

Unclassified

English - Or. English

14 September 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 23 April 2020

Working Party No. 3 on Co-operation and Enforcement

Cartel Criminalization and the Challenge of 'Moral Wrongfulness'

By Peter Whelan

9 June 2020

This paper by Peter Whelan was submitted by the author as part of the background material in support of their presentation at Item 1 of the 131st meeting of Working Party 3 on Co-operation and Enforcement on 9 June 2020. This paper was not commissioned nor vetted by the OECD Secretariat; the opinions expressed and arguments employed herein are exclusively those of the author and do not necessarily reflect the official views of the Organisation or of the governments of its member countries. The document is available in PDF only.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

Ms Sabine ZIGELSKI
[Email: Sabine.ZIGELSKI@oecd.org]

JT03465237

Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’

Peter Whelan*

Abstract—There is considerable debate at present, particularly in the Member States of the European Union, concerning the necessity and appropriateness of imposing custodial sentences upon individuals who have engaged in cartel activity. The vast majority of those contributing to this debate have focused on the punishment theory of (economic) deterrence. Little room is devoted to the punishment theory of retribution or to consideration of the ‘moral wrongfulness’ of cartel activity. This article posits that the issue of ‘moral wrongfulness’ is a central issue in the debate on cartel criminalization, irrespective of whether it is deterrence theory or retribution theory that informs the debate. By employing a norms-based approach, this article then examines the extent to which cartel activity can indeed be interpreted as conduct that is ‘morally wrong’ due to its violation of the moral norms against stealing, deception and/or cheating. By doing so, this article not only challenges traditional views of the nature of cartel activity but also provides scholars, legislatures and policymakers with specific analyses which are crucial to a decision whether to justify (or indeed to oppose) the introduction and maintenance of criminal cartel sanctions.

Keywords: anti-cartel enforcement, competition law, criminal antitrust sanctions, deterrence, moral wrongfulness, retribution

1. Introduction

‘Cartel activity’ can be conceptualized as the making or implementing of an anticompetitive agreement, concerted practice or arrangement by competitors to fix prices, make rigged bids, establish output restrictions or divide markets by allocating customers, suppliers, territories or lines of commerce.¹ It is widely accepted that cartel activity reduces competition in the marketplace to the detriment of consumers; it is therefore prohibited by all of the national competition laws of the EU Member States. Furthermore, if it affects trade

* Senior Lecturer in Law, UEA Law School, and Faculty Member, ESRC Centre for Competition Policy, University of East Anglia. Email: p.whelan@uea.ac.uk.

¹ Organization for Economic Cooperation and Development (OECD), ‘Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels’ (25 March 1998) C(98)35/final, para 2(a).

© The Author 2013. Published by Oxford University Press. All rights reserved. For permissions, please e-mail: journals.permissions@oup.com

between the EU Member States, cartel activity is prohibited in EU law by Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). This provision is enforced by the European Commission ('the Commission') and the national competition authorities and courts of the EU Member States.² In its cartel law enforcement role, the Commission imposes only administrative fines on undertakings; it cannot inflict criminal punishment (which, for present purposes, should be taken to mean a custodial sentence) on individuals.³ Traditionally, within Europe, EU cartel law enforcement at national level has tended to avoid the employment of personal criminal punishment.⁴ This tradition notwithstanding, recently there has been increasing debate concerning the imprisonment of individual cartelists by the EU Member States.⁵ Importantly, this 'European antitrust criminalization debate' is more than a mere academic exercise: some European countries, such as the UK, Ireland, Estonia and (in a limited manner) Germany, have introduced and imposed personal criminal cartel sanctions, while others (such as the Netherlands and Sweden) have contemplated their introduction in order to secure the effective enforcement of Article 101(1) TFEU and their national equivalents. These developments are consistent with worldwide trends in competition law enforcement, as 'countries in virtually every region of the world are criminalizing cartel offences'.⁶

The employment of such criminal sanctions within the context of anti-cartel enforcement presents a number of crucial challenges that need to be met if the underlying enforcement objectives are to be achieved in practice without violating prevailing legal norms or undermining the legitimacy of the relevant antitrust regime.⁷ Above all, given the severe consequences of a custodial sentence, the employment of criminal antitrust punishment must be justifiable in principle: one must have a robust normative framework rationalizing the existence of criminal cartel sanctions. Such a framework should be constructed with recognized theories of criminal punishment, employing either a single criminal punishment theory as the ultimate rationale for criminal cartel sanctions⁸ or a combination of different punishment theories, each performing its own distinct justificatory role

² See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

³ See *ibid* art 23(5).

⁴ See C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 *Critical Criminology* 181.

⁵ See generally C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011); K Cseres, MP Schinkel and F Vogelaar, *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar Publishing 2006).

⁶ G Shaffer and N Nesbitt, 'Criminalizing Cartels: A Global Trend?' (2011) U Minnesota Law School, Legal Studies Research Paper Series No 11-26, 1.

⁷ See P Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (OUP forthcoming).

⁸ See T Calvani, 'Enforcement of Cartel Law in Ireland' in B Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc 1999); W Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 17.

within the framework (eg justifying the existence of criminal punishment *per se* or its distribution in a given cartel scenario).⁹

Some punishment theories have more potential for inclusion in a cartel criminalization framework than others. Clearly, both 'rehabilitation through incarceration' and 'incapacitation through incarceration' are inappropriate in the antitrust context.¹⁰ The concept of 'rehabilitation through incarceration'—with its focus on those recidivist individuals who, after being punished, are, by their very nature, still incapable of adhering to the law—is of limited relevance when one is considering the punishment of educated corporate decision-makers who are capable, one assumes, of learning from their mistakes.¹¹ Unlike other types of crime—drugs-related crime, for example—the actions of such educated decision-makers cannot be easily perceived as being symptomatic of a wider social disease that needs to be treated.¹² For its part, 'incapacitation through incarceration' is inappropriate as we do not wish to put cartelists (who, their cartel activity notwithstanding, are usually productive, law-abiding members of society) behind bars *merely* to prevent them from being physically able to cartelize again in future. If one wished physically to prevent a given individual from engaging in cartel activity, one could use other, far less severe/costly methods, such as court orders preventing an individual from being involved in the management of a business.¹³

The theories of deterrence and retribution, by contrast, are of more obvious relevance in the debate on cartel criminalization. The available literature supports this view: both theories are generally perceived as representing the more appropriate objectives of the imposition of criminal sanctions on business enterprise.¹⁴ Indeed, both deterrence and retribution have been considered by commentators both in support of and against antitrust criminalization. Most of those legal commentators who advocate the imposition of personal criminal sanctions on individuals for engaging in cartel activity find inspiration for their arguments in the theory of deterrence. In a nutshell, those who advocate cartel criminalization highlight its necessity for the achievement of optimal deterrence,¹⁵ while those opposed to it argue the contrary.¹⁶ While far less room is

⁹ See P Whelan, 'Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law' (2008) 19 King's LJ 364, following the examples set by HLA Hart, *Punishment and Responsibility* (Clarendon Press 1968) and H Packer, *The Limits of the Criminal Sanction* (OUP 1968).

¹⁰ See C Renfrew, 'The Paper Label Sentence: An Evaluation' (1977) 86 Yale LJ 590, 592–93; G Werden, 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime' (2009) 5 ECJ 19.

¹¹ See D Baker and B Reeves, 'The Paper Label Sentences: Critique' (1977) 86 Yale LJ 619, 619.

¹² On this function of rehabilitation, see P Bean, *Punishment: A Philosophical and Criminological Inquiry* (Martin Robertson 1981) 54.

¹³ On the concept of a 'competition disqualification order', see A Stephan, 'Disqualification Orders for Directors Involved in Cartels' (2011) 2 Journal of European Competition Law and Practice 529.

¹⁴ See eg B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 S Cal L Rev 1141.

¹⁵ See eg W Wils, 'Is Criminalization of EU Competition Law the Answer?' in Cseres, Schinkel and Vogelaar (n 5).

¹⁶ See eg G Buccicrossi and P Spagnolo, 'Optimal Fines in the Era of Whistleblowers—Should Price Fixers Still Go to Prison?' (2005) Lear Research Paper No 05–01.

reserved in this debate for a systematic and detailed consideration of the concept of retribution, it is nonetheless possible to find some statements in the literature on the (negative) moral character of cartel activity.¹⁷ The well-known example is Klein's comment that collusion is the equivalent of 'theft by well-dressed thieves'.¹⁸ Likewise, Whish believes that there 'is not a great deal of difference between price-fixing and theft'.¹⁹ For Werden, cartel activity is 'properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm'.²⁰ Others are far less condemnatory and highlight the (relatively) neutral moral character of cartel activity.²¹

Given the above, one can therefore argue that: (i) one must have a robust normative framework rationalizing the existence of criminal cartel sanctions if the cartel criminalization project is to succeed and (ii) deterrence and/or retribution theory are *potential* criminal punishment theories that can inform such a normative framework. The word 'potential' is important here. This article precedes on the basis that deterrence and retribution are merely potential candidates for inclusion in the normative framework: it does not attempt to argue that deterrence and/or retribution theory should in fact be chosen for inclusion in the framework. The aim of the article is less ambitious; by developing the literature in this area, this article aims to provide scholars, legislatures and policymakers with specific analyses which are crucial to the choice as to whether to justify (or indeed to oppose) criminal cartel sanctions (ie imprisonment) on the basis of deterrence and/or retribution theory. In particular, it considers the challenge of actually identifying the 'moral wrongfulness' in cartel activity—a challenge that is relevant to the employment of not only retribution theory but also deterrence theory—and its implications for the definition of a criminal cartel offence.

To achieve its aim, this article is structured as follows. Section 2 provides a working definition of 'moral wrongfulness' and explains its relevance to the debate on cartel criminalization. It therefore presents the context in which the substantive analyses will be conducted. The remaining sections consider in turn whether cartel activity is 'morally wrong' on the basis of potential violations of particular moral norms which are widely accepted by society: Section 3 analyses whether cartel activity can amount to a violation of the moral norm against stealing, Section 4 considers whether cartel activity violates the moral norm against deception, and Section 5 examines whether cartel activity represents a violation of the moral norm against cheating. Finally, in Section 6, some concluding

¹⁷ See however M Stucke, 'Morality and Antitrust' [2006] Colum Bus L Rev 443; C Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 MULR 675; A MacCulloch, 'The Cartel Offence: Defining an Appropriate "Moral Space"' (2012) 8 ECJ 73.

¹⁸ J Klein, 'The War against International Cartels: Lessons from the Battlefield' (26th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, October 1999) 3.

¹⁹ R Whish, *Competition Law* (6th edn, OUP 2009) 498.

²⁰ Werden (n 10) 25.

²¹ See eg the comments of Switzerland in OECD, 'Cartel Sanctions Against Individuals' (January 2005) DAF/COMP(2004)39, 106.

observations are offered on the implications of the substantive analyses for the current debate on the employment of criminal sanctions for cartel activity.

2. 'Moral Wrongfulness' and its Relevance to the Debate on Cartel Criminalization

A. A Working Definition of 'Moral Wrongfulness'

The logical first step in this article would be to provide a working definition of the concept of 'moral wrongfulness'. To do so one can rely upon the innovative research conducted by Professor Stuart Green. According to that particular US scholar, the moral content of a given conduct can be assessed by analysing the culpability of the actor, the social harmfulness of the action and the moral wrongfulness of the action.²² Importantly, Green does not argue that the elements of this tripartite framework constitute a set of necessary or sufficient conditions for criminalization.²³ Rather, he uses the framework as an analytical structure 'for describing white-collar crime's moral complexity'.²⁴ Due to the research question posed by this article, it is Green's conceptualization of 'moral wrongfulness' that is of relevance for present purposes. For Green, conduct may constitute a 'moral wrong' if it is in violation of a pre-existing moral norm, such as that prohibiting stealing, deception or cheating.²⁵ To use this approach, one must acknowledge that moral wrongfulness is a norm-based concept, not necessarily a rights-based one.²⁶ This approach is less abstract than its 'traditional' counterpart, and therefore has the advantage of comprehensibility: '[e]ven people who have never had occasion to read a single page of moral philosophy are capable of making finely grained distinctions about, say, what properly constitutes cheating or stealing'.²⁷ Indeed, Green's treatment of moral wrongfulness is particularly useful for present purposes, ie determining the moral quality of a particular type of conduct which may at first glance seem innocuous or morally neutral. The definition of 'moral wrongfulness', then, fills the 'critical gap in the literature... by supplying a new tool kit for

²² S Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2006). For criticism of Green's tripartite framework, see eg M Berman, 'On the Moral Structure of White Collar Crime' (2007) 5 Ohio State J Crim L 301, 314.

²³ Green, *Lying* (n 22) 30.

²⁴ *ibid.*

²⁵ See S Green, 'Why it's a Crime to Tear a Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences' (1997) 46 Emory LJ 1535, 1551-53. It is conceded that other norms may also be relevant to cartel activity (eg the norm against promise breaking). However, due to spatial constraints, the author focuses on the norms against stealing, deception and cheating, norms which, as demonstrated below, have particular relevance to the concept of cartel activity.

²⁶ See A Steel, 'Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime by Stuart P Green', (Book Review), (2006) 29 UNSWLJ 349, 350.

²⁷ Green, *Lying* (n 22) 44.

understanding why everyday conduct, from speaking to investors to making campaign contributions to politicians, can be a crime worthy of society's moral condemnation';²⁸ to this list can be added the concept of cartel activity. In fact, the usefulness of Green's approach has been acknowledged a number of times by competition law academics. Stucke, for example, believes that Green's conceptualization of 'moral wrongfulness' is 'helpful' in evaluating the moral content of the antitrust conduct that has been criminalized by the Sherman Act 1890,²⁹ while Beaton-Wells contends that it would be of 'substantial assistance' in identifying the negative moral qualities of cartel activity, as defined in Australian legislation.³⁰ (In fact, these particular scholars employed, *inter alia*, Green's conceptualization of 'moral wrongfulness' to conduct their respective analyses in these contexts.³¹) The substantive sections of this article therefore consider the 'moral wrongfulness' of cartel activity by determining the extent to which such activity represents a violation of the moral norms against stealing, deception and/or cheating.

B. *Relevance to Deterrence*

The theory of deterrence holds that punishment can only be justified if it leads to the prevention or reduction of future crime.³² Deterrence is thus consequentialist: 'it looks to the preventive consequences of sentences',³³ viewing punishment as a method of maximizing utility, to be employed only when the disutility of its imposition is less than the utility to society secured by its deterrent effect. The economic variant of deterrence theory places the maximization of societal 'wealth' at the centre of the enquiry concerning utility.³⁴ Advocates of cartel criminalization have generally constructed their pro-criminalization arguments on the basis of (economic) deterrence theory. The key to an effective anti-cartel enforcement policy that ensures deterrence, so they argue, is the existence of the non-indemnifiable individual sanction of imprisonment. As observed by the OECD, '[a]s agents of corporations commit violations of competition law, it makes sense to prevent them from engaging in unlawful conduct by threatening them directly with sanctions and to impose such sanctions if they violate the law';³⁵ hence the rationale for a personal sanction. To avoid indemnification by the corporation (which ultimately

²⁸ P Henning, 'The DNA of White-Collar Crime' (2008) 11 New Crim L Rev 323, 354.

²⁹ Stucke (n 17) 491.

³⁰ Beaton-Wells (n 17) 679.

³¹ See Stucke (n 17) and Beaton-Wells (n 17).

³² N Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Barnes & Noble 1980) 26.

³³ A Ashworth, *Sentencing and Criminal Justice* (CUP 2005) 75.

³⁴ See G Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 J Pol Econ 169; R Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 JLS 103, 129; R Posner, 'The Value of Wealth: A Comment on Dworkin and Kronman' (1980) 9 JLS 243, 247.

³⁵ OECD, 'Cartel Sanctions Against Individuals' (n 21) 16.

benefits from the cartel), however, the personal sanction is coupled with the use of the criminal law—thereby introducing the (non-indemnifiable) threat of imprisonment—and accordingly becomes ‘the most meaningful deterrent’ to cartel activity³⁶ and a forceful method of sending ‘a message to other business executives about the risks and penalties for this kind of behaviour’.³⁷ Such an approach avoids the inherent problems associated with the imposition of an optimal deterrent fine on the firm (estimated at between 150 and 200% of annual turnover in the product market concerned),³⁸ which include insolvency, increased market concentration and the violation of legal caps on fines.³⁹

As implied by the paragraph directly above, a finding of ‘moral wrongfulness’ is not required in order to create a deterrence-based argument concerning the criminalization of cartels. In fact reliance on deterrence theory in this context has the potential to create a morally-neutral criminal offence. Indeed, those who depend upon deterrence theory to oppose criminalization sometimes emphasize the (relatively) neutral moral character of cartel activity in order to underline further the inappropriateness of criminal antitrust punishment.⁴⁰ While there are of course morally-neutral/-ambiguous offences,⁴¹ it does not necessarily follow that morality is no longer a concern for those who advocate criminalizing a given behaviour, including cartel activity.⁴² In fact, if the use of deterrence theory to justify criminal antitrust sanctions results in the creation of a morally-neutral criminal offence, a number of negative consequences may be engendered.⁴³ According to some, applying the criminal law to morally-neutral/-ambiguous conduct is not only unjust but is also counterproductive, in that by unfairly labelling offenders as criminals, the moral authority of the criminal law is undermined, resulting as a consequence in a weakening of its deterrent value.⁴⁴ Packer contends that applying the criminal sanction to morally-neutral conduct ‘decriminalizes’ the criminal law and can result in nullification or, more subtly, a changing of people’s attitudes towards the meaning of criminality.⁴⁵ The criminal law, then, should be concerned solely with conduct which unequivocally attracts the moral opprobrium of society.⁴⁶

³⁶ A Liman, ‘The Paper Label Sentences: A Critique’ (1977) 86 Yale LJ 619, 630–31.

³⁷ J Bauer, ‘Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?’ (2004) 16 Loyola Consumer L Rev 303, 307.

³⁸ See Wils (n 8) and Werden (n 10).

³⁹ See P Whelan, ‘A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law’ (2007) 4 Competition L Rev 7.

⁴⁰ See OECD, ‘Cartel Sanctions Against Individuals’ (n 21) 106.

⁴¹ See eg S Green, ‘Moral Ambiguity in White Collar Criminal Law’ (2004) 18 Notre Dame J L Ethics & Pub Policy 501.

⁴² See C Parker and VL Nielsen, ‘How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Non-Compliance with the Trade Practices Act’ (2008) 32 MULR 554, 601.

⁴³ See P Whelan, ‘Morality and its Restraining Influence on European Antitrust Criminalisation’ [2009] TCLR 40.

⁴⁴ Green, ‘Why it’s a Crime’ (n 25) 1536.

⁴⁵ Packer (n 9) 359.

⁴⁶ G Richardson, A Ogus and P Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press 1982) 14–15.

In the absence of such a restraint, the criminal law may begin to lose its legitimacy.⁴⁷

Such arguments do not entertain the possibility that by criminalizing cartel activity one may influence others as to how they perceive the nature of that behaviour.⁴⁸ They ignore the educative function of the criminal law and do not allow for the criminal law actually to *create*, and not just *reflect*, a moral opprobrium for what is, at least according to those who legislate, undesirable behaviour. The line between *malum in se* and *malum prohibitum* has been crossed many times and has largely been discredited and in fact the public learns a significant deal of its morality from what is punished by the criminal law.⁴⁹ However, even if one accepts this educative function, it does not necessarily follow that legislatures should be unrestrained in their attempts to develop a consensus concerning morality. There may be a problem of ‘sticky norms’, for example.⁵⁰ 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. The more negative that conduct is *already perceived* in terms of its moral qualities, the likelier it will be appreciated as undesirable conduct requiring criminal sanctions,⁵¹ and the easier it would be to employ the educative function of the criminal law. In fact, a number of important advantages can be achieved if a proposed criminal cartel offence relates to conduct which is morally questionable, such as a reduction in enforcement costs due to an internalization of the moral norm.⁵² Arguably, ‘[l]egal enforcement mechanisms cannot function unless they are based on a broad consensus about the normative legitimacy of the rules – in other words, unless they are backed by social norms’.⁵³ The success of a project of antitrust criminalization therefore ‘depends on the emergence of a genuine sense of “hard core” delinquency, without which effective regulation by means of criminal law is unlikely to be achieved’.⁵⁴ To avoid the potential for undesirable outcomes, one should therefore create a criminal cartel offence that has a sufficient degree of moral content. Accordingly, the issue of the ‘moral wrongfulness’ of cartel activity

⁴⁷ See S Kadish, ‘Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations’ (1963) 30 U Chi L Rev 423, 425–26; F Allen, ‘The Morality of Means: Three Problems in Criminal Sanctions’ (1981) 42 U Pitt L Rev 737, 738; P Robinson, ‘The Criminal-Civil Distinction and the Utility of Desert’ (1996) 76 BU L Rev 202; Packer (n 9) 359.

⁴⁸ See Stucke (n 17) 537.

⁴⁹ J Coffee, ‘Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law’ (1991) 71 BU L Rev 193, 200.

⁵⁰ Green, ‘Moral’ (n 41) 507–8. On this, see D Kahan, ‘Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem’ (2000) 67 U Chi L Rev 607.

⁵¹ See eg Packer (n 9) 262.

⁵² For a more detailed overview of the advantages of a finding of immorality in the context of antitrust criminal sanctions, see Stucke (n 17) 505–24.

⁵³ E Fehr and U Fischbacher, ‘Social Norms and Human Cooperation’ (2004) 8 Trends in Cognitive Sciences 185, 185.

⁵⁴ Harding (n 4) 183.

remains relevant even if one chooses to employ deterrence theory as the ultimate justification for criminal cartel sanctions.

C. *Relevance to Retribution*

At their most basic, theories of retribution have traditionally held that punishment ought to be justified not by reference to its ability to prevent future crime but rather because human beings are responsible for their actions and must thus receive what they deserve when they have made what society deems are wrong choices.⁵⁵ Such theories employ an approach to punishment that is backward-looking to the offence, rather than forward-looking to the offender or to the consequential effects of punishment on the rest of society;⁵⁶ they are centred on the concept of retribution for offences against the moral code.⁵⁷ Theories of (pure) retribution view punishment as a justification in itself for a wrong that has been committed; they argue for the imposition of punishment irrespective of its impact upon future crime levels.⁵⁸ For such retributionists it is the nature of the prohibited act, and not the consequences of punishment, that matters.⁵⁹ It is true, however, that most modern retribution theorists generally attempt to distance themselves from the 'strong form' retributive arguments, which claim that just deserts theories not only offer society a justification for the imposition of punishment but also impose an obligation concerning its use.⁶⁰ These theorists attempt to move beyond the intuitive assertion that 'those who have done wrong should be punished' and incorporate other social justifications into the use of their retribution models⁶¹ (such as neutralizing an unfair advantage⁶² or fulfilling a communicative function⁶³).

Given this context, the contention that 'moral wrongfulness' is relevant to a retribution-based argument in favour of cartel criminalization should be self-evident. In fact, unlike with deterrence theory (where the conceptualization of cartel activity as 'morally wrong' is advisable rather than absolutely necessary), a robust determination of the 'moral wrongfulness' of cartel activity is essential to support a retribution-based criminalization argument. This is true as much for 'pure' retribution theory, as for those retributionist theories that also incorporate other social justifications into their respective models.

⁵⁵ Packer (n 9) 37.

⁵⁶ On the distinction between forward-looking and backward-looking rationales for criminal punishment, see generally R Williams, 'Cartels in the Criminal Law Landscape' in Beaton-Wells and Ezrachi (n 5).

⁵⁷ D Galligan, 'The Return to Retribution in Penal Theory' in C Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths 1981) 144.

⁵⁸ D Boonin, *The Problem of Punishment* (CUP 2008) 85.

⁵⁹ See A Duff and D Garland, 'Introduction: Thinking About Punishment' in A Duff and D Garland (eds), *A Reader on Punishment* (OUP 1994) 4.

⁶⁰ See K Yeung, *Securing Compliance—A Principled Approach* (Hart Publishing 2004) 72–73.

⁶¹ Galligan (n 57) 153–54.

⁶² See eg J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 262–64.

⁶³ See A von Hirsch, *Censure and Sanctions* (Clarendon Press 1993).

Consequently, the analyses presented in Sections 3–5 of this article are at their most relevant when criminalization frameworks which employ the criminal punishment theory of retribution are at issue. As noted above, the literature on the ‘moral wrongfulness’ of cartel activity is underdeveloped: few detailed examinations of the moral quality of cartel activity exist and the robustness of a retribution-based criminalization argument remains to be tested. The addition to the literature represented by the substantive analyses that follow therefore has most to offer to those who wish to consider retribution theory in their cartel criminalization frameworks.

3. Cartel Activity as Stealing

Stealing can be conceptualized as an intentional and fundamental violation of another’s rights of ownership in something that is capable of being bought or sold.⁶⁴ There are four elements present in this definition. The first to be determined is the existence of something that is capable of being bought or sold. This element can be fulfilled with cartel activity. Successful cartels lead to a higher price for the cartelized good/service.⁶⁵ One can restate this as follows: with a successful cartel a given sum would purchase fewer goods/services following cartel activity than it would have done in its absence. The goods/services represented by this reduction are capable, by definition, of being bought or sold.

The second condition is that the victim of the cartel actually has a right of ownership over the overcharge. This is where the real potential for disagreement lies. In contrast to others,⁶⁶ Green argues that the right of ownership does not necessarily owe its existence to the law; rather, it can have a non-legal character: stealing is ‘in some fundamental way pre-legal’.⁶⁷ Consequently, one could argue that, irrespective of their legal rights, consumers are nonetheless entitled to a competitive price for the goods/services on the market; that, for example, due to the endorsement of free market economics by European citizens, consumers have a right to a competitive market.⁶⁸ It is difficult, however, to pinpoint exactly how and when such a right is created, hence the

⁶⁴ Green, *Lying* (n 22) 89–91. This definition is slightly different to the legal definition of ‘theft’ in s 1(1) of the Theft Act 1968, in particular because it does not require the intentional interference to be ‘dishonest’. Those who wish nonetheless to consider ‘dishonesty’ in this context would find the section below on ‘Cartel Activity as Deception’ to be informative.

⁶⁵ See eg J Connor and R Lande, ‘How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines’ (2005) 80 *Tul L Rev* 513; J Connor and R Lande, ‘The Size of Cartel Overcharges: Implications for US and EU Fining Policies’ (2006) 51 *Antitrust Bull* 983; J Connor, ‘Overcharges: Legal and Economic Evidence’ (2007) 22 *Research in L & Econ* 59.

⁶⁶ Such as B Gert, *Morality: A New Justification of the Moral Rules* (OUP 1988) 135–36.

⁶⁷ Green, *Lying* (n 22) 89.

⁶⁸ In support, one could even argue that Article 101(3) TFEU *impliedly recognises* the right of consumers to a competitive market: if an agreement etc violates Article 101(1) TFEU, the undertaking(s) must demonstrate, *inter alia*, that consumers are compensated to ensure that Article 101(1) TFEU is declared inapplicable: consumers must receive a fair share of any efficiencies secured due to the anti-competitive arrangement.

room for disagreement. It might be best therefore to consider the role of the law. Indeed, with cartel law one can create such a right of ownership. For example, one could criminalize the wealth transfer from the consumer to the purchaser. For Calvani, this occurred in Ireland: criminalization resolved the issue of ownership of the consumer surplus.⁶⁹ It would of course be circular to argue here that criminalization provides the basis for moral wrongfulness and therefore (following a retributionist line of argument) for criminalization itself. But this is not a problem that cannot be overcome: the *civil* law also can be employed to create such rights prior to criminalization. There is a strong case that progress towards the creation of such rights has already been made under EU law. Indeed, in recent years an increasing importance has been given to the place of the consumer in EU cartel law,⁷⁰ and consumers have been encouraged by the European (and national) institutions to sue for damages caused by cartel activity.⁷¹ At one point a consumer welfare standard (ie a standard which attempts to maximize the consumer surplus and reduce any consumer-to-producer wealth transfers) appeared to have been expressly recognized at EU level as the standard to be applied when assessing the anti-competitiveness of agreements under EU competition law.⁷² According to a former Commissioner for Competition, 'consumer welfare is now well established as the standard the Commission applies when assessing... infringements of the Treaty rules on cartels'.⁷³ Admittedly, however, the legality of such an approach can be questioned following the judgment of the Court of Justice in *GlaxoSmithKline*,⁷⁴ and debate concerning the appropriate welfare standard in EU competition law continues.

This brings one to a crucial point: the debate on whether cartel activity can be interpreted as a form of stealing cannot be divorced from the debate on the appropriate standard to be adopted in antitrust cases (ie consumer welfare or total welfare). That is, choice over the standard to be employed affects the viability of the argument on stealing. Neo-classical economists generally prefer a total welfare standard to a consumer welfare standard, as its implementation treats wealth transfers (from consumer to producer, for example) as welfare-neutral.⁷⁵ This preference has been reflected in the views of some antitrust

⁶⁹ T Calvani, 'Competition Penalties and Damages in a Cartel Context: Criminalization and the Case for Custodial Sentences' (Conference Paper, Irish Centre for European Law, 13 December 2004) 3.

⁷⁰ See M Hutchings and P Whelan, 'Consumer Interest in Competition Law Cases' (2006) 16 *Consumer Policy Review* 180.

⁷¹ See Commission, 'White Paper—Damages Actions for Breach of the EC Antitrust Rules' COM (2008) 165 final; Commission, 'Public Consultation—Towards a Coherent European Approach to Collective Redress' SEC (2011)173 final.

⁷² See Cases T-213/01 and T-214/01 *Österreichische Postsparkasse AG v Commission* and *Bank für Arbeit und Wirtschaft AG v Commission* [2006] ECR II-1601, para 115.

⁷³ N Kroes, 'European Competition Policy: Delivering Better Markets and Better Choices' (SPEECH/05/512, London, 15 September 2005).

⁷⁴ Joined Cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291.

⁷⁵ R Pittman, 'Consumer Surplus as the Appropriate Standard for Antitrust Enforcement' (2007) 3 *Comp Policy Intl* 205.

scholars.⁷⁶ Indeed, some academics have requested competition agencies to adopt this particular standard.⁷⁷ By adopting such a standard, the agencies would effectively ignore the distributive consequences of the conduct, focusing instead on its alleged efficiency effects. The question whether the cartelist ‘steals’ the property of her customer by overcharging her is therefore irrelevant; all that matters is whether total welfare is maximized. In contrast, by adopting a consumer welfare standard, the enforcement agencies concern themselves with distributive consequences and in the process take a politically-motivated decision on who should benefit from intervention in the market.

By choosing a consumer welfare standard over a total welfare standard, one facilitates the argument that cartel activity can be conceptualized as stealing: such a choice explicitly vests rights concerning the overcharge in consumers. There are a number of problematic issues with this type of approach, however. First, one must establish why consumers should be treated more favourably than producers, a difficult task given that the assumed ‘weaker/poorer versus stronger/richer party’ analysis may not be valid: ‘[t]he monopoly yacht manufacturer may be owned by a “blue collar” pension fund’.⁷⁸ Indeed, shareholders are ultimately consumers, and therefore no obvious reason exists to prefer consumer surplus to producer surplus.⁷⁹ Also, if distributional consequences are to be considered then presumably poor and rich consumers should not be treated alike; yet under the consumer welfare standard this is not the case.⁸⁰ Secondly, a total welfare standard would offer more legal certainty because it does not look to the subjective interests of consumers.⁸¹ Thirdly, compared to the tax system, competition policy is an inefficient instrument for ensuring the redistribution of income.⁸² Accordingly, a total welfare standard can be used to maximize efficiency, and any unwanted distributive consequences can be dealt with using the tax system.⁸³ These arguments reduce the attractiveness of a consumer welfare standard. To the extent that this is so, arguments that cartel activity is akin to stealing would suffer from an inherent limitation.

However, paradoxically, a strong case can be made as to why one should nonetheless use a consumer welfare approach: by maximizing consumer surplus one is likelier to secure a total-welfare-maximizing outcome than by

⁷⁶ See eg H Hovenkamp, ‘Antitrust Violations in Securities Markets’ (2003) 28 Iowa J Corp L 607, 609.

⁷⁷ Pitman (n 75).

⁷⁸ Calvani (n 69) 3–4.

⁷⁹ A Majumdar, ‘The Role of a Consumer Harm Test in Competition Policy’ (2008) 20 Loyola Consumer L Rev 144.

⁸⁰ J Farrell and M Katz, ‘The Economics of Welfare Standards in Antitrust’ (2006) 2 Comp Policy Intl 3, 11.

⁸¹ M Monti, *European Competition Law* (CUP 2007) 85.

⁸² *ibid.* See also Farrell and Katz (n 80); and L Kaplow and S Shavell, ‘Why the Legal System is Less Efficient than Income Tax in Redistributing Income’ (1994) 23 JLS 667.

⁸³ W Kerber, ‘Should Competition Law Promote Efficiency?’ in J Drexler, L Idot and J Moneger (eds), *Economic Theory and Competition Law* (Edward Elgar Publishing 2008).

using the total welfare standard.⁸⁴ Intuitively, this is correct, because when firms have a number of profitable strategies at their disposal, a consumer welfare standard may ensure that firms choose the best strategy which will maximize total welfare:

[u]nder a consumer standard, firms pursue profitable strategies up to the point where consumers are not harmed. If overall profits rise, while consumer surplus does not fall, total welfare must *increase*. Under a total welfare standard, firms can go past this point – they may find that the most profitable *permissible* strategies are those that harm consumers a lot (ie the very high profits just offset the loss to consumers). In this case, overall total welfare may hardly increase at all.⁸⁵

A consumer welfare standard is also easier to apply, as determining whether consumers have suffered harm, while perhaps difficult, is not as complicated as measuring that harm and then trading it off against gains in profits.⁸⁶ Consequently, a consumer welfare standard should be adopted, even absent an express political judgement on the desirability of consumer–producer wealth transfers. This pragmatic approach, if accepted, facilitates the conceptualization of cartel activity as stealing.

The third element, a fundamental violation, will be present in the case of cartel activity, provided of course that (i) the goods/services represented by the cartel overcharge can be deemed to be the property of the victims and (ii) the cartelists charge her customer(s) a price which is higher than the competitive price for the product: the cartelists will keep the overcharge and therefore substantially interfere with the victim's ability to use or possess her property. In fact, if the cartel is successful and the cartelized product is purchased, the victim would be completely incapable of exercising her rights of ownership in the overcharge. One should be aware that a fundamental violation will not be present where the cartel agreement⁸⁷ in question is formed but not implemented: by creating a cartel agreement, the cartelists will only have agreed to violate the rights of its customers; to actually violate them they must put the cartel into practice. Consequently, if the criminal cartel offence is necessarily to capture conduct which amounts to a violation of the moral norm against stealing, its scope should not extend beyond the implementation of a cartel to the mere agreement to implement a cartel.

The final element requires determination of the cartelists' intentions in entering into a cartel in the first place: stealing requires an intention to obtain the overcharge. In order to consider this element, one must first define the concept of intention. In criminal law intention is generally understood as

⁸⁴ See B Lyons, 'Could Politicians Be More Right Than Economists? A Theory of Merger Standards' (2002) University of East Anglia, Centre for Competition and Regulation Working Paper CCR 02–1; Majumdar (n 79).

⁸⁵ Majumdar (n 79) 145, footnote omitted.

⁸⁶ *ibid.*

⁸⁷ In this article, the word 'agreement' should be read as covering 'agreement, concerted practice or arrangement', unless the context dictates otherwise.

including two alternative categories: direct intention and indirect (oblique) intention.⁸⁸ The defendant *directly* intends a consequence (ie capturing an overcharge) if: (a) she wants to bring about that consequence; or (b) she believes that it is possible to achieve an ultimate objective by bringing about that consequence; and (c) she behaves as she does because of her desire in (a) or her belief in (b).⁸⁹ The literature on criminal intention therefore acknowledges that something done as a means towards another end is deemed to be an intentional act in its own right. By contrast, an *indirect or oblique* intention may be found to exist concerning a given consequence where that particular consequence was recognized by the defendant as a virtually certain consequence of her actions, even when the consequence was neither an ultimate objective nor a means towards an ultimate objective.⁹⁰ Importantly, the existence of multiple intentions of the defendant towards a given consequence is not problematic: '[i]gnoring extraneous intentions, the criminal law focuses only on the actus reus; and asks, *whatever else he intended*, did D intend that actus?'.⁹¹

The empirical literature on the intentions of cartelists is relatively sparse,⁹² a fact which complicates the issue. Theoretical arguments have tended to fill this void and can help one analyse this issue. The primary theoretical argument is as follows. By employing economic deterrence theory, one assumes that cartelists are rational economic actors who act in their own interest in order to maximize their own welfare.⁹³ Accordingly, a rational cartelist can be deterred from engaging in a given conduct if the cost to her of such conduct is greater than its benefit, and the existence of a cartel implies that, if rationality is indeed present as assumed, engaging in cartel activity results in a net gain to the cartelist. Following this line of argument, as cartels exist in practice, they must therefore be perceived as profitable to the relevant cartelists.⁹⁴ But how exactly are they profitable? They are profitable because the cartelist obtains all or part of the overcharge. The desired objective of maximizing profit (ie rationality) therefore manifests itself in a direct intention to obtain all or part of the overcharge. In other words if rational choice theory holds the mere existence of cartels dictates that cartelists intend to obtain the overcharge: the overcharge is

⁸⁸ See generally J Smith, 'Intention in Criminal Law' (1974) 27 CLP 93; A White, 'Intention, Purpose, Foresight and Desire' (1976) 92 LQR 569; G Williams, 'Oblique Intention' (1987) 46 CLJ 417; MC Kaveny, 'Inferring Intention from Foresight' (2004) 120 LQR 81.

⁸⁹ See AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Hart Publishing 2010) 128.

⁹⁰ See D Omerod, *Smith and Hogan Criminal Law* (12th edn, OUP 2008) 98. For English cases incorporating this definition of oblique intention, see *R v Woollin* [1999] 1 AC 82 (HL) and *R v D* [2004] EWCA Crim 1391.

⁹¹ See Simester and others (n 89) 138 (emphasis added).

⁹² For a general overview, see C Parker, 'Criminalisation and Compliance: The Gap Between Rhetoric and Reality' in Beaton-Wells and Ezrachi (n 5).

⁹³ On the plausibility of this assumption in the context of economic activity, see Whelan (n 39).

⁹⁴ Some commentators have proposed a positive relationship between collusion and profitability, positing that lower profits tend to lead to collusion. See eg P Asch and J Seneca, 'Characteristics of Collusive Firms' (1975) 23 J Industrial Econ 223; J Skilbeck, 'Cartels: Where Is the Case for Criminal Sanctions?' (2003) 4 World Econ J 1.

a means of obtaining profit maximization. But for this to be the case, the assumption of rationality must be a realistic assumption in practice.

Some argue that the available empirical evidence suggests that self-interested calculation is not the sole factor determining adherence to the (competition) law⁹⁵ and that complex social and normative factors also affect an individual's decision to cartelize.⁹⁶ There may, then, be many different reasons why cartelists act the way that they do. According to the available empirical literature however, cartelists frequently rationalize their conduct in a manner that is consistent with their highly regarded positions in society,⁹⁷ for example by claiming that their actions were designed to protect their companies (and their employees) in difficult times.⁹⁸ It may be too simplistic therefore to argue that, by virtue of rationality, cartelists necessarily act with a given intention.

There are two possible arguments, however, that can nonetheless be employed to attempt to substantiate the claim that cartelists intend to obtain the overcharge. The first is that the conclusions in the available empirical literature on the motivations of cartelists are not always inconsistent with the existence of rationality and therefore do not necessarily undermine the theoretical assumption made in the context of economic deterrence theory. Even if cartelists act with an apparent benevolent intention (eg to save jobs), obtaining the overcharge still remains *the means* by which such a benevolent aim is achieved: the cartelist acts because she believes that the benevolent aim can be achieved through cartel activity as such an activity increases profitability by enabling the firm to capture the overcharge. In fact, the same conclusion can hold if the ultimate aim of the cartelist is merely to increase her standing in the firm or to be seen to be doing what other executives in the firm are doing. Understanding intention as capturing both ultimate objective and the means to achieve that objective can therefore facilitate a finding of an intention to capture the overcharge.

The second argument again employs the wide definition of intention noted above, this time focusing on the inclusion of *indirect* intention within that definition. The argument here is that the cartelist was fully aware of the virtually certain results that her actions would occasion: her customers would suffer a fundamental violation of their rights in the overcharge. There is a nuance to be understood here however. This is due to the requirement of a 'virtually certain' result. When a cartelist *merely enters* into a cartel agreement with her competitors, it is not virtually certain that consumers will be harmed. This is due to the law of demand and the incentives that it places on cartel members to cheat on the cartel. The fact that by lowering their price (ie

⁹⁵ See Parker and Nielsen (n 42).

⁹⁶ Parker (n 92). See also T Tyler, *Why People Obey the Law* (Princeton University Press 2006).

⁹⁷ See G Geis, 'The Heavy Electrical Equipment Antitrust Cases of 1961' in G Geis, RF Meier and LM Salinger (eds), *White Collar Crime* (3rd edn, Free Press 1995) 155–56, 163.

⁹⁸ See A MacCulloch, 'Honesty, Morality and the Cartel Offence' (2007) 28 ECLR 355, 362.

cheating on the cartel) the cartelist may capture more customers may lead to the cartel agreement never being implemented in the first place.⁹⁹ Of course there are numerous examples of cartels that have lasted for many decades irrespective of incentives to cheat.¹⁰⁰ However, the point here is that it does not follow that *every single* cartel will in fact get beyond the stage of agreement and actually result in higher prices to consumers. Therefore, one cannot say with confidence that the creation of a cartel agreement inevitably leads to certain losses for consumers. That said, cartel agreements which have been *implemented* by the cartelists (ie by charging higher prices to their customers) will by definition lead to the virtually certain result that is required for a finding of stealing. Therefore, like with the requirement of a fundamental violation, one needs to be careful when defining the precise actions of the cartelist in this context. Where oblique intention alone is relied upon to substantiate the existence of an intention to capture the overcharge, any resulting criminal cartel offence must take account of the nuance identified. In particular, in such an instance, if the criminal cartel offence is necessarily to capture conduct which amounts to a violation of the moral norm against stealing, its scope should not extend beyond the implementation of a cartel to the mere agreement to implement a cartel.

4. Cartel Activity as Deception

Deception occurs where (i) a message is communicated, with (ii) an intent to cause a person to believe something that is untrue and (iii) a person is thereby caused to believe something that is not true.¹⁰¹ The central issues of concern inherent in the concept are: the actual message that is communicated by the cartelist; the process by which this message leads to a false belief on behalf of a third party; the content of the false belief itself; and the intentions of the cartelist when she communicates the message.

There are three potential scenarios involving the interaction of a cartelist with her customer which are relevant for present purposes. The first scenario relates to the situation where the cartelist *expressly states* to her customer that she *has* colluded. The second scenario exists where the cartelist *expressly states* to her customer that she *has not* colluded. The third scenario arises when the cartelist does not expressly state that cartelization has (or has not) occurred but nonetheless *fails to disclose* its occurrence to her customer.

The first scenario is the easiest to address. When the cartelist *expressly states* to her customer that she *has* colluded with her competitors, there will be no deception; the cartelist is merely telling the truth. Indeed, the admission

⁹⁹ M Motta, *Competition Policy: Theory and Practice* (CUP 2004) 139.

¹⁰⁰ On this, see the extensive literature referenced in O De, 'Analysis of Cartel Duration: Evidence from EC Prosecuted Cartels' (2010) 17 J Econ Bus 33.

¹⁰¹ See J Adler, 'Lying, Deceiving or Falsely Implicating' (1997) 94 J Phil 435, 437.

effectively ensures that the customer is made aware of the cartel: presumably, the customer would not be led to believe by such an admission that in fact no cartel exists. If there is an admission of the existence of a cartel prior to a sale, then, there is no violation of the moral norm against deception. While this assertion may represent a statement of the obvious, it can nonetheless influence how one designs a criminal cartel offence. For example, the UK Government recently decided to introduce a 'carve out' from the criminal Cartel Offence in section 188 of the Enterprise Act 2002 of (cartel) agreements which were published in a suitable format prior to their being implemented 'so that customers and others are aware of them'.¹⁰² Such a 'carve out' can be rationalized as an attempt to link cartel activity to immoral behaviour (ie deception), particularly given that the UK Government has also decided to remove the definitional element of 'dishonesty' from the UK Cartel Offence.¹⁰³

The second scenario is also relatively unproblematic. Here, however, there will be a violation of the moral norm. The message that is communicated ('I have not engaged in cartel activity') is a verifiable assertion which is literally false.¹⁰⁴ The assertion is verifiable as, irrespective of (legal) issues of evidence, the individual has indeed either cartelized or she has not. If the individual has indeed cartelized, the statement is literally false.¹⁰⁵ The actual message intended to be communicated, then, is a lie. The process by which this communicated message leads to a false belief on the behalf of a third party (ie that cartel activity has not occurred) involves the reliance by the third party upon one of the 'core conventions of dialogue': the convention that 'positive assertions of fact are true in the ordinary sense of the words used'.¹⁰⁶ It is this convention that causes the false belief. Furthermore, it is not difficult to argue that, absent a genuine mistake on the part of the cartelist, her ultimate objective in communicating is to mislead the customer. There are certainly incentives for the cartelist to so mislead. Customers are less likely to display 'bad feelings' about the price rise (and are therefore less likely to seek alternative suppliers) if they attribute the price rise to cost increases rather than to collusion; and due to their ignorance of the cartel's existence, customers will not report the cartel to the authorities. One must not forget here that cartel activity is unlawful after all and, if detected, will result in the imposition of

¹⁰² See Department for Business, Innovation and Skills, 'Growth, Competition and the Competition Regime—Government Response to Consultation' (URN 12/512, March 2012) 66; Enterprise and Regulatory Reform HC Bill (2012–13) [089] s 47.

¹⁰³ See P Whelan, 'Reforming the UK Cartel Offence: A Response to *A Competition Regime for Growth: A Consultation on Options for Reform*', submitted to the Department for Business, Innovation and Skills, June 2011; P Whelan, 'Improving Criminal Cartel Enforcement in the UK: The Case for the Adoption of BIS's "Option 4"' (2012) 8(3) ECJ 589.

¹⁰⁴ To use the words of Green, *Lying* (n 22) 77.

¹⁰⁵ On the concept of 'literal falseness', see PM Tiersma, 'The Language of Perjury: "Literal Truth", Ambiguity and the False Statement Requirement' (1990) 63 Cal L Rev 373, 379–80.

¹⁰⁶ L Alexander and E Sherwin, 'Deception in Morality and Law' (2003) 22 L & Phil 393, 403–4.

significant fines.¹⁰⁷ It should thus be no surprise that, according to the Commission at least, ‘the undertakings involved in the gravest antitrust infringements *usually* employ efforts and sometimes sophisticated means to conceal their illegal conduct’.¹⁰⁸ The General Court agrees with this assessment.¹⁰⁹ Alternatively, oblique intention would be present concerning the creation of the false belief if the cartelist is aware that her customers trust her and take her statements at face value. With express statements, then, the criteria concerning deception can be fulfilled relatively easily. But while the second scenario may indeed involve deception, it is unlikely to occur in practice: cases where cartelists provide statements such as ‘no need to worry, our prices have not been determined by collusion’ will be rare.¹¹⁰ A possible exception may be where official statements concerning the absence of collusion when preparing tenders are provided to secure government procurement contracts. This occurs in Germany, where bids responding to public calls for tender, or to calls for tender addressed to at least two entities, ‘contain either an express or at least an implied representation that the bids are not rigged’.¹¹¹

The third scenario is more common in the real world, however. It also presents a more complicated analysis concerning deception: the message here is more subtle, in that it does not *expressly* comment on the absence or otherwise of cartel activity; and the mechanism through which the message occasions a false belief is less robust. The message communicated by a cartelist when active in a market is that her (cartelized) goods/services are available for sale. This message is a literal truth: the goods are indeed for sale. This is not a problem though, as literally true statements are capable of being deceptive.¹¹² What is required is that the message communicated leads to a false belief. The false belief is that cartel activity has not occurred; it is created due to an assumption made by third parties as a result of the communication of the original message. The assumption is that the cartelist is lawfully engaged in normal competition with her competitors. By placing her (cartelized) good on the market and by keeping the cartel secret, the cartelist implies that she has not actually cartelized. A similar point has been argued concerning the common law offence of conspiracy to defraud:

in many situations today third parties who deal with undertakings that are in fact parties to cartel agreements will proceed on the *assumption* that they are dealing with

¹⁰⁷ For EU-level statistics, see generally C Veljanovski, ‘European Cartel Prosecutions and Fines, 1998–2009—A Statistical Analysis of Fines Under the 1998 Penalty Guidelines’ (March 2009) <<http://ssrn.com/abstract=1016014>> accessed 4 April 2013; C Veljanovski, ‘Penalties for Price-Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission’ (2006) 27 ECLR 510.

¹⁰⁸ Commission, ‘Commission Staff Working Paper Accompanying the White Paper—Damages Actions for Breach of the EC Antitrust Rules’ SEC (2008) 404, para 88 (emphasis added). See also Geis (n 97) 154–55.

¹⁰⁹ See Case T-53/03 *British Plasterboard v Commission* [2008] ECR II-1333, para 63.

¹¹⁰ P Whelan, ‘Resisting the Long Arm of Criminal Antitrust Laws: *Norris v US*’ (2009) 72 MLR 272, 280.

¹¹¹ F Wagner-von Papp, ‘What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany’ in Beaton-Wells and Ezrachi (n 5) 107.

¹¹² See Adler (n 101).

undertakings that are lawfully engaged in normal competition with each other; and the cartelists will know that that is so and will, in effect, act in a dishonest... manner, if the existence of the cartel is kept secret.¹¹³

This argument was accepted by the High Court when it ruled that cartel activity *per se*, that is without aggravating features such as express lies, could be a dishonest practice in law.¹¹⁴ While the argument was rejected on appeal,¹¹⁵ it was rejected due to legal precedent and not because the moral concept of dishonesty, or indeed deception, was incapable of accommodating cartel activity.

The assertion above concerning the assumptions of consumers is not unproblematic, however. The reason for this is that there is currently no empirical evidence available to demonstrate directly that consumers do indeed make the assumption that the sellers of goods/services have not colluded. Robust empirical evidence is required to overcome definitively this particular weakness; consumer surveys could be used. This is not to say, however, that the assertion that consumers make such an assumption cannot be supported at present. In fact, two particular points lend support to that assertion.

First, it appears that a majority (60%) of UK citizens surveyed believe that cartel activity is 'dishonest'.¹¹⁶ Perhaps they find the practice dishonest because they assume that sellers do not *as a matter of course* collude with their competitors. Cartelists may be dishonest because, *inter alia*, they are acting in a manner that is inconsistent with (what these citizens perceive to be) fair and legitimate business practice. Put differently, if such citizens assumed that *all* sellers actually engaged in cartel activity, would they be as quick to label any given cartelist as dishonest? The answer may well be 'no'. If so, UK citizens would at least be assuming, then, that *some* sellers are not colluding.

Secondly, the assumption against cartel activity can be transposed to a more general assumption made by consumers: the assumption that, in the absence of contrary evidence, sellers respect the law. Such an assumption could be conceptualized as the popular (rather than the legal) manifestation of the principle of the presumption of innocence. If citizens value the legal manifestation of this principle—which is likely—they may well put it into practice in their daily dealings. If so, consumers may assume that, until contradictory evidence is forthcoming, sellers usually adhere to the cartel law rules and so do not collude. This argument, however, requires citizens actually to be aware that cartel activity is unlawful. Consequently, to the extent that

¹¹³ J Lever and J Pike, 'Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence": Parts I & II' (2005) 26 ECLR 90, 95.

¹¹⁴ See *Norris v Government of the USA* [2007] EWHC 71 (Admin), [2007] 1 WLR 1730 [66]–[67].

¹¹⁵ See *Norris v Government of the USA* [2008] UKHL 16, [2008] 1 AC 920.

¹¹⁶ See A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 Comp L Rev 123.

such awareness does not exist, one cannot argue that the more general assumption (concerning adherence to the law) is active.

In any case, it is the secret nature of cartels which provides potential for the existence of any assumption on behalf of consumers concerning the existence of competition between competitors. If this secrecy is not present, for example due to a public statement by the cartelists acknowledging the cartel, then deception should not be found: reasonable publicity as regards the existence of the cartel would effectively turn the third scenario into the first scenario. Deception would be absent, then, if an exemption were expressly granted by the relevant competition authority prior to the cartelist offering her goods for sale, because presumably the public would have (at least constructive) notice of this exemption decision and therefore of the cartel.

The final element that requires consideration is the intention of the cartelist in scenario three. While an intention to mislead may well be inferred from the conduct of cartelists in those (detected) cartels involving sophisticated methods of concealment,¹¹⁷ the same issues of empirical assessment of the cartelist's direct intention are nonetheless present in this context as with the moral norm against stealing: the intentions of cartelists have not been determined definitively on the basis of empirical evidence. Likewise, to fill the empirical gap, one can also link the relevant intention (viz an intention to mislead) to a direct intention which is supported by robust theoretical arguments concerning cartel activity (an intention to make profit). Misleading the customer about the existence of the cartel helps to protect the reputation of the firm and to keep the existence of the cartel secret (thereby protecting the firm from a fine). Causing a false belief may therefore represent a *means* of achieving profit, itself a likely desired end of cartel activity for the majority of cartelists, and hence represents a direct intention in its own right.

An indirect intention to cause a false belief may also exist, although this would not be as clear cut as the indirect intention identified with stealing. The problem is that the making of an assumption by the customer (regarding the existence of competition) has not been established as an inevitable consequence of offering products on the market, as explained above. Furthermore, if such an assumption were in fact active in practice, the cartelist herself must be aware of it for an indirect intention to be present regarding the false belief. Depending on the closeness of her relationship with her customers, the cartelist may be well placed to appreciate the beliefs, assumptions and feelings of customers. Customers may reveal by their conduct that they are making the assumption in question. They may express gratitude to the cartelist (or to her representatives) for offering her 'best price' for the product, for example. Customer satisfaction surveys, if taken, may further imply the existence of the

¹¹⁷ An EU example is *Gas Insulated Switchgear* (Case COMP/F/38.899) Commission Decision, 24 January 2007, C(2006)6762 final, [2004] OJ C5/3.

assumption (particularly, if customers are generally satisfied with price levels). The point here, however, is that even if the assumption is inevitably made by customers, it is not inevitable that all cartelists will know about it. There are therefore two inherent limitations of a deception argument based on, *inter alia*, the indirect intention of the cartelist: the existence of the relevant assumption and the cartelist's awareness of it.

There is a further, final limitation to the argument that cartel activity is akin to deception. It exists for both scenario two and scenario three and irrespective of whether direct or indirect intention is at issue. The limitation is that the cartel must have been implemented by the cartelist. It is not sufficient for the cartelist to merely have entered into a cartel agreement. The reason for this is that the message communicated in both scenarios requires the offering of a product *at a cartelized price*. The second scenario requires a false statement that the product on sale is not cartelized; a relevant *false* statement here obviously necessitates that the product actually be overpriced due to a cartel. The third scenario requires the customer to have a *false* belief that a product's price is its competitive price merely through the offering of that product by the cartelist. Again for the belief to be false, the product in question must in fact be overpriced due to collusion. To link a criminal cartel offence to the violation of a moral norm against deception, then, one must therefore ensure that its *actus reus* does not include the mere conclusion of a cartel agreement.

5. *Cartel Activity as Cheating*

Cheating occurs where a natural or legal person has: (i) violated a fair, legitimate and fairly-enforced rule, with (ii) the intent to 'obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship'.¹¹⁸ The 'rule' in question must also be general, prescriptive, mandatory, conduct-based and represent a standard.¹¹⁹ Cartel activity can arguably be interpreted as a form of cheating. The 'rule' is represented by the prohibition on price-fixing, output restriction, market sharing and bid rigging ('the cartel prohibition') in Article 101 TFEU and/or national equivalents. This rule is general in application: it is concerned with *types* of actions (price-fixing, output restrictions, etc) as opposed to a particular set of actions in a particular set of circumstances.¹²⁰ It is prescriptive in that it guides or controls behaviour; it does not seek to describe the actual conduct of market players.¹²¹ The rule is mandatory: it describes what one must not do (eg one must not fix prices), not what one is advised not to do in order to achieve a desired result (eg one should not fix prices if one wishes to create loyal customers). The cartel

¹¹⁸ Green, *Lying* (n 22) 57.

¹¹⁹ *ibid* 58–62.

¹²⁰ See W Twining and D Miers, *How to Do Things with Rules* (Weidenfeld and Nicholson 1991) 123.

¹²¹ On this concept, see F Schauer, *Playing by the Rules* (OUP 1991) 2.

prohibition is clearly a conduct rule rather than a decision rule:¹²² it is directed at general market players in order to guide *their* behaviour on the market; it is not, by contrast, addressed to competition officials who take decisions concerning the violating behaviour. Furthermore, the actual standard represented by the cartel prohibition reaches sufficient specificity to ensure that it is considered more of a 'rule' in the Dworkinian sense than a 'principle' or a 'policy'.¹²³ While general in its application, the cartel prohibition is nonetheless precise enough to specify a particular outcome or mode of behaviour.

However, to satisfy the first limb of the paradigm of cheating, the cartel prohibition must also be fair, issued by a legitimate authority and enforced in an even-handed manner.¹²⁴ The criteria of legitimacy and even-handedness are institution-specific. It is assumed that the relevant authorities are indeed legitimate and that their enforcement of the cartel prohibition would be even-handed. Concerning fairness, what is in question here is whether the *existence* of the rule itself is inherently unfair: by prohibiting cartels is one acting *ipso facto* unfairly towards the potential cartelist? It is submitted that one would not be acting unfairly. First, the restriction upon the freedom of action of the potential cartelist is very narrow in scope. While the rule prohibits cartelists from agreeing to fix prices, restrict output, divide markets or bid-rig (ie from co-operating on business decisions), it does not prohibit them from co-operating on business functions, such as research or distribution.¹²⁵ Market actors, then, are not prohibited from engaging in co-operative ventures in which their activities are integrated in a manner reasonably expected to generate efficiencies.¹²⁶ Secondly, the power to prevent co-operation on business decisions is not absolute: if market actors are determined to co-operate with their competitors on business decisions, then, provided that the relevant merger control rules¹²⁷ are not violated, they may formally merge their respective firms with those of their competitors.¹²⁸ Thirdly, in the unlikely event that the cartel activity leads to efficiencies, the cartelist may be granted an exemption from the operation of the cartel prohibition. Whether this is the case will depend upon how the actual cartel offence is drafted. One could, for example, expressly provide for an (automatic) Article 101(3) TFEU-type exemption from criminal liability for those (very rare) cartel agreements that possibly generate net gains for consumer welfare.¹²⁹ Such an exemption would prevent the punishment of a cartelist for engaging in utility-enhancing activity.

¹²² On these concepts, see eg M Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 Harv L Rev 625.

¹²³ On these concepts, see R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 22–28.

¹²⁴ Green, *Lying* (n 22) 63.

¹²⁵ See G Werden, 'Antitrust Analysis of Joint Ventures: An Overview' (1998) 66 Antitrust LJ 701, 714.

¹²⁶ *ibid* 712–15.

¹²⁷ For the EU-level rules, see Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1.

¹²⁸ See P Marsden and SW Waller, 'Antitrust Marathon II' (2008) 4(1) ECJ 213, 266.

¹²⁹ See eg the Irish Competition Act 2002, s 6(4).

Fourthly, violation of the cartel prohibition rarely occurs through ignorance of the law and the activity involved is relatively easy to comprehend. Unlawfulness is therefore understood by business people.¹³⁰ Finally, given the harm caused and the very low probability of an increase in consumer welfare, it is not unreasonable to introduce and maintain the cartel prohibition. For these reasons, the first limb is relatively unproblematic.

Likewise, the second limb of the paradigm of cheating can arguably be fulfilled by the cartel prohibition. In this instance what is at issue is: (i) whether the cartel and her victim are engaged in a mutually beneficial, co-operative, rule-governed enterprise and (ii) whether by breaking the rule in question the cartel intends to gain an advantage over her victims. In order to determine the answers to both of these inquiries, one must first identify the actual victims. Three possible victims present themselves: the (potential) competitors of the cartelist; the customers of the cartel; and the final consumers of the cartelized good. The mutually beneficial co-operative enterprise within which these parties are organized is represented by the 'market': that is, the commercial mechanism that allows buyers and sellers to exchange goods/services. By entering the market, the potential cartelists (and their victims) have restricted their liberty to some degree—they have implicitly agreed to be bound by the rules of the marketplace. One of the rules of the marketplace is not to engage in cartel activity. So far, so good.

The difficulty, however, is in actually identifying the unfair advantage that the cartel intends to obtain in breaking the rule. With a *competitor*, it is not immediately obvious what the disadvantage would be. Cartel activity, if successful, will lead to an increase in a good's price. This may be in the interest of the competitor: she can now increase her own price. Moreover, by not changing her price, she will gain a competitive advantage over the cartelists. So, where is the disadvantage? But perhaps this analysis is a little obtuse. One could, for example, conceptualize the disadvantage in terms of the self-restraint exercised by the non-cartelist competitor in deciding not to enter into a cartel, a self-restraint that is exercised to ensure that the market functions correctly and to the benefit of all. Accordingly, the advantage obtained by the cartel is not one defined as an increase in sales away from a competitor (ie a financial gain) but rather as the gain inherent in 'indulging one's will, exercising one's freedoms beyond the restrictions imposed' by the cartel prohibition.¹³¹ The same analysis would hold for the *customer* of a cartel who is also a firm operating on a market, provided that she did not cartelize the upstream or downstream market: she would be exercising a self-restraint in not violating the

¹³⁰ See eg A Hammond and R Penrose, 'The Proposed Criminalisation of Cartels in the UK' (OFT 365, November 2001) para 2.5.

¹³¹ To borrow the words of Finnis (n 62) 265.

rule. She would also suffer a more tangible material disadvantage in terms of the cartel overcharge.¹³² But would the unfair disadvantage be present with regard to the *final consumer*? That is a difficult inquiry. Green contends that '[w]hen X cheats, she seeks an advantage by violating a rule that Y is believed to be obeying'.¹³³ If this analysis is correct, one therefore would have to establish that the carteliser believed that *the consumer* would not be in breach of the cartel prohibition (ie that she would be exercising self-restraint by not engaging in cartel activity). But is a final consumer actually exercising any restraint when she—by definition—is incapable of actually engaging in cartel activity?¹³⁴ The common-sense answer would probably be 'no'. But perhaps such an analysis would be following too literally the argument of Green and that what really is at issue here is the breach of one in a *set* of different rules of the marketplace; the *quid pro quo* for expecting adherence to the rule prohibiting cartel activity by the potential carteliser is the consumer's adherence to a different market-based rule, which she is capable of breaching (such as not submitting a vexatious complaint to the antitrust authorities). One can think of an exam situation here to justify such a broad approach to the concept of cheating. Arguably, cheating in the context of an exam is morally wrong not (merely) because one manages to get an advantage over the other exam candidates, but because one thereby 'gets one over' other stakeholders in the examination process who are bound to adhere to certain (fairness) rules (such as the examiner and/or those relying upon the exam results). If one accepts this argument, then there is clearly room to consider the exercise of an unfair advantage by the carteliser over not only her competitors and customers, but also the final consumer.

The final element to be examined again concerns the intention of the carteliser. For cheating to be found the carteliser must have intended to obtain an advantage over another. There were two potential advantages identified above: (a) the overcharge obtained from a customer, which is a firm operating on a market (and therefore bound by the EU/national competition rules); and (b) the advantage of having the freedom to collude with one's competitors. It should be clear that the conclusions from the analysis conducted above concerning the relevant intention for stealing (intention to obtain the overcharge) apply to an analysis of an intention to obtain (a). In short, a

¹³² It is noted that the customers of the carteliser may 'pass on' the cartel overcharge to their customers. In such a case the carteliser's customer may still have suffered from the overcharge: due to the law of demand, an increase in her price causes a fall in demand for her good, and possibly a fall in profit.

¹³³ Green, *Lying* (n 22) 66.

¹³⁴ It is true, for example, that intermediate purchasers of goods can be deemed to be 'consumers' for the purposes of the EU antitrust rules: P Akman, 'Consumer versus Customer: The Devil in the Detail' (2010) 37 J L & Soc 315. In the analysis conducted above, however, the word 'consumer' should be taken as 'final consumer'—that is, the person who purchases and ultimately consumes the good in question. Under EU law, such final individual consumers are not 'undertakings', as they do not use the purchased good in the furtherance of an economic activity; see eg Case T-319/99 *FENIN v Commission* [2003] ECR II-357, para 36. Therefore, by definition, such entities cannot violate Article 101(1) TFEU, by, for example, entering into collective purchasing agreements with other final individual purchasers.

strong theoretical argument can be constructed to establish a direct intention to obtain the overcharge; but if one relies upon indirect intention to find the relevant intention, one would be confined to a definition of cartel activity that does not include the mere conclusion of a cartel agreement. The analysis of intention to obtain (b) (ie to exercise the freedom to collude) is far more straightforward, provided that a cartel is entered into or implemented in a wilful manner rather than through mere inadvertence or negligence (ie where the cartel actually has a purpose (whatever that might be) rather than being an accident). Whatever the ultimate objective of a given episode of cartel activity, one thing is clear: exercising one's freedom to engage in that cartel activity is a prerequisite to the achievement of its ultimate objective. To put it another way, one can only obtain the objective *through cartel activity* by first breaking the rule prohibiting cartel activity. Consequently, violating the cartel prohibition (ie entering into and/or implementing a cartel) will inevitably be the *means* towards the achievement of any objective of cartel activity (eg profit maximization, protecting the firm from competition, fitting in at work, etc). A direct intention to achieve one's objectives through cartel activity implies a direct intention to engage in cartel activity. This finding is particularly interesting as the direct intention is not confined to situations where the cartel activity is implemented; by contrast, it covers situations where the cartelist has merely entered into a cartel agreement. This is because: (i) the existence of a cartel agreement itself is a necessary prerequisite to the implementation of a cartel (and is therefore one of the means towards the achievement of any objective of cartel activity) and (ii) the mere entering into a cartel agreement violates Article 101(1) TFEU and/or its national equivalents. As a result, a criminal cartel offence which is aimed at capturing conduct that violates the moral norm against cheating could indeed include an *actus reus* that extends beyond implementation to the initial conclusion of a cartel agreement.

6. Conclusion

There is a strong argument that cartel activity can be conceptualized as stealing. To sustain this argument one must establish that the victims of the cartel activity have rights to the cartel overcharge. The key issue to be decided here is whether a total welfare standard or a consumer welfare standard should be adopted in the context of antitrust law. There is a strong pragmatic argument why a consumer welfare standard should be chosen, even if one believes that wealth transfers from consumers to producers are wealth-neutral. However, even if the relevant rights to the overcharge are created, there is a further limitation of the conceptualization of cartel activity as stealing: due to the requirement of a fundamental violation of these rights, only the actual implementation of a cartel agreement will be captured.

Deception can certainly be present when false statements are offered by the cartelist concerning the non-existence of cartel activity. Deception through non-disclosure also remains a possibility, albeit one with problematic issues. In particular, one must establish that customers actually assume that cartelists compete with their competitors. Without firm empirical evidence supporting this assumption one must rely on (plausible) theoretical arguments, thereby introducing an inherent limitation to the analysis. Moreover, the determination of the intention of the cartelist in remaining silent is not as clear-cut as with false statements, although arguably a direct intention to mislead often exists in this context. There is a further limitation concerning deception through false statements and deception through non-disclosure: the cartel agreement must have been implemented, as the relevant message communicated requires the offering of a product *at a cartelized price*.

The moral norm against cheating also has potential to capture the 'moral wrongfulness' of cartel activity. But problematic issues also exist here. The main difficulty lies in identifying the 'unfair advantage' that the cartelist intends to obtain in breaking the relevant rule. If the 'advantage' is narrowly defined to include a material/financial advantage obtained over another who adheres to that rule, then cheating can only occur against a cartelist's customer who is an undertaking offering goods or services on a market. A wider definition of 'advantage' which includes the mere indulging of one's will beyond the restrictions imposed by the relevant cartel prohibition further facilitates a finding of 'moral wrongfulness' (this time against competitors, customers *and* final consumers), but does so at the expense of a more rigid link between the cartelist's actions and their impact on other market actors. That said, such an approach allows one to capture the full extent of cartel activity (ie entering into a cartel agreement as well as implementing it).

This article highlights that an interesting point of contact exists between the theories of deterrence and retribution: rationality. In the cartel criminalization literature, the relevance of arguments concerning the rationality or otherwise of cartelists has been confined to discussions of economic deterrence theory. This article demonstrates, however, that the existence of rationality can be relevant to both deterrence and retribution. If cartelists are indeed rational (as assumed by economic deterrence theory), then one can construct solid theoretical arguments as to why cartelists would have the relevant (direct) intentions required to substantiate claims that they violate the examined moral norms (thereby facilitating a retribution-based criminalization argument). If cartelists are not rational, however, the theories of deterrence and retribution exhibit inherent tensions. If rationality does not exist, it becomes more difficult to substantiate the required intentions. To overcome this difficulty while nonetheless creating a cartel offence that captures 'moral wrongfulness', one could add one or more of the relevant intentions to the definitional elements of the proposed offence. But doing so impacts negatively on deterrence: due to the

additional definitional elements' requiring of proof, *ceteris paribus*, for a given amount of resources fewer successful prosecutions will be achieved.

This article also demonstrates that creating a criminal cartel offence that captures 'moral wrongfulness' can also influence the scope of the offence and undermine deterrence. To align the criminal cartel offence with a violation of the moral norms against stealing and/or deception (but not cheating), one must ensure that its scope does not extend beyond the implementation of a cartel agreement to its mere creation. This conclusion is especially relevant to those wishing to reform the UK Cartel Offence. Currently, section 188 of the Enterprise Act 2002 makes it a criminal offence to dishonestly 'make or implement' or 'cause to be made or implemented' a cartel agreement. The UK Government has decided to remove the definitional element of dishonesty and (in an attempt to capture deceptive behaviour only) to introduce a 'carve out' from the criminal offence of (cartel) agreements that are published prior to their implementation. But to link full cartel activity with the moral norm against deception, it should also remove the relevant references to 'make' and 'cause to be made' from section 188. Admittedly, this would also impact negatively on deterrence; but the negative impact could be tempered if the mere making of a cartel agreement were caught by section 1 of the Criminal Attempts Act 1981.

Finally, this article reveals that more detailed empirical work is required to determine conclusively the primary objective of cartelists (and thereby the robustness of the theoretical arguments advanced). One way of conducting this research takes inspiration from Parker,¹³⁵ Sonnenfeld¹³⁶ and Lawrence:¹³⁷ the antitrust authorities (in conjunction with social scientists) could interview under conditions of anonymity and confidentiality convicted price-fixers to determine *inter alia* why the cartelists acted as they did.¹³⁸ While such interviews may produce self-serving statements and represent a biased sample (ie only *detected* cartelists would be interviewed), they often produce more revealing data than other studies.¹³⁹ In any case, until definitive data is forthcoming, assertions that cartel activity inevitably entails 'morally wrongful' conduct remain vulnerable to challenge.

¹³⁵ See C Parker and others, 'The Cartel Project—Report on Interviews with Civil Respondents in Cartel Cases' (2011) University of Melbourne Law School Cartel Project.

¹³⁶ J Sonnenfeld, 'Executive Apologies for Price-Fixing: Role Biased Perceptions of Causality' (1981) 24 *Academy of Management J* 192.

¹³⁷ J Sonnenfeld and P Lawrence, 'Why Do Companies Succumb to Price-Fixing?' (1978) 56 *Harv Bus Rev* 145.

¹³⁸ M Stucke, 'Am I a Price-Fixer? A Behavioural Economics Analysis of Cartels' in Beaton-Wells and Ezrachi (n 5).

¹³⁹ Parker (n 92) 245.