

Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’

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

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

1. Introduction

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

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