# The Criminalization of European Cartel Enforcement

*Theoretical, Legal, and Practical Challenges*

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# 1

# An Introduction to European Antitrust Criminalization and Its Theoretical, Legal, and Practical Challenges

## A. Background and Context to the Book: 'The European Antitrust Criminalization Debate'

Article 101 of the Treaty on the Functioning of the European Union ('TFEU')[1] contains, inter alia, the EU's prohibition on cartel activity. That prohibition is enforced by the European Commission ('the Commission') and the national competition authorities ('NCAs') and courts of the EU Member States.[2] In its cartel law enforcement role, the Commission can impose only administrative fines on undertakings;[3] it does not have the power to inflict criminal punishment on individuals.[4] Traditionally, within Europe, cartel law enforcement at national level has tended to avoid the employment of personal criminal punishment: such enforcement 'has been of a predominantly administrative character, and when penalties have been imposed these have, in legal terms, commonly been of an administrative or civil nature'.[5] This tradition notwithstanding, over the last decade or so there has been increasing debate within Europe concerning the imposition of the sanction of imprisonment on individuals who have engaged in cartel activity contrary to Article 101 TFEU.

This particular debate has been fostered and advanced at different stages by the activities of various European and non-European entities. The Competition Committee of the Organisation for Economic Cooperation and Development ('OECD') can be easily identified as one of these entities. While the OECD has not adopted a formal position on the issue of whether its members should impose individual criminal punishment for cartel activity, its work (viz., recommendations, reports and best practice roundtables) evidently recognizes that such punishment can be useful in the fight against such

[1] This particular provision of European law has appeared in three other guises since 1957: Article 85 TEEC (from 1957 to 1993); Article 85 TEC (from 1993 to 1999); and Article 81 TEC (from 1999 to 2009). However, its content has essentially remained the same: Article 101 TFEU merely changed the words 'common market' to 'internal market'. For the full text of Article 101 TFEU, see Annex I. For consistency, throughout this book the provision in question will be referred to as Article 101 TFEU.

[2] See Council of the European Union (2003) ('Regulation 1/2003'). Private enforcement of Article 101 TFEU, i.e. the use of private entities to enforce that particular provision in a civil action (for damages, for example), is also a feature of EU law; see: Case C-453/99, *Courage v. Crehan* [2001] ECR I-6297, [26]–[36]; and Joined Cases C-295–8/04, *Vincenzo Manfredi and others v. Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619.

[3] On the concept of 'undertaking', see, e.g.: Odudu (2006), Chapter 3; Odudu (2005); Townley (2007); and Wils (2002), Chapter 7.

[4] Regulation 1/2003, Article 23(5). It has been argued, however, that the EU-level competition regime 'has criminal characteristics in that it is intended to impose a high level of moral condemnation and disapproval, to inflict severe punishment, to deter future wrongdoing by others, and to unravel unlawful conspiracies': Forrester (2011), 200.

[5] Harding (2006), 181, relying on Gerber (2001).

anticompetitive conduct.[6] In particular, its 'Second Cartel Report' advised its Member States (the majority of which are within the EU) to consider: (i) introducing and imposing antitrust sanctions against natural persons; and (ii) introducing criminal sanctions in cartel cases in jurisdictions where it would be consistent with social and legal norms.[7] Given these efforts, it should be no real surprise then that 'countries in virtually every region of the world' have criminalized cartel activity.[8] The Antitrust Division of the US Department of Justice ('DoJ') is also responsible for bringing the issue to the European arena,[9] particularly as a result of the publication of its policy statements.[10] In fact, its officials have publicly espoused a consistent message concerning its role of enforcing Section 1 of the Sherman Act 1890;[11] for them, 'the most effective deterrent for hard-core cartel activity, such as price fixing, bid rigging, and allocation agreements, is stiff prison sentences'.[12] Academics have also responded to these claims and have analysed the issue of personal criminal antitrust sanctions in considerable detail. Conferences and panel discussions dedicated to the topic have been held across Europe, including in the cities of Florence (in 2001[13] and 2006[14]), Amsterdam (in 2005[15]), Oxford (in 2009[16]), Luxembourg (in 2012[17]), and Rome (in 2013[18]). Along with antitrust officials, academics represent the majority of the contributors to what can be termed 'the European antitrust criminalization debate'. None of this is to say, however, that the European debate is merely an academic exercise: national legislators have also offered their contributions. Indeed, the legislatures of some European jurisdictions have attempted to analyse the issue of personal criminal antitrust sanctions and some—such as the United Kingdom[19]—have changed their laws as a result of their analyses. While the relevant official outputs of these jurisdictions (viz., governmental reports and parliamentary debates) are relatively limited in number, they nonetheless represent an important contribution to the criminalization debate.

The European antitrust criminalization debate itself is a lively one; it has raised a number of controversial and difficult issues.[20] Both the necessity and the appropriateness of personal criminal antitrust sanctions have been examined,[21] as have the origins

[6] Reindl (2006), 111. See also Jenny (2011). [7] OECD (2003a), 46.
[8] Shaffer and Nesbitt (2011). See also Lipsky (2009), 967.
[9] Joshua et al. (2008–09), 359.
[10] See generally <http://www.justice.gov/atr/public/speeches/speech_criminal.htm>.
[11] 15 USC §§ 1–7 (2000 & Supp IV, 2004). [12] Barnett (2009), 2.
[13] Panel IV of 'Effective Private Enforcement of EC Antitrust Law', 6th Annual EU Competition Law and Policy Workshop, European University Institute, Florence, 1–2 June 2001.
[14] Panel III of 'Enforcement of Prohibition of Cartels', 11th Annual EU Competition Law and Policy Workshop, European University Institute, Florence, 2–3 June 2006.
[15] 'Remedies and Sanctions in Competition Policy: Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States', Amsterdam Center for Law and Economics, Amsterdam, 17–18 February 2005.
[16] 'Criminalising Cartels: A Critical Interdisciplinary Workshop on an International Regulatory Movement', Centre for Competition Law and Policy, Oxford, 12 November 2009.
[17] 'Per Se Cartel Offences—Legitimacy and Utility of Criminal Sanctions?', University of Luxembourg, Luxembourg, 23–4 March 2012.
[18] 'Panel IV: Criminal Enforcement', Antitrust Marathon V: Public and Private Enforcement of Competition Law, Italian Competition Authority, Rome, 18 March 2013. For the transcript of this panel, see Marsden et al. (2013).
[19] See Section 188 of the Enterprise Act 2002 ('EA') ('The UK Cartel Offence').
[20] For a flavour of these issues, see: Furse (2012); Beaton-Wells and Ezrachi (2011a); and Cseres et al. (2006a).
[21] See, e.g.: Aylward (2007); Baker (2001); Beaton-Wells (2007); Buccirossi and Spagnolo (2005); Calkins (2007); Calvani (2004a); Calvani (2004b); Capel (2007); Clarke (2005); Clarke and Bagaric (2003); Farmer (2013); Gray (2008); King (2010); MacCulloch (2010a); Rosochowicz (2004); Stephan

of the current manifestation of this particular debate in Europe.[22] The potential for differences in attitude concerning the criminality of cartel activity has also been investigated.[23] Scholarship has been dedicated to the analysis of some of the practical difficulties that the implementation of individual criminal antitrust sanctions allegedly engenders.[24] Some commentators have attempted to analyse the specific requirements of a criminal antitrust regime,[25] including those relating to human rights,[26] political and public support,[27] and publicity.[28] A limited number of articles also consider the competence of the EU institutions to mandate the use of individual criminal sanctions;[29] others, by contrast, have focused on international aspects of antitrust criminalization, such as the concepts of cooperation between states and extradition,[30] as well as the potential for the development of an international consensus on the criminality of cartel activity.[31] Commentators have even offered their opinions on the specific outcomes of actual criminal antitrust cases whenever they have arisen in the EU Member States,[32] as on occasion have the relevant enforcers.[33] A number of scholars have responded to (European and non-European[34]) government consultations on current and proposed cartel offences—the most important of which for present purposes is arguably the 2011–12 consultation on the (unsuccessful) operation of the UK Cartel Offence[35]—highlighting in the process some problematic aspects of design and implementation which are relevant to the European antitrust criminalization debate.[36] In addition, there are a number of studies either describing the specifics of the criminal antitrust regime in a given (European) jurisdiction[37] or detailing how and why a particular criminalized jurisdiction has failed to deliver on its objectives.[38] There are other country-specific reports which detail how future criminal enforcement can be improved, offering in the process some useful insights for other jurisdictions across Europe which are contemplating criminalizing cartel activity.[39] Some scholarship also exists which compares different approaches to cartel criminalization which have been adopted across the EU.[40] It is

(2008c); Wardhaugh (2014); Werden (2009); Werden and Simon (1987); Whelan (2009a); Whelan (2007); Wils (2006b); and Wils (2005b).

[22] See, e.g., Harding (2006).

[23] See, e.g.: Baker (2009); Harding (2010); Harding (2002); Stephan (2011c); Stephan (2010b); and Stephan (2008e).

[24] See, e.g.: Frese (2006); Joshua (2011); and Massey (2006). For useful Australian literature on this topic, see: Senate Standing Committee on Economics (2009); Beaton-Wells and Fisse (2008a); Fisse (2008); Fisse (2007a); and Fisse (2007b).

[25] See, e.g., Morgan (2010).

[26] See, e.g.: Parkinson (2004); Whelan (2010); and Whelan (2011a).

[27] See, e.g., Beaton-Wells (2008a).

[28] See, e.g.: Stephan (2011c); and Wagner-von Papp (2011).

[29] See, e.g.: Hakopian (2010); Simonsson (2011); Whelan (2008); Wils (2006b); Wils (2005b); and Zuleeg (2002).

[30] See, e.g.: Furse (2006); Joshua (2008c); Joshua (2006a); Joshua (2005); O'Kane (2009b); and O'Kane (2008).

[31] Ezrachi and Kindl (2011).

[32] See, e.g.: Curtis and McNally (2007); Joshua (2008a); Osepciu (2009); Stephan (2008b); Tassopoulou (2009); and Whelan (2009b).

[33] See OFT (2010d).

[34] Literature from Australia and New Zealand has been particularly instructive in the European antitrust criminalization debate; see, e.g.: Beaton-Wells (2007); and King (2010). See also the output of the 'Cartel Project' at the University of Melbourne: <http://www.cartel.law.unimelb.edu.au>.

[35] See: BIS (2011), Chapter 6; BIS (2012), Chapter 7; and the Enterprise and Regulatory Reform Act 2013, Section 47.

[36] See, e.g.: MacCulloch (2012); Summers (2012); Wardhaugh (2012a); and Whelan (2012b).

[37] See 'Part III: Country Experiences with Law Sanctions' in Cseres et al. (2006a).

[38] See, e.g., Furse (2011).

[39] See, e.g., Calvani and Carl (2013).

[40] See, e.g., Whelan (2012c).

clear, then, that a variety of issues informs the relevant literature and contributes to this particular criminalization debate.

It is submitted that the issues noted above are as pressing now as they were when the relevant literature was first published. Three points can be advanced in support of this assertion. First, as will become apparent below, currently a consensus is lacking on some of the central issues in the debate. In particular, important stakeholders in the process of antitrust criminalization (such as legislators, antitrust officials, and academics) have failed to reach agreement concerning the necessity and appropriateness of personal criminal antitrust sanctions.[41] In the absence of such agreement, continued discussion is likely (not to mention necessary), particularly given the seriousness of the potential consequences facing those cartelists operating within the jurisdiction of any given criminalized antitrust regime. In short, while there is 'general consensus in the US that jail sentences are warranted and effective',[42] the debate in the EU remains 'heated',[43] a fact which underlines the accuracy of Fingleton's contention as far back as 2002 that the criminalization debate then germinating in Europe was likely to be a 'long-term debate'.[44] Second, some EU Member States have already introduced personal criminal sanctions for cartel activity. If the authorities in these jurisdictions are intent on pursuing criminal antitrust cases, it is imperative that they are capable of: (i) justifying the employment of personal criminal punishment; (ii) demonstrating that in imposing such punishment they are respecting the rule of law; and (iii) putting in place the correct practical measures that will ensure that the employment of criminal antitrust punishment actually achieves its aims while maintaining its legitimacy. Whether—and indeed how—these requirements can be fulfilled remains to be conclusively decided; hence continued debate is necessary. Third, as examined directly below, there are a number of deficiencies in the literature which need to be addressed if the relevant authorities are to make informed decisions as to whether to introduce (or to continue to maintain) personal criminal sanctions for cartel activity. Consequently, continued, focused scholarship in this area is required, a fact that helps to underline the value of the contribution represented by this book.

## B. Aim of the Book

It was noted above that the European antitrust criminalization debate is still important as, inter alia, there are gaps to be filled in the literature. In order to comprehend fully the aim of this book, it is necessary to articulate the specifics of these gaps. There are at least three categories of deficiencies in the current literature on the employment within the EU of personal criminal sanctions for cartel activity. The first category contains those deficiencies related to the analysis of the application of justificatory criminal punishment theories to cartel activity. The second category encompasses those deficiencies related to the analysis of the legal restraints facing those who wish to introduce individual criminal antitrust sanctions. The third category corresponds to those deficiencies related to the examination of the practical aspects of a successful policy of European antitrust criminalization.

[41] See Joshua (2011), 132. This lack of consensus has been acknowledged for a long time; see: Bloom (2005), 62; and Lowe (2007), 102.

[42] Klawiter and Driscoll (2009), 77. Admittedly, some US critics have argued that criminal antitrust sanctions may be 'unduly harsh': Cavanagh (2005), 162–3.

[43] Hüschelrath (2010), 528. [44] Fingleton (2003), 310.

The following two points can be made regarding the first category. First, although deterrence theory has been used to construct[45] (and to deconstruct[46]) arguments in favour of European antitrust criminalization, little scholarship has been devoted to the systematic critical analysis of the problematic aspects of employing the theory of deterrence to justify antitrust criminalization. As a result, a number of potential limitations of the application of deterrence theory in this context have not received adequate attention. Examples include the rationality or otherwise of cartelists, the assumption of risk neutrality, and the difficulties associated with securing *efficient* deterrence through personal criminal antitrust sanctions. Second, the relevance and the strength of any plausible alternative arguments in favour of criminalization (i.e. those not built upon deterrence theory) have yet adequately to be tested in the literature. It is sometimes claimed, for example, that cartel activity should be criminalized because it is 'wrong';[47] but more often than not, such statements are not followed by rigorous analysis of the application of criminal punishment theory to the specific case of cartel activity.[48] In order to rectify both of these deficiencies in the literature, one must analyse what can be termed 'the theoretical challenges of antitrust criminalization'.

The following three points can be made regarding the second category of deficiencies. First, a thorough and comprehensive examination of the restraining influence of due process on a project of European antitrust criminalization has yet to be undertaken. Second, this due process-related deficiency in the literature relates to the validity and impact of two contentions, both of which need to be examined if a comprehensive understanding of the restraining influence of due process is to be achieved: (i) that the creation of a criminal antitrust offence necessarily leads to a 'strengthening of rights' in favour of the accused in comparison to the accused's position under an administrative regime; and (ii) that the introduction of criminal antitrust sanctions does not preclude the concurrent imposition of administrative antitrust sanctions for a given cartel. Third, there is little detailed scholarship which specifically focuses on the restraining influence of legal certainty on a project of European antitrust criminalization. In order to rectify the specific deficiencies in this category, one must analyse what can be termed 'the legal challenges of antitrust criminalization'.

The following points can be made about the third category of deficiencies. Real-world examples of failures in the design of the various cartel offences across the EU reflect the relative scarcity of debate concerning the essential practical elements of a European criminal antitrust regime. The UK Cartel Offence was badly drafted in 2002 and a public consultation on the future definition of this offence was recently conducted in an attempt to deal with this issue.[49] Greece recently criminalized cartel activity, but did so without paying close attention to practical implementing measures, and the resultant criminal antitrust regime is considered by antitrust scholars to be less than optimal.[50] By failing to publicize the workings of its criminal antitrust regime, Germany has failed to consolidate public support for its criminal (bid-rigging) offence.[51] Other examples of such failures exist. All of these failures demonstrate that achieving a workable criminal antitrust regime in practice is a far from easy task. Unfortunately, the literature currently

[45] See, e.g.: Wils (2006b); and Wils (2005b).
[46] See, e.g., Spagnolo (2006).
[47] See, e.g., Vickers (2003), 4. For Werden, for example, cartel activity is 'properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm': Werden (2009), 23.
[48] See, e.g., King (2010).
[49] See: BIS (2011), Chapter 6; and BIS (2012), Chapter 7. The final outcome of this process was, inter alia, the adoption of Section 47 of the Enterprise and Regulatory Reform Act 2013.
[50] See, e.g., Brisimi and Ioannidou (2011).
[51] See, e.g., Wagner-von Papp (2011).

provides little in the way of guidance concerning a number of practical issues that need to be considered and resolved by a jurisdiction that wishes to criminalize cartel activity effectively. A number of deficiencies can be detected. First, the potential (negative) impact of Regulation 1/2003 on the actual design and operation of a national criminal cartel offence (and what can be done to reduce the scope for such impact in this context) remains to be articulated in detail. Second, in a process of antitrust criminalization, how one can ensure through legislative drafting that 'acceptable' (i.e. legitimate and/or efficiency-enhancing) cartel activity is not subjected to criminal sanctions is also far from clear. Third, a detailed, systematic analysis that focuses on the practical challenges of leniency/immunity for European antitrust criminalization is also absent from the current literature. In particular, the specifics of the challenge of ensuring peaceful co-existence of both administrative leniency/immunity and criminal cartel sanctions remain to be articulated. Finally, the current literature, while informative to a degree, can nonetheless be criticized for failing to provide a systematic, detailed analysis of the important enforcement strategies that help to ensure that the criminal cartel regime is effective in practice. In order to rectify the specific deficiencies in this category, one must analyse what can be termed 'the practical challenges of antitrust criminalization'.

This book aims to inform the debate at issue by rectifying the identified deficiencies in the current literature. It does so by analysing the theoretical, legal, and practical challenges of European antitrust criminalization. There is a clear need for analysis of these challenges.[52] An examination of the theoretical challenges is advisable in order to determine the obstacles facing those who seek to justify criminal antitrust sanctions in a rational, objective manner as a method of achieving stated predetermined objectives. In other words, it helps to inform the process of justification which should face conscientious, principled legislators. An examination of the legal challenges helps to avoid the creation of a criminal antitrust regime that violates fundamental legal norms. Such an examination helps to prevent the 'short-circuiting' of a given project of antitrust criminalization: it facilitates the introduction and maintenance of a criminal antitrust regime which is legally sound from the outset. An examination of the practical challenges is warranted as such challenges—if unmet—can undermine the effectiveness in practice of a given jurisdiction's effort(s) to achieve the theoretical objectives of antitrust criminalization, even if legalities have been respected. It is not enough to demonstrate the case for criminal cartel sanctions and to explain how criminal punishment can be legally sound; to create a criminal antitrust regime that works in reality, one may need to put in place particular practical measures and make concrete decisions on the content of the criminal cartel offence and on the specifics of the criminal antitrust regime. An understanding of these practical challenges is therefore very important.

In order to understand fully the challenges relevant to European antitrust criminalization, it is not sufficient to consider the above three categories of challenges in isolation. Some of the responses to a given challenge, say the challenge of respecting legalities, may have a potential negative impact on efforts to overcome a different type of challenge, say a theoretical or practical challenge. Accordingly, to present a fuller picture of the complexities of European antitrust criminalization, not only must one understand the specifics of the theoretical, legal, and practical challenges, but one must also determine how choices concerning one challenge may impact upon the specifics of another, separate challenge. To date, the available literature has failed to provide a detailed analysis of this dynamic interaction, a fact which may explain some of the recent failures in criminal enforcement

[52] See, e.g., Harding (2012), 139.

of cartel activity in Europe. In short, then, the interrelationships between the theoretical, legal, and practical challenges are not fully understood. In examining all three types of challenges for antitrust criminalization, as well as their dynamic interaction, this book contributes to the current literature on European antitrust criminalization.

## C. Scope of the Book

As noted above, this book is centred on the theoretical, legal, and practical challenges for European antitrust criminalization. In order to understand fully the scope of this book, however, one should also appreciate both: (a) the definitions of the important terms in this book; and (b) the specific limitations imposed upon that scope.

### (a) Definitions employed

A number of important terms are used throughout this book: 'punishment'; 'sanction'; 'criminal punishment'; 'criminal sanctions'; 'personal criminal sanctions'; 'personal criminal punishment'; 'individual criminal sanctions'; 'individual criminal punishment'; 'corporate criminal sanctions'; 'corporate criminal punishment'; 'antitrust'; and 'cartel activity'. In order to avoid ambiguity, these terms should be expressly defined at the outset.

'Punishment' has traditionally been defined as a composition: (i) involving pain or some other consequences normally considered unpleasant; (ii) for an offence against the legal rules; (iii) imposed on an actual or supposed offender for his offence; (iv) intentionally administered by human beings other than the offender; and (v) imposed by an authority constituted by a legal system against which the offence is committed.[53] This definition is employed in this book. For the purposes of this book, the term 'sanction' is used interchangeably with the term 'punishment'.

The term 'criminal punishment' refers to punishment for an act capable of being followed by criminal proceedings having a criminal outcome.[54] Wils identifies six characteristics of the criminal law which set it apart from other areas of law: (i) the existence of criminal penalties (including imprisonment); (ii) the requirement of criminal intent; (iii) the existence of moral condemnation; (iv) the fact that there is a less strict relationship between penalty and harm; (v) the existence of criminal powers of investigation; and (vi) the existence of criminal rights of defence.[55] The term 'criminal punishment' is used interchangeably with the term 'criminal sanction'.

The term 'personal criminal sanctions' refers to criminal sanctions which are imposed only on natural persons (i.e. individuals), as opposed to corporate entities. For the purposes of this book, it is used interchangeably with the terms 'personal criminal punishment', 'individual criminal sanctions', and 'individual criminal punishment'. The term 'corporate criminal sanctions' refers to criminal sanctions which are imposed only on corporate entities (e.g., firms, undertakings, corporations), as opposed to natural persons; it is used interchangeably with the term 'corporate criminal punishment'.

The term 'antitrust' generally refers to the law and policy developed by a jurisdiction to deal with anticompetitive market behaviour. It encapsulates a number of different

[53] See: Benn (1958); Feinberg (1970), 95; and Hart (1959–60), 4.
[54] Williams (1955). See also Fitzgerald (1960), 259.
[55] Wils (2006b), 61–3. See also Lamond (2007).

branches of enforcement activity, such as those relating to cartel activity, horizontal agreements, vertical distribution agreements, and unilateral conduct. However, when the terms 'antitrust criminalization' and 'criminal antitrust sanctions' are employed in this book—unless another meaning is obvious or specified—they should be taken as referring specifically to one particular branch of antitrust law and policy (viz., that relating to cartel activity) and not any of its other branches.

As noted by Harding, despite its wide usage, the word 'cartel' still 'lacks precise definition' and—depending on the context—can be used to encapsulate: '(a) an agreement; (b) a practice which is the subject-matter of agreement; and (c) a form of organisation to give effect to such an agreement'.[56] That said, the OECD has provided a useful working definition of 'cartel activity' in its 1998 Recommendation; accordingly, one can conceptualize 'cartel activity' as making or implementing:

> an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.[57]

The OECD's definition of 'cartel activity' has a number of important merits: 'clarity and simplicity, while covering what are agreed to be the principal categories of anti-competitive strategy, but also linking the agreement of anti-competitive purpose with its material realisation'.[58] It also limits the definition of 'cartel activity' to agreements, concerted practices, or arrangements that are horizontal in nature, thereby ensuring that their vertical counterparts (which often display efficiency-enhancing properties) are excluded. Such a definition of 'cartel activity' is therefore adopted in this book.[59] Article 101(1) TFEU prohibits

> all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

The prohibition in Article 101(1) TFEU, then, while necessarily more inclusive, nonetheless captures the concept of 'cartel activity' as defined by the OECD.[60]

## (b) Limitations imposed upon the scope

The scope of this book is limited in six distinct ways. First, it focuses on the employment of *personal* criminal sanctions for cartel activity and leaves it for others to examine the specific issues raised by the imposition of *corporate* punishment (whether criminal or administrative) for cartel activity. Second, in the analyses conducted, it is assumed that criminal antitrust punishment necessarily includes the potential imposition of custodial sanctions on individuals. This book, then, does not consider the use of criminal antitrust sanctions where imprisonment is not a potential outcome. Third, its findings are (often) EU-specific, particularly as regards the legalities which must be respected in criminalizing cartel activity. That said, while the focus of this book is indeed on national

[56] Harding (2004), 278. [57] OECD (1998), [2(a)].
[58] Harding (2004), 279. Cf. ICN (2005), 11–12.
[59] To be clear, the terms 'cartel activity' and 'hard-core cartel activity' are used interchangeably in this book, unless the context clearly dictates otherwise. On the use of the term 'hard-core cartel', see: Harding (2011b), 44; and Massey (2012), 153.
[60] For a general overview of the substantive content of EU cartel law, see Whish and Bailey (2012), Chapter 13.

enforcement of EU competition law (specifically the cartel prohibition in Article 101(1) TFEU), its analyses and conclusions may well be of interest to entities in non-European jurisdictions which have recently introduced criminal cartel sanctions, which are in the process of so doing, or which may consider such an approach in the future. Fourth, this book only examines the theoretical, legal, and practical challenges concerning the criminalization of *cartel activity*. Other aspects of antitrust law (such as unilateral behaviour) are not considered. Fifth, this book does not attempt to provide a framework according to which one can determine the actual level (i.e. the severity) of personal criminal punishment which should be imposed in any given (criminal) case involving cartel activity. Finally, this book does not attempt to propose a 'model' criminal antitrust offence (i.e. a statutory offence that can be employed by any EU jurisdiction contemplating the criminalization of cartel activity). The author has left that particular task to the legislators. It is hoped, however, that such legislators will find the analyses contained in this book to be of use.

## D. Methodology Employed in the Book

This book employs the analytical method of research. In order to fully comprehend how this method is utilized in this book, one should understand: (i) the pertinent aspects of the analytical approach adopted concerning the examination of the theoretical, legal, and practical challenges for antitrust criminalization; and (ii) the specific sources which were relied upon in attempting to achieve such an examination.

### (a) Critical analysis of the theoretical, legal, and practical challenges

There are seven important aspects to the analytical approach employed in this book concerning the examination of the theoretical, legal, and practical challenges of antitrust criminalization. First, this book identifies and critically analyses each category of challenges (namely, the theoretical, legal, and practical) separately. Second, the theoretical challenges are considered before the other categories of challenges. Third, the legal challenges are considered before the practical challenges. Fourth, some of the specifics of the approach taken to the theoretical challenges are not relevant to the approaches adopted concerning the legal and practical challenges. Fifth, some of the specifics of the approach taken to the legal challenges are not relevant to the approaches adopted concerning the theoretical and practical challenges. Sixth, some of the specifics of the approach taken to the practical challenges are not relevant to the approaches adopted concerning the theoretical and legal challenges. Finally, any links between the theoretical, legal, and practical challenges analysed are eventually identified in this book.

#### *(i) Each category of challenges is analysed separately*

The first point to note in relation to the approach adopted concerning the identification and analysis of the challenges of antitrust criminalization is that this book considers each category of challenges separately. There are three reasons for this. For a start, there is a conceptual distinction between each of the three categories of challenges under examination: the analysis of the theoretical challenges focuses on the existence or otherwise of a sound *justification* for antitrust criminalization; the analysis of the legal challenges

focuses on the *legalities* restraining the implementation of a project of antitrust criminalization which relies upon such a justification; and the analysis of the practical challenges focuses on the most important *practicalities* which need to be considered and implemented in order to ensure a successful, workable project of antitrust criminalization. Second, as a result of the conceptual differences noted, the research question pertaining to each category of challenges is inevitably unique. Third, the theoretical, legal, and practical challenges raise important yet complicated issues that deserve considerable (and comparable) space in order to be understood and investigated fully. For reasons of clarity and comprehension, then, it is preferable to separate the categories of challenges and devote sufficient space to the consideration of all three types of challenges. This is not to say, however, that the links between the theoretical, legal, and practical challenges will not be investigated where appropriate, as explained below. So, while the theoretical, legal, and practical analyses are separated in this book, they are not necessarily isolated from one another.

### *(ii) Theoretical challenges analysed before legal and practical challenges*

For a number of reasons, the theoretical challenges should be considered first in a book analysing the inherent difficulties associated with the process of antitrust criminalization. For a start, one must first know *why* one is doing something (i.e. introducing criminal antitrust sanctions) before deciding *how* to do it effectively (i.e. introducing criminal antitrust sanctions in a manner that respects legal norms *while nonetheless achieving its objectives*). It is possible that in adhering to the rule of law—without anything more—one undermines to a degree the objectives of the criminal antitrust offence. If this is so, in order to achieve the objectives of the criminal antitrust law one must put certain (practical) measures in place to offset the negative impact. However, without first understanding these objectives, one cannot design such practical measures. Put differently: one cannot come to a conclusion as to whether adhering to the relevant legalities will negative a given project of antitrust criminalization without first understanding what the purpose of such a project could or should be. Furthermore, there may be a number of ways of respecting a given legality (e.g., drafting a criminal antitrust offence in a manner that respects legal certainty); and in such a case a decision will have to be made concerning the approach to be taken concerning this legality. If the approach decided upon is to be consistent with the aim(s) of antitrust criminalization, it is imperative that one first comprehends the actual objectives of the given criminalization project. Considering the actual theoretical justifications for antitrust criminalization before the legal and practical requirements affecting the implementation of those theories is therefore sensible.

### *(iii) Legal challenges analysed before practical challenges*

Following the theoretical challenges, the next challenges to be analysed are the legal challenges. The legal challenges are analysed prior to the practical challenges for two reasons. The first is that any practical measures designed to give effect to the theoretical justifications for antitrust criminalization are inevitably restricted in their application due to the mandatory nature of respecting any identified legalities. In short, the practical measures chosen cannot involve measures which run counter to what is required in order to respect the relevant legalities: the legal challenges may place restrictions on the choices concerning the practical measures that ensure effective criminal cartel enforcement.

Understanding and articulating the relevant legalities prior to determining the practical measures is therefore warranted: it avoids a potential waste of time and resources on creating practical measures that run counter to the specific mandatory legal dictates that are relevant to the process of European antitrust criminalization. Second, analysis of the legal challenges may highlight additional problematic issues regarding the achievement of the underlying objectives of criminal antitrust enforcement. If so, the articulation of the practical measures that can help a jurisdiction to achieve these underlying objectives should consider the extent of any legal challenges. Given this fact, it makes good sense to analyse the legal challenges prior to the practical challenges.

### *(iv) Unique aspects of the approach to theoretical challenges*

Two points are specific to the approach taken in this book concerning the identification and analysis of the theoretical challenges for antitrust criminalization: first, a fundamental assumption is made, namely, that finding a workable justification for European antitrust criminalization is not required in order to proceed to the analysis of legalities and then practicalities; and, second, two distinct processes ('filtration and application') are involved regarding the relevant identification and analysis.

#### 1. A fundamental assumption: finding a workable theoretical justification is not required to proceed to legalities or practicalities

It should be noted here that, irrespective of the points raised directly above, the following argument is rejected in this book: that there is little point in spending time and resources analysing whether and how legalities can be respected and what practical measures need to be employed if it is difficult to place cartel activity within a given criminal justificatory theory. The reason for this should be clear. One can still offer advice concerning legalities and practicalities to those European jurisdictions that wish to criminalize cartel activity for a given reason (e.g., deterrence or retribution), even if there are limitations to their deterrence- or retribution-based argument. At the very least, such advice—if taken—would ensure that their approach to legalities and practicalities does not undermine the objectives they seek to achieve; in other words, their efforts may be less disappointing than would otherwise have been the case. As a result of this attitude, one does not need actually to discover a workable justification for the criminalization of antitrust behaviour in order to proceed to the analyses of legalities and practicalities conducted in this book. Consequently, the part of this book dealing with theoretical challenges does not necessarily set out to argue in favour of antitrust criminalization. Rather, it seeks to identify and analyse the theoretical challenges for antitrust criminalization. The assumption that finding a workable theoretical justification for antitrust criminalization is not required in order to proceed to the analyses of the legal and practical challenges, then, has an observable impact upon the analysis of the theoretical challenges conducted in this book: it ensures that any (problematic) limitations of the application of a given justificatory theory to cartel activity are acknowledged and analysed in detail.

#### 2. Two relevant processes: filtration and application

There are two processes to the identification and analysis of the theoretical challenges for antitrust criminalization: filtration and application. First, the justificatory theories of criminal punishment that are potentially relevant for antitrust criminalization are identified ('filtration'). Second, the potentially relevant criminal punishment theories

are applied to the concept of 'cartel activity' ('application'). By ensuring that irrelevant punishment theories do not form part of the detailed analyses of the process of application, the two-step approach adopted has obvious benefits in terms of efficiency and spatial considerations.

*The process of filtration:* In determining whether a given justificatory theory of criminal punishment is of potential relevance for antitrust criminalization, one can consider at least three factors: (i) whether the objective(s) underlying that justificatory theory is/are consistent with current antitrust enforcement practice; (ii) whether there is consensus in the current academic literature on its potential relevance for antitrust criminalization; and (iii) whether there are a priori reasons to dismiss the theory as an unsuitable justification for the creation of an antitrust regime that imposes the criminal sanction of imprisonment. These factors will be considered when the process of filtration is conducted in this book. As will be demonstrated below, the process of filtration produces two potentially relevant justificatory theories: deterrence and retribution.

*The process of application:* This process is conducted separately for both deterrence and retribution. The approach to deterrence differs somewhat from the approach taken with retribution. With deterrence theory, three steps are taken in the process. The first, preliminary step helps to inform the two steps which follow it: it involves the demonstration that current EU antitrust enforcement efforts aimed at deterring cartel activity are deficient. With the second step, (economic) deterrence theory is employed to present as strong an argument as possible concerning the use of penal criminal antitrust punishment. With the third and final step, the criminalization argument advanced is then critically examined for its (problematic) limitations. The specific problematic limitations identified are deemed collectively to comprise the 'challenge' of deterrence theory for European antitrust criminalization. With retribution theory, two steps are taken in the process. The first, preliminary step again helps to inform the step which follows it: it involves the articulation of a framework which can be used to determine the moral content of cartel activity. The second step, by contrast, employs the framework and examines in the process: (i) the extent to which such activity displays sufficient (negative) moral content to be put forward as a suitable candidate for criminalization if retribution theory is employed as a rationale; and (ii) the limitations and weaknesses of a retribution-based antitrust criminalization argument and, hence, the theoretical challenge of retribution in the context of European antitrust criminalization.

### *(v) Unique aspects of the approach to legal challenges*

Three points are specific to the approach taken concerning the identification and analysis of the legal challenges of antitrust criminalization: first, a preliminary acknowledgement is advanced, namely, that legalities need to be adhered to by any European antitrust criminalization project; second, two particular types of legal challenge represent the substance of the analysis; and, third, for analytical purposes a choice needs to be taken concerning the identity of the 'controlling' legal documents.

#### 1. A preliminary acknowledgement: legalities must be respected

Two justificatory theories of criminal punishment are analysed in this book: deterrence and retribution. As examined below, both of these theories of punishment have specific underlying principles that come into effect once a given justificatory theory is chosen: efficiency in relation to (economic) deterrence, and responsibility and proportionality in relation to retribution. Choosing one of these theoretical foundations for

antitrust criminalization over the other, then, arguably allows one to place a stronger emphasis upon the chosen theory's principle(s) than the principle(s) of the remaining theory. This is not to say, however, that the principle(s) underlying the chosen theoretical justification should in fact be allowed to 'trump' all other relevant principles, values, or concerns: one should not assume that, simply by choosing the theoretical justification for antitrust criminalization, one ipso facto elevates its principle(s) to an unassailable position on the hierarchy of societal values. Indeed, other values will also need to be respected; the punishment theories cannot be applied in a vacuum. This is the case, as it is unquestionable that there are more ideals that are important to us as citizens than simply the prevention of crime or the seeking of retribution. Society is founded upon a plurality of values and principles, including those enshrined in human rights documents. Any proposed criminalization project should take account of this fact. As Packer states in relation to deterrence theory in particular, theories of criminalization have 'to be qualified by other social purposes, prominent among which are the enhancement of freedom and the doing of justice'.[61] To this, one can add two additional purposes: respect for human rights and respect for the rule of law. This book takes account of this reality and therefore analyses the legal challenges that one faces when attempting to create a criminal antitrust regime within the EU.

## 2. Focus of the analysis: two particular types of legal challenge

Two types of legal challenge are deemed to be of central importance and are critically analysed in detail in this book. The first ('due process') concerns the restraining influence on European antitrust criminalization of the minimum level of procedural rights protections which is required across the EU. The second ('legal certainty') relates to the restraining influence of the principle of legal certainty on the concept, substance, and existence (or otherwise) of European antitrust criminalization. While both of the challenges identified are human rights-related, they differ in terms of their focus: one challenge is procedural in perspective (due process), the other is substantive (legal certainty).

A thorough understanding of these two particular legal challenges is important for three reasons. First, the legal requirement to protect the human rights of the accused applies to all of the Member States of the EU due, inter alia, to their respective national constitutions, and international and regional human rights law. In fact, the protection of the human rights of the accused is now widely considered to be an essential element in the judicial system of a democratic regime.[62] Such is the importance currently attributed to human rights that one commentator has even argued (perhaps with a degree of hindsight) that the idea of '[d]emocracy was founded on the primacy of the law and the exercise of human rights'.[63] In any case, a project of European antitrust criminalization that does not respect such rights will certainly violate an essential element of democratic regimes, in the process losing its legitimacy as well as its ability to adhere to the rule of law.

Second, in certain circumstances, the dictates of EU law itself mandate that due process and legal certainty be respected. Specifically, as a result of the EU Charter[64] as well as EU jurisprudence,[65] when Member States are acting within the scope of EU law

[61] Packer (1968), 16. See also Hart (1968), 21–4 and 177–85.

[62] See, e.g., the comments of the Office of the United Nations High Commissioner for Human Rights: <http://www2.ohchr.org/english/issues/rule_of_law/democracy.htm>.

[63] Ramcharan (2008), 80.

[64] Charter of Fundamental Rights of the European Union [2000] OJ C364/1 ('EU Charter' or 'CFR').

[65] Fundamental rights are respected as general principles of EU law. See: Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419, [7]; and Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, [3]–[4]. On this, see: Craig and de Búrca (2011), Chapter 11; and Scheuner (1975).

they are under the obligation to comply with EU requirements concerning the protection of fundamental rights,[66] which includes rights concerning due process and legal certainty.[67] According to the Court of Justice, Member States act within the scope of EU law where they apply Treaty provisions,[68] i.e. any provisions of the Treaty on European Union ('TEU') or of the TFEU. It is important to remember here that for the Member States of the EU, adherence to the dictates of EU law is not optional; they cannot choose whether or not to comply with EU law. In legal terms, EU law is 'supreme' in the constitutional order of each Member State.[69] Accordingly,

> every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.[70]

This doctrine of supremacy therefore also ensures that human rights (including rights concerning due process and legal certainty) must be respected by any EU Member State that attempts to enforce Article 101 TFEU with criminal sanctions.[71]

Finally, respecting due process and legal certainty helps to ensure that a given European jurisdiction is perceived to be legitimate not only by its citizens, but also by other Member States of the Union. This perception of legitimacy is particularly important when cooperation is required between Member States in order to ensure the effective enforcement of criminal antitrust laws. Respecting due process and legal certainty, then, is not only necessary in principle, but also helps to develop effective enforcement in practice.

### 3. Source of the analysis: the 'controlling' legal documents

Acknowledging the fact that legalities must be respected inevitably leads one to consider the specifics of those legalities. In order to determine these specifics, one must first identify their actual source (i.e. the relevant 'controlling' legal documents). As noted directly above, two particular types of legal challenge are examined in this book: (i) the challenge of due process; and (ii) the challenge of legal certainty. The 'controlling' documents to be identified should address both of these types of challenges.

For both of the legal challenges, the 'controlling' document for present purposes is the European Convention on Human Rights,[72] as interpreted by the jurisprudence of the European Court of Human Rights ('ECtHR').[73] This document has been chosen over other (EU/national) sources of human rights, such as the EU Charter or national constitutional provisions, for a number of reasons. First, the aim here is to articulate the impact upon antitrust criminalization provided by the *minimum level* of human rights

[66] See: Article 51(1) CFR; and Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, [18].

[67] See, e.g., EU Charter, Chapter VI.

[68] See, e.g., Case 222/86, *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v. Heylens* [1987] ECR 4097, [14]–[16] (Article 45 TFEU).

[69] See generally: Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125; and Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

[70] Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, [21].

[71] Likewise, any action by the EU institutions must also respect the dictates of EU law; see Article 263 TFEU.

[72] *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14*, Rome, 4.XI.1950 (hereinafter 'the European Convention' or 'the ECHR').

[73] On this, see generally: Mowbray (2012); and Ovey and White (2010).

protections required across the EU. Consequently, the specific requirements of national human rights law—which may or may not be stricter than the minimum European standard[74]—are not considered. Second, EU-level jurisprudence is itself directly inspired to a very large degree by the jurisprudence of the ECtHR.[75] Indeed, the Court of Justice 'has always indicated its willingness to follow the case-law of the ECtHR'.[76] Third, the jurisprudence of the ECtHR is arguably more extensive at present than that offered by the EU Courts, and therefore offers more substance upon which an analysis can be conducted. It should be remembered here that the EU Charter, for example, only achieved full legal effect in December 2009. Fourth, the rulings of the General Court ('GC')[77] and the Court of Justice in relation to antitrust procedures and the protection of human rights in particular concern the operation of a regime which imposes administrative sanctions of a corporate, as opposed to a personal, nature, and are therefore of limited relevance in the context of the imposition of personal criminal sanctions.[78] That said, such EU-level jurisprudence is examined when necessary: for example, to highlight how current (lawful) procedures at EU level would need to be modified if criminal sanctions were to be imposed at that particular level. Finally, the jurisprudence of the ECtHR has become even more relevant lately with the entry into force of the Lisbon Treaty, as at that point a legal obligation for formal EU accession to the European Convention was created.[79]

### *(vi) Unique aspects of the approach to practical challenges*

This book acknowledges that the theoretical and legal challenges cannot be fully appreciated without considering some of the most important practicalities involved in criminalizing cartel activity: a number of practical measures can help one to respond to the theoretical and legal challenges; without analysing these, one cannot come to a firm conclusion on the level of difficulty associated with each of the other types of challenges. Therefore, in conducting its critical analyses, this book not only determines the main problematic issues with European antitrust criminalization presented by the theoretical and legal challenges, but also identifies the chief practical measures which can be used to overcome some of these issues. In doing so, this book demonstrates how the responses to the theoretical and legal challenges identified can have an impact upon the actual specifics of the measures required to ensure that the enforcement regime is effective in practice. The practical challenges, then, are unique, in that they result from the need to respond to the theoretical and legal challenges identified.

Three types of practical challenge are analysed. The first practical challenge is the challenge of defining the criminal cartel offence itself. In this context, it is important to understand the potential (negative) impact of Regulation 1/2003 on the design and operation of a national criminal cartel offence and what can be done to reduce the scope

[74] For a general (albeit not completely up-to-date) overview of the differences in human rights protections across the Member States, see, e.g.: Kortmann et al. (2006); and Prakke and Kortmann (2004).

[75] See, e.g.: Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, [41]; *Opinion 2/94* [1996] ECR I-1759, [33]; and Case C-299/95, *Kremzow v. Austria* [1997] ECR I-2629, [14].

[76] Slater et al. (2008), 3.

[77] Formerly known as the Court of First Instance ('CFI').

[78] On human rights and (administrative) antitrust enforcement, see generally: Ameye (2004); Andreangeli (2008); Andreangeli (2006); Benjamin (2006); and Roth (2006).

[79] See Article 6(2) TEU. See also: Article 59(2) of the ECHR (as amended by Protocol 14, which entered into force on 1 June 2010); and <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>.

for such an impact. In addition, it is also clear that some types of cartel that fit within the OECD definition may in fact be deemed to be 'acceptable' cartels under EU competition law and therefore not subject to a prohibition under Article 101 TFEU. In designing a criminal cartel offence, one should respond to the challenge of dealing effectively with such 'acceptable' cartel activity. Both of these issues for the first practical challenge are considered in this book. The second practical challenge involves articulating and overcoming the unique challenges of criminal immunity for cartelists and responding to the challenge of ensuring peaceful co-existence of both administrative leniency/immunity and criminal cartel sanctions. The final practical challenge involves the identification of important enforcement strategies that help to ensure the criminal cartel regime is effective in practice in achieving its underlying objectives. In responding to each of these unique types of practical challenge, one can draw upon the experiences of other (non-European) jurisdictions which have used criminal sanctions to enforce their cartel laws, chief among which is the US.

#### *(vii) The critical analyses are used to identify potential links between the respective challenges*

It was noted above that this book critically examines each category of challenges for antitrust criminalization separately. These separate examinations form the vast bulk of the substantive analysis presented in this book. However, this book also acknowledges that all three types of challenges may be interrelated. Therefore, after analysing all three types of challenges in detail, this book proceeds to identify any links between all of the challenges analysed. In particular, this book examines: whether the theoretical challenges display any common traits; the extent to which adherence to legalities may create tensions with the theoretical justifications of antitrust criminalization and what (if anything) can be done to reduce such tensions; and the extent to which the theoretical and legal challenges dictate the adoption of certain practical measures (thereby creating additional, *practical* challenges) and whether responding to those practical challenges impacts further upon the theoretical and/or legal challenges. Given that employing antitrust criminalization in order to achieve retribution or deterrence is inherently costly (and, if unsuccessful, brings with it reputational risks for the competition enforcers), the identification of any links between the theoretical, legal, and practical challenges is of considerable importance and should be included in this book.

### (b) Specific sources relied upon in the book

This book relies upon a wide range of sources in order to identify and analyse the theoretical, legal, and practical challenges of antitrust criminalization. These sources include case law, legislation, treaties, explanatory memoranda, peer-reviewed articles, government reports, parliamentary debates, speeches, theses, books, chapters, conference papers, presentations, conference discussions, essays, editorials, survey data, newspapers, and even video posts on YouTube. Almost all of these sources are in the English language; a limited number of French articles represent the exceptions. The majority of the sources were found by searching through, inter alia, the Social Science Research Network ('SSRN'), Westlaw UK, JustCite, HeinOnline, Lexis Library, Lawtel, Practical Law Company, British and Irish Legal Information Institute ('BAILII'), and Google Scholar. The websites of the many different antitrust authorities and antitrust organizations and think tanks were also useful for research purposes.

However, not all of the sources are antitrust-specific. In fact, some of the originality of this book consists in applying general criminal scholarship to the specific case of cartel activity. Likewise, not all of the sources are Europe-specific. Indeed, while EU Member States like the UK and Ireland provide excellent case studies concerning the employment of criminal cartel sanctions, other non-European states, such as the US, Australia, and New Zealand, also provide a growing source of scholarship in this area. Furthermore, not all of the sources are 'legal' sources. Actually, a number of different disciplines help to inform the analyses undertaken, including economics, criminology, and statistics. These sources, then, help to provide a degree of interdisciplinarity to the research.

Empirical and non-empirical sources were consulted. The empirical sources were particularly helpful in analysing the size (and impracticality) of an optimal cartel fine, as well the degree of social harm due to cartels—measurements which are of considerable relevance to the theoretical challenges of deterrence and retribution. The author himself did not conduct empirical research, surveys, or interviews. However, a number of informal conversations with leading antitrust scholars, practitioners, and officials helped to focus and refine the research. This is not to concede that further empirical evidence would not have facilitated a deeper understanding of the (theoretical) challenges for antitrust criminalization. In fact, as noted in some of the chapters below, robust empirical evidence is currently lacking concerning important issues in the European antitrust criminalization debate.

## E. Structure and Layout of the Book

This book is divided into three substantive parts. Part I deals with the theoretical challenges of European antitrust criminalization; Part II deals with the legal challenges; and Part III deals with the practical challenges. Each part comprises three chapters. Part I includes Chapters 2, 3, and 4. Part II contains Chapters 5, 6, and 7. Part III is composed of Chapters 8, 9, and 10. A final, concluding chapter (Chapter 11) 'links' the findings in Parts I, II, and III.

### (a) Part I: theoretical challenges

Chapter 2 concerns itself with the process of 'filtration' noted above in the section on methodology. This chapter presents two different *criminal punishment theories* which are potentially relevant to the European antitrust criminalization debate: deterrence and retribution. It details the inherent (general) limitations of these theories and provides an insight into the extent to which their objectives are already pursued by EU antitrust enforcement policy. By doing so, it provides sufficient context to enable one to appreciate the arguments raised in the two remaining chapters of Part I.

Chapter 3 represents the first treatment of the process of 'application' noted above. This chapter focuses on the criminal punishment theory of *deterrence*. It considers the extent to which deterrence theory can be used to justify the imposition of personal criminal antitrust sanctions, as well as the specific limitations (and thereby the main theoretical challenge) of any deterrence-based antitrust criminalization argument.

Chapter 4 represents the second (and final) treatment of the process of 'application' noted above. This chapter focuses on the criminal punishment theory of *retribution*. It considers the extent to which retribution theory can be used to justify the imposition of

personal criminal antitrust sanctions, as well as the specific limitations (and thereby the main theoretical challenge) of a retribution-based antitrust criminalization argument.

### (b) Part II: legal challenges

Chapters 5 and 6 both examine the first type of human rights-based legal challenge noted above in the section on methodology: protecting the due process rights of the accused in the context of European antitrust criminalization. In considering this *procedural aspect* of the human rights-related legal challenge to European antitrust criminalization, Chapters 5 and 6 consider respectively the validity and impact of the following two contentions in the European antitrust criminalization debate: (i) that the introduction of criminal antitrust sanctions, including imprisonment, results in a 'strengthening of rights' in favour of the accused; and (ii) that the introduction of criminal antitrust sanctions in a particular jurisdiction does not preclude the imposition of civil/administrative sanctions alongside criminal sanctions for a given cartel. In doing so, these two chapters present analyses concerning a number of different procedural issues that are of relevance to the European antitrust criminalization debate, such as: the standard of proof; the right to silence; the division of functions; the exchange of information; double jeopardy; and concurrent proceedings.

By contrast, in considering the *substantive aspect* of the human rights-related legal challenge to European antitrust criminalization, Chapter 7 focuses on the impact in this context of the principle of legal certainty. In doing so, this chapter presents analyses concerning: legal certainty and the concept of a criminal antitrust offence; legal certainty and the definition of a criminal antitrust offence; and legal certainty and the existence of a criminal antitrust offence (i.e. the awakening of so-called 'sleeping giants' in the laws of the Member States).

### (c) Part III: practical challenges

Chapter 8 analyses what is deemed in this book to be the 'first (practical) challenge of design' for European antitrust criminalization: defining the criminal cartel offence itself. In particular, it focuses on two issues: (i) the potential (negative) impact of Regulation 1/2003 on the design and operation of a national criminal cartel offence and what can be done to reduce the scope for such impact in this context; and (ii) how the issue of 'acceptable' cartel activity can be dealt with in the context of European antitrust criminalization.

Chapter 9, by contrast, focuses on what is deemed in this book to be the 'second challenge of design' for European antitrust criminalization: articulating and overcoming the unique challenges of criminal immunity for cartelists and responding to the challenge of ensuring peaceful co-existence of both administrative leniency/immunity and criminal cartel sanctions. In particular, it considers the potential for the existence of criminal cartel sanctions to have a negative impact upon administrative leniency/immunity policies and whether any mechanisms (such as a criminal immunity policy) can be put in place to counteract any negative effects. In addition, it considers the challenges that are specific to the use of a criminal immunity policy to secure successful cartel prosecutions.

Chapter 10, for its part, examines what is here termed the 'third (practical) challenge of design' for European antitrust criminalization: the identification of important enforcement strategies that help to ensure that the criminal cartel regime is effective in practice. In doing so, it: (i) explains the importance of creating and fostering political

and public support for the criminal cartel regime; (ii) analyses the strategic issue of ensuring sufficient support in practice from important stakeholders (the general public, potential jury members, and the judiciary) in the cartel criminalization project; (iii) critiques the strategic issue of which entity/entities should exercise the investigative and/or prosecutorial functions in a criminal cartel regime; and (iv) considers the importance of international cooperation for those criminalized regimes that are serious about tackling the most harmful cartels, the difficulties engendered in this context by criminal antitrust enforcement, as well as strategies that can be adopted in order to overcome these difficulties.

### (d) The concluding chapter: linking the theoretical, legal, and practical challenges

The concluding chapter of this book, Chapter 11, provides final remarks on the theoretical, legal, and practical challenges of European antitrust criminalization. In doing so, it highlights the difficulties presented by all three types of challenges. Importantly, however, it also: (i) emphasizes the potential 'points of contact' between the two theoretical challenges identified; (ii) underlines the extent to which the legal challenges further complicate the theoretical challenges under examination; and (iii) articulates any additional links between the theoretical and legal challenges and the practical challenges. It clarifies, in other words, the extent to which the theoretical, legal, and practical challenges are interrelated. It demonstrates that the theoretical, legal, and practical challenges of European antitrust criminalization cannot be analysed in isolation and that a dynamic relationship exists between all three types of challenges. Suggestions for future research in this area are also advanced in that final chapter.