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Sentencing in Criminal Cartel Cases in Ireland:
the Duffy Judgment

Paul K. Gorecki and Sarah Maxwell*

Abstract: Despite 33 convictions of individuals and firms for criminal cartel offences in Ireland since 1996, there is only one reported judgment. The paper examines the Duffy judgment concerning a member of the Citroen motor vehicle cartel. The judgment provides some guidance on sentencing: cartels are pernicious and jail sentences are to be expected in future cases. However, no guidance is provided as to how the jail term for an individual will be determined or the fine for an individual or a firm. Despite the statement that cartels are pernicious, the fine levied on Duffy Motors was 1.3 per cent of the maximum fine under competition legislation and 1.1 per cent of the likely increase in profits due to firm's participation in the cartel. An alternative approach to sentencing is suggested that utilises a well developed methodology and is consistent with the view that cartels are pernicious, while at the same time leaving considerable judicial discretion in determining the ultimate sentence.

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Sentencing in Criminal Cartel Cases in Ireland: the Duffy judgment

1. Introduction

The Competition Authority stated goal is “to ensure that markets work well for Irish consumers, business and the economy.”¹ The Competition Authority (2012, p. 9), as with similar agencies in other jurisdictions, sees “stopping cartels ... [as its] top enforcement priority.” However, for such enforcement to be successful requires not only that the Competition Authority detects cartels and that the Director of Public Prosecutions secures convictions, but also that the Courts impose coherent and proportionate sentences on individual and firms. In this paper the latter issued is addressed. We explore the extent to which the Courts have provided a methodology or set of sentencing guidelines in cartel cases.

Since the criminalisation of cartels² in Ireland with the passage of the Competition (Amendment) Act, 1996,³ there have been 33 convictions on indictment of individuals and firms.⁴ These convictions relate to three cartels: heating oil (18 convictions); Citroen motor vehicles (14) and Ford cars (1).⁵ Despite the imposition of fines and prison sentences, albeit suspended, the methodology used by the Courts in determining these sentences is conspicuous largely by its absence. There is only one reported judgment, *DPP v Duffy*, in the Citroen case,⁶ while the transcript of the sentencing in *DPP v Hegarty*, in the heating oil cartel, has been made available on the initiative of the Competition Authority.⁷ Nevertheless, the Duffy judgment has been seen as providing guidelines for cartel sentencing.⁸ The Competition Authority cites the judgment for its condemnation of cartels and threat to imprison cartelists, albeit in the future not the present.⁹

¹ <http://www.tca.ie/>. Accessed 30 November 2012.

² The term cartel refers to agreements between competitors that fix price, allocate markets, and/or limit production or capacity. Such agreements are inherently anti-competitive. In the US they are per se offences; in Europe they are by object offences. See Whish (2009, pp. 116-122) for a discussion of agreements that fall into the latter category. Agreements falling into this category are set out in Section 6(2) of the Competition Act 2002.

³ See Massey and Cooke (2011) for a discussion of the background on criminalising cartels in Ireland.

⁴ The term firm is used to refer to the corporate entities that are subject to competition policy. Under competition law in the EU and in Ireland the legal term is an undertaking. For further discussion of the concept at the EU level see Whish (2009, pp. 82-91)

⁵ For details of all three cases see: <http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases.aspx>. Accessed 9 November 2012.

⁶ *The DPP vs. Patrick Duffy and Duffy Motors (Newbridge) Limited*, [2009] IHEC 208. This will be referred to as the *DPP v Duffy* or the Duffy judgment, delivered by Mr Justice McKechnie. It may be accessed at www.courts.ie.

⁷ The Competition Authority arranged for the transcript of the sentencing hearing in *DPP v Pat Hegarty* held on 3 May 2012 in front of Judge Groarke to be made publicly available. The transcript can be found at: <http://www.tca.ie/images/uploaded/documents/Hegarty%20sentencing.pdf>. Accessed 19 October 2012.

⁸ See, for example, McNally (2010) and McCann FitzGerald (2009).

⁹ See, for example, Competition Authority (2010, pp. 17-18).

In considering the issue of developing a sentencing methodology it is important to consider the framework or context within which the Courts operate. In Section 2 of the paper we pay attention to two such matters: the statutory penalties as set out in successive competition legislation since 1996; and, the role played by the counsel in the sentencing process in Court. Section 3 presents a critical examination of the extent to which the Duffy judgment provides a coherent and cogent sentencing methodology that can be applied in cartel cases. Section 4 concludes by asking whether there is a better alternative to the sentencing methodology embodied in the Duffy judgment.

2. The Role of Statutory, Prosecutor and Defence Counsel Guidance in Sentencing

Sentencing does not take place within a vacuum. The competition legislation under which an individual or firm is charged may provide statutory guidance to the Courts. The penalties, whether as a maximum and/or combined with a minimum, convey the views of elected representatives, advised by officials, as to the seriousness or gravity of the offence. While the legislation sets the parameters within which the sentences must be set, the prosecutor, the Director of Public Prosecutions (DPP), and counsel representing the defendants, may of course, play a role in assisting the Court in coming to a determination of the appropriate sentence in the context of a specific case.¹⁰

Statutory Guidance

Elected representatives have clearly signalled that cartels are serious criminal offenses. The maximum sentences for individuals and firms have increased steadily since 1996, as set out in Table 1.¹¹ For an individual the maximum prison sentence has increased from two years in 1996, to five years in 2002, to 10 years in 2012, while the maximum fine in nominal terms has increased from €3.81 million to €5 million. In the case of firms a similar pattern emerges. These maximum sanctions provide a wide range of discretion to the Courts in sentencing individuals and firms in cartel cases, since the legislation provides no guidance as to the factors that might be considered in sentencing and there are no minimum tariffs.

¹⁰ For further discussion of sentencing in Ireland, not specifically related to competition law, see O'Malley (2006).

¹¹ Since interest centres on serious cartel cases, as opposed to less serious summary prosecutions, the table and the discussion in the paper refer to cartel prosecutions by way of indictment.

Table 1: Maximum Sentences, Cartel Cases, On Indictment, Ireland, 1996 -2012^a

Legislation	Individuals	Undertakings ^b
Competition (Amendment) Act 1996	A fine not exceeding the greater of 10 per cent of turnover of the individual ^c in the 12 months prior to conviction or €3.81 million and/or a prison sentence of 2 years or less.	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €3.81 million
Competition Act 2002	A fine not exceeding the greater of 10 per cent of turnover of the individual in the 12 months prior to conviction or €4.0 million and/or a prison sentence of 5 years or less.	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €4.0 million
Competition (Amendment) Act 2012	A fine not exceeding the greater of 10 per cent of turnover of the individual in the 12 months prior to conviction or €5.0 million and/or a prison sentence of 10 years or less.	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €5.0 million

a. Cartel offences refer to hard core offences such as price fixing, allocating markets, and limiting production or capacity.

b. Undertaking is the legislative term used for a firm.

c. The turnover of the individual is not defined. One definition might be the gross income of the individual from all sources.

Source: Competition (Amendment) Act 1996, Competition Act 2002, and Competition (Amendment) Act 2012.

The Role of the Prosecutor and Defence Counsel

The discretion of the Court is strengthened by two further factors that limit the participation of the prosecutor and defence counsel: the lack of plea bargaining with respect to the sentence; and, the fact that the DPP does not recommend any sentence to the Court. This does not mean, however, that the DPP and the defence counsel do not provide information to the Court that is likely to assist it in sentencing.

In contrast to jurisdictions such as the US, plea bargaining concerning sentencing is not permitted in Ireland. As McFadden (2007, p. 216) states, “plea discussions between prosecutor and defence counsel will not include discussions of the level of fines to be imposed by the Court or the appropriate amount of jail time to be served in consideration for the guilty plea.” The Court retains sole discretion with regard to sentencing.

The prosecutor does play, however, a role, albeit limited, in determining the sentence. The DPP does not suggest to the Court the appropriate sentence. Indeed, the Prosecutor’s Guidelines explicitly states that the “prosecutor must not seek to persuade the court to impose ... a sentence of a particular magnitude.” (*ibid*, p, 217). The prosecutor may, however, draw to the attention of the Court any “relevant precedent” and “factual matters

that may affect the choice of sentence to be imposed” (*op cit*, p. 217).¹² This is clear from the transcript of the sentencing in *DPP v Hegarty* and from reports of the sentencing in Ford cars.¹³ The only exception to this rule is if the Court specifically asks the DPP for their views on “whether he considers a custodial sentence is required” (*op cit*, p. 217).¹⁴

Defence counsel will, “as a matter of course, always address the trial judge ... on the sentence that the judge will hand down to the defendant” (*op cit*, p. 217) paying particular attention to factors that might mitigate the sentence. As we shall see in the discussion of the Duffy judgment, there was extensive reference by the Court to the arguments put forward in mitigation by the defence.

Conclusion

The upshot of this discussion is that the Courts have considerable discretion, within wide statutory limits, in deciding what sentence to impose on an individual and a firm in cartel cases. In determining how that discretion is exercised and how sentences are determined, reported judgments of the Court are vital. While the sentence itself – a fine of x and/or a jail sentence of z years – gives some indication of the attitude of the Court, without the contextual factors – the volume of commerce affected by the cartel, its duration, mitigating circumstances, aggravating factors and so on – it is difficult to come to any conclusion as to the Court’s sentencing principles and methodology.

¹² The evidence, albeit limited, suggests that Courts jealously guard their right to determine the sentence. In the sentencing hearing in the *DPP v Pat Hegarty*, the following exchange took place between a witness for the DPP and the judge:

DPP witness: “Just in relation to the matters in relation to fines, there was a kind of a – you applied I suppose in some respects a scale. There was a lot of minnows, a lot of small companies in this case. Of course, they all pleaded but there were two large companies --- “
Judge: “I’m not comfortable with a commentary from the witness on the sentencing policy of the Court.”

DPP Witness: “Sorry. Apologies. Judge. Apologies.”

What the witness was alluding was a comment by the judge in sentencing an earlier heating oil cartel member where the Court made reference to the fact that there ‘minnows’ and ‘sharks’ (Gorecki and McFadden, 2006, p. 640).

¹³ In Ford cars the only prosecution was of the cartel organiser or fixer, Denis Manning, who pleaded guilty. At the sentencing hearing the witness for the DPP referred to the sentence that had previously been imposed on J P Lambe, the organiser of the heating oil cartel. (For details see Competition Press (2007b) and Curtis and McNally (2007)). It should be noted that Denis Manning was the first conviction under the Competition Act 2002, with the charge relating the period 1 July 2002 to 30 June 2003 (Competition Press, 2007a). Curtis and McNally (2007, p. 45) argue that in comparing the higher fines and prison sentences available under the Competition Act 2002 compared to the Competition (Amendment) Act 1996 and the sentence imposed on J P Lambe, that Denis Manning’s “sentence does not appear to reflect the increased teeth provided for in the 2002 Act.”

¹⁴ It appears that in the Duffy case that the judge asked “for written submissions ... about how he should sentence” Competition Press (2009). Reference is made by the Court to submissions received from the DPP and the defendants (*DPP v Duffy*, paragraph 4), but the content and the arguments are not explicitly linked to the submissions except possibly with respect to the arguments put forward by the defence in mitigation.

3. Sentencing in Cartel Cases: the Duffy Judgment

In considering the sentencing methodology employed by Irish courts in cartel cases we confine our attention to the Duffy judgment and the transcript in the *DPP v Pat Hegarty* in the heating oil case. In 31 of the 33 criminal cartel convictions there is no judgment – either reported or unreported – on which to rely. Of course, this lack of judgments may not necessarily have been a problem if the Duffy judgment, which was concerned with an individual, Mr Duffy, and a firm, Duffy Motors (Newbridge) Limited (Duffy Motors), was the first of the 33 cartel convictions. In other words, the guidelines it set out would have not only influenced sentencing in subsequent cartel cases, but also been developed and refined. However, this was not the situation.¹⁵ The Duffy judgment has had a very limited impact on sentencing in cartel cases. Its impact will be felt primarily in future cartel prosecutions.

Desperately Seeking Guidance: R v Whittle

A Court in approaching the question of what methodology to use in cartel sentencing can go back to first principles or it may decide to draw on precedent from similar or analogous situations in Ireland or other jurisdictions where sentencing guidelines have been developed. In the Duffy judgment the latter option is selected with reliance placed on an English judgment, *R v Whittle, Alison and Brammar*,¹⁶ for guidance as to the correct approach to sentencing. At first glance this seems a sensible approach. Under UK competition law cartels are criminal offences for which an individual can be sentenced up to five years with an unlimited fine,¹⁷ which, at the time of the Duffy judgment, was similar to Ireland except that the fines for an individual were capped at the highest of 10 per cent of turnover or €3.81 million, while the maximum jail sentence was two years.¹⁸ However, on closer inspection it is not at all obvious that *R v Whittle* can be relied upon for guidance.

For a start *R v Whittle* itself states that it is *not* to be taken as providing a set of guidelines for sentencing. Whittle and his co-defendants had already entered into plea agreements with the US antitrust authorities and the issue was whether or not the English Court would

¹⁵ The Duffy judgment is dated 23 March 2009. By that date 17 of the 18 sentences had been handed down in heating oil, the sole conviction in Ford cars, and four of the 14 in Citroen motor vehicles. As we shall see below, heavy reliance is placed by the Courts on the sentences imposed in the first conviction in a particular cartel. This limits the discretion of the Courts in subsequent cases.

¹⁶ *R v Whittle, Alison and Brammar* [2008] EWCA Crim 2560. This will be referred to as *R v Whittle*. It may be found at: http://www.ofc.gov.uk/shared_ofc/prosecutions/judgment.pdf. Accessed 13 September 2012.

¹⁷ *R v Whittle*, paragraph 8. These sentences refer to conviction on indictment.

¹⁸ These were the maximum sentences that could be imposed on indictment on an individual for a cartel offence under the Competition Amendment Act 1996, which was the relevant legislation in *DPP v Duffy*, paragraph 21. (See Table 1 for details of the evolution of penalties under competition legislation). It should be noted that Mr Duffy and Duffy Motors (Newbridge) Limited were charged on six counts, four under the Competition (Amendment) Act 1996 and two under the Competition Act 2002. They pleaded guilty to the four counts under the Competition (Amendment) Act 1996. On these pleas being entered the DPP entered a *nolle prosequi* (i.e. withdrew the charges) on the other two counts. Because the accused had been charged on indictment under the Competition Act 2002 as well as the Competition (Amendment) Act 1996, the case took place in the Central Criminal Court. In contrast, the cartel charges against Mr Doran and Mr Durrigan, two other Citroen dealers discussed below, were solely under the Competition (Amendment) Act 1996 and took place in the (lower) Circuit Court.

impose higher prison sentences than those already agreed.¹⁹ As the judgment states, “we do not intend to lay down any guidance in this case for the disposal of other cases because of the way we felt obliged to deal with the case.”²⁰ Nevertheless, six “plainly relevant” general factors, which are not exhaustive, are listed.²¹ It is these that are cited in the Duffy judgment.²² There is no methodology presented in *R v Whittle* (not surprisingly) as to how these factors should be taken into account or weighed in order to determine the appropriate sentence. Since, at the time of the Duffy judgment, *R v Whittle* was the only criminal cartel prosecution taken under the Enterprise Act 2002, which first criminalised cartel activity for individuals in the UK, the Irish Court had no other cases under that Act on which to draw for guidance.

Despite the fact that *R. v Whittle* appears to be a not entirely appropriate precedent, the Court may still have been able to use that judgment to fashion a set of sentencing guidelines. As noted above, the Court in the Duffy judgment set out the six factors that should be taken into account in sentencing following *R v Whittle*. These are as follows:²³

- The gravity and nature of the offences:
- The duration of the offences:
- The degree of culpability of the defendant in implementing the cartel agreement:
- The degree of culpability of the defendant in enforcing the cartel agreement:
- Whether the defendants conduct was contrary to guidelines laid down in a Company Compliance Manual, and
- Mitigating factors, for example, any co-operation the defendant may have provided in respect of the inquiry: whether or not the defendant was compelled to participate in the cartel under duress: whether the offence was a first offence: and any personal circumstances of the defendant which the courts may regard as a factor suggesting leniency.

The Court does not go through these factors one by one in a systematic manner and then link its assessment of each factor to the sentence it imposes on the individual and firm that are the subject of the Duffy judgment. Indeed, one of the six factors is never subsequently mentioned. In part this reflects the fact that much of the discussion with respect to these factors appears in the lengthy section of the judgment where the mitigating arguments put forward by the defence are considered.²⁴ In other words, it could be argued that the defence sets the framework for the discussion of these issues rather than *R v Whittle*.

¹⁹ Each of the defendants had entered into a plea agreement with the US authorities to serve minimum sentences. If the English court sentenced the defendants to less than the agreed sentence then the defendants would return to the US to serve the balance. See *R v Whittle* for details.

²⁰ *R v Whittle*, paragraph 33.

²¹ *R v Whittle*, paragraph 34. The factors are taken from Hammond and Penrose (2001). They are reproduced below.

²² *DPP v Duffy*, paragraph 33.

²³ *DPP v Duffy*, paragraph 33.

²⁴ *DPP v Duffy*, paragraphs 45-63.

Applying R v Whittle: Assessing the Six Plainly Relevant Factors

In this section we consider the assessment made in the Duffy judgment with respect to each of the six factors identified as relevant to sentencing in *R v Whittle*. Next, attention turns to the comments made in the judgment concerning sentencing in terms of prison and fines, together with the determination of the actual sentence itself. The Duffy judgment was concerned with a member of the Citroen cartel which fixed the price of Citroen motor vehicles by agreeing maximum discounts off the retail dealer's recommended price as well as limiting other methods that could be used to effectively reduce the price of a new motor vehicle through, for example, paying a high price for a trade-in. The cartel monitored adherence to the agreement by hiring mystery shoppers to survey cartel members and imposed fines on those found to be breaking the rules.²⁵

(i) *The gravity and nature of the offences.* It is clear that the Court regards cartels as serious breaches of criminal law. The Court states, for example,

22. ... As with this association [Citroen Dealers Association or CDA], they remove price choice from the consumer, deter customer interest in product purchase and discourage variety. They reduce incentives to compete and hamper invention. They cause a transfer of consumer's money to themselves. They are offensive and abhorrent, not simply because they are *malum prohibitum*, but also because they are *malum in se*. They are in every sense anti-social. Cartels are conspiracies and carteliers and conspirators.

37. ... Competition crimes are particularly pernicious.

As a result breaches of competition law "have to attract serious punishment."²⁶ Such sentiments are, of course, consistent with the progressive raising of the maximum penalties for cartel offences by elected representatives under revisions and amendments to competition legislation since 1996.

(ii) *The duration of the offences.* The Court mentions the duration at several points in the judgment, The Court sets out the dates - 24 June 1997 to 18 June 2002 – for which Mr Duffy and Duffy Motors were charged with entering into and implementing an agreement to prevent, restrict and lessen competition by fixing the selling price of Citroen motor vehicles.²⁷ The Court subsequently comments that:

47. ... For five years, being the period of the indictment (in fact the Association operated for almost nine), he [Mr Duffy] involved himself in the significant ongoing efforts which are required by the operators of criminal cartels. Operating a cartel is not a once off criminal act. It is not done on the spur of the moment. It is continuous and requires high levels of planning and organisation.

²⁵ *DPP v Duffy*, paragraphs 6 – 11 for details.

²⁶ *DPP v Duffy*, paragraph 43. It is clear from the previous paragraph in the judgment that serious punishment refers to a custodial sentence.

²⁷ *DPP v Duffy*, paragraphs 1 -3.

The Court also pointed out the cartel broke down only when a cartel member went to the Competition Authority making 13 statements and furnishing over 160 relevant documents.²⁸

(iii) The degree of culpability of the defendant in implementing the cartel agreement. The Court notes that Mr Duffy participated extensively in the cartel, which was organised through the Citroen Dealers Association. He was the sole representative of Duffy Motors and attended virtually all of the meetings.²⁹ The issue of implementation of the agreement by Mr Duffy was addressed when it was argued, in mitigation, that Mr Duffy cheated on the cartel agreement. However, the judge was not impressed, commenting that the “overall value of the evidence given is highly problematic.”³⁰

(iv) The degree of culpability of the defendant in enforcing the cartel agreement. Mr Duffy, as the Court notes, played a leading role in the Citroen cartel. He was treasurer for three years and in that capacity “he was responsible for discharging the outgoings of the association including the expenses of the Secretary and the costs of employing the so-called independent monitors.”³¹ The monitors conducted mystery shopping surveys in order to determine whether or not members of the Citroen Dealers Association were adhering to the pricing structure agreed for Citroen motor vehicles. If a member of the Association was found to have breached the agreement then it was fined €1,270.³² Hence Mr Duffy was involved in the enforcing of the cartel agreement, albeit perhaps indirectly.

(v) Whether the defendants conduct was contrary to guidelines laid down in a Company Compliance Manual. The Court makes no reference to this factor. This applies to both Duffy Motors and the Citroen Dealers Association. Indeed, that fact the Association systematically and regularly minuted the prices that were agreed, suggests that a Compliance Manual on competition was not a document to be found on the shelves of Duffy Motors.³³

(vi) Mitigating factors. The defence put forward six mitigating factors in the Duffy case: “i) The unblemished reputation of the accused, so therefore the acts were out of character; ii) The absence of previous convictions; iii) Co operation with the authorities; iv) His plea of guilty; v) The circumstances of the offence; and, vi) The personal circumstances of the accused.”³⁴ The Court remarked that the “importance to be attached to any them [these factors] must be both offence specific and individual specific.”³⁵ The Court examined each factor, in turn, but in general did not accord them much weight. For example, on the issue of the absence of a previous offence the Court states,

²⁸ *DPP v Duffy*, paragraph 10. The cartel member went to the Competition Authority after an attempt by the CDA to discipline the dealer who refused to pay the fine.

²⁹ *DPP v Duffy*, paragraph 10.

³⁰ *DPP v Duffy*, paragraph 52.

³¹ *DPP v Duffy*, paragraphs 10, 55.

³² *DPP v Duffy*, paragraph 9.

³³ *DPP v Duffy*, paragraph 8.

³⁴ *DPP v Duffy*, paragraph 45.

³⁵ *DPP v Duffy*, paragraph 46.

48. Factors such as that the conduct concerned was a first offence and that the offender is unlikely to re-offend are, in my view, of limited application in cartel cases. This is so because of their generally pernicious nature, the fact that the perpetrators knew that their conduct was illegal, and the level of detailed planning and concealment involved in both the network and the activity. Further, given the white collar nature of the crimes, it is almost invariable that persons convicted will have a low level of recidivism.

These findings may have repercussions to other areas of white collar crime than competition law.

Perhaps, not surprisingly in view of the Court's assessment of these factors, it was strongly of the view that custodial sentences were appropriate. The Court after setting out the maximum fines for a firm under the Competition (Amendment) Act 1996 and commenting that these can "at least in some cases ... seriously impact on an undertaking's business,"³⁶ continues:³⁷

42. Notwithstanding this level of fine however, the availability of a custodial sentence is critical. On this complementary form of penalty, I had the following to say in *Manning*:-

"In my view, there are good reasons as to why a court should consider the imposition of a custodial sentence in such cases. Firstly, such a sentence can operate as an effective deterrent in particular where if fines were to have the same effect they would have to be pitched at an impossibly high figure. Secondly, fines on companies might not always guarantee an adequate incentive for individuals within those firms to act responsibly. This particular point may not, in some circumstances have the same force where individuals are concerned. Thirdly, knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater cooperation in cartel investigations against, and quite frequently against their employers. Fourthly, 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 and finally, the imposition of the sentence for the type or category of persons above described can carry a uniquely strong moral message. Accordingly, they are in my view some very powerful reason[s] to custodise an individual who has been found guilty under the Competition Acts."

43. I would like to re-assert these views and to further state, as I also did in *Manning*, that I see no room for any lengthy lead in period before use is commonly made of this supporting form of sanction. If previously our society did not frown upon this type of conduct, as it did in respect of the more conventional crime, that forbearance or tolerance has eroded swiftly, as the benefits of competition have become clearer. Every purchaser of goods or

³⁶ *DPP v Duffy*, paragraph 41.

³⁷ In the passage cited reference is made to what the judge said in *Manning*. This judgment, which is not available, concerned the sentencing of the organiser in the Ford case.

services now has a strong and definite appreciation of what competition can do for him or her. Therefore it must be realised that serious breaches of the code have to attract serious punishment.

The Court thus argued that there are strong grounds for custodial sentences in cartel cases to serve as an effective deterrent. It is the directors and leading decision makers in the firm that are responsible for entering into and implementing a cartel.

The Court, while noting that “[F]ines evidently play a significant role in criminal law,”³⁸ felt that fines “unless severe and severely impacting, are not a sufficient deterrent.” Hence there is a danger that appropriate fines may seriously impact on an undertaking’s business. Fines sufficient to remove the cartel gains may bankrupt a firm, thus making consumers’ worst off if the degree of competition is reduced. Furthermore if the future of the firm is adversely affected innocent parties such as the firm’s employees may be made unemployed. The Court also noted that the way that the maximum fine “clearly indicates a strong relationship between the undertaking’s business and the crime.”³⁹ In considering turnover of the firm that should be used for the purposes of estimating a fine, the Court considered that it should be based on the firms total turnover, not just that relating to the products or services subject to cartel activity.⁴⁰

The Court considers that separate sentences can be imposed on the firm and its directors, with regard to the same conduct. Charges were preferred by the DPP against both Duffy Motors as well as Mr Duffy, who was a 50 per cent owner of the firm, for preventing, restricting, and distorting competition by fixing the price of Citroen motor vehicles.⁴¹ The Court therefore considered the issue of whether it is appropriate to punish both the firm and a director. The Court is unequivocal on this question:

38. ... Therefore, both entities can be guilty of offences arising out of the same prohibited conduct. This makes perfect sense as otherwise miscreant manoeuvres could set the sanction provisions at nought. It cannot, therefore, be argued that a penalty imposed on both, constitutes some form of double punishment. Each is being punished for what it, as a separate legal *persona*, did. It matters not what the size or corporate structure of the company is or that its directors are also sued. Both can commit offences even if the underlying circumstances are identical.

Such a view is consistent with competition legislation that permits charges to be filed against a firm and an individual.⁴²

³⁸ *DPP v Duffy*, paragraph 41.

³⁹ *DPP v Duffy*, paragraph 41.

⁴⁰ *DPP v Duffy*, paragraph 41.

⁴¹ *DPP v Duffy*, paragraph 13.

⁴² It should be noted that an officer of a firm can be convicted of participating and implementing a cartel even though the firm for which the individual is employed by has not been convicted of a cartel offence, For details see: *DPP v Hegarty* [2011] IESC 32. This may be accessed at: www.courts.ie. Accessed 22 October 2012.

The Court felt that in sentencing there is a strong case for horizontal equity – individuals and firms in similar circumstances should receive similar sentences. When the Court came to sentencing in the Duffy case sentences had already been handed down with respect to Mr Durrigan and Mr Doran, two other Citroen dealers that were part of the same cartel as Mr Duffy. Since the circumstances of Mr Durrigan and Mr Doran, on the one hand, and Mr Duffy, on the other, were “virtually indistinguishable,”⁴³ the Court in the Duffy judgment imposed sentences consistent with those imposed earlier: fines totalling €50,000 and six and nine month prison sentences, suspended for five years on Mr Duffy, and a fine of €50,000 on Duffy Motors. However, there is no judgment available in either of the cases concerning Mr Durrigan and Mr Doran to determine how the Court decided upon the appropriate sentence. In any event it is clear from the Duffy judgment that the Court would have imposed higher sentences, but for the constraint that was imposed by the two earlier sentences in the Citroen cartel.⁴⁴

Setting Fines: Some Comments

While the Court is correct that fines high enough to be an effective deterrent might have adverse consequences this does not mean that substantial fines cannot be imposed on individuals and firms, only that some attention needs to be taken of the implications of such fines on the viability of the business and the impact of its possible demise on competition and consumers. Individual decision makers in firms participating in a cartel benefit from having a quieter life because competition is lessened. Furthermore, to the extent that executive pay is linked to corporate performance through increased profits, these individuals will have higher pay packets than would otherwise be the case. Equally the owners of a firm, the shareholders, and the employees may gain because, other things being equal, increased returns may feed through to higher dividends, share values and wages.

But these general considerations do not answer the question of what level of fines is appropriate and what methodology should be applied? In the Duffy judgment no attention is given to these questions, although the Court is clearly aware of the legislative maximum.⁴⁵ In considering the issue of fines it is almost as though the Court is arguing that jail is the main tool to be employed in combating cartels and that fines designed to make cartel activity unprofitable are unlikely to succeed without adversely affecting the cartelists’ business. However, no evidence is offered as to what level of fines could be imposed without affecting the viability of a business. Furthermore competition authorities in other

⁴³ *DPP v Duffy*, paragraph 66. This was based on the evidence of a witness for the DPP cited in the judgment. All three individuals, for example, held important positions in the Citroen Dealers Association: Mr Duffy as treasurer (*DPP v Duffy*, paragraph 55); Mr Durrigan and Mr Doran as past presidents (McNally, 2010, p. 137).

⁴⁴ *DPP v Duffy*, paragraphs 68, 71.

⁴⁵ *DPP v Duffy*, paragraphs 21 and 41.

jurisdictions routinely impose large fines even in the recession. At the EU they can run into several hundred million euros.⁴⁶

At a minimum cartel fines should surely equal the gains made by the participant in the cartel activity.⁴⁷ This removes the illegal gains from the beneficiaries and serves as a deterrent.⁴⁸ However, it is often argued that cognisance should be taken of the probability of the cartel being detected by the competition authorities and the probability of conviction. Hence what is of interest is whether the expected benefits are less than that the expected fine. Following Hviid and Stephan (2009, p.139) the relevant expression is:

$$B < P^d \times P^c \times F, \text{ where}$$

B = expected benefit

P^d = probability of detection

P^c = probability conviction.

For example, if a cartel was able to raise revenue by €10 million, the optimum fine to ensure deterrence should not be €10 million, but some multiple thereof to take into account the fact that P^d and P^c are likely to be less than 1. Hence, for example, if these two probabilities were 0.5 and 0.66, respectively, the fine, F, would need to be €30 million. However, if these probabilities are much lower, the appropriate fine is correspondingly higher and it is in this context that there may be concerns over the impact of the fine on the viability of the firm.

We use three benchmarks to evaluate the fines levied in the Duffy judgment on Duffy Motors, the results of which are presented in Table 2. All of the benchmarks were open to the Court, but none were used. The first two benchmarks relate to the two alternative maximum possible fines under the Competition (Amendment) Act 1996, while the third benchmark is the overcharge or excessive profits earned by involvement in cartel activity. The first two benchmarks are straightforward to estimate, but the third requires some explanation. Here we follow Werden (2008, p. 12) who stated, “[I]n view of the empirical evidence ... , a conservative assumption is that cartel activity increases prices by 10 percent.” Armed with that information and estimates of the sales of Duffy Motors over the five year period for which it was found guilty of breaching the competition law, the excess profits earned by Duffy Motors can be estimated.⁴⁹ We use Werden (2008) because that paper was cited in *DPP v Duffy* with approval.⁵⁰ Indeed, Werden presented his paper at a conference sponsored by the Competition Authority on “Sanctions, Fines, Settlements in Cartel Cases:

⁴⁶ or details see EC (2102). It is, of course, the case that the EU cannot impose sanctions on individuals. However, this does not take away from the point that seemingly large fines can and are imposed on firms.

⁴⁷ These issues are discussed by, for example, Hviid and Stephan (2009). There is, of course, the issue of estimating the gains that the cartel made from its activity.

⁴⁸ This is consistent with the remarks made by the Court in the sentencing in *DPP v Pat Hegarty* where it is stated: “I’m also of the view that [there should be] a penalty of a financial nature – as I’ve said, the motivation for the commission of this crime was clearly greed, and a financial penalty must be imposed in order to teach those who are motivated by greed to commit crime that there can be a serious and painful penalty for them as and when the crime is to be punished.”

⁴⁹ We assume that in the equation set out above that P^d and P^c are set equal to 1.

⁵⁰ *DPP v Duffy*, paragraphs 24, 25.

Developments and Deterrence in the EU and Ireland,” held in Dublin on 22 November 2008,⁵¹ at which members of the judiciary attended.

Table 2: Benchmarking Fines, *DPP v Duffy*, Duffy Motors (Newbridge) Limited, t/a P. G Duffy and Sons

Benchmark	€50,000 fine as % of benchmark
Benchmark #1: 10% of the sales of Duffy Motors prior to conviction or €927,000 ^a	5.4%
Benchmark # 2: €3.81 million ^b	1.3%
Benchmark # 3: Cartel overcharge or €4.64 million ^c	1.1%

- The Competition (Amendment) Act 1996 states that the maximum fine is the greatest of 10 per cent of turnover in the 12 months prior to conviction or €3.81 million. The judgement in *DPP v Duffy* is dated 23 March 2009; for the 11 months ending 30 November 2008 the turnover of Duffy Motors was €8.5 million. Pro-rating the first 11 months, yields annual sales in 2008 of €9.273 million.
- See footnote a. The Competition (Amendment) Act 1996 refers to IR £ 3.0 million, which translates into €3.81 million. However, in *DPP V Duffy* the maximum is incorrectly stated as €3.0 million.
- It is assumed that the Citroen cartel raised prices by 10 per cent, based on Werden (2008). The indictment of Duffy Motors was five years from June 1997 to July 2002. Using turnover in 2008 as a proxy for annual sales in this period results in an overcharge of €4.25 million (i.e. 5(.1x 9.273 million)).

Source: *DPP v Duffy*, paragraphs 1, 15, Werden (2008, p. 12) and Competition (Amendment) Act 1996.

The first two benchmarks are the maximum specified in competition legislation, while the third is a measure of the excess profit that Duffy Motors was able to realise due to membership of the cartel. In the case of the latter benchmark any fine should be designed to at least ensure that the cartel member does not gain from their illegal activity or else, other things equal, the cartel member will have an incentive to continue breaking the law. Given that the judge has characterised Duffy Motors offence as a serious breach then it is to be expected that the fine should be towards the top of the maximum specified in law and at least the estimate of the excess profit accruing to Duffy Motors.

An examination of the table suggests that these expectations are not borne out. Measured against the statutory maximum the fine on Duffy Motors is between 1.3 and 5.4 per cent, while it is only 1.1 per cent of the cartel overcharge. Crime pays. It could of course be argued that this analysis overstates the case, since the fine on Duffy Motors (i.e. €50,000) and Mr Duffy (i.e. €50,000) should be taken together (i.e. €100,000). However, if this approach were used the results do not change: twice nothing is still nothing. Furthermore, as noted above, the Court found in the Duffy judgment that sentencing of firms and individuals separately was appropriate.

⁵¹ For details see: <http://www.tca.ie/EN/News--Publications/Conferences/Sanctions-Fines-and-Settlements-in-Cartel-Cases.aspx>. Accessed 27 September 2012. It should be noted that Werden’s paper was subsequently published as Werden (2009).

On the issue of the ability to pay, the Duffy judgment does not consider whether or not Duffy Motors is able to pay a substantial fine. Nevertheless, the Duffy judgment does set out a few facts concerning Duffy Motors which is considered to be in good shape despite the recession. In 2008 turnover was €9.27 million, while although Duffy Motors experienced a small loss in 2008, it nevertheless invested €1 million over 2007 and 2008, paid its two director owners €189,000 in 2007 and €164,000 in 2008. At a minimum this suggests that Duffy Motors was able to pay substantially more than the €50,000 fine levied by the Court. Whether fines towards the higher end of the benchmarks set out in Table 2 could have been paid without adversely affecting the viability of Duffy Motors is not clear since the issue was not explored in the judgment.

*Setting Jail Sentences*⁵²

The Court felt that in considering the balance between fines and jail that there were good arguments for a custodial sentence.⁵³ However, no attempt was made to determine how the duration of the custodial sentence should be determined. Given the two year maximum under the Competition (Amendment) Act 1996 and the Court's strong statements about the gravity of the offence and its attitude concerning the inadequacy of fines as a suitable deterrent, then a jail sentence towards the upper end of the two year maximum would be expected, not suspended sentences of less than a year.

One of the remarks made by the Court in the Duffy judgment concerns the greater effectiveness of jail compared to fines. However, there must be some questioning of what is after all conventional wisdom. We have little evidence that imprisonment is a better than fines as a deterrent. The only evidence in cartel cases in Ireland is somewhat ambiguous. One of Mr Duffy's fellow Citroen cartelists was Mr Bursey, who was fined €80,000. However, Mr Bursey failed to pay the fine. As a result he was imprisoned for 28 days.⁵⁴ Arguably Mr Bursey got a good deal, since the judge values Mr Bursey's time as €14,286 per week or €742,857 per year. That is of course post tax; pre tax, assuming an average rate of income tax of 36 per cent for a person with this post tax income, implies a pre-tax income of around €1.16 million.⁵⁵ This does not, of course, prove that jail is not an effective deterrent, rather it suggests that 28 days may be too short a period of imprisonment for failure to pay a fine of €80,000.

4. Conclusion

It is important that the process by which a Court sentences an individual and/or a firm is open, transparent, predictable, carefully reasoned and explained, while at the same taking

⁵² It should be noted that on conviction of a cartel offence an individual will be, under section 160 of the Companies Act 1990, "disqualified from holding any directorships for a period of five years (*DPP v Duffy*, paragraph 59)." The individual will also likely experience difficulty entering the US with a criminal record.

⁵³ *DPP v Duffy*, paragraphs 40-43.

⁵⁴ Details from Competition Authority (2010, p. 13).

⁵⁵ This was the average tax rate for gross incomes over €80,000 in 2009. For details see: http://www.finfacts.ie/irishfinancenews/article_1016661.shtml. Accessed 9 November 2012.

into account the particular circumstances of the case. This requires a coherent set of principles or rules or guidelines that take cognisance of the alleged crime and facts of the case to determine the sentence. Furthermore, it requires that judgments are reported so as to ensure that justice is not only done but seen to be done.

In the case of cartels the sentencing methodology should result in cartel members that are individuals having a reasonable idea what fine and jail and prison sentence to expect and for a firm the magnitude of the fine. This in turn implies that the methodology sets out the factors that determine the sentence. However, the methodology must do more than merely list and assess the relevance and applicability of these factors. The expected weight or importance of each of these factors needs also to be specified, so that a link can be made to the sentence.

In the case of the Duffy judgment there is no clear link between the Court's assessment of the factors and the sentences imposed on Mr Duffy and Duffy Motors. In part of course this may reflect the fact that the Court felt bound by sentences handed down in two earlier judgments in the Citroen case. However, the Court clearly thought that higher sentences were appropriate. Since it was the first and only judgment on sentencing in a cartel case in Ireland it would have been beneficial if it had laid out the methodology for deciding the appropriate sentence in a cartel case, despite acknowledging that precedent would mean that the methodology could not be used to derive the sentence for Mr Duffy and Duffy Motors. By not doing so we are little further ahead in developing sentencing guidelines beyond statements that cartels are serious breaches of criminal law and pernicious; individuals should go to jail, but not yet.

Is there a Better Alternative?

Of course, it is easy to criticise the lack of sentencing guidelines that emanate from the Duffy judgment. Developing such guidelines is unlikely to be either easy or straightforward. There is a tension between too much predictability and too much fettering of the discretion of the Courts. Just as too much judicial discretion without the need to reason carefully why a particular sentence is imposed can all too easily lead to sloppy thinking, injustice, and lack of accountability equally an excessively prescriptive set of guidelines can lead to injustice. The challenge is to get the balance between the two extremes correct, so that the sentencing guidelines or methodology provides a reasonably acceptable framework within which sentences are determined while at the same leaving the Court sufficient flexibility to reflect the facts of the case.

The Court in the Duffy judgment drew on – although it is not clear it applied – a not altogether relevant English precedent of *R v Whittle*. There was, it could be argued, no alternative source for a methodology for sentencing. However, the Court could have drawn upon US guidance in determining the appropriate sentence. US cartel law is much more similar to Irish than either that of the UK or the EU, to which reference was also made in the

Duffy judgment.⁵⁶ In the US, as in Ireland, cartel offences are criminal for both the individual and the firm, whereas in the UK cartel offences with respect to individuals are criminal, but civil for firms, while for the EU cartel offences are civil for firms, but with no sanctions for individuals. The differing standard of proof (i.e. civil v criminal) and coverage (i.e. individuals and/or firms) limit the applicability of UK and EU sentencing guidance to criminal cases in Ireland.

US sentencing guidance in cartel cases are set out in the *Federal Sentencing Guidelines Manual* (the Sentencing Guidelines).⁵⁷ These are evidence based and incorporate the factors mentioned in *R v Whittle* as being relevant to sentencing. The application of the Sentencing Guidelines provides a methodology that determines, given the facts of the case, a *range* of fines and/or imprisonment. In other words, sentencing is not reduced to a process whereby the Court says all the relevant factors have been weighed, no doubt carefully, and the answer is a fine €x and/or z years imprisonment, but with very little connection between the facts of the case, the relevant factors and €x or z years. However, at the same time the Sentencing Guidelines do not remove judicial discretion, since they are advisory and the Court can go outside the range suggested by the Sentencing Guidelines, provided that the reasons are carefully set out by the Court. As such it is inappropriate to characterise these Sentencing Guidelines as “rigid” (O’Malley, 2006, p. ix).

Furthermore the Sentencing Guidelines place considerable emphasis on the economic damage inflicted by the cartel on consumers. In this respect it is in full agreement with the sentiments expressed by the Irish Supreme Court in the Irish League of Credit Unions 2007 judgment when it stated that:

106. The entire aim and object of competition law is consumer welfare. Competitive markets must serve the consumer. That is their sole purpose. Competition law, as is often said, is about protecting competition, not competitors, even if it is competitors who most frequently invoke it. Its guiding principle is that open and fair competition between producers of goods and services will favour the most efficient producers, who will thereby be encouraged to satisfy consumer demand for better quality products, wider choice and lower prices. Their reward is a greater market share.⁵⁸

In a related paper we apply the Sentencing Guidelines to the facts of the Citroen case for each of the 14 individuals and firms convicted.⁵⁹ The results suggest that the level of fines and imprisonment imposed by the Irish Courts in the Citroen case was far too low, resulting in serious under enforcement. Consumers pay the cost in terms of higher prices, while cartelists reap the benefits as individuals in terms of higher executive pay, as owners in

⁵⁶ *DPP v Duffy*, paragraphs 28-32, 34. However, the Court takes the view that the EU approach has limited applicability to Ireland because of the quite different regime of sanctions that applies there as compared with the UK and Ireland.

⁵⁷ The Sentencing Guidelines are discussed extensively on Gorecki and Maxwell (2012).

⁵⁸ *Competition Authority v O’Regan & Ors.* [2007] IESC 22.

⁵⁹ Gorecki and Maxwell (2012).

terms of higher share prices and higher dividends. Hence the Court is correct in the Duffy judgment to argue that higher sentences than have been imposed up until now should be set in cartel cases.

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