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LEGAL CERTAINTY AND CARTEL CRIMINALISATION WITHIN THE EU MEMBER STATES

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ABSTRACT. *There is a trend within the EU Member States to introduce criminal sanctions for cartel activity. Such criminalisation must respect the human rights of the accused. Unfortunately the literature on cartel criminalisation pays scant regard to the investigation of human rights issues. A comprehensive analysis of the impact of the principle of legal certainty (Article 7 ECHR) upon cartel criminalisation in the EU Member States is conspicuously absent from the literature. This article rectifies this deficiency by examining how this particular principle of European human rights law may impact upon the concept, substance and existence of a criminal cartel offence.*

KEYWORDS: *Anti-cartel enforcement; competition law; criminal cartel sanctions; human rights law; principle of legal certainty; UK Cartel Offence*

I. INTRODUCTION

"Cartel activity" can be conceptualised 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.[1] Cartel activity is prohibited by all of the national competition laws of the EU Member States. Furthermore, if it affects trade 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 of EU law is enforced by the European Commission ("the Commission") and the national competition authorities and courts of the EU Member States.[2] Importantly, EU law does not preclude the Member States from imposing criminal

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[1] OECD, *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, adopted by the Council at its 921st Session on 25 March 1998.

[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 (OJ 2003 L1 p.1).

sanctions in order to enforce Article 101(1) TFEU. The Commission, however, can only impose punishment of a non-criminal nature.[3]

Among industrial economists, there is a consensus that cartel activity is harmful to consumers in that it leads to increased prices, reductions in innovation, and allocative inefficiency. Cartels are therefore taken extremely seriously by those entities which enforce competition law within the EU. High fines are regularly imposed on undertakings (firms) that have engaged in cartel activity. Competition enforcement within the EU has prioritised the detection and punishment of cartels, and innovative enforcement techniques have been developed in this context over the last number of years. A recent important development in European anti-cartel enforcement has been the introduction of criminal cartel sanctions within a number of the Member States of the EU.[4] Accordingly, in these jurisdictions individual cartelists face the prospect of spending time in prison if they are found guilty of cartel activity by a national (criminal) court. Criminal cartel sanctions are rationalised on the basis of their ability to secure more effectively the deterrence of cartels than their civil or administrative counterparts.[5] European jurisdictions which have criminalised cartel activity appear to be following the example set in the United States, where criminal enforcement is perceived as a cornerstone of the Department of Justice's successful campaign against domestic and international cartels. These European jurisdictions are not alone in following the lead of the US: "countries in virtually every region of the world are criminalizing cartel offences".[6]

While strong arguments can indeed be advanced as to why cartel criminalisation should occur within the EU Member States, it does not follow that such criminalisation should proceed on an unprincipled basis.[7] Human rights considerations in particular need to be accommodated by the criminalised cartel regime. A systematic failure to protect the human rights of the accused in this context would result in an illegitimate, legally unsound anti-cartel enforcement regime. Unfortunately, the literature on the compatibility of cartel criminalisation with the requirements of European human rights law is relatively underdeveloped.[8] A comprehensive analysis of the impact of

[3] See ibid., Article 23(5).

[4] See generally K. Cseres, M. Schinkel and F. Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Cheltenham 2006).

[5] See, e.g., W. Wils, "Is Criminalization of EU Competition Law the Answer?" (2005) 28(2) World Competition 17.

[6] G. Shaffer and N. Nesbitt, "Criminalizing Cartels: A Global Trend?", University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 11–26, June 2011, 1.

[7] See P. Whelan, "A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law" (2007) 4(1) Competition Law Review 7.

[8] See, however: P. Whelan, "Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off" in C. Beaton-Wells and A. Ezrachi (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement* (Oxford 2011); and

the principle of legal certainty upon cartel criminalisation in the Member States is conspicuously absent from this literature. Given the obvious importance of respecting the human rights of the accused, as well as the legal certainty concerns raised by legislators in regimes undergoing a process of cartel criminalisation, an examination of the impact of the principle of legal certainty in this context is warranted.

This article aims to rectify the identified deficiency in the literature on European cartel criminalisation by analysing the impact of the principle of legal certainty on criminal cartel laws in the EU Member States. In doing so, it intends to advance this particular criminalisation debate and to offer valuable advice to legislators and antitrust enforcers. In order to facilitate this analysis, the principle of legal certainty is first set out in detail: Section II. An examination is then undertaken concerning three separate areas where legal certainty may have an impact in this context: (i) the concept of a criminal cartel offence; (ii) the substance of a criminal cartel offence; and (iii) the existence of a criminal cartel offence.

Section III analyses the relationship between legal certainty and *the concept* of a criminal cartel law. It analyses the argument that, due to the inherently vague nature of (economics-based) antitrust laws, it would be inappropriate to enforce such laws (including their cartel prohibitions) with criminal sanctions. The issue here is whether or not the principle of legal certainty ensures that the concept of a criminal cartel law *per se* is incapable of adhering to the requirements of European human rights law. This is an important inquiry. First, if *by definition* the concept of a criminal cartel law cannot adhere to the principle of legal certainty, it will not be possible to criminalise cartel activity, irrespective of the robustness of the normative justifications for criminal cartel sanctions. Second, if it is simply impossible to criminalise cartel activity without violating the principle of legal certainty, it follows that all current European criminal cartel laws will be in violation of European human rights law.

Section IV demonstrates how legal certainty can influence *the substance* (i.e., definition) of a criminal cartel offence. The UK Cartel Offence has been chosen as a case study for this purpose, as concerns about the compatibility of this particular criminal offence with the principle of legal certainty were raised both in its passage through parliament as well as in a recent government discussion document on the reform of the UK competition regime.[9] This case study in particular

P. Whelan, "Protecting Human Rights in the Context of European Antitrust Criminalisation" in I. Lianos and I. Kokkoris (eds), *The Reform of EC Competition Law: Towards an Optimal Enforcement System* (Amsterdam 2010).

[9] See Department for Business, Innovation and Skills (hereafter "BIS"), *A Competition Regime for Growth: A Consultation on Options for Reform*, March 2011, 67.

considers the extent to which efforts both to underline the seriousness of cartels and to restrict the scope of a criminal cartel offence to those deemed most culpable can have problematic results in terms of respecting the principle of legal certainty.

Finally, Section V considers the impact of the principle of legal certainty upon *the existence* of a criminal cartel offence. In particular, it analyses the issue of "sleeping giants": that is, the use of already existing (relatively broad, non-cartel-specific) criminal laws to impose sanctions for cartel activity. The recent case of *Norris*[10] is not only on point but is also particularly instructive; it is therefore analysed in detail. This analysis helps one to construct normative instructions as to how one can deal with the challenge of legal certainty when attempting to awaken the "sleeping giant" for the first time (i.e., when asserting that a criminal cartel offence has been in existence as a result of a non-cartel-specific piece of criminal legislation or common law offence).

II. The Principle of Legal Certainty

Article 7 of the European Convention on Human Rights ("ECHR") provides that no one should be convicted of a retroactive "criminal offence" nor be subjected to retroactive criminal punishment. This provision, in incorporating the principle of legal certainty,[11] holds that a person can only be criminally convicted on the basis of a pre-existing rule of law (*nullem crimen, nulla poena sine lege*) and that the criminal law must not be extensively construed to the detriment of the accused.[12] In doing so, Article 7 ECHR not only ensures respect for the rule of law, but also helps to reduce potential costs of litigation.[13] There are two sides to the principle of legal certainty, both of which affect the substance of a criminal law.[14] The first is that legislatures and courts are prohibited from creating or extending the law in order: (a) to criminalise acts or omissions which were not criminal at the time of commission or omission;[15] or (b) to increase a penalty retroactively. Nonetheless, and in relation to limb (a), the courts may clarify the

[10] *Norris v Government of the United States of America and others* [2008] UKHL 16, [2008] 1 A.C. 920.

[11] Legal certainty is also a principle of EU law (see, e.g., T. Tridimas, *The General Principles of EU Law*, 2nd ed. (Oxford 2006), ch. 5) and is enshrined in Article 49 of the Charter of Fundamental Rights of the European Union, 2000/C 364/01. Relevant EU cases which have considered the principle include: Case 14/86, *Pretore de Salò* v. *X* [1987] E.C.R. 2545; Case 80/86, *Kolpinghuis Nijmegen BV* [1987] E.C.R. 3969; and Case C-168/95, *Criminal Proceedings against Luciano Arcaro* [1996] E.C.R. I-4705.

[12] See: *Kokkinakis* v. *Greece* (Application no. 14307/88) (1994) 17 E.H.R.R. 397, particularly 423; and *Veeber* v. *Estonia (No. 2)* (Application no. 45771/99) (2004) 39 E.H.R.R. 6, [31].

[13] R. Buxton, "The Human Rights Act and the Substantive Criminal Law" [2000] Criminal Law Review 331, 332.

[14] See C. Ovey and R.C.A. White, *Jacobs & White, The European Convention on Human Rights* (Oxford 2006), 209.

[15] See, e.g., *X* v. *Austria* (Application no. 1852/63) (1965) 8 Yearbook 190, 198.

existing elements of the offence and adapt them to new circumstances which can "reasonably be brought under the original concept of the offence".[16] According to the late Lord Bingham, the jurisprudence from Strasbourg establishes that while "absolute certainty is unattainable, and might entail excessive rigidity", and "some degree of vagueness is inevitable" (particularly so in common law countries), "the law-making function of the courts must remain within reasonable limits".[17] For him, "[i]f the ambit of a common law offence is to be enlarged, it 'must be done step by step on a case by case basis and not with one large leap'".[18] The second aspect of the principle holds that a criminal offence must be clearly defined in law; in other words, it must be possible to predetermine, if necessary with legal advice, what conduct is criminal and what conduct is not solely by reference to the law: Article 7 ECHR "implies qualitative requirements, notably those of accessibility and foreseeability".[19] This particular requirement does not imply that the concrete facts giving rise to criminal liability should be stated in the legislation in question; rather, it is sufficient for a general definition to be provided by law for interpretation by the courts.[20] While both of the identified aspects of the principle of legality are distinct, the second is clearly a precondition of the first: the more precision that is brought to bear upon the definition of an offence, the less scope is available for creative judicial interpretation.[21]

Respecting Article 7 ECHR is clearly a *legal* requirement for the EU Member States, all of which are signatories of the European Convention. That said, adherence to the principle of legal certainty also entails significant *non-legal* rewards. Indeed, there are sound reasons why one should ensure that the content and scope of any criminal cartel law can be reasonably understood by potential cartelists, judges, jurors and the general public. For a start, comprehensibility is important for the achievement of the potential underlying objectives of a criminal cartel offence.[22] For a criminal law to deter a given conduct, that individual must understand that that conduct is the subject of a criminal law and if carried out will result in criminal punishment. A firm understanding of the prohibited conduct is also important for

[16] *Gay News Ltd. and Lemon* v. *United Kingdom* (Application no. 8710/79) (1983) 5 E.H.R.R. 123, 128–29.
[17] *R v Rimmington* [2005] UKHL 63, [2006] 1 A.C. 459, [35].
[18] Ibid. at [33], quoting *R v Clark (Mark Grosvenor)* [2003] EWCA Crim 991, [2003] 2 Cr. App. R. 363, [13].
[19] *SW and CR* v. *United Kingdom* (Application no. 20166/92) (1996) 21 E.H.R.R. 363, 399.
[20] See generally M. Dougan, "From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law" in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford 2012) 115.
[21] Ovey and White, op. cit., p. 209.
[22] On these objectives, see generally P. Whelan, "The Criminalisation of European Antitrust Enforcement: Theoretical and Legal Challenges", Ph.D. Thesis, University of Cambridge, December 2010.

the achievement of retribution, particularly if such retribution aims to *communicate* the wrongfulness of the behaviour in question to the accused.[23] Furthermore, comprehensibility is required to avoid potential jury nullification, as well as to ensure that legal educative efforts are not overburdened; it can also result in lower social costs, as, for example, fewer resources are consumed in litigation related to clarification. Finally, a clear comprehensible criminal cartel law may also help to reduce the likelihood of a negative impact on society's respect for the criminal law.

III. Legal Certainty and the Concept of a Criminal Cartel Offence

To respect Article 7 ECHR, a criminal cartel offence must be clearly defined in law. It must be obvious to a potential cartelist that if she colludes with others and fixes prices, restricts output, allocates markets or rigs bids she will be committing a criminal offence and may be subject to criminal punishment. Those opposed to criminalisation might argue that, due to their economic foundations, the antitrust rules are not always clear and that, given the severity of imprisonment, it would be unfair to impose criminal sanctions at all for their violation. They may argue, in other words, that, *inter alia*, the principle of legal certainty does not support the actual concept of a criminal cartel offence. This type of argument is likely to be raised when criminal cartel sanctions are a novel development in an antitrust regime. While criminal sanctions for cartel activity are now firmly established in the United States,[24] antitrust prosecutors received such a criticism as criminal punishment for cartel violations became more common in the early twentieth century. It was argued, for example, that "the steadily increasing economic emphasis of the [Sherman Act 1890] has rendered the criminal prosecution less and less appropriate" and that "too many indictments have been returned in areas where the law was unsettled or where the economic complexities of the case were such that [a criminal trial] was highly improper".[25]

It is conceded that in some antitrust cases it would indeed be unfair to impose criminal sanctions, in particular due to the uncertainty surrounding the exact content of the law. This would be the case, for example, with abuses of a dominant position under Article 102 TFEU, particularly where an infringement is found on the basis of a controversial (narrow) market definition and/or a novel type

[23] See A. von Hirsch, *Censure and Sanctions* (Oxford 1993).
[24] See D. Baker, "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging" (2001) 69 George Washington Law Review 693.
[25] J. Chadwell, "Antitrust Administration and Enforcement" (1955) 53 Michigan Law Review 1133, 1138–39.

of abuse.[26] Recent research of the archives has revealed that at the time of the negotiations concerning the adoption of what was to become Regulation 17/62 even one of the original drafters of the competition provisions in the EEC Treaty, namely Hans von der Groeben, "did not think it possible to impose fines on dominant undertakings under [Article 102 TFEU] as long as no sufficiently detailed rules were laid for their conduct".[27] According to Akman, this fact "almost implies that the provision was not intended to be enforced".[28] The vagueness of that particular provision has in fact been criticised on numerous occasions in the past, and there have been recent efforts by the European Commission to provide some form of guidance on its operation in practice.[29] It appears, however, that the Commission's efforts in this regard have not been entirely successful.[30] Significant uncertainty therefore continues to surround the operation of Article 102 TFEU.[31] For this reason alone criminal sanctions should not be imposed for anticompetitive unilateral conduct.

But Article 102 TFEU should be contrasted with the cartel law rules contained in Article 101(1) TFEU. The latter provision captures *inter alia* the behaviour articulated in the 1998 OECD Recommendation. This is the type of behaviour (i.e., agreeing with a competitor to fix prices, share markets, restrict output and/or rig bids) over which little to no disagreement exists concerning its anticompetitive nature, and indeed for which EU (and national) competition law has no tolerance. In fact, if any aspect of EU antitrust law achieves consensus it is the rules concerning "hard core" cartels. Unlike Article 102 TFEU, the substance of the law on "hard core" cartels is to all intents and purposes settled.[32] In practice, the fact that business people are aware of the unlawfulness of their cartel activity is often evidenced by the extent to which they are prepared to go to conceal their behaviour from the authorities.[33] Indeed, under the old notification regime of Regulation 17/62, it was rare for cartelists to notify their cartel agreements in the hope that they would be granted an exemption: only four per cent of the 49 cartels investigated by the European Commission between 1980

[26] K. Nordlander and P. Harrison, "Are Rights Finally Becoming Fundamental?" (February 2012) (1) CPI Antitrust Chronicle, 8–10.

[27] P. Akman, "Searching for the Long-Lost Soul of Article 82 EC" (2009) 29(2) Oxford Journal of Legal Studies 267, 297.

[28] Ibid.

[29] See, e.g., European Commission, *Communication from the Commission — Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, C(2009) 864 final, Brussels, 9 February 2009.

[30] See, e.g., P. Akman, "The European Commission's Guidance on Article 102 TFEU: From *Inferno* to *Paradiso*?" (2010) 73(4) Modern Law Review 605.

[31] See, e.g., Y. Katsoulacos, "Some Critical Comments on the Commission's Guidance Paper on Article 82 EC" (February 2009) 1 Global Competition Policy.

[32] See generally R. Whish and D. Bailey, *Competition Law*, 7th ed. (Oxford 2012), ch. 13.

[33] See, e.g., Case COMP/F/38.899, *Gas Insulated Switchgear*, Commission Decision, 24 January 2007, C(2006)6762 final.

and 2004 (when the notification system was abolished) were originally notified by the parties.[34] Unlawfulness had therefore been understood and effectively conceded by the relevant undertakings. Moreover, the "undisputed illegality" in EU law of cartel activity is demonstrated by the fact that, in the vast majority of appeals against Commission decisions condemning cartels, the legal issues raised were the standard of proof and the amount of the fines imposed.[35] It is true that, irrespective of this consensus on illegality, "proper legal advice will always be crucially important in this area".[36] However, the requirement to seek expert legal advice is not necessarily inconsistent with legal certainty.[37] While it would be disingenuous to state that EU cartel law has never been criticised for falling foul of legal certainty requirements, it is true that when such arguments are raised in this context, it almost always concerns the size of a potential fine as opposed to the existence of an infringement *per se*.[38] Finally, while a cartelist is entitled in law to argue that a cartel should be exempt from unlawfulness by virtue of Article 101(3) TFEU,[39] such an exemption for a "hard core" cartel is very unlikely to be provided by EU law.[40] In effect rather than in strict legal terms, cartel activity is subject to *per se* illegality in Europe, much like it is in the US. Such behaviour therefore does not actually involve rambling "through the wilds of economic theory" under the rule of reason, to use the words of the US Supreme Court.[41] Any arguments that the rule-of-reason approach under Section 1 of the US Sherman Act 1890 conflicts with the rule of law[42] are therefore not transferrable to the cartel rules of Article 101(1) TFEU.

The argument concerning vagueness in EU antitrust law should therefore be placed in proper perspective: while relevant to the outer fringes of anticompetitive activity, as well as to unilateral conduct, it does not necessarily apply to clear-cut violations of the EU cartel

[34] A. Günster, M. Carree and M.A. van Dijk, "Do Cartels Undermine Economic Efficiency?", December 2011 (working paper in the possession of the author).

[35] F.E.G. Diaz, D. Kirk, F.P. Flores and C. Verkleij, "Horizontal Agreements" in J. Faull and A. Nikpay (eds), *The EC Law of Competition* (Oxford 1999), 336. See also Whish and Bailey, op. cit., p. 520–21. A very recent, typical example is the (unsuccessful) appeal brought by ICI against a Commission decision imposing a fine upon it of €91 million for its participation in a cartel concerning acrylic glass: Case T-214/06, *Imperial Chemical Industries Ltd.* v. *Commission*, Judgment of 5 June 2012, not yet reported.

[36] A. Albors-Llorens, "Horizontal Agreements and Concerted Practices in EC Competition Law: Unlawful and Legitimate Contacts between Competitors" (2006) 51(4) Antitrust Bulletin 837, 876.

[37] See *Sunday Times* v. *United Kingdom* (Application no. 6538/74) (1979–80) 2 E.H.R.R. 245, 271.

[38] For an example, see I. van Bael, "Fining à la Carte: The Lottery of EU Competition Law" (1995) 4 European Competition Law Review 237.

[39] See Case T-17/93, *Matra Hachette SA* v. *Commission* [1994] E.C.R. II-595.

[40] See, e.g.: European Commission, *Xth Report on Competition Policy*, Brussels, 1980, [115]; and ICN Working Group on Cartels, *Defining Hard Core Cartel Conduct – Effective Institutions, Effective Penalties*, ICN 4th Annual Conference, Bonn, 6-8 June 2005, 14.

[41] *United States v Topco Association* (1972) 405 U.S. 596, 609, footnote 10.

[42] See M. Stucke, "Does the Rule of Reason Violate the Rule of Law?" (2009) 42(5) U.C. Davis Law Review 1375.

prohibition, where little confusion exists concerning unlawfulness. The concept of price-fixing, for example, is sufficiently clear as to caution market actors in their business dealings: businessmen should simply refuse to talk to their competitors about prices. Indeed, unlike other (commercial) practices, cartel activity is not a complex concept: at its base, it involves a relatively straightforward, uncontested economic model; in practice, no intricate economic efficiency arguments are offered; and, generally, its effects are direct and observable. Economic analysis, then, does not complicate a prospective cartelist's understanding of the unlawfulness of cartel behaviour. The same is true with the courts' understanding of cartel activity. Unlike with other areas of competition law, the "possible complications stemming from the fact that the courts are not adequately equipped to make [economic] analyses and from the possibility that criminal law principles will be breached, will not materialise in these '*by their object*-cases'".[43] Indeed, economics is of limited application in this context. According to Lyons, "[a]lthough econometric evidence can be used to identify suspicious pricing patterns, there is little subtle economics used in identifying a cartel".[44] In fact, in cartel cases economic theory is only really applied in two situations: (a) to help to determine the optimal fine that is to be imposed by a competition authority; and (b) to determine the amount of damages that are payable to a private enforcer. Economics is not used to establish a violation of the cartel law rules *per se*: situations (a) and (b) are only relevant once an infringement of the cartel law rules has been established. Such a violation is more often than not proven by incriminating documentary evidence (e.g., e-mails) and witness statements provided by whistleblowers and leniency applicants.[45] In any event, irrespective of the above arguments, a criminal cartel provision could always be created by the legislator which does not contain elements requiring an economic assessment.[46] This occurred in the US with Section 1 of the Sherman Act 1890, where the word "conspiracy" ensures both that the only proof of price-fixing required is proof that the defendant had conspired to fix prices and that an inquiry whether the defendants actually caused a significant increase in price or reduction in output is immaterial.[47]

For these reasons, then, legal certainty arguments concerning the "inherently vague" nature of the cartel prohibition in Article 101(1)

[43] M. Frese, "The Negative Interplay Between National Custodial Sanctions and Leniency" in Cseres *et al.*, note 4 above, p. 205.
[44] B. Lyons, "Agreements between Firms" in B. Lyons (ed.), *Cases in European Competition Policy – The Economic Analysis* (Cambridge 2009), 130.
[45] Ibid. at p. 130. See also OFT, *Powers for Investigating Criminal Cartels*, OFT 515, January 2004, [2.2].
[46] Frese, op. cit., p. 206.
[47] R. Posner, *Antitrust Law: An Economic Perspective*, 2nd ed. (Chicago 2001), 53.

TFEU are not problematic. Admittedly, it does not follow that none of the cartel prohibitions in the national competition laws of the EU Member States (which may have additional (problematic) elements to the cartel prohibition in Article 101(1) TFEU) violate the principle of legal certainty. But this is not problematic for present purposes: the point here is that, by taking the example of the cartel prohibition in Article 101(1) TFEU, one can negative the argument that a cartel prohibition *per se* violates the principle of legal certainty. The comprehensibility of the cartel prohibition in Article 101(1) TFEU demonstrates that the very concept of a criminal cartel offence within the EU Member States is not prohibited by virtue of Article 7 ECHR.

A final point can be made here concerning the concept of a criminal cartel offence. If, however unlikely, a cartel case did indeed arise involving uncertainty as to unlawfulness, any consequent doubt concerning criminal liability could be resolved through the exercise of prosecutorial discretion; one could ensure that only civil or administrative proceedings result. Such an approach would be consistent with the approach adopted in the US. The US Government, in an attempt to undermine initial criticism concerning uncertainty, requested antitrust enforcers to exercise a reasoned discretion in their use of the power of criminal prosecution: the "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade".[48] However, the use of such discretion in this context is not without its own problems — e.g., it may be difficult to respect the principle of equal treatment — and therefore it should be kept to an absolute minimum.[49] To ensure that this is so, a very clear, non-economics-based definition of cartel activity is required. In seeking such a definition, the legislator should be prepared to accept under-inclusivity in the conduct proscribed by the cartel offence, if necessary: one should not rely upon prosecutorial discretion to rectify uncertainty merely to ensure that all potentially harmful horizontal anticompetitive conduct is criminalised. A less inclusive definition which does not rely upon prosecutorial discretion would avoid the pitfalls associated with such a power, and is therefore preferable.[50] In seeking such a definition, one should also be mindful of the (negative) experiences of the relevant EU Member States, in particular that of the UK.

[48] Report of the Attorney General's National Committee to Study the Antitrust Laws, 31 March 1955, 349. See also: Baker, note 24 above, pp. 694–95; and D. Baker, "To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement" (1978) 63 Cornell Law Review 405.

[49] Cf. Committee of Ministers of the Council of Europe, *The Role of Public Prosecution in the Criminal Justice System*, Recommendation Rec(2000)19, 6 October 2000.

[50] The Canadian authorities recently adopted such an approach in their redrafting of their criminal cartel laws. On the new Canadian regime, see D.M. Lowe and C.W. Halladay, "Redesigning a Criminal Cartel Regime: The Canadian Conversion" in Beaton-Wells and Ezrachi, note 8 above.

IV. Legal Certainty and the Substance of a Criminal Cartel Offence: Avoiding the Pitfalls of the UK Experience

As argued above, there are no inherent conceptual difficulties with the EU cartel prohibition which inevitably lead to a legal certainty problem if criminal sanctions are used to enforce that particular prohibition. It does not follow however that cartel criminalisation within the EU Member States necessarily avoids problems of legal certainty. The reason for this should be clear: cartel criminalisation within the EU Member States is not necessarily a process of merely introducing criminal sanctions for violation of the EU cartel prohibition. Cartel criminalisation within the EU Member States can also involve the creation of a national cartel offence which is conceptually distinct from the EU cartel prohibition (while based upon the conceptualisation of cartel activity offered by the OECD[51]). In particular, the national cartel offence may include (problematic) definitional elements which are not included in the EU cartel prohibition. These additional definitional elements may be chosen to underline the moral wrongfulness of cartel activity or to restrict the scope of the offence to those who are most culpable concerning the cartel, objectives which are particularly laudable with *criminal* anti-cartel enforcement. It is in adding these additional definitional elements that legal certainty problems may be engendered. Of course the existence (and the extent) of the legal certainty problem depends on the specifics of what has been added: some elements will be problematic, others will not. By considering the experience of those EU Member States which have created unique national cartel offences, one can learn how potential legal certainty problems are created by poor choices in the drafting process. To date, the UK Cartel Offence provides the most instructive case study in this context.

A. The UK Cartel Offence: An Argument Concerning Legal Certainty

Under Sections 188-89 of the Enterprise Act 2002 ("EA"), the UK Cartel Offence is committed when an individual dishonestly agrees with one or more other persons that competing undertakings will price-fix, limit supply or production, market-share and/or bid-rig.[52] This offence criminalises cartel activity but differs in at least four regards from the EU cartel prohibition.[53] First, the Cartel Offence does not impose

[51] See OECD, note 1 above.

[52] See generally: M. Furse and S. Nash, *The Cartel Offence* (Oxford 2004); and A. MacCulloch, "The Cartel Offence: Is Honesty the Best Policy?" in B. Rodger (ed.), *Ten Years of UK Competition Law Reform* (Dundee 2010).

[53] There is also a disconnect between the UK Cartel Offence and the (civil) cartel prohibition in the Competition Act 1998. For the sake of conciseness, the discussion which follows focuses on the consequences of the disconnect between the Cartel Offence and the EU cartel prohibition. This choice does not materially affect the relevant analyses.

a *de minimis* requirement concerning the cartel activity, unlike Article 101(1) TFEU.[54] Second, in contrast to Article 101(1) TFEU, the UK Cartel Offence does not require an (actual or potential) effect on trade between Member States.[55] Third, the Cartel Offence does not contain an express legal exception such as that contained in Article 101(3) TFEU. Fourth, it utilises a definitional element not present in the EU cartel prohibition: the concept of "dishonesty". The test for dishonesty articulated in *Ghosh*[56] is applicable to the UK Cartel Offence.[57] Accordingly, the conduct must be: (a) dishonest according to the standards of ordinary people; and (b) known by the defendant to be dishonest according to those standards. Dishonesty was employed as an explicit element of the Cartel Offence as it delimited the scope of the offence[58] and it underlined the wrongfulness of the cartelist's behaviour.[59] For similar reasons a non-European state (namely Australia) recently considered employing "dishonesty" in its criminal cartel law.[60]

One could argue that the Cartel Offence as currently drafted suffers from a potential legal certainty problem.[61] The essential thrust of this argument is that the offence violates the requirement of legal certainty due to its employment of the mens rea of dishonesty. The point, however, is not that the mere use of dishonesty in this context is problematic, but rather that its use becomes problematic when the cartel offence does not contain an actus reus which itself clearly points to criminality. By not linking the actus reus of the Cartel Offence to violation of an already existing cartel prohibition (i.e., the EU cartel prohibition), so the argument runs, the authorities have failed to rectify or assuage the inherent imprecision associated with dishonesty, thereby violating Article 7 ECHR.[62] With no actus reus which necessarily violates the EU prohibition on cartel activity, Section 188 EA expects a cartelist to decide whether her conduct is dishonest (and therefore criminal) without providing a clear pointer to criminality in the offence itself.[63] The problem here is that all depends upon how the jury decides the issue of dishonesty and "seeking legal advice on such an issue is not likely to be of much assistance, since a lawyer's view as to what a jury

[54] See Case 5/69, *Völk v Vervaecke* [1969] E.C.R. 295.
[55] See, e.g., *R. v B.* [2009] EWCA Crim 2575, [2010] 2 All E.R. 728, [18].
[56] *R v Ghosh* [1982] Q.B. 1053.
[57] *R v George and others* [2010] EWCA Crim 1148, [2010] 1 W.L.R. 2676, [6].
[58] A. MacCulloch, "Honesty, Morality and the Cartel Offence" (2007) 28(6) European Competition Law Review 355, 356.
[59] OFT, *The Proposed Criminalisation of Cartels in the UK — A Report Prepared for the Office of Fair Trading by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM*, OFT 365, November 2001, [2.5].
[60] See B. Fisse, "The Cartel Offence: Dishonesty?" (2007) 35 Australian Business Law Review 235.
[61] See S. Parkinson, "The Cartel Offence under the Enterprise Act 2002" (2004) 25(6) Company Lawyer 187.
[62] Ibid., at p. 189.
[63] Cf. K. MacDonald and R. Thompson, "Dishonest Agreements" [2003] Competition Law Journal 94, 96.

may think dishonest is likely to be no better than anyone else's".[64] So when the EU cartel prohibition would not be violated (and therefore the actus reus of the alleged offence would not in itself point to criminality), a given cartelist *herself* cannot be sure whether or not in engaging in cartel activity she would actually commit a crime until the jury decides the matter *at a later date*. It is the requirement of the *later* ruling of the jury which is problematic: with this approach, the prospective cartelist would not be able to *foresee*, within reasonable limits, the consequences of her chosen course of action. According to the extreme view, the jury is not merely determining whether a crime has been committed but is also rendering a given act (of cartel activity) criminal due to its willingness to characterise that act as "dishonest". Accordingly, prosecutions in cases where the EU cartel prohibition is not violated (for example, where the *de minimis* rule is not fulfilled) would therefore be suspect under Article 7 ECHR, as in such an instance "a person may not be able to foresee with any reasonable degree of accuracy whether or not a proposed course of action would be decided to be criminal by a jury".[65]

B. Critically Evaluating the Validity and Implications of the Legal Certainty Argument

The argument concerning incompatibility with the ECHR was not conceded by the UK legislature when it adopted the Cartel Offence in 2002. In fact, the argument was not presented in any detail during the Parliamentary passage of the Enterprise Bill (although, admittedly, one of the Lords did observe that the wording of the offence "goes against the concept of maximum certainty in the definition of an offence" to the detriment of principles of human rights[66]). More importantly, however, such an argument has not (yet) been advanced in front of the UK courts, something that may change in the future if the Cartel Offence is not reformed and prosecutions under Section 188 EA are forthcoming. One must wait to see if such arguments are advanced and, if so, whether they will be accepted by the judiciary. If legal certainty arguments are raised in this context they will have a difficult task to be successful. For a start, a case based upon Article 7 ECHR is quite difficult to sustain in law: the offence must be "very loosely defined indeed"[67] and "where certainty of criminal law has come into issue in ECHR questions, the standards required by the Convention jurisprudence have been distinctly undemanding".[68] Furthermore, while legal

[64] Parkinson, op. cit., pp. 188–89.
[65] Ibid., at p. 189.
[66] HL Deb. vol. 637 col. 1537 (18 July 2002) (Lord Hunt of Wirral).
[67] See Ovey and White, note 14 above, pp. 214–15.
[68] Buxton, note 13 above, p. 332.

certainty arguments are not unknown concerning an offence based upon "dishonesty",[69] they have not yet succeeded solely on the basis of the employment of this concept in the definition of an offence. It was held by Judge Mercer in *Pattni*,[70] for example, that dishonesty as interpreted in *Ghosh* did not necessarily render the common law offence of cheating unascertainable. All elements of the definition need to be considered and the mere existence of the definitional element of dishonesty is insufficient to invalidate a criminal offence on legal certainty grounds.

Nonetheless, comments of the European Court of Human Rights ("ECtHR") can perhaps be relied upon to substantiate the legal certainty argument concerning the Cartel Offence. The ECtHR noted in *Hashman and Harrup*[71] that dishonesty "is but one element of a more comprehensive definition of the proscribed behaviour" in the UK Theft Acts. This statement has been interpreted as the "distinguishing mark" between conduct proscribed by, for example, the Theft Acts (which was assumed to be in conformity with legal certainty) and conduct such as behaving *contra bonos mores* (which was held to be in violation of legal certainty requirements).[72] It may therefore support the argument advanced regarding the Cartel Offence: the "comprehensive definition" referred to by the court may imply that other elements in the offence point to the criminality of the conduct, and that on this basis one may be able to foresee, within reasonable limits, the consequences of one's chosen course of action, irrespective of the definitional element of dishonesty. Admittedly, this may be a stretch too far for a quotation that is an obiter dictum in a case where the issue of dishonesty was not considered directly. The Law Commission, however, appears to have adopted a similar approach in its interpretation of the potential impact of the ECHR upon dishonesty-based offences. In its 1999 consultation paper on fraud and deception,[73] for example, the Law Commission rejected a general fraud offence with the element of dishonesty at its core; because it would criminalise otherwise unobjectionable behaviour merely by the employment of the concept of "dishonesty", such an offence would be "undesirable in principle" and insufficiently certain to satisfy the requirements of the European Convention.[74] This approach

[69] There are English cases concerning offences based upon dishonesty, public mischief or conspiring to corrupt public morals where violation of the principle of legal certainty has been (unsuccessfully) argued: *Shaw v DPP* [1962] A.C. 220; *Knuller Ltd. v DPP* [1973] A.C. 435; and *R v Pattni, Dhunna, Soni and Poopalarajah* [2001] Crim. L.R. 570.

[70] *R v Pattni, Dhunna, Soni and Poopalarajah* [2001] Crim. L.R. 570.

[71] *Hashman and Harrup* v. *United Kingdom* (Application no. 25594/94) (2000) 30 E.H.R.R. 241, 258.

[72] C. Ovey, "Case and Comment: *Hashman and Harrup v United Kingdom*" [2000] Criminal Law Review 185, 186.

[73] Ibid.

[74] Law Commission, *Legislating the Criminal Code, Fraud and Deception: A Consultation Paper*, Consultation Paper 155, London, March 1999, [1.23] and [5.9]–[5.53].

was also followed through in its final report on fraud,[75] where the Law Commission recommended a dishonesty-based offence that contained an actus reus which pointed itself to criminality.[76] So some support exists, then, for a fundamental assumption of the legal certainty argument, viz. that a dishonesty-based offence is suspect under Article 7 ECHR unless the other definitional elements somehow point to criminality. Of course, even if one accepts this assumption, it does not necessarily follow that the legal certainty argument has been established: one must analyse whether the underlying conduct in the Cartel Offence does not point to criminality.

It is true that one can commit the Cartel Offence without violating Article 101(1) TFEU (or indeed the national equivalent in Chapter 1 of the Competition Act 1998): the Cartel Offence does not impose a *de minimis* requirement and it does not contain an Article 101(3) TFEU-type exemption, for example. But it does not necessarily follow from this fact that the underlying conduct in the Cartel Offence fails to point to criminality and therefore that (due to the definitional element of "dishonesty") the offence violates Article 7 ECHR. Linking the actus reus of a criminal cartel offence to a violation of a pre-existing administrative cartel prohibition is *merely one method* of pointing to criminality in this context; another method could also be employed: one could attempt to conceptualise cartel activity, as defined in the criminal offence, as being inherently wrongful in a moral sense. To the extent that this can be achieved one can overcome the legal certainty problem identified.

Using Green's research on white collar crime,[77] one can argue that cartel activity encompasses conduct that violates each of the moral norms against cheating, deception or stealing[78] and that therefore the legal certainty argument lacks merit. Accordingly, cartel activity involves cheating as the cartelist, by engaging in cartel activity, breaks an unspoken rule of the market (i.e., not to collude with competitors) with the intention of obtaining an advantage (i.e., the overcharge) over those with whom she is in a rule-bound relationship (i.e., consumers). Furthermore, cartel activity involves deception in that by placing her good for sale the cartelist intends to mislead a consumer about the non-existence of collusion. And cartel activity involves stealing as by colluding the cartelist intends to deprive consumers of property (i.e., the overcharge) over which they have rights of ownership (due to social acceptance of the value of competition and the system of

[75] Law Commission, *Fraud*, Law Com No.276, London, July 2002.
[76] See Parkinson, note 61 above, p. 189.
[77] S. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford 2006).
[78] See C. Beaton-Wells, "Capturing the Criminality of Hard Core Cartels: The Australian Proposal" (2007) 31(3) Melbourne University Law Review 675.

free market capitalism). For each of these three statements to be substantiated, one is required to accept certain (problematic) assumptions, the most difficult of which concern the intentions of cartelists.[79] Indeed, given the insights from the available literature on the motivations of cartelists,[80] it would be rather simplistic to claim that cartelists necessarily have the relevant intentions required by each of the norms identified. If so, the relevant norms will not always be violated by cartelists and cartel activity will not *by definition* involve morally questionable behaviour. One could respond to this problematic issue by defining the criminal cartel offence in a manner that also requires proof of the problematic element of a chosen moral norm (e.g., an intention to obtain an advantage, an intention to mislead or an intention to deprive). However, by doing so, one creates additional evidential burdens for prosecutors to the potential detriment of the objective of (economic) deterrence: *ceteris paribus*, for a given amount of resources the antitrust authorities will achieve fewer successful prosecutions. For this reason it would be preferable to link the commission of the criminal cartel offence to a violation of an already existing civil cartel prohibition. In doing so, one can employ the mens rea of dishonesty in a criminal cartel offence which contains an actus reus which clearly points to criminality, thus avoiding the legal certainty problem identified.

This legal certainty problem, then, highlights the difficulties one may face when trying to create a criminal law which explicitly underlines the wrongful nature of cartel activity (by requiring one to consider its dishonest quality) while simultaneously protecting the human rights of the accused. The employment of the concept of dishonesty may not actually be required in order to underline the moral wrongfulness of cartel activity. If, however, dishonesty is used, one should ensure that the remaining definitional elements of the offence clearly point to criminality. To do this one should: (a) link the commission of the criminal cartel offence to the commission of a pre-existing (civil/administrative) cartel prohibition; or (b) ensure that at least one of the moral norms against cheating, deception or stealing is inevitably encompassed by the criminal cartel offence. Failure to follow either of these recommendations could lead to a situation where the legality of the (dishonesty-based) cartel-specific offence is questionable under European human rights law, as is arguably the case with the UK Cartel Offence as it currently stands. In fact, given the above analysis concerning legal certainty, it is difficult not to support BIS's recent

[79] On these assumptions, see Whelan, note 22 above, ch. 4.

[80] See generally: C. Parker, "Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality" in Beaton-Wells and Ezrachi, note 8 above; and M. Stucke, "Am I a Price Fixer? A Behavioural Economics Analysis of Cartels" in Beaton-Wells and Ezrachi, ibid.

recommendation to abolish the "dishonesty" element in s.188 EA, a recommendation that is likely to be implemented by the legislature.[81]

V. Legal Certainty and the Existence of a Criminal Cartel Offence: The Issue of "Sleeping Giants"

The issue of whether "sleeping giants" exist in the criminal laws of the Member States — whether, that is, pre-existing criminal laws can be interpreted in novel ways to capture cartel activity — is an issue particularly relevant to the debate on cartel criminalisation. For various reasons, legislators may refuse to adopt criminal cartel laws. They may be reluctant to antagonise the business community, for example.[82] Or they may decide that their limited resources are better allocated to the fight against more serious or morally-questionable activities. They may underestimate the harm caused by cartel activity.[83] There may even be disagreement on the legal definition to be employed, or the exact conduct to be criminalised.[84] Even if criminal cartel laws exist, their temporal jurisdictions might not extend to past cartel activity.[85] In such circumstances, it may be others who develop the (criminal) antitrust regime. Prosecutors, for example, when faced with an apparent lack of specific criminal cartel laws, may decide to characterise cartel activity in terms of an already existing, relatively broad criminal offence such as fraud[86] or conspiracy to defraud.[87] If so the authorities must insulate themselves from allegations of a violation of Article 7 ECHR: such allegations have the potential to affect the very existence of the alleged criminal cartel sanction, as has occurred in the UK in the *Norris* case.[88]

A. The Norris *Case*

The facts of the *Norris* case are as follows. In September 2004, Mr Ian Norris, a British national, was indicted by a US grand jury on four counts, one of which alleged that Mr Norris conspired with others to

[81] See: BIS, *Growth, Competition and the Competition Regime – Government Response to Consultation*, March 2012; and Enterprise and Regulatory Reform Bill, HC, 23 May 2012, Bill 7, 55/2, s 39(2).

[82] On antitrust sanctions and the reaction of business, see C. Parker, "The 'Compliance Trap': The Moral Message in Regulatory Enforcement" (2006) 40 Law & Society Review 591.

[83] See OECD, *Report on Hard Core Cartels*, OECD Competition Committee, 2000, 20.

[84] As occurred in Australia prior to its adoption of a new criminal cartel law in the summer of 2009; see, e.g., B. Fisse, "Defining the Australian Cartel Offences: Disaster Recovery", Competition Law Conference, Sydney, 24 May 2008, www.brentfisse.com/images/Fisse_Defining_the_Australian_Cartel_Offences_240608.pdf.

[85] The UK Cartel Offence, for example, only applies to conduct occurring after 20 June 2003.

[86] Cf. D. Corker and A. Smith, "Cartels: Who's Liable?" (2007) 157 New Law Journal 1593.

[87] See *R v GG plc and others* [2008] UKHL 17, [2009] 1 W.L.R. 458.

[88] *Norris v Government of the United States of America and others* [2007] EWHC 71 (Admin), [2007] 1 W.L.R. 1730; and *Norris v Government of the United States of America and others* [2008] UKHL 16, [2008] 1 A.C. 920.

operate a price-fixing agreement in relation to different carbon products in a number of different countries, including the US, contrary to Section 1 of the US Sherman Act 1890. On the basis of this indictment, the US authorities sought to extradite Mr Norris from the UK. The problem, however, was that "dual criminality" was required for extradition to occur: Section 137(2) of the Extradition Act 2003. In other words, the price-fixing agreement in question would also have to have been proscribed by UK criminal law at the time that it was concluded. As the alleged cartel was outside the temporal scope of the UK Cartel Offence, the US authorities argued that the cartel nonetheless violated UK criminal law, as it amounted to a conspiracy to defraud. District Judge Evans accepted this argument and held that Mr Norris could legally be extradited. Mr Norris appealed to the High Court and then to the House of Lords (now the Supreme Court); the latter allowed the appeal in part, and held that Mr Norris should not be extradited to face price-fixing charges in the US.

Norris argued in both of his appeals that mere price-fixing would not have constituted a criminal offence in the UK at the material time. All parties accepted that such conduct would not have been subject to criminal punishment under statutory law; nonetheless, the US Government was persistent in its claim that the conduct would have amounted to a common law conspiracy to defraud, as price-fixing in itself, due to its secretive nature, was inherently dishonest. Such a claim was bolstered by a recent article published by Lever and Pike arguing that price-fixing could indeed be a common law offence if it "involves the use of dishonest means and prejudices, or carries a risk of prejudice to, another's rights, to the knowledge of the parties to the agreement that they had no right to do so".[89] In contrast to the High Court,[90] the Supreme Court was not prepared to accept this argument. According to the latter's interpretation of the applicable jurisprudence, an agreement to fix prices was not criminal under the common law, "unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract".[91] While the common law recognised that agreements in restraint of trade may indeed be unreasonable and therefore against the public interest and so void and unenforceable, such agreements were not actionable or indictable in the absence of such "aggravating features".[92]

Importantly, their Lordships held that even if it had otherwise been open to them to decide that price-fixing in itself could now amount to a

[89] J. Lever and J. Pike, "Cartel Agreements, Criminal Conspiracy and the Statutory 'Cartel Offence': Parts I & II" (2005) 26(2) European Competition Law Review 90, 93.
[90] [2007] EWHC 71 (Admin), [2007] 1 W.L.R. 1730 at [66]–[67].
[91] [2008] UKHL 16, [2008] 1 A.C. 920 at [17].
[92] For criticism of this interpretation, see P. Whelan, "Resisting the Long Arm of Criminal Antitrust Laws: *Norris* v. *US*" (2009) 72(2) Modern Law Review 272, 277.

common law offence, they would have been prevented from doing so due to the principle of legal certainty.[93] Specifically, the "consistent message" of Parliament and the judiciary, through legislation and case law respectively, reinforced by both ministerial statements and textbooks, was that price-fixing *per se* was not capable of constituting a crime. Given this context, it would have been contrary to the principle of legal certainty to hold that price-fixing in itself could amount to a dishonest practice and therefore a conspiracy to defraud. Even if a recent shift in public perception concerning price-fixing could be established,[94] which on the facts it could not, criminalisation would be hard to reconcile with the jurisprudence of the ECtHR denying courts the ability to criminalise conduct merely because it was wrong rather than right according to the majority of contemporary fellow citizens.[95]

It was undisputed that there has not been a criminal prosecution for price-fixing *per se* under the common law of England and Wales. This was not enough, however, to rule in favour of Mr Norris. What needed to be examined was whether mere price-fixing could "reasonably be brought under the original concept of the [common law] offence".[96] According to the late Lord Bingham, the jurisprudence from Strasbourg established that while "absolute certainty is unattainable, and might entail excessive rigidity", and while "some degree of vagueness is inevitable" particularly so in common law countries, "the law-making function of the courts must remain within reasonable limits".[97] The question, then, was whether it would be reasonable to bring price-fixing into the common law offence of conspiracy to defraud. It is submitted that in that particular case it would not have been reasonable to do so and that the ruling of the Supreme Court is correct in this regard. It is undeniable that there was a "consistent message" of the UK authorities that price-fixing *per se* was not capable of constituting a crime. This is clear from, *inter alia*, parliamentary debates, ministerial statements and the research of experienced legal scholars. As stated by the Supreme Court, there "was no reported case, indeed, it would appear, no unreported case, no textbook, no article which suggested otherwise".[98] Even if Mr Norris retained some of the best lawyers in the UK when he allegedly engaged in cartel activity, it is almost certain that he would have been advised then that price-fixing was not criminal

[93] [2008] UKHL 16, [2008] 1 A.C. 920 at [55].
[94] On this, see A. Stephan, "Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain" (2008) 5 Competition Law Review 123.
[95] [2008] UKHL 16, [2008] 1 A.C. 920 at [57], quoting *Hashman and Harrup* v. *United Kingdom* (Application no. 25594/94) (2000) 30 E.H.R.R. 241, 258.
[96] *Gay News Ltd. and Lemon v United Kingdom* (Application no. 8710/79) (1983) 5 E.H.R.R. 123, 128–29.
[97] *R v Rimmington* [2005] UKHL 63, [2006] 1 A.C. 459, [35].
[98] [2008] UKHL 16, [2008] 1 A.C. 920 at [55]. On the importance of publicly-accessible, identifiable sources for legal certainty, see *Fothergill v Monarch Airlines Ltd.* [1981] A.C. 251, 279.

according to UK law. Such is the strength of this argument that it may have been preferable for the Supreme Court to have upheld Norris's appeal on this point alone: the court's additional ruling on the necessity to prove "aggravating features" may have a potential (unintended) negative impact on the operation of the UK Cartel Offence in practice (as opposed to in law).[99]

B. Application of the Lessons Learned in Norris

The *Norris* case demonstrates the perils that one faces when attempting to awaken a "sleeping giant" and use novel interpretations of existing laws to ensure that anticompetitive conduct is subject to criminal sanctions. These perils are relevant not only to common law offences but also to statutory ones: the principle of legal certainty applies to both types of offences. Given this, as well as the fact that the courts in *Norris* relied upon European human rights jurisprudence, one can confidently say that the lessons from that particular national case can be applied to the issue of "sleeping giants" in other EU Member States. One should note here that the UK is not the only Member State to attempt to awaken a "sleeping giant" in this context. Indeed, a number of years ago the German authorities attempted to make more accessible the criminal prosecution of price-fixing agreements and competition law violations under the general rules on fraud in the German Criminal Code ("StGB").[100] If any of the EU Member States in future follow the leads of these jurisdictions, then the lessons from *Norris* would become even more relevant.

Cartel criminalisation due to the awakening of a "sleeping giant" must take note of (*inter alia*) the principle of legal certainty: the authorities must be very careful in assuming that existing laws are capable of catching cartel activity *per se* when such a situation has never arisen before and when cartel activity in itself has consistently been perceived as being outside of the scope of the criminal law. Without such caution, criminal enforcement efforts will be undermined, resulting in wasted resources and a possible reduction in levels of respect for the law. The central issue in this context is the *reasonableness* of applying a broadly-defined criminal offence to a very novel set of circumstances, namely those relating to cartel activity. This inquiry in any given case will of course be one of fact. It will be decided according to an objective standard. Therefore, it is the opinion of the common, ordinary person as to whether it is reasonable to bring a given (anticompetitive) conduct within the original concept of the

[99] See P. Whelan, note 92 above, p. 278.

[100] See S. Gotting and T. Lampert, "Opening Shot for Criminalisation of German Competition Law? Federal High Court Judgment Simplifies Options for Prosecuting Competition Law Violations as Fraud under German Penal Code" (2003) 24(1) European Competition Law Review 30.

offence in question that matters; the subjective views of a competition authority or of a domestic or foreign prosecutor, for example, are not determinative. Different jurisdictions or courts may differ in their opinion concerning (objective) reasonableness, as seen in the respective judgments of the courts in the *Norris* case. Different outcomes concerning legal certainty arguments are therefore possible. But, as suggested by the approach of the Supreme Court — an approach that is grounded in European human rights jurisprudence — the greater the degree of (prior) consensus of the legal community on the apparent lawfulness of a given behaviour, the more likely that it will be considered unreasonable for judges to bring that behaviour within the original concept of a given ("sleeping-giant-type") offence. Where no reported or unreported case, no textbook, no article, or indeed no publicly-available PhD thesis suggests anything other than lawfulness, the more difficult the antitrust prosecutor's case becomes.

It appears, then, that an authority contemplating awakening a "sleeping giant" in the context of cartel activity has two immediate choices: either it leaves the "giant" sleeping for good (i.e., it refuses to apply the broadly-defined criminal offence to anticompetitive activity) or it awakens it very slowly. In the latter case, if the "awakening" is to be successful, some form of advance notice must be given to market operators that a criminal cartel law already exists and could be used against them. Such notice should only concern itself with contemplated conduct rather than with conduct that has already occurred, otherwise the efforts to improve legal certainty will be in vain: what matters is that the rules be ascertainable at the time the individual actually decides on her future (competitive/anticompetitive) conduct. In other words, if notice is effected, it will only remove or reduce legal certainty concerns for conduct which occurs *after* the provision of notice. Accordingly, prosecutors should avoid bringing charges against those who allegedly engaged in cartel activity prior to the provision of notice as to the encompassing effect of a "sleeping giant".

Care should also be taken to ensure that contradictory statements do not emanate from the authority wishing to effect notice, or indeed from any other governmental authority that could help to inform legal advisors' opinions as to the lawfulness or otherwise of cartel activity under a "sleeping-giant-type" offence. In the UK, immediately prior to the entry into force of the Cartel Offence, quite a number of statements were offered by the legislature, government agencies and the Office of Fair Trading ("OFT") about the *introduction* of criminal cartel sanctions in Section 188 EA,[101] which impacted upon later efforts to

[101] See, e.g., Department of Trade and Industry, *A World Class Competition Regime*, Cm 5233, July 2001, [7.2.4].

awaken the apparent "sleeping giant" in the common law. Margaret Bloom, then Director of Competition Enforcement at the OFT, noted in a public speech that the Enterprise Bill "introduces" a criminal offence for cartels,[102] for example, while a report prepared for the OFT referred in its title to "The Proposed Criminalisation of Cartels in the UK".[103] These sorts of statements obviously did not help the US Government in the *Norris* case. In fact, they helped Lord Bingham to reach his conclusion about the "consistent message" of Parliament, reinforced by both ministerial statements and textbooks, concerning the lawfulness of mere price-fixing.[104] While the consistent message of a given single authority may be relatively easy to produce, problems arise when various different authorities or government agencies are involved. In such a case it may be difficult for the government to present a united front on the issue. There may, for example, be differences in principle: one agency may not agree with the interpretation of the law offered by another. Differences may also be caused by the fact that some government agencies/departments may be "captured" by business (which may be opposed to the use of criminal cartel sanctions). If a united front is not presented the chances of allaying legal certainty concerns through the use of notice will be significantly reduced. While the provision of notice in such an instance is not without merit – informed legal practitioners will at least be aware of the debate and should advise their clients of that fact, thereby allowing them to evaluate the advisability of their (future) conduct – it will not be fully effective. In such a situation, it might be preferable to let the "sleeping giant" lie and to concentrate one's efforts on trying to introduce a new law through Parliament which expresses explicitly its applicability to cartel activity.

If the provision of notice is chosen as a way forward (e.g., where no conflicting statements from the legislature or from government agencies on existing criminality are reasonably foreseeable), it could be effected through the use of seminars, public meetings, the publication of guidelines for businesses, competition advocacy, or any of a wide range of activities, including the sponsorship and publication of PhD theses. The provision of notice through such means would not be a significant departure from current practice: at present in the UK, for example, in addition to guidance documents, senior OFT officials occasionally provide information to market actors by "speaking publicly and candidly about enforcement efforts".[105] The provision of

[102] M. Bloom, "Key Challenges in Public Enforcement", Speech, British Institute of International and Comparative Law, London, 17 May 2002, 6.
[103] OFT, note 59 above.
[104] [2008] UKHL 16, [2008] 1 A.C. 920 at [46].
[105] M. O'Kane, *The Law of Criminal Cartels: Practice and Procedure* (Oxford 2009), 33.

such notice, however, is not necessarily equivalent to the educative efforts which are necessary to develop political support for a criminal cartel offence: notice is aimed at potential lawbreakers, whereas the educative efforts are aimed at all entities with a stake in the criminal antitrust regime (legislators, antitrust officials, juries, and the public). It must also be understood that the provision of notice is not lawmaking *per se*; the authorities are not creating a new criminal cartel offence. Rather, they are putting business people on notice of the fact that such a criminal law already exists and may be used against them; in other words, they are trying to ensure that a future prosecution (of future anticompetitive conduct) does not collapse due to lack of legal certainty. Furthermore, the authorities should allow a period of time to pass in order for the notice to take root and grow, so to speak. Indeed, if Lever and Pike's article had appeared prior to the alleged cartel activity in the *Norris* case[106] — and had received as much attention as it did in the mid-2000s[107] — it is very possible that the Law Lords might have come to a different conclusion on legal certainty. At any rate, their assertion in *Norris* that no textbook/legal article suggested anything other than lawfulness in the context of conspiracy to defraud — a statement that was, if not determinative, at least highly supportive of their conclusion on legal certainty — would have been impossible to advance.

While helpful, then, the provision of notice — whether effected directly through intervention of the authorities themselves or indirectly through the scholarship of legal commentators — is not a panacea for the legal certainty problems with "sleeping giants". Even if notice is provided as to the intentions of the authorities, and/or their or the legal community's understanding of the current law, it does not necessarily follow that legal certainty will be established. Notice does not necessarily establish reasonableness with regard to bringing a given (anticompetitive) conduct within the original concept of the offence in question; if effective at all, it merely reduces the likelihood of unreasonableness being found. In other words, irrespective of notice, a sufficient (definitional) link should still exist between the specifics of the offence and the cartel activity in question. It must also be noted that the provision of advance notice may not be possible in practice prior

[106] One should remember in this regard that their article 'was not only published after the 2002 [Enterprise] Act, but a number of years after the activities complained of in [the indictment] had ended. So it is not as if even an astute reader of legal articles in this area of law could have informed [herself] at the relevant time [i.e., between late 1989 and May 2000] of the possibility of [her] price fixing activities attracting criminal sanctions': *Norris v Government of the United States of America and others* [2008] UKHL 16, [2008] 1 A.C. 920, [60].

[107] Not only was the article quoted in both the High Court and the Supreme Court – although admittedly as a result of the *Norris* case itself – it was also the subject of a number of specialised conferences in respectable legal fora; e.g., "Cartel Agreements, Criminal Conspiracy and the Statutory 'Cartel Offence'", 22 February 2005, British Institute of International and Comparative Law, London.

to the awakening of the "sleeping giant". *Norris* again provides an example of how this can happen. In that case it was the US authorities which adopted a novel interpretation of conspiracy to defraud, thereby forcing the UK courts to consider the issue before any effort was taken by the British authorities to provide notice of its intentions or of its understanding of conspiracy to defraud as it applies to cartel activity. Indeed, given the current attitude of the US Government to (international) cartels,[108] its evident desire to seek the extradition of foreign nationals,[109] as well as the fact that cartel activity engaged in outside of the US will fall within US jurisdiction if it has substantial and reasonably foreseeable effects in the US market,[110] it is not unlikely that its authorities would attempt to awaken a "sleeping giant" in another Member State in the future. The "sleeping giant" in such an instance could be either a common law offence, as in *Norris*, or a statutory offence. If this situation arises, it is very likely that the defendant would raise the issue of legal certainty to attempt to avoid serving time in a US federal prison. Consequently, the analysis above remains relevant, even after the resolution of the conspiracy to defraud issue in the UK-specific case of *Norris*.

VI. Conclusion

European human rights law requires legal certainty in the context of punishment for the commission of a criminal cartel offence. The principle of legal certainty inherent in Article 7 ECHR imposes a number of different imperatives: legislatures and courts are prohibited from creating or extending the law in order to criminalise acts or omissions which were not criminal at the time of commission or omission or to increase a penalty retroactively; and a criminal offence must be clearly defined in law. This principle presents a challenge for those EU Member States that may wish to introduce a criminal cartel offence. There are three potential elements to this particular legal challenge.

The first element of the legal challenge under investigation requires the demonstration that the principle of legal certainty does not prohibit in any absolute sense the imposition of criminal cartel sanctions. The cartel prohibition in Article 101(1) TFEU was employed for this purpose. It was argued that that particular cartel prohibition is not inherently vague to a degree that would ensure inevitable legal certainty

[108] See S. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades", Speech by the Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division of the US Department of Justice, 24th Annual National Institute on White Collar Crime, Miami, Florida, 25 February 2010.

[109] See, e.g., J. Joshua, "The Brave New World of Extradition: A North Atlantic Treaty Alliance Against Cartels" in P. Marsden (ed.), *Handbook of Research in Transatlantic Antitrust* (Cheltenham 2006).

[110] *United States v Nippon Papers Industries Co. Ltd.* (1997) 109 F. 3rd 1 (1st Circuit).

problems and that therefore its enforcement could encompass the use of criminal sanctions in principle. Indeed, while relevant to the outer fringes of antitrust activity, the argument that legal certainty prohibits criminal antitrust sanctions does not necessarily apply to clear-cut violations of European cartel law, where little confusion exists concerning unlawfulness. Meeting this element of the challenge, then, is relatively undemanding.

The second element of the legal challenge at issue concerns the substance of the criminal cartel law: one must be careful in designing the criminal cartel law that the principle of legal certainty is not violated. This article did not attempt to construct a definitive legally-certain cartel offence; rather, it attempted to present the lessons learned to date from the European experience with criminal cartel sanctions. The UK Cartel Offence was chosen as the relevant case study. Relying upon this case study, the article argued that the employment of the definitional element of "dishonesty" in a criminal cartel offence can create legal certainty problems. In particular it argued that if the definitional element of "dishonesty" is employed, one should ensure that the remaining definitional elements of the offence clearly point to criminality. To do this one should: (a) link the commission of the criminal cartel offence to the commission of a pre-existing (civil/administrative) cartel prohibition; or (b) ensure that at least one of the moral norms against cheating, deception or stealing is inevitably encompassed by the criminal cartel offence. By doing so, one can overcome potential objections concerning the violation of Article 7 ECHR.

The final element of the legal challenge under examination only becomes relevant when one attempts to impose criminal cartel sanctions by awakening a "sleeping giant": that is, by employing a non-cartel-specific, pre-existing criminal law. This issue was raised directly in the *Norris* case. That particular case was therefore informative concerning normative instructions on the use of "sleeping giants". The provision of notice, including its limitations, was analysed in this context. In particular, it was emphasised that the provision of notice (whether effected directly through intervention of the authorities themselves or indirectly through the scholarship of legal commentators), while useful, is not a panacea for the legal certainty problems with "sleeping giants". Notice does not necessarily establish reasonableness with regard to bringing a given (anticompetitive) conduct within the original concept of the offence in question; irrespective of notice, a sufficient (definitional) link should still exist between the specifics of the offence and the cartel activity in question. Finally, it was noted that, while applicable to other situations where the awakening of a "sleeping giant" is attempted (i.e., where criminalisation is actively pursued by the authorities of a given European jurisdiction),

this warning becomes increasingly relevant as the US Government continues to pursue its hard-line approach to international cartels and to seek extradition of accused individuals from the European jurisdictions.

It should be clear that the analyses presented in this article can influence the wider debate about whether (and if so, how) cartel criminalisation should occur within the EU Member States. Importantly for advocates of cartel criminalisation, there is little substance to the argument that the criminal enforcement of a cartel prohibition is invariably inappropriate due to the principle of legal certainty. Article 7 ECHR does not necessarily obstruct cartel criminalisation within the EU Member States, a fact which, if understood, can help to diminish opposition to moves to criminalise cartel activity. Given the theoretical strength of pro-criminalisation arguments, as well as the current trend towards cartel criminalisation, this particular finding is not without force or importance. Of course, this does not mean that Article 7 ECHR is completely unproblematic in this context: those who wish to impose criminal cartel sanctions need to be careful in designing the criminal cartel offence and/or in choosing the appropriate method to proceed. For a start, the lessons provided by the UK's experience with its poorly-drafted Cartel Offence should be taken on board by those who wish to include additional definitional elements into their proposed cartel offences which require analysis and proof of the perceptions and/or norms of regular members of society. Fortunately, if adopted by the UK legislature, Section 39(2) of the Enterprise and Regulatory Reform Bill will rectify the legal certainty problem with that particular cartel offence and should help to improve its effectiveness in deterring cartel activity. The legislatures in other EU Member States may not be as keen on criminal cartel sanctions as that of the UK (examples include the Netherlands and Sweden). It is in these jurisdictions that the lessons on awakening a 'sleeping giant' may be of most relevance, particularly if their criminal prosecutors are convinced of the merits of criminal cartel sanctions. Provided that the requirements noted in this article are fulfilled, the awakening of the 'sleeping giant' can be achieved in accordance with the principle of legal certainty. This particular conclusion ensures that awakening a 'sleeping giant' may be an alternative method of ensuring cartel criminalisation in an EU Member State with a legislature that is equivocal about the appropriateness of such a development. In any case, it also ensures that in future criminal lawyers in the EU need to consider the possibility of the existence of a 'sleeping giant' (and should be on the lookout for the occurrence of activities designed to awaken it in accordance with the principle of legal certainty) when advising relevant clients on the potential criminal exposure of their cartel activities.