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Criminalisation of cartels and bid rigging conspiracies – Note by BIAC

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1. Introduction

1. In 2003, the OECD held a roundtable discussion on a related topic entitled "Cartel Sanctions Against Individuals."[1] Various scholars, enforcement agency officials, and other commentators have contributed to the discussion on that issue, as well as a related but separate issue on criminalization of cartels. In this paper, *Business at OECD* discusses some of these commentaries and studies. It also offers several observations for further consideration.

2. The ultimate question may be whether it is more desirable to criminalize cartels and bid rigging conspiracies as an alternative or complement to other methods of combating these undisputedly anticompetitive types of conduct. For those jurisdictions that are considering a criminal cartel enforcement program, it will be useful to consider the following questions: (1) what do we really mean by "criminalization" of cartels and bid rigging conspiracies?; (2) what can be the realistic goals of criminalization of cartels and the effectiveness to achieve such goals?; (3) what are some of the most pressing intra-jurisdictional challenges in criminalizing cartels?; and (4) what are some of the most problematic inter-jurisdictional obstacles or complications to address? We discuss each of these questions in turn.

3. For the purposes of this session we assume that "criminalization" must mean individual criminal sanctions, including not just a possibility but a realistic likelihood of incarceration.

4. Reasonable persons may disagree on the need for or desirability of criminalizing cartels. There appears to be no consensus or objectively reliable and conclusive support for the premise that individual criminal sanctions (especially substantial jail time) are more effective to deter cartel violations than a non-criminal cartel enforcement program with large administrative fines. The calculus becomes even more complicated when factoring in the role and effect of private cartel enforcement such as the U.S.-style treble damages system or recently adopted EU Private Damages Directive.[2]

5. It has also recently been observed in this Working Party that leniency applications have declined significantly in recent years, particularly as relates to international cartels. This raises additional questions as to whether further expansion of criminal penalties would be beneficial to overall cartel enforcement measures.

6. In designing and implementing a criminal cartel enforcement program, there are numerous internal issues within the relevant jurisdiction—such as reconciling its criminal cartel enforcement program with that jurisdiction's existing leniency program and also with the rest of its criminal justice system—that need to be addressed in tandem with a particular jurisdiction's decision to criminalize cartels. Similarly, there are significant external reconciliation issues vis-a-vis other jurisdictions.

7. *Business at* OECD believes that consideration of further criminalization of cartel conduct requires further study and should be approached with caution. If a particular jurisdiction

[1] OECD, Cartel Sanctions against Individuals (2003), available at https://www.oecd.org/competition/cartels/34306028.pdf [hereinafter 2003 OCED Report].

[2] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1.

chooses to adopt a l criminal cartel enforcement program, it must have a clear understanding of how the program will perform its intended functions, interact with other national and international enforcement regimes, and achieve desired results.

2. Meaning of Criminalization of Cartels

8. Various types of criminal sanctions may be available. One obvious type is large criminal fines as most vividly illustrated by the U.S. Department of Justice's (DOJ) application of criminal cartel fines.[3] Another fundamental tool may be individual incarceration, again most clearly used by the U.S. DOJ. Assuming that criminalization has something extra to offer that large administrative cartel fines and the threat of private damages award cannot or do not offer, what can be the optimal or at least desirable scope of criminal sanctions? A general perception suggests that the truly unique aspect of criminalization means individual sanctions, especially incarceration.[4] Studies tend to suggest that individual criminal fines may be and often are absorbed by companies one way or another and in turn may be treated as just another type of administrative fines.[5]

9. Through its numerous speeches and policy statements, the U.S. DOJ also appears to focus on and tout individual incarceration as a truly distinguishing factor and key ingredient of its successful criminal cartel enforcement program.[6] "The [U.S. DOJ's] Antitrust Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences."[7] Large criminal fines can certainly be credited to deter cartel violations and help reduce recidivism. However, that may not be particularly different from large administrative fines in the EU and some other jurisdictions. On the other hand, imprisonment with a vivid image of a once high-flying executive locked up in prison offers a totally different type of deterrent. The U.S. system

[3] On this point, the EU also has a proven track record of imposing substantial (potentially up to 10% of the offending company's worldwide turnover in the preceding year) administrative cartel fines.

[4] Gregory J. Werden, Scott Hammond & Belinda A. Barnett, Deterrence and Detection of Cartels: Using All the Tools and Sanctions, Address Before the 26th Annual National Institute on White Collar Crime 11 (Mar. 1, 2012), available at https://www.justice.gov/atr/file/518936/download ("A very different set of tools and sanctions is provided by the criminal justice system. In addition to fining corporations, the Antitrust Division prosecutes culpable individuals, who are subject to imprisonment.").

[5] For example, "companies can relatively easily indemnify their agents for any threat of fines or any fines effectively imposed, thus taking away the deterrent effect of the penalty on the individuals concerned. Companies can relatively easily compensate their agents in advance for taking the risk of being fined and/or indemnify them ex post when they have to pay the fine." Wouter P.J. Wils, Is Criminalization of EU Competition Law the Answer?, in Criminalization of Competition Law Enforcement 60, 85-86 (Katalin J. Cseres, Maarten Pieter Schinkel & Floris O.W. Vogelaar (eds., 2006) available at https://ssrn.com/abstract=684921.

[6] Scott D. Hammond, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Address Before the 24th Annual National Institute on White Collar Crime 8 (Feb. 25, 2010), available at https://www.justice.gov/atr/file/518241/download ("During the last decade, the Antitrust Division has made increased individual accountability a critical piece of its cartel enforcement program and the Antitrust Division's enforcement statistics demonstrate that individuals who violate U.S. antitrust laws are being sent to jail with increasing frequency and for longer periods of time."). See also Werden, Hammond & Barnett, supra note 4, at 11-12; Richard A. Powers, The State of Criminal Antitrust Enforcement in 2020, Address Before the Global Competition Review Live Ninth Annual Antitrust Law Leaders Forum 5 (Feb. 7, 2020), available at https://www.justice.gov/opa/speech/file/1246076/download.

[7] Hammond, supra note 6, at 11 (internal citation omitted).

is not common, where the antitrust authority also has criminal powers. In administrative systems, oftentimes there is a separate criminal prosecutor that must coordinate with the antitrust authority. Such coordination may not always be smooth.

10. Therefore, while the term "criminalization" may have different meanings and entail different degrees of criminal sanctions, personal incarceration, imprisonment, or custodial sanctions appear to be the most significant distinguishing feature of most criminal cartel regimes. Similarly, to a large degree, a "corporate criminal fine" and an "individual criminal fine" might not reflect as great a difference , especially if there is an arrangement for the company to cover its executive's individual criminal fine.[8]

11. Many jurisdictions have adopted some types of "criminal" program or an element of it. However, some jurisdictions do not meaningfully enforce them, especially the imprisonment portion of their criminal enforcement programs.[9]

12. Without an imprisonment provision that is enforced, a jurisdiction may maintain only a nominal criminal enforcement program. Such a name-only criminal enforcement program may not add any more deterrent effect than a straightforward civil administrative enforcement program.

3. Goals and Effectiveness of Criminal Cartel Enforcement

13. The goal of a criminal cartel enforcement program may be to enhance the effectiveness of an existing cartel enforcement program's (thus presumably a civil administrative enforcement-based approach) deterrent effect. Some jurisdictions may desire to criminalize cartels for related but different reasons. For example, reportedly, the Taiwan Fair Trade Commission reportedly has considered the idea so that it would gain the new power to conduct dawn raids or unannounced on-site inspections.[10]

14. There appears to be no conclusive evidence to support the effectiveness of a true criminal cartel enforcement program or that has proved a causal link between incarceration leading to greater deterrence of individuals.[11] Literature is split on this issue. The OECD's position on individual sanctions appears to be positive: "As corporate sanctions rarely are sufficiently high to be an optimal deterrent against cartels, there is a place for sanctions against natural persons that can complement corporate sanctions and provide an

[8] See Wils, supra note 5.

[9] "In the past 20 years, there has been a movement, internationally, towards the US model. Around 25 jurisdictions have criminalised 'hardcore' cartel conduct, including the UK, France, Ireland and Australia – with many more having criminal offences that relate only to bid-rigging in public procurement. . . . Although there is clear momentum behind the cartel criminalisation movement, the actual use of criminal cartel offences outside the US is still in its infancy, with only a small number of convictions and even fewer custodial sentences." Andreas Stephan, An Empirical Evaluation of the Normative Justifications For Cartel Criminalisation, 37 Legal Studies 621, 623 (2017). "Ireland is probably the most successful of these, although no prosecutions there have yet resulted in a custodial sentence." Id. at 623 n.14.

[10] Criminalization may be needed to gain rights to raid, Taiwan's antitrust regulator says, MLex (Mar. 5, 2010), available at https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1168277&siteid=202&rdir=1 (subscription may be required).

[11] Daniel S. Nagin, Deterrence in the Twenty-First Century: A Review of the Evidence, Crime & Justice (2013), available at https://kilthub.cmu.edu/articles/Deterrence_in_the_Twenty-first_Century_A_Review_of_the_Evidence/6471200/1.

enhancement to deterrence."[12] But it may be increasingly difficult to integrate criminalsation of cartel conduct into leniency programs designed to entice corporate cooperation.[13]

15. The EU's (and some other jurisdictions') administrative fine amounts have significantly increased since the 2003 OECD discussion on sanctions against individuals.[14] The consideration of criminalization would therefore be to provide a complement to deter cartel violations. The U.S. DOJ believes that individual sanctions, especially incarceration, provide an additional incentive to deter cartel violations.[15]

16. The 2003 OECD Report further observed that:

> *Systematic empirical evidence to prove the deterrent effects of sanctions on individuals, and/or to assess in a cost/benefit analysis whether such sanctions can be justified, is not available. Ultimately, countries have to consider whether they accept as self-evident that individual sanctions, including imprisonment, can be a useful part of effective anti-cartel enforcement. There is a trend among OECD member countries to accept that view.*
>
> *Anecdotal evidence exists that criminal sanctions against individuals can have deterrent effects. There is, however, no systematic empirical evidence to prove such effects, and to assess whether the marginal benefit of introducing sanctions against individuals (in the form of less harm from cartel activity) exceeds the additional costs that in particular a system of criminal sanctions entails (including the costs of prosecution as well as of administering a prison system).*[16]

17. On the issue of whether it is desirable for a particular country to have sanctions against individuals, the 2003 OECD Report states that:

> *[E]ach country must determine its own 'right' mix of sanctions that has the most effective deterrent effects against cartels. The decision . . . depends on a number of factors, including a country's cultural and legal environment, its enforcement history in cartel cases, the relationship between a competition authority and courts and prosecutors, as well as the resources of a competition authority.*[17]

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[12] 2003 OECD Report, supra note 1, at 7.

[13] "Several jurisdictions have experienced problems in relation to criminalisation of cartel law. For example, in Australia, it was assumed that criminal reform would bolster leniency, arguing that by adding clout to the 'stick' (criminal prosecution), the 'carrot' of immunity from prosecution would be more attractive. However, at least in the early years after criminal sanctions were introduced, the numbers of markets and proffers under the competition authority's leniency policy actually feel. Similar results were reported for the UK: When the criminal cartel offence was adopted, it was expected that the UK would become the most active criminal competition enforcement regime outside the US and was envisaged that he offence would yield six to ten convictions a year. However, in practice, very few cases were actually prosecuted with the first criminal case (the British Airway case) actually collapsing in court." OECD, Challenges and Co-ordination of Leniency Program—Background Note by Secretariat ¶ 29 (June 1, 2018), available at https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf (internal citations omitted).

[14] For example, since 2013 the EC has imposed over EUR 2 billion on numerous car parts cartelists. See Eur. Comm'n, Report on Competition Policy 2018 6 (July 15, 2019), available at https://ec.europa.eu/competition/publications/annual_report/2018/part1_en.pdf.

[15] See Hammond, supra note 6, at 11; Werden, Hammond & Barnett, supra note 4, at 15; Powers, supra note 6.

[16] 2003 OECD Report supra note 1, at 7 (emphasis added).

[17] Id. at 7-8.

18. While the threat of prison time is a real risk and must have some degree of deterrent effect, the question is not whether an imprisonment-centric criminal enforcement program in and of itself is effective but whether it is more effective than alternatives or offers something unique and different. This is a difficult question to answer, largely because it will be hard to separate the effect of the imprisonment element from the entire enforcement package.

19. U.S. Court of Appeals for the D.C. Circuit Judge Ginsburg's very recent article offers quite timely and useful observations.[18] In studying why the number of cartel cases has decreased in the U.S. in recent years, Ginsburg posits three possible hypotheses: (1) increasingly large fines in multiple jurisdictions lessened the incentive to apply for leniency in any one jurisdiction?; (2) technical advances making tacit coordination easier and making it less necessary to engage in overt hardcore cartels?; and (3) aggressive cartel enforcement programs around the globe actually worked to reduce cartel violations, at least in the U.S.?[19] Ginsburg concludes that the third hypothesis is probably the most likely answer. Ginsburg further notes that a change in the types of corporate defendants in these criminal cases (from U.S. company defendants to predominantly foreign company defendants) is consistent with the third hypothesis.[20]

20. According to speeches by senior officials at the EC's DG-Competition, the EC's aggressive cartel enforcement program has played a significant role in deterring and appropriately punishing cartel violations. For example, in 2013, Alexander Italianer, then EC Director-General for Competition, after stating that they share the common goals, explains the key distinctions between Europe and the U.S. this way:

> *Cartels in the US count as a serious crime. This approach is based on the idea that jail time is a strong disincentive for individuals to participate in a cartel.*
>
> *The EU enforcement system is, by contrast, an administrative one, built around financial sanctions against undertakings, not individuals. Fines against companies are exclusively set as a deterrent against cartels: there are no treble damages. The current legal framework of the European Union does not provide for criminal sanctions, and, in particular, custodial sanctions. This is what the debate about criminal sanctions usually refers to, imposed through a procedure involving a public prosecutor and a trial before a court.*[21]

21. Even in the U.S., where individual cartel violators are routinely sent to prison, it would not be simple to have a definitive cause-and-effect test. In addition to an imprisonment provision, the U.S. cartel enforcement system also has a significant criminal fine component (for both corporations and individuals), as well as a highly successful leniency

[18] Douglas H. Ginsburg & Cecilia (Yixi) Cheng, The Decline in U.S. Criminal Antitrust Cases: ACPERA and Leniency in an International Context (George Mason L. & Econ. Research Paper Series No. 19-31, 2019) [hereinafter Ginsburg Paper], available at https://ssrn.com/abstract=3460091.

[19] Id. at 1.

[20] Id. at 3-4 ("That is, the types of corporate defendants prosecuted by the Division have shifted dramatically, starting in 2008, to include a predominance of foreign companies, while both the number and the share of U.S. companies—particularly privately held U.S. companies—have decreased. . . . this leads us to be tentatively optimistic that the Division's criminal program has for the most part deterred U.S. companies from engaging in criminal antitrust violations—though we acknowledge, of course, the alternative explanation that these companies may have instead simply become more adept at avoiding detection.").

[21] Alexander Italianer, Fighting Cartels in Europe and the US: Different Systems, Common Goals, Address Before the Annual Conference of the International Bar Association 2 (Oct. 9, 2013), available at https://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf.

program. Further complicating the calculus, the U.S. also features the most active private damages system, where the award is automatically trebled, as well as significant amounts awarded for attorney's fees. Therefore, one could legitimately ask whether the success of the U.S. system is due to any one single element or the whole of its multifaceted cartel enforcement (public criminal enforcement plus private damages enforcement) approach. Interestingly, in the U.S., some law professors attributed the lion's share of the success of cartel enforcement to the private plaintiff's bar and heavily discounted the U.S. DOJ's role in initially uncovering the cartels.[22] Understandably, this drew a sharp rebuke from the DOJ.[23] In the European Union, even without EU-level criminal sanctions, its extremely large civil administrative fine system (up to 10% of the undertaking's worldwide turnover) is hailed as a key ingredient of its success.

22. While it may be still too early to tell and there appears to be no serious quantitative support yet, the European Union's December 2014 adoption of the Private Damages Directive that imposed the minimum uniform standard in setting up each Member State's private damages litigation procedures and expected resulting (or already occurring) private damages claims further complicate the calculus.[24] Some practitioners have questioned whether the EU-wide introduction of a private damages system has finally tipped the balance in an undertaking's calculation as to whether to file a leniency application in the first place. It is possible that addition of active private damages litigation in the European Union as a counterpart to significant U.S. damages exposure could result in decreasing leniency applications.[25] As Ginsburg explains it, "This phenomenon may be considered a tragedy of the anticommons."[26]

23. Ginsburg posits that U.S. companies may have become more compliant with the criminal anti-cartel rules of the U.S., which may explain the decrease in the number of new U.S. DOJ criminal cartel cases in recent years. Similarly, it may be that EU companies are more sensitive to the total costs of filing a leniency application and admitting wrongdoing in Europe than the U.S.-associated costs. Therefore, the EU's embrace of an EU-wide private damages recovery regime makes a more meaningful and direct difference and injects a significant amount of uncertainty than the already well-known presence of heavy criminal fines and imprisonment in the U.S.

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[22] Robert H. Lande & Joshua P. Davis, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws, 2011 BYU L. Rev. 315 (2011), available at https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2591&context=lawreview.

[23] See Werden, Hammond & Barnett, supra note 4, at 17-21.

[24] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1.

[25] Ginsburg Paper, supra note 18, at 11 (quoting Caron Beaton-Wells, OECD Cartel Paper, Criminal Sanctions for Cartel Conduct: The Leniency Conundrum 8-9 (Nov. 2016), available at https://one.oecd.org/document/DAF/COMP/GF(2016)7/en/pdf ("Ironically, then, because leniency is based upon the 'absolute certainty that the first company to apply will receive total immunity from sanctions,' the global proliferation of criminal sanctions and leniency polices may have reduced the net incentives to report cartels.").

[26] Ginsburg Paper, supra, note 18, at 11 n.28 (quoting Michael H. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621, 624-25 (1988) (defining the tragedy of the anticommons and explaining 'it can appear whenever governments create new property rights,' as 'too many property rights and too many decisionmakers . . . can block use' of anticommons property)).

4. Intra-Jurisdictional Challenges in Devising, Implementing Criminal Cartel Enforcement Program and Coordinating With Other Programs

24. There are a number of considerations that must be made in evaluating a criminal enforcement regime. First, a jurisdiction that to adopts a criminal cartel enforcement program may have to reconsider its existing leniency policy and avoid adversely impacting the effectiveness of that program.[27] Where the relevant jurisdiction's Ministry of Justice (or Prosecutor's Office as some countries use different names to refer to their criminal justice arm of the government) will execute the criminal cartel enforcement program the two different arms of the government must find a way to set up a new leniency system that would address both its criminal enforcement and civil administrative enforcement goals and procedures.

25. Furthermore, the contemplated criminal cartel enforcement program should properly fit with the rest of the criminal justice system including its procedural requirements. A criminal justice system typically entails more stringent and higher due process requirements. For example, "criminal procedures tend to have stronger procedural protections, designed to avoid false convictions. In particular, in criminal enforcement systems the adjudicative or decision-making function is always separated from the investigative and prosecutorial function or functions."[28] This also implies a higher demand for due process norms and protections of individual liberty that are not always demanded in the context of civil or administrative findings and penalties.

26. The importance of coordination or harmonization with the rest of the same jurisdiction is no different even within the EU. For example, Italianer explains the EU and Member State harmonization (or lack thereof), this way:

> *[B]oth Commission and Member States may fine companies, but the Member States remain free to set up other sanctions for fighting anti-competitive behaviour. That is why many Member States also allow for individual sanctions. . . . The majority of Member States allow for the fining of individuals, however, this is not carried out in practice everywhere. The severest individual sanction, namely custodial sentences, are also provided for in several countries, but again rarely imposed.*[29]

27. Mr. Italianer went on to say, "Whatever the case, consistency between criminal and administrative procedures is important. In its anti-cartel enforcement manual (2009), the ICN calls for consistency when applying leniency in criminal and civil cases, in order to avoid uncertainty."[30]

28. However, achieving harmonization or convergence even within a common economic block such as the EU is not simple at all. Andreas Stephan noted in 2017 that:

> *Within the EU, a divergence has emerged, in that some Member States have adopted criminal offences while others have chosen to reject them. It appears that the decision to reject criminalisation has been primarily motivated by practical*

[27] OECD, Challenges and Co-ordination of Leniency Program Secretariat Note, supra note 13, ¶ 70 ("Leniency programmes do not exist in a vacuum and will have to be coordinated with other enforcement policies. Authorities should secure that leniency applicants are not worse off than other cartel participants in private enforcement actions. With regard to criminal sanctions, it is debatable whether sanctions for individuals including jail time actually support or hinder leniency programmes, with good arguments pointing in both directions." (emphasis added)).

[28] Wils, supra note 5, at 62.

[29] Italianer, supra note 21, at 3.

[30] Id.

> *concerns, rather than worries relating to legitimacy or questions of morality. Sweden and Finland, for example, both felt that it would jeopardise the effectiveness of their enforcement regimes by undermining leniency programmes.*[31]

29. To the extent that countries would look to the U.S. as a model of a successful criminal cartel enforcement regime, it should be recalled that the U.S. results took place over a long period of time and in light of important historical context. For example, even in the U.S., after enacting a criminal antitrust statute (the Sherman Act) in 1890, it took over 30 years before the first cartel offender was sent to jail in 1921. The next imprisonment was 40 years later in 1959.[32] It also took some 84 years after the passage of the Sherman Act for a cartel violation to become a felony in 1974. In the '90s, the U.S. DOJ started enforcing the imprisonment element in earnest. Then, in 1999, in the vitamins cartel case, the U.S. DOJ sent the very first non-U.S. citizen to jail for violating the U.S. criminal antitrust statute.[33] While some of these steps and refinements may not take as long as they did in the U.S., other jurisdictions may wish to consider this history and the related political, legal, social, cultural and other unique considerations related to the imposition of a criminal cartel system.

30. If a jurisdiction decides to adopt or maintain a dual criminal/civil administrative cartel enforcement system, a different type of issue may arise. Having both large criminal fines and large administrative fines (plus possibly another large set of significant amount of private damages awards) may raise an excessive punishment (not an "excessive deterrent") issue. While it might not legally constitute double jeopardy, in essence and from an economic perspective, it does raise the issue of double or even triple jeopardy. For this reason, some commentators criticize the EC's large administrative fines as punitive in nature and in essence de facto criminal fines.[34]

5. Inter-Jurisdictional Consideration and Complications—International Cooperation and Coordination

31. Even within the European Union, there is a practical tension due to different approaches. While the European Union itself does not have a criminal cartel enforcement program, some Member States already have at least nominal criminal cartel enforcement programs and others also separately handle bid rigging conspiracies as a criminal offense. Practical issues including access to information across Member States, confidentiality safeguards, and limits on the use of exchanged intelligence should be considered.

32. Similar issues in a broader international context may be even more complicated and cumbersome to resolve although such issues sometimes may be addressed through bilateral, multilateral agreements or MOUs on investigative information exchange, with appropriate limits on the proper use. New inter-agency arrangements might be needed to address the issues in light of whether both agencies have genuine and meaningful criminal cartel

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[31] Stephan, supra note 9, at 623, (internal citations omitted).

[32] D. Daniel Sokol, Reinvigorating Criminal Antitrust?, 60 Wm. & Mary L. Rev. 1545, 1555 (2019), available at https://scholarship.law.wm.edu/wmlr/vol60/iss4/12.

[33] See Hammond, supra note 6, at 7; Werden, Hammond & Barnett, supra note 4.

[34] Italianer, supra note 21, at 3 ("some critics have argued that, due to the size of our fines, we do in fact have a criminal enforcement system which should therefore be subject to a higher standard of proof. . . . The ECJ and General Court have also stressed that while our fines may be considered criminal in the specific sense as defined by the ECHR, all required safeguards are in place.").

enforcement programs but possibly with different approaches and institutional structures. Some commentators caution strongly against international harmonization of cartel enforcement, especially using a U.S.-style criminal cartel enforcement system.[35]

33. A different type of issue may also arise more frequently. The U.S. DOJ requires full, truthful, and continuing cooperation for an individual to stay protected by the DOJ leniency program. This may require an individual leniency applicant or an executive (or an employee) of a corporate leniency applicant to become an informant for the U.S. DOJ in a clandestine intelligence gathering operation.[36] Conceivably, those jurisdictions with new or newly strengthened criminal cartel enforcement programs may also require similar cooperation in return for reduced prison time or full immunity. But the consequences of this cooperation may raise separate issues.

34. The 2003 OECD Report on Sanctions against Individuals observes that:

> *International law does not recognize the principle of double jeopardy that would prevent authorities in different countries from prosecuting the same person for her participation in the same cartel. Nevertheless, where cartels are investigated in a multi-jurisdictional context, jurisdictions may consider arrangements to ensure that only one of them prosecutes an individual.*[37]

35. This Report further notes on this point, "[I]t appears that jurisdictions with a criminal sanctions system have in the past been willing to make arrangements with another jurisdiction which investigated the same cartel to ensure that only one of them would prosecute an individual."[38]

36. As an example, in recent years, the United States has increasingly sought prosecution of individuals who are located outside the U.S. In some cases, foreign countries accommodated the U.S. DOJ's extradition requests. If other countries also adopt genuine criminal cartel programs, that likely would ease the path for the U.S. DOJ to make extradition requests. The same would become true for other countries seeking to extradite and prosecute foreign citizens. Conversely, it is also conceivable that the United States will

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[35] Luke Danagher, The Criminalisation of Cartels: A European and Trans-Atlantic Perspective, 33 Eur. Competition L. Rev. 522, 525 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546739 ("In a world dominated by international conglomerates, a country's competition law cannot be considered as merely regulating internal affairs. Instead, it must be seen in an international context. However, this does not mean there is a need to harmonise anti-cartel enforcement worldwide. On the contrary, attempts at harmonisation should be severely restrained. What works in one jurisdiction may become counterproductive if adopted in another. This can be evidenced in the United Kingdom, where the US approach of criminalizing cartels has proven to be inefficient and has further strained the fragile relationship that exists between the United Kingdom and the European Union. . . . While the United States may have influenced European competition law in the past, the two continents have grown apart in recent decades. US anti-cartel laws do not reflect the complex relationship which Member States have with the European Union. Consequently, US anti-cartel law should not be seen as a source of inspiration for Member States. If a Member States chooses to align its laws with that of the United States, it axiomatically drives a wedge between its laws and EU norms. The harmonisation of criminal anti-cartel laws in the European Union is a commendable goal, but any attempt at harmonisation with the United States is a step too far and will ultimately end in disaster." (emphasis added)).

[36] Powers, supra note 6, at 10 ("Participation in covert techniques such as recording conversations has always fit within the ambit of full, truthful, and continuing cooperation. When covert investigative opportunities are presented, we expect individuals to assist in them in order to be fully cooperative and expect their cooperating employers, where appropriate, to help facilitate such assistance.").

[37] 003 OECD Report, supra note 1, at 9.

[38] Id.

receive extradition requests from foreign jurisdictions seeking to prosecute or impose custodial sentences against cartel members. Thus, as numerous jurisdictions operationalize criminal cartel enforcement regimes, then there probably will have to be a more structured multilateral understanding or arrangement on criminal punishment to avoid overlapping penalties. The U.S. DOJ and UK have coordinated on such issues in the past, which may serve as an example. But if additional jurisdictions become more active, a multilateral solution will be required.

6. Conclusion

37. In sum, even though a criminal cartel enforcement program, especially an imprisonment-centric program where individual wrongdoers would face a real risk of going to jail, may have a deterrent effect, it is not clear the extent to which it would materially enhance a civil administrative enforcement program incorporating administrative fines could not provide, particularly in the presence of a robust private enforcement mechanism.

38. If a particular jurisdiction decides to adopt an active criminal cartel enforcement program or invigorate its nominal criminal enforcement program into a more robust program, it should do so after consideration of the interplay with other domestic laws and processes as well as international enforcement regimes.