IRISH COMPETITION (AMENDMENT) ACT 2012: STRENGTHENING COMPETITION LAW ENFORCEMENT IN IRELAND

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A INTRODUCTION

The inception of a scheme of market regulation within the Irish legal system originated in the passage of the Restrictive Trade Practices Act 1953,[1] a statute which was firmly grounded in familiar control of abuse principles prevalent at the time.[2] Upon its debut, a Minister of the Irish Parliament responsible for the legislation, Seán Lemass, informed Dáil Éireann (Irish House of Parliament) that a prohibitions based system modelled on US law had been considered but decidedly rejected.[3] It is now purported that, since 1953, the Irish competition system has in fact veered closer to the American system owing largely to the introduction of criminal sanctions for transgressions of Irish competition law.[4] This innovation occurred at a steady pace on the periphery of Europe until it was accelerated in 2011 far ahead of the creeping criminalisation beguiling other Member States presently.[5] As part of the response mechanisms employed by the EU in the wake of the Euro Debt Crisis,[6] the Irish Government undertook to give effect to the EU/IMF/Ireland Memorandum of Understanding on Specific Economic Policy Conditionality 2011 (the EU/IMF/Ireland MoU).[7] Most pertinent for the

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[1] Restrictive Trade Practices Act 1953.

[2] Patrick Massey, 'What has Irish Competition Policy Achieved?' (Compecon Limited, Dublin Economics Workshop Annual Economic Policy Conference, Kenmare, 15 October 2011) 2.

[3] Massey (n 2) 2.

[4] Gerald FitzGerald, David McFadden, 'Filling a gap in Irish Competition Law Enforcement: The Need for A Civil Fines Sanction' 9 June 2011, Competition Authority, 1.

[5] Ken Daly, 'Cartels and Deterrence - Creeping Criminalisation and the Class Action Boom' (2007) Bloomberg European Business Law Journal 318. It is noted that nineteen of the twenty eight Member States of the EU, individuals can currently be sanctioned for infringements of competition law. Fourteen Member States have introduced criminal penalties for competition law infringements, sometimes parallel to a system of administrative fines. See, further, Marco Slotboom, 'Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield' (Kluwer Competition Law Blog 25 April 2013) <http://kluwercompetitionlawblog.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/> accessed 25 February 2014

[6] Commission, Economic and Financial Affairs, 'EU Response to the Crisis – Emerging Stronger from the Crisis: The European Vision' COM (11 September 2012) <http://ec.europa.eu/economy_finance/crisis/index_en.htm> accessed 25 February 2014

[7] Memorandum of Understanding between the European Commission and Ireland (17 May 2011) subsequently updated 28 July 2011, 9.

present analysis, as part of its conditionality, the EU necessitated[8] that Ireland further implement an escalation in the terms of incarceration for breaches of competition; which in 2012 have brought criminal sanctions for infractions of competition law in Ireland formally on par with the American antitrust law in terms of penal sanctions.

This analysis will examine the rationale and utility of an increase in criminal sanctions in an already developed and functioning competition regime[9] that is far ahead of its contemporaries in the growing trend to incarcerate competition law offenders. Therefore, as a point of departure, it must be considered how well in fact the existing system was functioning until the crucial year of 2011. A consideration of the functioning of a competition enforcement system cannot be divorced from a consideration of the general principles that govern the administration of justice in the relevant jurisdiction.[10] To date, in Ireland, these principles of administration have provided cartel offenders with the prospect to escape imprisonment under the provisions of the Probation of Offenders Act 1907[11] (the Probation Act).[12] The marginal benefit of doubling the criminal sanctions inherent in the Competition Act 2002[13] is therefore questioned in a legal culture in which, until the recent dicta of McKenchie J,[14] cartel offenders have escaped imprisonment due the prevailing ethos of non-application of the most stringent sanctions of the legal system to white collar crime. Although the possibility to avail of the provisions of the Probation Act have now been removed under the Competition Act 2012[15] and it is expected that the 'second generation'[16] of cartel offenders in Ireland will face the full rigours of increased criminal sanctions, it will be considered whether there is a realistic prospect of these sanctions strengthening competition law enforcement in Ireland as envisioned. Finally, as the additional increase is mandated by EU/IMF/Ireland MoU

[8] ibid 'Government shall bring forward legislation to strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty on the Functioning of the European Union as well as ensuring the effective functioning of the Competition Authority.' As per the Regulatory Impact Analysis, as will be discussed below, the Government opined that it had no other avenue open to it to fulfil this commitment but to increase sanctions within the 2002 Act.

[9] Ireland has been plaudited internationally on the strength of its competition regime: D Purcell, 'Competition policy, law and culture in 2011' (Competition Authority, Competition Authority 20th Anniversary Conference, Dublin) <http://www.tca.ie/images/uploaded/documents/2011%20Conference%20-%20Declan%20Purcell%20paper.pdf> accessed 25 February 2014

[10] Director General of European Competition Authorities 'Principles for Leniency Programmes', prepared for ECA meeting in Dublin 3, 4 September 2001.

[11] Probation of Offenders Act 1907, ch XVII.

[12] Probation of Offenders Act 1907.

[13] Competition Act 2002.

[14] *DPP v Duffy and Duffy Motors (Newbridge) Ltd* [2009] IEHC 208 [67] '[T]he first generation of carteliers have escaped prison sentences. I can say that the second will not.'

[15] Competition (Amendment) Act 2012.

[16] *DPP v Duffy* [2009] IEHC 208.

conditionality, it is considered whether the EU is teetering on advocating a policy of domestic criminalisation for competition law offences amongst its Member States, despite the fact that the Commission itself has not introduced criminal sanctions for such behaviour. Further removed from this, is the question whether the Commission itself will seek to introduce such criminal sanctions in respect of Article 101 and 102, albeit in the context of the continued debate raging as to whether the EU has competence to do so.[17] Therefore, in this regard, it will be contemplated whether the developments in Ireland are part in parcel of the 'grand design'[18] of the Commission to introduce EU-wide criminal sanctions for competition law infractions or whether they remain specific to the competition regulation exigencies of Ireland.

1 Chronological Introduction to Irish Competition Legislation

The Restrictive Trade Practices Act 1953 pre-dated the original EC Treaty of 1957, to which Ireland acceded in 1973, as well as competition legislation in other European countries. Following the accession of Ireland to the European Union, Ireland became subject to the competition articles implicit in the Treaty of Rome. The Competition Act 1991 reformed Irish competition law in an effort to accommodate the principles implicit therein; then, Articles 85 and 86 of the EC Treaty. As was a resounding critique to be propounded in relation to many further legislative initiatives of the Irish competition regime, it was noted that 'one of the most consistent criticisms of this legislation was the inadequacy of the enforcement procedures.'[19] The 1991 Act adopted a hybrid of the EU and US systems. The Act provided for the enforcement of competition law to be privatised[20] and in effect 'took the US enforcement model and grafted it on to the EU substantive model.'[21] In 1994, the Fianna Fáil coalition with Labour Government introduced a Bill to amend existing legislation in order to allow the Competition Authority to bring civil proceedings before the Courts in respect of breaches of sections 4 and 5 of the 1991 Act,[22] which are the sections relating to hardcore

[17] Gurgen Hakopian, 'Criminalisation of EU Competition Law Enforcement - A possibility after Lisbon?' (2010) 7(1) CompLRev 57 -173.
[18] Daly (n 5) note 4, 315.
[19] ibid 9.
[20] Vincent JG Power, 'Some Reflections on Competition Law and Practice in Ireland' (2013) 1 CPI Antitrust Chronicle 3. The 1991 Act allowed aggrieved persons to file an action in the High Court for injunction, declaration and damages but providing no means for the imposition of fine by public authorities for restrictive practices or abuses of a dominant position. See Commission, Directorate-General IV- Competition, 'Surveys of the Member States' powers to Investigate and Sanction Violations of National Competition Laws' COM (1995) 57.
[21] ibid.
[22] Competition Act 2002.

offences. The Bill, however, contained no proviso for penal sanctions (including fines) and would have merely allowed the Authority to obtain declaratory and injunctive relief and, ultimately, did not come to fruition. Following a change of administration, the new 'Rainbow' Government announced on taking office that consideration would be given to the: '…strengthening of the Competition Authority by giving it enforcement powers and by enabling the Courts to impose stiff fines on those found to be engaging in unfair competition.'[23] It was subsequently announced that the amended Bill would not only introduce fines for companies found to be in breach of the Act but would also provide for fines for the executives of such companies. Thus, Ireland became somewhat unique in criminalising both the competition infringements of legal entities as well as individuals. However, the rationale for criminalising all breaches of competition law was not as a consequence of avant-garde competition regulation thinking on the part of the Government but directly related to characteristics of the underlying legal culture. It was a generally accepted view that under the Irish Constitution, Bunreacht na hÉireann, with reference to Article 38.1 of the Constitution,[24] that penal fines could only be imposed with respect to criminal offences. This is illustrative of the fact that the ethos of criminalising cartel offences did not spring organically from a considered initiative to advocate stringent criminalisation for white collar crime but was the result of pragmatic ingenuity introduced in an effort to facilitate penal fines for competition law offences. This accorded with the prevalent views of society that breaches of competition law were a brand of white collar crime which did not have parallels with the traditional conception of crime.

However, Ireland continued to strengthen its competition enforcement regime in this fashion owing to evolution of the Competition Authority.[25] Terms of incarceration for breaches of competition law were introduced in Ireland in July 1996 under the Competition Amendment Act 1996[26] which provided for both fines and imprisonment for up to two years for infractions.[27] With the advent of the Competition Act 2002,[28] an erudite distinction was

[23] A Policy Agreement between Fine Gael, The Labour Party and Democratic Left, '*A Government of Renewal'*, December 1994, 21.
[24] Bunreacht na hÉireann, Article 38.1, 'No person shall be tried on any criminal charge save in due course of law'.
[25] Aileen Murtagh, 'Irish Competition Policy under the EU/IMF Spotlight' (2012) CompLRev 63. 'Ireland's competition regime is accustomed to change, with five substantive pieces of primary legislation in the last twenty years, arguably demonstrating the legislature's willingness to ensure an effective regime.'
[26] Competition Amendment Act 1996.
[27] Eugene F Collins, 'Cartels: Criminal Penalties become Reality in Ireland' (2006) EU Competition and Regulated Markets 1.
[28] Competition Act 2002.

drawn between 'hardcore' cartel activities such as price-fixing, market sharing and bid-rigging and other types of anti-competitive behaviour or non-hardcore offences. The Organisation for Economic Cooperation and Development referred to this partisan as a 'new distinction between mortal sins and venial sins.'[29] The maximum penalty for such hardcore offences was increased from two years in the 1996 Act to five years while prison sentences were abolished for non-cartel offences (although the Authority campaigned for the retention of prison sentences of up to two years in such cases).[30] By increasing the maximum prison sentence for cartels from two to five years, it was meant that such offences had become arrestable offences. A growing stigma in relation to hardcore competition offences was fostering. Further, Ireland explicitly and formally incorporated breaches of Articles 101 and 102 into the 2002 Act on par with breaches of Irish Competition law. In 2012, as a direct consequence of the EU/IMF/Ireland MoU 2011, Ireland was necessitated to introduce further increases in its sanctions for hardcore cartel activity; in this instance, increasing the sanctions from five to ten years. It is the utility of this increase, enshrined in the Competition Act 2012,[31] which follows in a long series of amendments in the incremental criminalisation of hardcore competitive practices in Ireland that is the focus of this paper.

B IRISH COMPETITION LAW ON THE INTERNATIONAL STAGE

A comparative overview of the locus of the prescribed Irish periods of incarceration for competition law offences on the international stage demonstrate that they are less than that of the Canadian regime, which wields the oldest competition statute in the world,[32] whose sanctions for hardcore cartel activities prescribe fourteen years incarceration.[33] By comparison, the UK, close geographically and conceptually to the Irish system, has increased the deterrent force of its anti-cartel laws in recent years, but still yet the maximum penalty remains at five years.[34] To further situate Ireland's competition regime on the international stage, it is seen that according to the World Economic Forum 2010,[35] Ireland is ranked 25th

[29] OECD, *Ireland – The Competition Act 2002* (2002) Annual Report on Competition Policy Developments in Ireland, 2.
[30] Patrick Massey, 'Criminal Sanctions for Competition Law: A Review of Irish Experience' (2004) 1(1) CompLRev 26, note 11.
[31] Competition Amendment Act 2012.
[32] Yves Beriault and Oliver Borgers, 'Overview of Canadian Antitrust Law' (2004) Antitrust Review of the Americas 76.
[33] Competition Act 1985, RSC, c C-34, s45(2).
[34] Enterprise Act 2002, s190(1).
[35] World Economic Forum, 'The Global Competitiveness Report' (2010-2011) 189.

out of 139 countries in terms of effectiveness of competition policy. This puts Ireland behind most of our EU partners and OECD countries and suggests that there is considerable scope for improvement.

However, despite the rankings of the World Economic Forum 2010, it is gainsaid that Ireland is now a forerunner within the EU in terms of the severity of its criminal anti-cartel enforcement legislation. It was not only one of the first Member States to criminalise its competition law regime, but further, Ireland was also the first European jurisdiction in which a jury criminally prosecuted and secured a conviction for cartel activity in 2002.[36] Taking away from these successes, however, is the fact that these domestic cases have so far resulted in suspended sentences. It would therefore seem that to breach the gap between the Irish competition system and that of its global contemporaries who advocate criminalisation; it is the enforcement mechanisms in Ireland which are lacking and need to be improved. Encouragingly, in an indication of a turn of tide, Honourable Justice William McKenchie in 2009 warned that 'the first generation of carteliers have escaped prison sentences. I can say that the second will not.'[37] However, without tuned mechanisms of enforcement, this warning cannot be fully realised. Massey at the 2011 Kenmare Conference submits that deterrence depends not just on the level of penalties but on the likelihood of being caught, prosecuted and convicted.[38] The Competition Authority for some time now has repeatedly stated that it is only capable of mounting one criminal cartel investigation per year[39] due to the Authority's limited resources.[40] Therefore, the rationale for increasing the maximum prison sentence for those engaged in cartels from five to ten years without a significant strengthening of enforcement mechanisms is consequently at odds with the Authority's capacity to prosecute. Whilst there have been improvements to the enforcement regime under the 2012 Act, it is posited that these may still be unbalanced in relation to the weighty deterrence measures prescribed. This second generation of carteliers may be subject to the resolve of the judiciary to give effect to increased sanctions under 2012 Act; but in the first instance, they must be detected.

[36] The Heating Oil cartel including *DPP v Pat Hegarty* (Cir CC, 3 May 2009) .
[37] *DPP v Duffy and Duffy Motors (Newbridge) Ltd* [2009] IEHC 208, 67.
[38] Patrick Massey, 'What Has Irish Competition Policy Achieved?' (15 October 2011, Compecon Limited, Dublin Economics Workshop Annual Economic Policy Conference, Kenmare) 8.
[39] ibid 8.
[40] Irish Competition Authority, *Annual Report* (2012) 14.

1 The Detection Tally

Following the passage of the 1996 Act, the Competition Authority exercised its new enforcement powers initially by bringing a number of civil actions in cases involving alleged cartels. All of these cases were ultimately resolved by the parties concerned through the giving of undertakings to the Court not to engage in certain behaviour in the future. The 'Heating Oil'[41] cartel conviction, the first of its kind, was procured under the 1996 Act. With the advent of the Competition Act 2002, the Competition Authority was more acquainted with criminal sanctioning for competition offences. The Competition Authority summates that since 2003 some 50 prosecutions have been brought by the Competition Authority, all involving alleged cartels.[42] To date, prosecutions mounted by the Authority have resulted in 33 convictions of which, four were for summary offences, and the remainder procured on indictment.[43] It must be noted, as above, however that the majority of successful convictions have been the result of guilty pleas and ultimately, resulted in suspended sentences. And less sanguinely still, 32 out of 33 of these convictions relate to two cartels, the Galway Heating oil and the Citroen Car Dealer Cases.[44] Further, it is noted, as referred to in the Competitions Authority's Annual Report 2012, that unlike most other EU countries, hardcore cartel offences are subject to a criminal burden of proof in court, therefore that the offence must be proved beyond reasonable doubt, as opposed to balance of probabilities, which has raises its own added intricacies.[45]

C IS THERE AN OPTIMAL LEVEL OF SANCTIONS FOR INDIVIDUALS IN CARTEL ENFORCEMENT

It is commonly accepted that pecuniary fines imposed on legal entities should account for the unlawful gains from the participation in a cartel as well as the probability that unlawful

[41] *DPP v Pat Hegarty* (Cir CC, 3 May 2012).
[42] Up to date figures available from the Irish Competition Authority <http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases.aspx> accessed 25 February 2014. Also, Irish Competition Authority, *Annual Report* (2012) 11 summarises the role of the Competition Authority in enforcement.
[43] Competition (Amendment) Bill 2011, Seanad Deb 8 March 2011, vol 214, n 3, Second Stage.
[44] Irish Competition Authority, Citroen Dealer Car Association <http://www.tca.ie/en/Enforcing-Competition-Law/Criminal-Court-Cases/Citroen-Dealers-Association.aspx> accessed 25 February 2014.
[45] Irish Competition Authority, *Annual Report* (2012) 8 <http://www.tca.ie/images/uploaded/documents/Annual%20Report%202012%20FINAL.pdf> 25 February 2014.

cartels are being undetected in order to serve as an optimal deterrent.[46] However, it is also commonly accepted that deterrents imposed on legal entities are never sufficiently high enough to serve as a true deterrent. Therefore, the imposition of sanctions against natural persons are utilised as a complementary means of deterrent. Like the sanctions for legal entities, it can be questioned whether there exists an optimal sanction for natural persons.[47]

At the outset, it is noted that there has been no systematic evidence proving the deterrent effects of sanctions against individuals and/or assessing whether such sanctions can be justified.[48] It should be considered whether the marginal benefit of introducing sanctions against individuals exceeds the additional costs of introducing these sanctions. The factors which determine whether any given sanction in fact has deterrent effects are loosely elucidated as whether (i) there is a reasonable probability that unlawful conduct will be detected; (ii) the potential sanction is perceived to be severe, and (iii) an individual believes with some degree of certainty that the sanction will be imposed.[49] A consideration of these factors in light of the 2012 Act is largely a question of the capability of the Competition Authority to investigate suspected cartels and an exposition of judicial reticence. However, other benefits of the imposition of criminal sanctions for individuals involved in cartel activity have been recognised. Given that cartels are more harmful than other types of anti-competitive behaviour,[50] the imposition of more serious penalties has helped defeat the aura that white collar crime is victimless and brings Ireland more in line with the European vantage point that 'cartels are cancers on the open market economy.'[51] Further, this approach reduces the moral hazard problems associated with solely penalising legal entities for competition law transgressions.

The OECD makes the argument that relatively short prison sentences are the most cost effective deterrent. This is because after a relatively short time the marginal cost to society of additional prison time would likely exceed the gains from an additional sentence.[52] Further, it

[46] OECD, Policy Roundtables, 'Cartel Sanctions against Individuals' (2003) DAF/COMP(2004) 39, 19.
[47] ibid 7.
[48] ibid 1. See also Katalin J Cseres, Maarten-Pieter Schinkel, Floris OW Vogelaar, *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar Publishing 2006) 111-125.
[49] ibid 14.
[50] Patrick Massey, 'What has Irish Competition Policy Achieved?' (Compecon Limited, Dublin Economics Workshop Annual Economic Policy Conference Kenmare, 15 October 2011) 4.
[51] Mario Monti, European Commission 'Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?' (3rd Nordic Competition Policy Conference, Stockholm, 11, 12 September 2000).
[52] The Global Competitiveness Report (n 35) 8.

has been argued that cost/benefit arguments in favour of shorter prison terms assume that business leaders contribute to society in a unique way, but that this assumption is unfounded.[53] However, at the same time, the OECD acknowledges that only longer statutory sentences adequately express a society's condemnation of hardcore cartels. In addition to increasing levels of deterrence, sanctions against individuals can be a powerful incentive for individuals to reveal information about existing cartels and to cooperate in investigations.[54] Longer sentences increase the likelihood that someone will defect from a cartel arrangement and offer information and cooperation. As a result, leniency programs will become more effective, which is incidental to the developments in Ireland, whose leniency program continues to make advancements.

The OECD pronounces that the decision whether to provide for sanctions against individuals as part of a cartel enforcement regime 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.[55] A consideration of the 2012 Act will evoke a consideration of some of these factors.

1 Prior to the 2012 Assessment

Signaling the importance ascribed to cartel activity by the Irish Parliament, jurisdiction was vested in the Central Criminal Court to adjudicate these offences; the CCC being the division of the High Court whose jurisdiction is limited to genocide, piracy, treason, murder, rape and other serious sexual offences as well as now cartel offences under the 2002 Act. Despite legislative innovation, Ireland like many other jurisdictions was reluctant to incarcerate non-violent, first time offenders[56] which ultimately detracted from the progressive legislative initiatives undertaken.

Aside from the fact that alleged cartelists were usually non-violent first time offenders, Wardhaugh cites two other reasons why reprisals against cartelists were reactively weak in Ireland. In Ireland, a procedural loophole allowed for the discharge of cartelists antecedent to the 2012 Act. There were provisions in place for discharge of offenders absolutely or for a

[53] ibid 80.
[54] ibid 1.
[55] ibid 7.
[56] Bruce Wardhaugh, 'The Irish Parliament amends the Competition Act Strengthening Competition Law Enforcement by providing New and Increased Sanctions and Penalties' (2013) 2 e-Competitions, National Competition Bulletin, n 50366, 2.

three year period upon proof of an offence if the character, antecedents, release of age, health, or mental condition of the person charged, or offenders to the trivial nature of the offence, or to the extenuating circumstancing under which the offence was committed suggest that such a dispensation is appropriate. This is found under section 1(1) of the Probation of Offenders Act 1907. Under this provision, it was traditionally argued that the character of the cartelist in question sanctioned had been unblemished before the offence. Short shrift was delivered on the issue by McKenchie J in *DPP v Manning*,[57] who outlined that

> […] prison, in particular for those with unblemished pasts, for those who are respected within the community and for those who are unlikely to re-offend can be a very powerful deterrent; … the imposition of a sentence for the type or category of persons above described can carry a uniquely strong moral message.

Whilst regard was had for the age of the cartelist in *DPP v Manning*, his previously unblemished character was not accounted for in sentencing. This represented a significant problem prior to the 2012 Act, in which McKenchie J's foretelling words would be realised in statute. As apart from a deterrence perspective, the Honourable Justice notes that the Probation Act was misapplied in these cases due to a basic misconception concerning the character of a cartelist:

> the ongoing and continuous nature of cartel crimes would tend to suggest that the acts complained of were not, in fact, out of character. The accused was not a man of generally good character who committed an unfortunate, foolish or impulsive act. Whatever his public persona, which I have no doubt was a positive one, he was, in private deliberately engaging in wanton criminal conspiracy against the greater public with the intention of defrauding them for public gain.[58]

The non-application of Probation Act to competition offences would have a significant effect on deterrence. The application of such legislation in the recent past has prevented successful convictions by the Competition Authority during lengthy and expensive investigations such as the 'Drogheda Grain Imports'[59] saga of March 2003. In this case, the Competition

[57] *DPP v Manning* (HC, 9 February 2007).
[58] *DPP v Pat Duffy and Duffy Motors (Newbridge) Ltd* [2009] IEHC 208 [42].
[59] *The Competition Authority v Ruaidhrí Deasy & Ors* (DC, March 2003).

Authority secured summary convictions in Drogheda District Court against six farmers for breaches of section 4 of the 2002 Act arising from a blockade and meeting, the object of which was the prevention of unloading of cargoes of grain from the UK. The convictions were appealed and the case was heard de novo in Dundalk Circuit Court where in October 2004, the three convictions were upheld but the 1907 Act was applied. In this way, the Probation Act was seen to negate the harshest penalties of competition legislation.

Finally, Wardhaugh notes that the pursuit of private damages in competition matters are reactively weak and that there have been few reported decisions concerning actions for damages being awarded to the plaintiffs involved for infringement of Irish competition law. There have been no reported cases to date in which damages have been awarded for infringement of EC Competition law.[60]

However, on the other hand, it was noted by the Regulatory Impact Analysis,[61] prefacing the introduction of the 2012 Act, that the Competition Act 2002 already provided for quite severe sanctions. As well as providing for a range of fines and penalties in section 8 of the 2002 Act,[62] the 2002 Act explicitly and formally incorporated breaches of Articles 101 and 102 into the Act. As regards civil penalties, there is an explicit right of action granted to those seeking declaratory or injunctive relief to a 'competent authority' in the Circuit or High Court against undertakings or their directors, managers, officers (or those purporting to act in that capacity) for breaches of prohibitions under section 4 or 5 of the 2002 Act or Articles 101 or 102. The case law in respect of the 2002 Act highlights the particularly penetrating nature of this piece of legislation which may bequeath sanctions to any persons within a legal entity who may be recused in some way for participation within the cartel, although not being in a position of authority within the entity. The far reaching effects of this application were challenged by Mr Hegarty in the Supreme Court[63] on the grounds that, as he argued, he could not be convicted of an alleged cartel offence unless his employer was first convicted of the offence; but nevertheless, he stood to be indicted.

Being there both strengths and weakness in the antecedent legislation, the 17th of May 2011 EU/IMF/Ireland MoU nevertheless required that the Irish Government committed to:

[60] Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the Conditions of Claims for Damages in case of Infringement of EC Competition Rules' (31 August 2004) Ashurst LLP Comparative Report, 54.
[61] Department of Jobs, Enterprise and Innovation, Competition (Amendment) Bill 2011 Regulatory Impact Analysis September 2011.
[62] Competition Act 2002.
[63] *DPP v Pat Hegarty* (SC, 28 July 2008).

> […] introduc[ing] legislation to strengthen competition law enforcement in Ireland by ensuring the availability of effective sanctions for infringements of Irish competition law and Articles 101 and 102 of the Treaty on the Functioning of the European Union as well as ensuring the effective competition of the Competition Authority, which will be merged with the National Consumer Agency.[64]

Set out in the Regulatory Impact Analysis (the Analysis)[65] are the prospective benefits and impacts of the Amendment Bill. The Analysis considers that the updated competition regime will institute more effective sanctions in compliance with EU/IMF commitments and in turn this will level the playing field for all participants in the market, enhance consumer welfare and improve national competitiveness. Further, it facilitates increased private enforcement of competition law qua private actions. Finally, it will act as a deterrent against potential breaches of the competition law. It is noted by the Analysis that in reality there is only one course of action open to the Irish Parliament vis-à-vis the undertaking in the relation to the strengthening of competition law: 'Thus there is only one option open to the Department: viz. drafting legislation that will meet this commitment.'[66] Given the unique qualities of Ireland's constitution, there was no other way to achieve deterrence through effective sanctions as apart from using criminal law processes and penalties.[67] Therefore, the operative influence in doubling the maximum prison sentence for competition sanctions under the Irish competition regime has its place in the nucleus of the EU, is oft monikered a 'by-product of the Troika deal',[68] and can be fairly said not to be a legislative initiative wholly conceived of on home soil, albeit flavoured as such.

2 The Advent of the 2012 Act

At the time of introduction, representatives of the Irish Parliament made explicit the endeavours of the legislation. Richard Bruton, Minister for Jobs, Enterprise and Innovation stated that the legislation 'will provide a more effective deterrent and punishment for individuals or organisations who engage in price-fixing, cartels, abuse of a dominant position

[64] Memorandum of Understanding between the European Commission and Ireland (17 May 2011) subsequently updated 28 July 2011, 9.
[65] ibid (n 61).
[66] ibid 4.
[67] OECD, 'Regulatory Reform in Ireland: The Role of Competition Policy in Regulatory Reform' 2001, 12.
[68] Vincent JG Power, 'Ireland's Competition (Amendment) Act 2012: A By-Product of the Troika Deal but Legislation with Long - Term Consequences' (2012) C L Pract 180

and other anti-competitive practices.'[69] On the 3rd of July 2012, Ireland's Competition Amendment Act 2012 came into force. This Act amends the existing Competition Act 2002 to enhance Ireland's anti-cartel regime through augmentations to the criminal and private enforcement regimes, and provides further rigour to the settlement system used to abate anti-competitive practices.

In order to carry out the conditionality of the EU/IMF/Ireland MoU mandate, the orchestration of a system of 'credible deterrence'[70] required the increase of both penalties for criminal offences and a strengthening of the range of reliefs and sanctions available for both public and private enforcement of civil offences. Most importantly for the effectiveness of the new regime, the safety net provisions of the Probation Act are removed from the benefit of those convicted of cartel offences.[71] Section 2 of the 2012 Act substitutes '10 years' for '5 years' in s 2(b)(ii), amending section 8 of the 2002 Act. Other increased deterrence measures include making a guilty party liable for the Authority's costs and, finally, the extension of director's disqualification regime. Further, the new legislation provides that individuals and undertakings found guilty of any competition offence are now both liable on summary conviction to a fine of up to €5,000 (up from €3,000) or, on conviction on indictment, to a fine of up to €5 million (up from €4 million) or 10 per cent of worldwide turnover, or whichever is greater.

(a) Increased Personal Liability

The potential for personal liability being incurred by a director, manager or other officer of a company, or even an employee as seen in the *Hegarty*[72] case, has also been expanded upon in the 2012 Act. Where it is proven that an undertaking is or was party to an anti-competitive agreement or has committed any act that constitutes an abuse, then it shall be presumed, until the contrary is proven that each director of the undertaking and person employed by it whose duties included decision making which could affect the management of the undertaking

[69] Department of Jobs, Enterprise and Innovation, 'Maximum Prison sentence for Competition Offences Doubled to Ten Years', (29 September 2011 Press Release) <http://www.djei.ie/press/2012/20120703.htm> accessed 25 February 2014.
[70] Memorandum of Understanding between the European Commission and Ireland, 17 May 2011 updated 28 July 2011, 24.
[71] Competition Act 2012, s 2(h), adding s 11(a) to the 2012 Act.
[72] *DPP v Pat Hegarty* (n 65), involving the Heating Oil cartel conducted between 2001 and 2002, Irish Competition Authority list of prosecutions <http://www.tca.ie/EN/Enforcing-Competition-Law/Crimina l-Court-Cases/Home-Heating-Oil.aspx> accessed 25 February 2014.

consented to such actions. In addition, where a person is convicted of an offence under the 2012 Act, the court, unless it is satisfied that there are special reasons for not so doing, must order that person to pay all the Authority's costs and expenses incurred in the investigation, detection and prosecution of the offence. The amendment also adds breaches of competition law to the list of circumstances under which a court may take a disqualification order against a person under section 160 of the Companies Act 1990, still in effect, including restricting that person from acting as auditor, director or other officer or being in any way concerned in the promotion or management of a company.[73] Under the provisions of the Irish Companies Act 1990,[74] any person convicted on indictment for any offence in relation to a company will, without the need for further judicial intervention, be automatically disqualified from being a company director or from being in any way involved in the promotion, formation or management of a company for a period of five years from conviction. This provision now applying to competition law offences also compounds the consequences of anti-competitive behaviour in personal capacity for those involved. In relation to non-indictable offences under the 2012 Act, a person convicted may now be disqualified from acting as a company director at the discretion of the High Court on its own accord or following an application by the Authority to make the relevant disqualification order.

(b) Increased enforcement

The 2012 Act also aims to promote the Authority's enforcement powers by establishing a process whereby the Authority can have commitments given to it by companies under investigation made a rule of court. Under section 5 of the 2012 Act, the Authority will be able to apply to the High Court to have the settlement made a rule of court. Detailed procedural requirements apply to this new provision. The court must be satisfied regarding a number of matters before agreeing to make the settlement a rule of court, including that the undertaking involved has consented, has obtained legal advice and is aware that failure to comply with the order would constitute contempt of court. This new provision, while procedurally complex, should ultimately assist the Authority in imposing enforceable obligations on undertakings that breach competition law.[75]

[73] 'Ireland strengthens its Competition Enforcement powers' (Eversheds Ireland, 2 October 2012) <http://www.eversheds.com/global/en/what/publications/shownews.page?News=en/ireland/Ireland-strengthens-competition-enforcement-powers-oct2012> accessed 25 February 2014.
[74] Companies Act 1990.
[75] Cormac Little and Sarah Lynam, 'A New Act in Town: Irish Competition Legislation has just been Reformed' (31 July 2012) Competition Law Insight 11.

3 Appraisal of the 2012 Act

Regarding the enhancements to the criminal regime, the increase in sanctions, both pecuniary and in terms of potential period of incarceration is perhaps the most apparent consequence of the amendments to the 2012 Act. As per Peter Whelan, the strongest signal sent out by the amendments consists of its 'upward adjustment of criminal sanctions.' It is noted that section 4 of the Competition Act 2002 was modelled on the provisions now incorporated in the Treaty on the Functioning of the European Union [hereinafter TFEU] and its language is almost identical. However the sanctions, and in particular, that of custodial sentences owe much to the American experience. Thus, whereas the substance of the law is European, it is submitted by the author that levy of criminalisation reflects the American approach to sanctions.[76]

Most aptly elucidated by Bruce Wardhaugh, the weak point in the legislation is the possibility of judicial reticence and the discretion of the judiciary as to whether to undertake this course of action 'of course, the weak point of this amendment is that unless judges in fact do incarcerate offenders, there is a gap between what the statute says and what in practice occurs. And the deterrent effect that any law has is with the latter.'[77] The increases in sanctions do however grant an implicit legislative 'green light' to the judiciary to incarcerate cartel offenders. Coupled with the removal of the benefit of the Probation Act, this sends a strong signal to the judiciary to impose the actual and not suspended sentences on offenders. In conjunction to this, prosecutions for competition law offenders seem to loom imminently on the horizon; as per McKenchie J, 'I see no room for any lengthy lead in period before use is commonly made of this supporting form of sanction.'[78] However, commentary queries whether the new implemented system of deterrence is not unbalanced.[79] The 2012 Act is critiqued in the respect that its private enforcement regime that does not go far enough in comparison to the criminal enforcement measures advocated thereunder.

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[76] Terry Calvani and Kaethe M. Carl, 'The Competition Act 2002, Ten Years Later: Lessons from the Irish Experience of prosecuting Cartels as Criminal Offences' (2012) Journal of Antitrust Enforcement 4. Aileen Murtagh, 'Irish Competition Policy under the EU/IMF Spotlight' (2011) 62 Competition Law Review 2.
[77] Bruce Wardhaugh (n 45) 4.
[78] *D.P.P v Duffy and Duffy Motors (Newbridge) Ltd* [2009] IEHC 208, 43.
[79] Gerald FitzGerald, David McFadden, 'Filling a Gap in Irish Competition Law Enforcement: The Need for a Civil Fines Sanction' (9 June 2011) The Competition Authority <http://www.tca.ie/images/uploaded/documents/2011-06-09%20Filling%20a%20gap%20in%20Irish%20competition%20law%20enforcement%20-%20the%20need%20for%20a%20civil%20fines%20sanction.pdf>, 4, accessed 25 February 2014. Public Seminar on Civil Fines, 'The Civil Fines Condition in the EU/IMF/MoU: The Competition Authority's Perspective' (11 April 2011, Irish Competition Authority).

D CRIMINALISATION AT EUROPEAN LEVEL

It has been suggested that because 'the Irish regime was limited in its success in criminal matters and was simultaneously weak in civil matters, the IMF insisted upon a strengthening of Ireland's competition regime as part of its "bail out" package.'[80] It is posited that the IMF insisted upon such a strengthening in order to generate 'more credible deterrence.'[81] Be this as it may, it is yet to be adduced whether the IMF conditionality and the requirements thereof indicates that serious consideration was given to Ireland as a particular case, or whether such requirements are part and parcel of a standard recovery plan template which will be introduced pan-Europe. As a momentary departure, it is noted that as part of Ireland's recovery, the Commission oriented Ireland's *Economic Adjustment Programme*[82] towards ensuring that 'any amendment to the Competition Bill would improve the enforcement regime, to make it as effective and efficient as possible.'[83] However, in comparison to the Greek Economic Adjustment Programme,[84] the Commission focused its role on dispensing advice in relation to state aid and use of public funds. In parallel to Greece, the Spanish programme aims to ensure respect for EU competition rules throughout the implementation of state aid programmes.[85] Portugal's recovery programme is more similar to that of the Irish experience; however, the Commission advocates a policy of ensuring improvement to the competition law framework to make it as effective and efficient as possible, not only legislative initiatives therefore, albeit a necessary ingredient. As under the Irish EU/IMF/MoU, Portugal is required to undertake some legislative implementation, but in contrast, these initiatives are largely sector specific. In relation to the enhancement of competition law, legislation is required to be introduced to improve the functioning of the judicial system through restructuring the court system.[86]

On a wider spectrum, it is submitted however that while the 2012 Act is a panacea to some of the economic difficulties arising in Ireland, the introduction of increased individual sanctions,

[80] Bruce Wardhaugh (n 45) 3.
[81] Memorandum of Understanding European Commission and Ireland (n 70) 24.
[82] Commission, 'Economic Adjustment Programme for Ireland' (14 January 2014) <http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm> accessed 25 February 2014.
[83] ibid.
[84] Commission, 'Financial Assistance to Greece' (27 January 2014) <http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm> accessed 25 February 2014.
[85] Commission, 'Competition and the countries under adjustment programmes' 27 November 2012, <http://ec.europa.eu/competition/recovery/programme_countries_en.html> accessed 25 February 2014.
[86] Commission, 'Portugal, Memorandum of Understanding on Specific Economic Policy Conditionality' (17 May 2011) s 7, 31 <http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf> accessed 25 February 2014.

largely under the initiative of the EU, is not a country specific recovery manoeuvre aimed at regenerating the Irish economy but in actuality a facet of the 'grand design' of the European Commission who is tactilely permitting the introduction of criminal sanctions for competition law in Europe. As per Hakopian,[87] the possibility of criminalising EU competition law would entail a consideration of the institution of criminal law framework at the level of the EU institutions, with the Commission or another entity acting as the prosecutor before the European courts, bolstered by a criminal code and the harmonisation of criminal competition law enforcement in all Member States. The political will to initiate these initiatives has been wanting. However, introduction of criminal sanctions for competition law from grassroots-up is not ruled out. As mentioned previously, it was seen that the 2002 Act in Ireland incorporated Articles 101 and 102 into Irish legislation formally, and instituted sections 4 and 5 which were substantial reproductions of these articles. In this way, it cannot be far from the Commission's contemplation that the effects of the criminalisation of domestic law will have some influence on the operation of EU Competition law.

It was queried from the outset of this analysis whether it could be reasonably said that the rationale of increasing sanctions upwards from five years as mandated in the EU/IMF/Ireland MoU was solely predicated on considerations of strengthening of competition law in a system in which, despite judicial reticence, lack of private enforcement had always been a weak point. Further, in order to ensure the application of the sanctions of the 2002 Act, other lesser means of legislative intervention (though within the sphere of criminal process) could have been utilised to curb judicial reticence, such as the introduction of a sentencing guideline. As aforementioned, while the optimal level of sanctions for individual may not be determined, jurisdiction specific factors would indicate that Ireland's competition enforcement regime at the juncture of the 2002 Act had not yet achieved maturity and that, therefore, such bold increase in sanctions did not arise as a result of the successes of the sanctioning scheme under the 2002 Act. It is accepted that, however, by its nature and through its introduction as part of a remedy to the Irish debt crisis, the introduction of the 2012 Act must be precipitated on a belief that increased competition sanctions will make a difference to Irish recovery.[88]

[87] Gurgen Hakopian, 'Criminalisation of EU Competition Law Enforcement - A possibility after Lisbon?' (2010) 7(1) Competition Law Review 15.

[88] Andreas Stephan, 'Will IMF Requirement that Ireland Strengthen Competition Law Sanctions Actually Make a Difference?' (2010) Competition Policy Blog, <http://competitionpolicy.wordpress.com/2011/10/31/will-imf-requirement-that-ireland-strengthen-competition-law-sanctions-actually-make-a-difference/> accessed 25 February 2014. Irish Minister for Jobs, Enterprise and Innovation, Richard Bruton stated that 'It will make a real difference in the fight to bring down costs and ultimately help our economy on the road to recovery.'

However, it may still be acknowledged, without conjecturing the intentions of the Commission excessively, that the role of heightened criminal sanctions in the Irish competition system may have an important influence on the European competition scheme.

E AN IRISH TEMPLATE

The important role of sanctions against individuals in the United States Department of Justice (DOJ) fight against hardcore cartels has been widely recognised. A 2001 Report to the UK Office of Fair Trading published in connection with the introduction of criminal sanctions against individuals in the United Kingdom, acknowledged that despite the Commission's successful anti-cartel enforcement, some distance between the EU and US leniency programs remained:

> Under EU law, unlike in the US, participation in a cartel is not a criminal offence and hence the incentive for individuals to inform on other cartel participants in return for immunity from prosecution is lessened under circumstances in which there is no possibility of facing the imposition of custodial sentences.[89]

The fact that individual Member States, such as Ireland, the United Kingdom and Estonia, have criminalised their enforcement of Articles 101 and 102, without parallel criminalisation at the level of the EU institutions and without EU harmonisation, is not problematic. It is significant that the developments in the Irish system are not unforeseen given that Regulation 1/2003 is open ended and does not preclude criminalisation amongst Member States. Indeed, Regulation 1/2003 has been designed precisely to accommodate criminalisation in individual Member States.[90] Article 5 of Regulation No. 1/2003 leaves each Member State the choice of whether or not to provide for criminal penalties to enforce Article 101 and 102.

Amongst EU Member States, Ireland and Estonia are the two jurisdictions which make provision for criminal penalties for both companies and individuals. Between these Member States, Ireland's legal system is most similar to that of the United States. Other EU jurisdictions have enacted criminal sanctions for individuals or undertakings, but not both.

Department of Jobs, Enterprise and Innovation, 3 July 2012 (Press Release) <http://www.djei.ie/press/2012/20120703.htm> accessed 25 February 2014.

[89] OECD (n 46) available at <http://www.oecd.org/competition/cartels/34306028.pdf> 13, accessed 25 February 2014.

[90] Wouter P.J Wils, 'Is Criminalisation of EU Competition Law the Answer?' (2006) *Enforcement of Prohibition of Cartels*, European Competition Law Annual 39.

For example, the UK imposes non-criminal fines on undertakings and criminal fines, imprisonment and director disqualification for price fixing, bid-rigging and market allocation in respect of individuals.

Specifically with regard to the role of the Commission in the overall task of enforcing EU competition law, Peter Kunzlik has made the following speculation[91] of what may happen if criminal enforcement in Ireland is successful, and the other EU Member States follow its example:

> The situation might well arise in which cartels will be uncovered and prosecuted more efficiently at the national level than at the European level … The Commission may in practice lose its central role in European cartel enforcement to quicker, more effective, and better resourced national competition authorities operating under systems such as the ones in Ireland and the United Kingdom.

It is argued that this would be a positive consequence from the vantage point of the Commission. The European Union began a modernisation effort on the 1st of May 2004 which eliminated the notification scheme that had been in place since the 1960s and begun a process of devolving to Member States the responsibility for enforcing the articles within their respective borders and has begun a more delegated program of competence sharing amongst the European Competition Network. The key features of the enhanced anti-cartel enforcement under modernisation include: a strengthened Leniency programme, EU Guidelines on fines and increased fine levels, endorsement for private rights of action and the creation of a formal network of cooperation amongst Member States and the EU.[92] This devolution of responsibility for Article 101 and 102 reserves significant enforcement discretion to the Member States including the prerogative to impose criminal sanctions and imprisonment for cartel offences.[93] Therefore, the increase or introduction of sanctions for individuals at grassroots level would positively affect anti-cartel enforcement amongst Member States, without the probative legislative task resting on the Commission.

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[91] KJ Cseres, Katalin J Cseres, Maarten-Pieter Schinkel, and Floris OQ Vogelaar, *Criminalization of Competition Law Enforcement: Economic and Legal* (Edward Elgar Publishing 2006) 94.
[92] Carolyn Galbreath, 'Can the United States Model of Criminal Antitrust Enforcement be Successfully Transferred to Ireland and Europe?' (1 October 2007, ABA International Section, Fall Meeting) 8.
[93] ibid.

It may be questioned why at present the Commission has not instituted a top-down approach to eliminating the 'cancer'[94] of Europe. The rhetorical answer is that the EU currently lacks capacity with respect to criminal matters as it is an area of competence reserved to the Member States. However, as astutely acknowledged by Ken Daly, 'In reality, this is untrue and also does not take account of the many other areas in which the Community already has real influence on how criminal law develops.'[95] In this respect, it can be argued that the Commission through 'soft power', such as the EU/IMF/Ireland MoU may facilitate the attainment of its objectives in relation to competition law enforcement, despite this sphere of operation having criminal aspects. Further, it may be postulated that the most convincing argument for the introduction of EU-wide legislation for criminal sanctioning of competition law for individuals, given the lack of support at present, would be to submit to the Council of Europe a proposal which can evidence already functioning systems of competition criminalisation within specific Member States in the Union. This boomerang effect is best summated by Margaret Bloom:

> If criminal sanctions do provide far more effective deterrence, why has Commissioner Monti apparently not considered introducing such sanctions as part of the fight against cartels? Should such powers be considered now? One obvious answer is the fact that only six out of the twenty five have such powers in their national law and these have not yet been used on their own for any custodial sentences. Also, the European Commission does not currently have criminal powers in any area. At this time, it seems unlikely that there would be the necessary support within the EU for such a change. But if the United Kingdom or another MS demonstrates effective use of its powers and increases deterrence significantly as a result, the Commission should consider criminal powers seriously.[96]

In this regard, Ireland may not, in and of itself, be part and parcel of a blueprint for the transposition of competition laws criminalising competition law for hardcore offences EU-wide but should the current 2012 Act be met with success, the Irish experience could serve as a useful template. Further, it may serve as a panacea to diffident political will.

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[94] Irish Competition Authority Report (n 40).
[95] Ken Daly, 'Cartels and Deterrence- Creeping Criminalisation and the Class Action Boom' (2007) 1 Bloomberg European Business Law Journal, 318.
[96] Margaret Bloom, 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy' (2005) 1 Competition Policy International 55, 78.

F TOWARDS AN AMERICAN SYSTEM OF SANCTIONING?

The campaign for criminal sanctions has been led by the US authorities, based primarily on the view that individual accountability through incarceration is the most effective means of deterring and punishing cartel conduct.[97] Although, it is often said that the 'success of the American cartel enforcement experience is attributable to the criminalisation of the offence',[98] the history of US cartel enforcement would suggest that criminal laws alone do not eradicate cartels.[99] This history is not unlike the development in criminal sanctions in Irish competition law in recent decades, despite differing judicial systems and constitutional underpinnings. Before 1974, when the Sherman Act was elevated to a federal felony, with a maximum jail time of three years, and fines on companies were capped at $1 million and $100,000 for individuals, cartel violations were only federal misdemeanours. In the beginning of the 1990s, the US fundamentally altered the risk/reward calculus for cartels with three significant changes to criminal enforcement: increased sanctions for cartels; adoption of a reinvigorated Amnesty program by the United States DOJ Antitrust Division; and the introduction of the US Sentencing Guidelines. Used together, they became three pillars of US DOJ cartel enforcement and are widely viewed as the impetus for significant rise in cartel prosecutions in the Unites States which have continued to the present day.

The US enforcement successes have evolved and been refined over years of experience and provide approaches rather than formulas which can be transferred in their entirety to jurisdictions seeking to replicate these successes. The Irish Competition Authority has made an impressive start in securing criminal cartel convictions despite 'differing national traditions' that make criminal enforcement more difficult relative to the US.[100] One of the main challenges appears to be that Ireland has not yet achieved the optimal balance between risks and rewards. However, with respect to the other two limbs of the winning American recipe: the Irish Competition Authority has been making steady improvements to their Leniency Programme. Immunity from prosecution for criminal offences under the 2002 Act

[97] Caron Beaton-Wells, Christine Parker, 'Justifying Criminal Sanctions for Cartel Conduct: A Hard Case' (2012) Journal of Antitrust Enforcement 2.
[98] Terry Calvani, 'Enforcement of Cartel Law in Ireland' (2003) The Competition Authority (Speech) <http://www.tca.ie/images/uploaded/documents/2003-11-30%20Speech%20(TC).pdf> 1, accessed 25 February 2014.
[99] Donald I. Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 George Washington Law Review 693.
[100] Carolyn Galbreath (n 92) 3.

was outlined in the Notice Cartel Immunity Programme of December 2001.[101] As cartels are by their very nature conspiratorial, this leniency program is aimed at encouraging self-reporting of unlawful cartels by offenders. The Notice makes transparent the policy of both the Authority and the Director of Public Prosecutions in considering applications for immunity. It is noted in the Director's General of European Competition Authorities meeting in Dublin on the 3rd and 4th of September 2001 that it is:

> the experience of several competition authorities around the globe in the five years preceding this meeting that [the] offer of lenient treatment to members of cartels, who come forward to cooperate with the authorities, has been of great benefit in facilitating the effective investigation of cartels.[102]

Ireland continues to take notice from the European initiatives with respect to Leniency policy. As for the third prong of the American recipe, sentencing guidelines have not yet been realised in Irish law. The US Sentencing Commission Guidelines,[103] which were made applicable to all federal criminal offences, provide detailed guidance to courts prosecutors and defendants alike about sentencing ranges and factors that properly are to be applied to enhance or mitigate the imposition of a sentence. In Ireland, McKenchie J encouragingly postulated that he sees no reason for a long lead in the period to the imposition of prison sentences, and perhaps therefore generally no need will be seen for the introduction of sentencing guidelines. However, despite this, developments may be garnered in support of the establishment of an Irish sentencing guideline. As per James Hamilton, Director of Public Prosecution in Ireland, during the Opening Remarks to the 8th Annual National Prosecutors Conference, '[i]n the past, our courts have shied away from establishing sentencing guidelines but I believe the time has come when the courts should no longer take this approach.'[104] It is in the interest of not only the Competition Authority, but the system of judicial administration generally, that a trend of judicial reticence with regard to legislative criminal sanctions not be endured again as it distorts the pace of the development of law. It is

[101] '*Cartel Immunity Program'* (20th December 2001) Irish Competition Authority, <http://www.tca.ie/images/uploaded/documents/Cartel%20Immunity%20Programme.pdf> accessed 25 February 2014.
[102] *'Principles for Leniency Programmes'* (September 2001) European Competition Authorities, <http://www.tca.ie/images/uploaded/documents/2001-09-04%20eca%20leniency%20principles.pdf> 1, accessed 25 February 2014.
[103] The United States Sentencing Guidelines were first instituted in 1987 <http:/www.ussc.gov/> accessed 25 February 2014.
[104] James Hamilton, (19 May 2007, Opening Remarks, 8th Annual National Prosecutors Conference, Dublin Castle Conference Centre) 7.

therefore possible that, like the three pronged system of American cartel enforcement, Ireland may also advocate a sentencing guideline to ensure that judicial reticence as was experienced before the 2002 Act may not occur once more. In the interim, the Irish Competition Authority continues to advocate the colloquially phrased policy of 'Defection, Detection, Deterrence'[105] which may more formally resemble antitrust law in the future.

G CONCLUSION

Even if the EU is not at present openly pursuing an EU-wide system of criminalisation for transgressions of competition law, it cannot be gainsaid that developments are underway within specified Member States. The introduction to this analysis gave a jaded summation of Ireland's legislative developments in competition law since 1953 in order to illuminate its beginnings as a system polarised to that of the US anti-cartel regime and a system which largely procured its initiatives from the European Union. Upon the introduction of the 1991 Act, it was seen that Ireland had adopted a hybrid of the American and European system. However, whereas the 1991 Act introduced technical legal constructs imported from the US system, the 2012 Act arguably introduces antitrust technique as well as substance to the provisions of the TFEU, Article 101 and 102. Presently, the Irish system, given that it is now set firmly apart from the majority of other Member States, is more properly held in comparison to the US regime. From meagre beginnings, Ireland's competition enforcement regime is developing to the forefront of Europe and it is surmised that its progress will be watched carefully by its Member State contemporaries and the Commission. It was contemplated through the discourse whether Ireland is still procuring it's competition law initiatives from Europe, and whether it is the case that these initiatives are now antitrust flavoured. This remains to be answered following subsequent analyses of the, preferably more overt, influences and initiatives applied by Europe in this regard. It is yet to be seen whether the EU, using the hands of the Commission and the European Competition Network, will openly advocate a policy of criminalisation for hardcore offences −at all, of a different genus to that of the US or perhaps, even similar to that of the American antitrust experience. Bearing this in mind, only time will tell whether the Irish competition regime will come to be truly identified more with the American or European system of competition law enforcement with respect to the criminalisation of anti-cartel law.

[105] Carolyn Galbreath, 'Competition and Cartels in Public Procurement' (15 October 2009) Irish Competition Authority, Public Affairs Ireland, Public Procurement Course, 14.