

LEGAL CERTAINTY AND CARTEL CRIMINALISATION WITHIN THE EU MEMBER STATES

PETER WHELAN*

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

* Ph.D. (Cantab.), Lecturer in Law, UEA Law School and ESRC Centre for Competition Policy, University of East Anglia. Address for correspondence: University of East Anglia, Norwich Research Park, Norwich, NR4 7TJ. Email: p.wheLAN@uea.ac.uk.

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).