is not required could be amended to include a cartel offense,\textsuperscript{161} but given that such a move would require the consent of all of the Member States, it is unlikely to occur any time soon.

If other jurisdictions could eventually be persuaded to criminalize cartel activity, two particular ways could be created to alleviate on a bilateral basis the difficulty of prosecuting international cartels. The first solution would be to ensure that legal arrangements are in place that would allow for the extradition of the overseas executive. Most likely this will involve the extension of an already existing extradition treaty to cartel activity. This solution, quite clearly, would aim to ensure that the executive located in the requested state could be legally coerced back to the prosecuting jurisdiction, thereby enhancing the enforcement of criminal cartel law in that country (to the benefit of deterrence and/or retribution).\textsuperscript{162} The second solution would be the adoption of a mutual legal assistance treaty (MLAT) between the two jurisdictions providing for cooperation on cartel cases (or the extension of an already existing MLAT to the prosecution of cartel activity). This type of arrangement would

\begin{itemize}
  \item \textsuperscript{157} \textit{Id.} at 240.
  \item \textsuperscript{158} See Furse, \textit{supra} note 14, at 482.
  \item \textsuperscript{160} See Joshua, \textit{supra} note 94, at 636.
  \item \textsuperscript{161} See Council Framework Decision, \textit{supra} note 159, art. 2(3).
  \item \textsuperscript{162} Cf. Michael O’Kane, \textit{International Cartels, Concurrent Criminal Prosecutions and Extradition: Law, Practice and Policy}, in CRIMINALISING CARTELS, \textit{supra} note 8, at 419.
\end{itemize}
facilitate the collection of evidence, the production of records or the question-
ing of witnesses located in the requested state to the benefit of criminal cartel
enforcement in the requesting state.\textsuperscript{163} Such are the perceived potential advantages of MLATs in this regard that it has been argued that the mere fact that an MLAT can be created between two criminalized regimes is an important factor in itself for justifying the actual existence of criminal cartel sanctions.\textsuperscript{164}

Admittedly, each of these solutions is inherently limited due to the principle of “dual criminality.” The fact that extradition invariably requires “dual criminality” has already been noted above. With MLATs the situation is similar but not equivalent: “Sometimes dual criminality is not a requirement for the application of MLATs, thus their use might in theory be extended into the area of competition law enforcement even if only one of the parties to the agreement is a criminal jurisdiction as regards competition law.”\textsuperscript{165} It seems, however, that the general (if not universal) principle with MLATs is that “dual criminality” is indeed required: it represents the rule, rather than the exception.\textsuperscript{166} This fact explains why some commentators have argued that traditionally MLATs have not been particularly useful to the United States in criminal competition enforcement.\textsuperscript{167} When those arguments were advanced, there were very few jurisdictions with criminal cartel offenses on their legislative books. It also brings one to an important point about the strategy that a criminalized regime should adopt to ensure effectiveness. Such a regime should engage in advocacy in order to convince other jurisdictions of the desirability of introducing criminal cartel sanctions.\textsuperscript{168} Once criminal sanctions have been adopted in other jurisdictions, then the adoption of the two solutions noted above is facilitated.\textsuperscript{169}

Convincing another jurisdiction to introduce criminal cartel sanctions is not going to be easy, particularly given that currently no international consensus

\textsuperscript{163} See, e.g., 1 ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES, Overview 117 (Michael J. Fanelli et al. eds., 2d ed., 2011).

\textsuperscript{164} See, e.g., Frédéric Jenny, Foreword, in CRIMINALISING CARTELS, supra note 8, at v.

\textsuperscript{165} ICN, CO-OPERATION BETWEEN COMPETITION AGENCIES IN CARTEL INVESTIGATIONS, supra note 152, at 15. (Examples include the United States–Spain and the United States–Italy MLATs).

\textsuperscript{166} See id.


\textsuperscript{168} The United States has been particularly enthusiastic about pursuing such a strategy. See, e.g., Gerald F. Masoudi, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the Cartel Conference, Cartel Enforcement in the United States (and Beyond) (Feb. 16, 2007), www.justice.gov/atr/speech/cartel-enforcement-united-states-and-beyond.

\textsuperscript{169} This reality was noted by the Ministry of Economic Development in New Zealand in the Discussion Document, which they published prior to the tabling of legislation to introduce criminal cartel sanctions in that jurisdiction. See Ministry of Econ. Dev., Cartel Criminalisation ¶¶ 41 (Discussion Document, Jan. 2010).
exists concerning the need for criminal cartel sanctions (even if there is consensus on the harmful nature of cartel activity). One should also understand that cartel criminalization is usually a domestic issue, relying on national social norms, and thus may not be amenable to a multinational trend in its favor. Given this reality, focusing on the most important bilateral trading relationships for the criminalized regime might be a priority, as demonstrated by the move in New Zealand to introduce criminal cartel sanctions after their introduction in Australia. The advocacy efforts of a criminalized regime in this context have some potential for success: by demonstrating that close trading partners have made the move to cartel criminalization, a non-criminalized jurisdiction may find it easier to “sell” the idea of criminal cartel sanctions to its own stakeholders (particularly where there is a distinct similarity between the social and legal norms of the respective jurisdictions). Admittedly, justifying cartel criminalization on the basis of the actions of one’s close trading partners (or indeed on the basis of developing international practice) is questionable on theoretical grounds. The point here, however, is that what the already criminalized regime wishes to see is the existence of criminal cartel sanctions in the other jurisdiction, however they are “sold” to the stakeholders and justified in principle in that other jurisdiction.

If these points are accepted, it would be advisable for a criminalized jurisdiction to focus the majority of its advocacy efforts on its close trading partners before turning to multilateral fora to convince the wider world of the desirability of introducing criminal cartel sanctions. It is important to avoid pressuring the other jurisdiction into adopting criminal sanctions when that jurisdiction is at a stage in the development of its competition law when criminalization would be inappropriate. Any attempt “to implant a criminalization regime into a non-receptive environment risks leading to ‘unenforced criminalization,’ the social cost of which may be higher than the mere lack of criminalization.”

A cynic might reply that all that is required for extradition to work is the adoption of a criminal cartel offense and the putting in place of legal measures to allow for extradition to occur: “unenforced criminalization” is therefore not problematic (at least for the requesting state). The reasoning there would be

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170 See Ezrachi & Kindl, supra note 15, at 420.
171 Id.
174 On the importance of the timing of cartel criminalization, see Fingleton et al., supra note 108, at 21.
175 Ezrachi & Kindl, supra note 15, at 434.
that “dual criminality” does not require active enforcement; it simply requires the criminal cartel offense to be in existence in both the requesting and the requested state.\textsuperscript{176} However, this analysis would miss the bigger picture. For a start, the task of convincing other jurisdictions of the desirability of introducing criminal cartel sanctions becomes more difficult if the resource-intensive failures of “unenforced criminalization” are evident in jurisdictions that have been previously convinced by the criminalized jurisdiction’s rhetoric. Furthermore, the use of an MLAT in particular requires the expenditure of considerable resources by the requested state: to justify the expenditure of such resources the requested state needs to demonstrate to its stakeholders that the imposition of criminal sanctions (in the other jurisdiction) is justifiable.

Central to a successful advocacy strategy is the articulation of solid theoretical justifications for antitrust criminalization and the demonstration that the criminalized regime has been successful in prosecuting criminal cartel cases. Focusing initially on local cartels (as opposed to global ones) can help to demonstrate the ability of the criminalized regime to prosecute cartel activity successfully. Once the message about the benefits of criminalization has been heard (and acted upon) by other jurisdictions, there will be increased potential for criminal enforcement action against bi-national or global cartels. If, however, at an early stage the criminalized regime wishes to prosecute international—as opposed to local—cartels then, in order to demonstrate effectiveness, it could make use of the novel strategy adopted by the United Kingdom in 2008 in the *Marine Hoses* case.\textsuperscript{177} In doing so, the criminalized regime in question would be taking the advice of Terry Calvani and Torello H. Calvani when they suggest that competition enforcement agencies embarking on a criminal cartel program should “piggyback where possible” on the enforcement efforts of the United States.\textsuperscript{178}

In the *Marine Hoses* case, three UK nationals were arrested in Texas by U.S. antitrust prosecutors investigating price fixing and bid rigging in the marine hose market. All three of the UK nationals confessed their involvement in the (international) cartel and entered into a plea bargain with the DOJ.\textsuperscript{179} According to the terms of this plea bargain, the three individuals would be allowed to travel back to the United Kingdom where they would


\textsuperscript{177} R v. Whittle [2008] EWCA (Crim) 2560.

\textsuperscript{178} Calvani & Calvani, supra note 19, at 139–40.

plead guilty to the UK Cartel Offence. In addition, they would waive their right to contest extradition back to the United States if the sentence served in the United Kingdom were less than that agreed to in the plea agreement. The effect of the agreement “was that, assuming that the individuals were convicted in the United Kingdom for a term not less than the term of imprisonment specified in their respective plea agreements, they would not be required to return to the United States to serve time in custody.” When the individuals arrived back in London, they pled guilty to the UK Cartel Offence as agreed. Unfortunately for them, the trial judge imposed higher sentences than those stated in the plea agreement. On appeal, however, these sentences were reduced to the sentences in that agreement. This particular novel arrangement allowed the OFT to prosecute its first successful criminal international cartel case, thus helping to demonstrate that criminal enforcement can be effective in the United Kingdom, even where an international cartel is at issue.

IV. CONCLUSION

Well thought-out enforcement strategies need to be in place in order for a criminal cartel regime to be effective in practice. These strategies comprise: (1) securing sufficient support from stakeholders in the project of antitrust criminalization; (2) designing effectively the criminal antitrust enforcement agencies; and (3) securing international support for the enforcement efforts of the criminalized cartel regime. This article provides several suggestions for implementing such strategies.

First, support from all stakeholders in a project of antitrust criminalization is vitally important to its success. To secure public support for cartel criminalization, the authorities (1) must engage in considerable educative activity regarding the nature of cartel activity, (2) must demonstrate that anticompetitive conduct can be harmful and that a strong normative case can be made for the existence of criminal cartel sanctions, (3) must ensure a well-publicized, well-designed public consultation on cartel criminalization prior to the adoption of criminal cartel sanctions, (4) must be clever in their prioritization strategies regarding criminal antitrust prosecutions, and (5) must take steps to prevent nullification, particularly of early cases, such as by ensuring juries receive assistance in understanding the complexities of these cases and ensuring judges overcome any reluctance in imposing criminal sentences.

182 R v. Whittle [2008] EWCA (Crim) 2560 [32]. For additional background, see also Nikpay, supra note 67, at 2–3.
Second, in designing the criminal antitrust enforcement regime, four strategic questions need to be considered: (1) whether an existing competition authority should exercise the investigative function in a criminal cartel regime; (2) if so, whether the competition authority should share the investigative function with another special or general agency; (3) whether the competition authority should also be able to prosecute a cartel offense; and (4) if so, whether it should exercise its prosecutorial function alone or in conjunction with another special or general prosecutor. In answering these questions, one should understand that each approach has its own particular advantages and disadvantages; there is no ideal way to allocate the investigative and prosecutorial functions.

Third, and finally, the criminalization of cartel activity brings with it particular disadvantages regarding the need for international cooperation and the desire of other non-criminalized jurisdictions to provide such cooperation when imprisonment could occur. If, however, other jurisdictions could eventually be persuaded to criminalize cartel activity, two particular ways of alleviating the difficulty of international cartels on a bilateral basis could be created: (1) the extension of extradition treaties to cartel offenses; and (2) the use of MLATs to facilitate the collection of evidence, the production of records, and the questioning of witnesses located abroad. Central to this strategy is, of course, the difficult challenge of convincing other countries to adopt criminal cartel laws.

As noted above, the three enforcement strategies analyzed in this article are designed to make cartel criminalization more effective. They clearly have an important role to play in this regard. That said, one should not lose sight of their common limitation: the real usefulness of the strategies depends on the extent to which there is scope for criminal cartel sanctions to achieve their objectives in practice. Indeed, without potential for success, cartel criminalization will fail, irrespective of the strategies identified. Consequently, the strategies do not alleviate the need for robust theoretical analysis of the likelihood of cartel criminalization to achieve the objectives that it pursues.

Important questions still remain unanswered (and, indeed, some are unanswerable) in this context. For example, the extent to which criminal cartel sanctions are economically efficient, the extent to which the assumption of rationality on behalf of cartelists is realistic, and the extent to which cartel activity inevitably displays morally wrongful behavior that society generally would be happy to see punished by the criminal law are all issues that remain unresolved in the European cartel criminalization debate. That particular debate is therefore likely to continue, irrespective of whether the analyses presented in this article are accepted as robust.