

ARTÍCULOS

Towards a mixed approach to justify cartel criminalisation: The particular Chilean experience

*Un enfoque mixto para justificar la penalización de la colusión:
La experiencia particular de Chile*

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ABSTRACT This essay explores the justifications for criminalisation of cartels, both from a retributivist and deterrence-oriented point of view. For those purposes, we theoretically conceptualise the figure of cartels and of criminalisation, analyzing the reasons behind the aims sought by penalising this anticompetitive practice. We further analyze the two classical theories of punishment —just deserts or retributivism, and deterrence or utilitarianism— and the effectiveness of the different possible sanctions before analysing Chile’s particular situation in the context of this discussion. Historically, cartels were penalised from the introduction of this anticompetitive practice, only to be decriminalised in the first decade of the 2000s, period incidentally followed by the highest-profile cartel cases in Chile so far, which led to the reinstatement of the criminal sanction for cartels. We focus on how the legislative discussion for this reinstatement provides an insight of the impact that cartel cases inflicted on the Chilean society, and how, despite the fact that the framework of the legislative discussion was mainly focused on deterrence as the objective sought by the criminalisation, retributivist or just deserts connotations of the discussion are useful to infer a mixed approach in what came to be the actual configuration of the criminal figure of the cartel in Chile, which has not been applied to this day, almost a decade after its reinstatement.

KEYWORDS Cartels, punishment theories, retributive justice, deterrence, collusion.

RESUMEN Este ensayo explora las justificaciones detrás de la criminalización de los carteles, desde el punto de vista del fin tanto retributivo como disuasorio de la pena. Con este objetivo en la mira, conceptualizamos teóricamente la figura de los carteles y de la criminalización, analizando los fines que se buscan al penalizar esta práctica anticompetitiva. Analizamos las dos teorías clásicas de la pena —fin retributivo y disuasivo o utilitarista— y la efectividad que pueden tener las distintas sanciones aplicables, antes de examinar la situación particular de Chile en el contexto de esta discusión. Histó-

ricamente, los carteles fueron una figura penal desde la introducción de esta práctica anticompetitiva, solo para perder su calidad de delito en la primera década de los 2000, periodo que fue precisamente testigo de los casos más mediáticos de carteles en Chile a la fecha, lo que llevó a la reinstauración de la sanción penal de estos. Nuestro análisis se centrará en cómo la discusión legislativa que dio origen a esta reinstauración del cartel como delito proporciona luces sobre el impacto que causaron los casos emblemáticos de carteles en la sociedad chilena, y cómo, a pesar de que el foco de la discusión legislativa estaba orientado a la disuasión como el objetivo buscado con la penalización, connotaciones de índole moral y del fin retributivo de la pena que fueron parte de la discusión son útiles para inferir un enfoque mixto en lo que pasó a ser la actual configuración de la figura penal de la colusión en Chile, la cual no ha sido aplicada a la fecha, casi una década después de su reinstauración.

PALABRAS CLAVE Carteles, teorías de la pena, justicia retributiva, disuasión, colusión.

Introduction

In Spanish, the primary and most common use for the word *cartel* is as a “poster with inscriptions or figures that are displayed with informative or advertising ends”, according to the Real Academia Española. Thus, as a synonym for a sign, poster, or billboard, it is a physical display of an image or message. However, it is also used to describe, as in the English language, illicit organisations related to the traffic of drugs and weapons; and, in the business sector, the agreement between competitors on a certain market to engage in conducts such as fixing prices, limiting production or output, assigning market quotas, bid-rigging, among other anticompetitive agreements.

In a way, when evaluating the presence of business cartels in certain economies, and the treatment given to said anticompetitive agreements, both its presence and its consequential treatment tend to constitute a “sign” of the society itself. Specifically, of how tolerant or reactive it is towards said practices, via its laws or by the people’s reactions to them. Whereas some types of white-collar or corporate crimes are recognised by jurisdictions worldwide, there has been an intense discussion in the literature regarding, in the first place, the reasons that might justify a criminal response to cartels as the most harmful antitrust practice for both consumers and the market; and second, regarding the question of how to effectively punish said conducts from the spectrum of available options, being imprisonment the most severe of them.

Although there appears to be a global trend in support of criminalisation of cartels, it remains crucial for each jurisdiction to properly assess its particular circumstances, as opposed to merely extrapolating comparative experiences that might not always be transferrable to a specific jurisdiction. In this regard, the case of Chile is

an interesting example to analyze, both from an antitrust and criminological perspective, serving as an example to similar-sized economies that are considering the criminalisation of cartels or have recently adopted such a policy.

Chile criminalised agreements that limit competition since the origin of its competition legislation in 1959 (Aydin, 2020: 177). However, the lawmakers considered that this criminal figure was redundant since it was never used, thus it was later derogated as a crime in 2003 by Law 19.911, only to be later reinstated by legislative reform, Law 20.945 in 2016. Furthermore, it was highly supported by all sides of the political spectrum and the public, possibly as a response to a sequence of hardcore cartels which impacted and resonated with the population by fixing prices on basic goods such as medications, poultry, and toilet paper, activities that took place precisely during the period in which cartels were no longer criminalised. The legislative debate of this last reform that reinstated the criminal figure of cartels gives an interesting perspective on the high support for imprisonment as the proper response to cartel conducts, as well as a tacit moral condemnation and a search for retributivism that complements the primary goal of deterrence as the main justification for punishing cartels.

The scope of our theoretical analysis will be placed in the two main arguments held in literature to justify punishment in general—and imprisonment in particular— towards cartels, that is, deterrence and retributivism; and whether a mixed approach or combination of the two is desirable, or even possible, as well as further challenges that such an approach might bring. Consequently, we shall analyze the Chilean evolution of the legal treatment towards cartels and assess the factors that hint at the mixed approach it has developed in the latest legal reforms that cartel regulation has undergone. Finally, we shall make a critical analysis of the challenges faced by the Chilean authorities in order to convict under the current legal system of criminalisation of cartels.

Criminalisation of cartels: Theoretical analysis and overview

Conceptual framework

The elusive concept of cartel

The OECD definition for (hardcore) cartels refers to all “anti-competitive agreements or practices between competitors that aim to fix and raise prices, restrict supply and divide or share markets, thereby causing substantial economic harm” (OECD, 2022). It is characterised by the same entity as “the most egregious violation of competition law” (OECD, 2022) and has been similarly conceptualised as “cancer” (Monti, 2000) and “the supreme evil of antitrust.”¹

1. *Verizon Communications v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004).

The exact and precise meaning of the concept remains to this day elusive according to some authors,² yet “its current usage has become predominantly sinister in tone” (Harding, 2006: 183) and has acquired a “pejorative connotation” (Harding, 2006: 183), especially given the fact that it is a term shared by criminal organisations that traffic guns or drugs.³ According to Harding (2006: 183), “in the context of competition policy and antitrust law, the term has now come to represent the more delinquent end of the spectrum of anti-competitive activity and is commonly coupled with the adjective “hardcore” for this purpose”. The same author years later has brought this point even further by stating that until there is a common ground regarding the definition of cartels and cartelists, the discussion regarding the level of usefulness of the measures employed is bound to take place in an “intellectual muddiness” (Harding, 2011: 364). In the same vein, Dunne (2020: 376) has noted that “a precise and exhaustive definition is arguably impossible in light of the wide (and ever-evolving) range of behaviours that the cartel concept must cover”, and that most antitrust lawyers would claim to know a cartel when they see it.

For our purposes, we will employ Dunne’s (2020: 400) suggested four-pronged definition, according to which:

- i) Cartels comprise forms of horizontal collusion, ii) which restrict fundamental parameters of competition, iii) involving purely private profit-maximizing behaviour, and iv) which almost invariably include some form of deliberate secrecy and/or deception on the part of participants.

Cartels and “hard core” cartels will be used indistinctly, and later in the essay will be conceptualised as per the Chilean legal definition, which provides a non-exhaustive list of the collusive conducts that are criminally sanctioned.

Characterising the concept of criminalisation

As for criminalisation, instead of a definition, we will follow Wils’ (2005: 118-119). characteristics displayed by criminal law that make it different from administrative, civil or public law enforcement. In that sense, the criminalisation of conduct requires:

- Criminal penalties: in this regard, imprisonment is exclusively a criminal sanction, as opposed to fines, which can also be used as an administrative penalty. Furthermore, imprisonment can only be applied to individuals, whereas fines can also be imposed on entities.

2. See Dunne (2020: 376); Harding (2006: 183); Joshua (2011: 133).

3. For the purpose of this essay, cartel is used only in the context of anti-trust.

- Criminal intent: that is, the conduct is not a result of mere negligence but was committed with guilt.
- Moral condemnation: or the stigma effect that is carried by the criminal sanction, which, according to Wils, relates to the fact that criminal enforcement achieves a “stronger message-sending role or expressive function” when compared with enforcement of a civil or administrative nature.
- Less strict relationship between penalty and harm: that is, a certain disconnection from the external costs of the conduct, and a higher focus on banning the conduct itself.
- Criminal powers of investigation.
- Criminal rights of defense: with standards that differ from civil or administrative procedures in the sense of including procedural protections, a separation between the investigation and prosecution, and a higher standard of proof, amongst other differences.

With these features in mind, we will address the concept of criminalisation of cartels as a type of enforcement that differs from the mere civil or administrative treatment of collusion. As we will see later on, the element of moral condemnation is not an automatic nor obvious response towards the figure of cartels. The latter, especially if the transition from an administrative conduct towards a criminal figure—or a simultaneous treatment as a conduct with both administrative and penal consequences, as in the Chilean case—has taken place recently, and accordingly, there is no popular knowledge or acceptance of a cartel receiving the same treatment as other types of corporate or white-collar crime, or crimes against property.

The question of “why”: What justifications have been used to criminalise cartels?

The debate on cartel criminalisation integrates the realms of criminal law and competition law. The construction of the criminal figure of collusion takes place over the preconceived concept of illicit conduct, namely the distinction between *per se* or “rule of reason” anti-competitive conduct in the US,⁴ and anti-competitive “by object” or “by effect” in the case of the EU.⁵ Cartels are considered to be *per se* anti-competitive in the US, but anti-competitive “by object” in the EU (Dunne, 2020: 377-378). The reason for this is that such an agreement “constitutes an immediate and direct interference with the free play of market forces and thus presents an almost existential challenge to the free market philosophy that underpins the antitrust system” (Dunne, 2020: 378).

4. Section 1 of the Sherman Act (1890).

5. Article 101(1) of the Treaty on the Functioning of the EU.

In Chile, cartels are considered to be *per se* prohibited by most of the literature and jurisprudence (García, 2021: 7 and 23). Furthermore, the criminal figure of cartels has been constructed, according to García (2021: 23), as an accessory to the administrative figure of cartels. Other authors have stated that we currently have a combined or joint system of protection of competition, being the previous competition —administrative— law the general rule, and criminal law an “additional reaction towards the conducts that the legislative power considers of the utmost severity, namely ‘hardcore cartels’” (Artaza, Belmonte and Acevedo, 2018: 550).

This treatment of cartels as being always an anti-competitive conduct may explain why it has been considered, from a criminal law point of view, as a conduct that is prohibited regardless of its actual materialisation⁶ —also known as a conduct crime— and without the need for economic harm to have been inflicted on consumers or competitors. As Dunne points out:

Criminalization goes hand in hand with the automatic and unqualified condemnation of cartel behaviour, moreover, marking such conduct for heightened moral censure over and above the private and administrative law penalties that attach to other antitrust violations (2020: 378).

Furthermore, the intersection of competition and criminal law in the treatment of cartels also “invokes the classic debate about the legitimate scope and functions of criminal law and the contest between those who regard it as necessary that offenses have some ‘moral’ content and those who are prepared to settle for a consequentialist or effects-driven model” (Beaton-Wells and Ezrachi, 2011: 6), being deterrence the main consequentialist theory applied to the anti-cartel enforcement discussion.⁷ We will focus on this debate in sections later in this article.

However, it is important to point out that cartel criminalisation is a relatively recent phenomenon. Before the decade of the 1970s, in Europe, cartels “were not categorically bad or clearly illegal, and so were more visible and their extent and operation was more easily ascertainable” (Harding, 2011: 376) or, as Baker (2009: 159)

6. In Chile, according to Artaza, Belmonte, and Acevedo (2018: 554), “the only thing requested by our jurisprudence is that the agreement reached is able to produce an effect that is against competition, at least potentially”.

7. This is because, as Whelan (2013: 537) points out, some theories of punishment have a better role to play in anti-cartel enforcement than others. Hence, both rehabilitation and incapacitation as explanations for imprisonment, while being also consequentialist, are less appropriate according to this author since: i) rehabilitation “is of limited relevance when one is considering the punishment of educated corporate decision-makers who are capable, one assumes, of learning from their mistakes”; and ii) incapacitation “is inappropriate as we do not wish to put cartelists (who, their cartel activity notwithstanding, are usually productive, law-abiding members of society) behind bars merely to prevent them from being physically able to cartelize again in future” and there are other, less costly alternatives to attain that goal.

puts it, they were “assumed to be a way of life”. According to (Harding, 2011: 361), the change of attitude regarding cartels in the past decades has been radical from a normative standpoint, whereas they do not seem to have changed much in their economic role. From a normative perspective, however, there seems to be a transition from the view of cartels as a regulatory problem towards an increasing level of involvement of criminal law in the cartel legal landscape.

According to Parker, part of the case that has been made for criminalisation of cartels relies on the “plethora of papers that theoretically model decision-making about cartel behaviour from an economic perspective” (Parker, 2011: 242). Yet, she warns that empirical evidence is mainly from the US and there is a danger in inferring the impact of criminalisation in jurisdictions with different legal and business culture backgrounds, not to mention the different levels of comparative experience and available resources to deal with business regulation Parker (2011: 243).

In the same vein, as Shaffer, Nesbitt, and Weber (2015: 3) point out, a great part of the global criminalisation trend⁸ regarding cartels, led by the US⁹ and promoted by the OECD,¹⁰ seems to be a product of transnational enforcement interests more than of domestic bottom-up processes. Consequently, while it might be still too soon to reach conclusions about the effectiveness of anti-cartel enforcement via criminalisation and imprisonment, some jurisdictions might have adopted a that approach without taking the time to channel their own population’s view on the matter, but by merely abiding by the OECD recommendations and following the example of the US.

Before analyzing two of the main arguments present in the literature to justify cartels, it is necessary to point out two issues that appear to be, up to this moment, inevitable when this anti-competitive conduct is penalised regardless of its justifications and/or the pursued aim. These two unsought effects that come from criminalisation of cartels are, firstly, the increasing level of secrecy and surreptitious character of the conduct itself, being even possible that cartelists in time begin to adopt the *modus operandi* of other criminal organizations. On the other hand, wrongdoers might begin using technological advances to incur in forms of tacit collusion without having to be explicitly part of an unlawful agreement (Ginsburg and Cheng, 2019: 12). In such cases, imprisonment and moral censure by the public would make of criminalisation rather more like a self-fulfilling prophecy rather than an effective anti-cartel policy (Parker, 2011: 259).

8. These authors have stated that “countries in every region of the world, including virtually all of the world’s leading economies, have significantly enhanced sanctions and, in a growing number of cases, criminalized cartel offenses, often only recently” (Shaffer, Nesbitt and Weber, 2015: 28).

9. Indeed, as Maher (2015: 555) has stated, the US experience has been “held up as a model to emulate in order to secure optimal deterrence”.

10. See, for instance, OECD (2022).

The second non-sought issue —connected with the decrease in cartels’ visibility— is the consequential problem of the difficulty in assessing the overall number of cartels, or their stability (Ghosal and Sokol, 2016: 408). This challenge impedes a proper assessment of the effectiveness of the measures taken to tackle cartels in the first place and forces both policymakers and competition authorities to come up with the most effective mechanisms by dealing with possibly just the “tip of the iceberg” (Harding, 2011: 361). One of the paradoxical difficulties regarding cartel detection is precisely the “black box” effect caused by its secrecy, which leads to a good news-bad news scenario, as Harrington (2018: 335) cleverly puts it: “The good news is that competition authorities are regularly detecting and convicting cartels. The bad news is that competition authorities are regularly detecting and convicting cartels”.

These unsought consequences of criminalisation need to be kept in mind when analyzing the appropriateness or lack thereof of deterrence and retributivist or moral reasons that have been held to justify the criminalisation of cartels and may provide a useful insight to further adjust or calibrate a policy to tackle cartels. Accordingly, as Whelan (2013: 538) points out, these two theories of punishment merely inform the normative framework and, as such, their effect on said framework is merely potential. It is also relevant that the logic behind these theories has a resonance on the population, in order to attain their consequential support of the normative framework applied towards cartels within the particular jurisdiction.

The deterrent aspect of cartel criminalisation: A tool to be handled with care

On broad penal terms, deterrence can be conceptualised as “discouraging reoffending or offending by hitherto law-abiding citizens, through fear of potential punishment” (Hudson, 2003: 19). This concept will be used throughout this essay including both individual and general deterrence, that is, “deterring someone who has offended from offending again, and deterring potential offenders from offending at all” (Hudson, 2003: 19), respectively.

Baker mentions three elements that are necessary for an effective system based on deterrence in the context of business cartels, which are (Baker, 2011: 35): i) clear rules, that allow actors to “understand the difference between right and wrong”; ii) believing on the reasonable possibility of being caught, with likely grave consequences if that should happen; and iii) a frequent and highly visible level of enforcement. Regarding the latter, the author mentions that the case of the US —usually approached in the literature as the quintessential example of criminal enforcement towards cartels, with a high level of incarceration— responds to a level of enforcement that has included imprisonment for almost a century. This scenario differs from jurisdictions that have only recently criminalised cartels in general or some of their forms. If, on the other hand, prosecutions are scarce and infrequent “as to appear more like ran-

dom lightning strikes or prosecutorial vendettas”, the level of deterrence sought by criminalisation is not likely to hold up the test of time.

In the context of competition law, most of the arguments in favour of criminalising cartels are based on this consequentialist or utilitarian, that is, forward-looking vision of punishment that “finds its roots in the classic utilitarian argument that suffering is a pain that should be avoided and that, as a result, punishment, itself a form of suffering, could not be justified unless a specific social benefit or utility can be derived from its imposition” (Whelan, 2007: 10 and 535).

This justification for criminalisation of cartels has the general benefit of setting proportionality between the offense and the sanction, that is, setting the specific *quantum* for an effective penalty based on economic theory, which is an ability that its retributivist counterpart lacks (Whelan, 2007: 14).

However, deterrence theories in the context of anti-cartel enforcement are also based on widely accepted assumptions that are not always empirically supported, such as that individuals make “rational, self-interested, and considered decisions to form or join cartels” (Parker, 2011: 241) and, as such, will always weigh the possible profits against the chance of being prosecuted and convicted, as well as the type of sanction applicable such as the payment of a fine and/or imprisonment.¹¹

However, as Parker (2011: 249) points out, “individual personalities, levels of emotionality, and senses of moral obligation to obey the law each play a part in how individuals perceive the costs and gains of non-compliance”. While companies and decision-making executives are prone to analyze and weigh the calculations of costs against profits¹² when deciding how to operate their business, it can be argued that they do so under the influence of their subjective perception of those costs and profits, more so than the objective data and projections (Parker, 2011: 249). Still, while some believe that in the context of economic crime, it is at least more likely for executives to make a cost-benefit analysis of their conduct than the everyday citizen who is not directly involved in the business world, it remains a contested view in the literature (Whelan, 2007: 17).¹³

Overall, considering its faults and virtues, the importance of deterrence in the context of anti-cartel enforcement policies and the literature is neither to be undervalued, nor idealised, especially when a level of full deterrence is impossible to

11. The effectiveness of fines is outside the scope of this essay. For an analysis of the impact of fines on deterrence against cartels, see, for instance, Connor (2006) and Van den Bergh (2017: 399).

12. Profits, however, as Parker points out, might not be just financial but can rather include emotional and social rewards. As for financial rewards, they might also include indirect financial rewards, such as bonuses or promotions. Furthermore, the main motivation might not be profits at all, but the company's very survival. See Parker (2011: 252).

13. See, for instance, Stucke (2011: 287).

achieve. As Van den Bergh (2017: 397) notes, “not only will companies constantly find new creative ways to obstruct the detection of illegal conspiracies; prevention of all cartel agreements is simply too costly”.

An empirical investigation, not to mention the analysis of its effects and implementation in jurisdictions that have criminalised cartels, acquires a new level of importance as time goes by since the establishment of this policy and more information can be thus gathered. Additionally, as we will see later on, it might be useful to define the criminal offense of collusion according to not only deterrence-oriented theories but also as a reflection of the popular perception of the moral condemnation —if present— that a cartel deserves.

The retributivist aspect of cartel criminalisation: Does the question of morality have a role to play?

Unlike deterrent-oriented theories, which are forward-looking and consequentialist aiming to prevent future crime, retributivist theories of punishment are backward-looking and hold as their two key elements that,

punishment should be in return for crimes past rather than in anticipation of crimes future; and that the punishment should be suitable for the crime —the severity of punishment should be commensurate to the seriousness of the crime for which it is inflicted (Hudson, 2003: 38).

Being cartels widely accepted as more serious and harmful than other anti-competitive conducts, this second element would consequently lead to cartels meriting more serious sanctions (Massey and Cooke, 2011: 111). The focus of punishment is, thus, placed not on the prevention of future crime but rather on the offender who is responsible for his or her actions, and “must therefore receive what he deserves when he has made what society deems are wrong choices” (Whelan, 2007: 8).

Modern theories of retributivism have adopted elements such as the communicative element of punishment and restoration of social balance “by neutralising an unfair advantage secured by a non-compliant citizen in his breach of the law” (Whelan, 2007: 9). This second position does not apply to all types of crime but can very well be applied in the profit-oriented criminal figure of collusion.

As for the communicative element of punishment, the stigma effect carried by criminal enforcement in the anti-cartel context displays a stronger message-sending function than mere administrative or civil enforcement (Wils, 2008: 157). Thus, it could be argued that the moral element that comes from punishing or asserting a credible threat of punishment, serves as a warning signal to law-abiding citizens and onlookers, hence strengthening their moral commitment to the law (Wils, 2008: 185).

As Whelan points out, retributivism by itself is capable of justifying moral condemnation for a certain conduct but it has difficulty explaining “why such reprobation should translate into penal hard treatment” (2007: 14). This observation acquires an additional difficulty when assessing the level of actual moral condemnation that occurs against cartels in each jurisdiction. In this sense, authors like Harding have noted that “there appears to be (at least outside North America) no strong feeling on the part of the wider public about the inherent criminality of price fixing and like practices” (2006: 197). In turn, the lack of condemnation can be reflected in both the legal profession and the judicial system which might not involve efforts in prosecuting. Therefore, indications of reluctance or avoidance to use criminal proceedings might be a signal that shows a sense of doubt or uncertainty regarding the level of moral offending or the harm caused by the cartel’s conduct (Harding, 2006: 194). Harding (2006: 197) further warns that efforts by competition authorities might be more invested in convincing the public of the level of criminality of cartels rather than showing evidence of the inherent criminality of the conduct.

An explanation of the different levels of moral condemnation between jurisdictions can be multi-pronged. In the case of the US, arguably one of the countries where the strongest support for criminalisation of cartels can be found, it might find its reasons, as Stephan points out, in “a stronger tradition of pursuing corporate crime; an affinity between the free market and national identity; and a historically small public sector with minimal interference by the State in the functioning markets” (2011: 382). Therefore, moral condemnation towards cartels appears to be deeply embedded in the jurisdiction’s core features and popular reaction towards white-collar crime, but that is not the general case when assessing the experience of other countries that have criminalised cartels.¹⁴

The reasons for a softer reaction towards cartels might include the consideration of criminal law as a last resource, reserved for the most harmful illegal conduct (Stephan, 2011: 383); a less intuitive sense of moral boundaries when compared to violent offenses which pose a threat to more basic rights —autonomy of the body or survival— (Williams, 2011: 299); a certain admiration towards these business acumen, who despite their anti-competitive conducts do play a role in society and might even be considered to be outstanding citizens; or even the “wrongful perception that it is a victimless crime, ignoring the fact that cartels harm consumers by rising prices” (Massey and Cooke, 2011: 112). However, as Van den Bergh notes, the harm caused by anti-trust infringements is difficult to assess, since “it does not simply equal the consumer surplus transferred to the producer but also consists of the additional loss of consumer welfare (deadweight loss), the harm in terms of productive and dynamic efficiencies as well as the costs of the rent-seeking efforts” (2017: 399).

14. See, for instance, Stephan (2011: 383).

Either for strong or weak levels of condemnation of cartels, some authors have pointed out the key role that media can play in informing the population. Thus, the way media portrays cartel cases “will influence how those practices are perceived by the public at large and even the amount of attention given to them by policymakers” (Stephan, 2011: 384), which in part explains, as we will see later on, the Chilean change of attitude regarding cartel criminalisation.

As with deterrence-based theories, a retributionist perspective poses its challenges and is arguably insufficient in order to justify criminalisation of cartels, or criminal punishment in general, on its own.

Towards a mixed approach

While many authors advocate for a deterrence-based approach without mentioning nor attempting to include retributivism or just deserts theory in the equation, a certain call for introducing some moral elements in the discussion of cartel criminalisation can be found in the literature. For example, Parker (2011: 259) warns about the danger of a mere utilitarian choice to criminalise cartels, which might lead to a slippery slope of overcriminalisation and the consequential difficulty of where to draw the line if businesses begin engaging in alternative behaviours that fall outside the scope of criminal prohibitions but end up having the same anti-competitive result than a cartel.¹⁵ A solution to this potential problem could be including a moral element that acts as an anchor to mark which conduct is being penalised.

Stucke (2011) on the other hand, points out the possibility of executives refraining from price fixing due to ethical concerns, for fear of social stigma or being disapproved by their peers or other “informal norms”. Hence the challenge for policymakers should be to accentuate the immoral and unethical elements of collusion (Stucke, 2011: 287). Therefore, wherever the risk of penalties fails to deter, there is still some room for social stigma to do the trick, but it should be sufficiently strong for that to effectively happen (Stephan, 2011: 384).

Whelan (2007: 18) proposes a mixed approach with the use of deterrence as the main justification for punishment in anti-trust law. The main reasons for deterrence are aiming at the seemingly lessened perception of immorality amongst the population in certain jurisdictions when it comes to cartels and the use of economic deterrence theory as a guide regarding the number of optimal fines or the need for an extra disincentive, such as imprisonment (Whelan, 2007: 18). In turn, retributionist con-

15. In a similar way, Kovacic (2011: 55) points out the importance of competition policymakers paying attention to the changes in business behaviour after significant adjustments have taken place in the system of sanctions. In this sense, beginning to criminally prosecute cartels might lead to business managers considering alternative routes to achieve a restriction of output that causes price increases.

cepts, such as the need for a proportionate sanction that fits the level of wrongfulness of the conduct and that punishment is only inflicted as a response to liable and responsible individuals' conducts, might serve as a useful complement of deterrence.¹⁶

In Chile, as we will see later on, the legislative discussion regarding the reintegration of the criminal figure of cartels contained both deterrence and retributivism as arguments for the criminalisation of cartels, which hint at an implicit embrace of this mixed approach to justify the criminalisation of the, then, only administrative figure. Furthermore, the recent academic discussion on the criminal figure of cartels in Chile taken place after the criminal figure of cartels was reintegrated in 2016, while not particularly revolving on deterrence or retributivism points of view, offers a different angle for the problem of justifying criminalisation of cartels. This is based on the features of this criminal figure such as the collective or supra-individual object of its protection —competition—. The fact that the mere conduct is enough for the criminal figure of collusion to be satisfied, regardless of its result on competition, and that it's a crime of abstract endangerment, are all characteristics that will be reviewed later on.

The question of “how”: Imprisonment as the criminal sanction for cartels

So far, our theoretical analysis has focused on the question of why punishing cartel offenses, followed by the practical matter of implementing it and the question of how to punish. This has been attempted to be answered in the literature regarding cartels using mostly deterrence-based analysis with some moral elements.

Accordingly, the concept of imprisonment is mostly approached as a complement¹⁷ to already existing fines of administrative or criminal nature¹⁸ or other sanctions (for example, director disqualification),¹⁹ which might not be entirely effective in achieving deterrence-based purposes.²⁰ Additionally, the *quantum* of the appli-

16. Whelan himself warns that this approach is subject to criticisms, one of them being an unclear definition of the exact link between the deterrence and retribution elements of this mixed approach. See Whelan (2007: 19).

17. Stucke proposes as the optimal way to deter cartels a system that involves “a pluralism of mechanisms, including criminal and civil penalties, structural means (improved merger review), and developing informal norms that highlight price fixing’s ethical and moral implications” (2011: 288).

18. While both entail a financial loss for the offender, it has been argued that “criminal fines carry a stigma effect, showing that society morally disapproves infringements of the cartel prohibition” (Van den Bergh, 2017: 386).

19. According to Wils (2005: 147), director disqualification might have a relative effect depending on factors such as age, being less effective as a deterrent than imprisonment, yet might be more effective than fines due to a stigmatic effect.

20. Wils (2005: 148) also disregards deterrent-efficient private actions for damages, when combined with fines or by itself exceeds the companies' ability to pay, not to mention it might decrease the effectiveness of leniency programmes.

cable fines must also be subject to further analysis and equilibrate different factors due to their being a double-edged sword. In this sense, “excessive fines can cripple the corporation completely, causing it to reduce investments in innovation, and if it cannot absorb or otherwise pass along the penalty, to reorganise under the bankruptcy laws or exit the market” (Stucke, 2011: 288). In the long run, this can lead to less innovation, fewer choices for consumers, and higher prices due to the decrease of meaningful actors in the market (Stucke, 2011: 288).²¹

Another difficulty when imposing fines is that individuals —executives or directors of the company— might not be deterred at all unless they personally face the possibility of being fined themselves, and not even then if one considers the possibility of the company reimbursing them the amount paid through bonuses, promotions or raises (Massey and Cooke, 2011: 111). Theoretically speaking at least, fines in some contexts might not affect deterrence whatsoever, especially if the company, regardless of the amount of the fines, has achieved a level of profitability or market power that can outgain any quantity that is requested to pay.

As a result, imprisonment, as a complementary sanction, has the particularity that it cannot be passed on by the individual to the company (Massey and Cooke, 2011: 111). Therefore is more likely to impact the decision of the individual to participate or not in a cartel (Baker, 2011: 37). Furthermore, the fear of imprisonment can become a powerful incentive in order to collaborate in the investigation or to reveal a cartel the competition authority is unaware of when a proper and well-constructed leniency programme is in place (Baker, 2011: 37).

An additional benefit that comes from imprisonment is its expressive character. As a sanction, it conveys not only a more powerful message than fines but also a more effective one, since “prison sentences for businesspeople are much more newsworthy than fines and will thus get more publicity and be more noted by other businesspeople” (Wils, 2008: 185). However, the comparatively higher efficiency of prison sanctions as opposed to fines is not to be overestimated, nor should the use of this sanction be excessive. In this sense, Wils supports the view that imprisonment should only be reserved for price fixing cartels or antitrust violations with similar profitability and ease of concealments, and overall, only imposed in case of wilful clear-cut violations being the use of this sanction desirable for “horizontal, naked price fixing, bid rigging and market allocation schemes” (Wils, 2008: 186) which is an idea applied to the Chilean regulation on the matter, as we will see later on.

On the other hand, authors such as Parker (2011) have noted how the introduction of imprisonment (or the introduction of longer sentences if it already exists as a sanction) is not the only element that impacts the individual’s conduct when deciding to participate in a cartel, rather empirical evidence suggests that people’s perception regarding

21. See also Massey and Cooke (2011: 111).

the probability of detection is just as influential on the person's conduct as the threat of imprisonment. Accordingly, investing in increased monitoring and enforcement capabilities (namely, staff, technology, and investigation powers) should be "just as much of a priority as increased penalties for cartel enforcement policy" (Parker, 2011: 250).

Finally, Stucke (2011: 288) argues that, if a utilitarian or deterrent approach is taken to justify the use of jail sentences, then longer sentences are not necessarily effective, or at least not more so than shorter sentences. The message will be either way conveyed to onlookers and other potential cartelists, and the longer sentences are, the higher the costs for the taxpayer, not to mention the risks of over-criminalising conducts that, as discussed, might not always be perceived as the most serious of offenses, therefore lowering the sought effects of criminal law as a whole.

Criminalisation of cartels in Chile

Competition law enforcement in Chile is undertaken by two different bodies: i) a decentralized administrative entity in charge of investigation and prosecution, called the National Economic Prosecutor (FNE for its Spanish acronym)²² established in 1963; and ii) a judicial entity specialised in competition matters, called Competition Law Tribunal (TDLC, for its Spanish acronym) established in 2002.²³ The mission of this Tribunal is to prevent, correct, and sanction offenses against competition and is subject to the oversight of the Supreme Court.

The criminal figure of collusion in Chile

From the origin of the Chilean anti-trust system in 1959 up to a reform of the Competition Act in 2003,²⁴ infringements of competition law where prosecutable and criminal sanctions were available in general for anti-trust offenses, including cartels.²⁵ Re-

22. The FNE is independent from other entities or public services, subject to the oversight of the President through the Ministry of Economy.

23. The creation of TDLC came to replace and enhance from a specialized and properly judicial position the role previously undertaken by Preventive and Resolutive Commissions.

24. The administrative provision regarding cartels is broadly included in Article 3 of the Competition Act. It refers to some categories for illustrative reasons, characterising cartels as "express or tacit agreements among competitors, or concerned practices between them, that confer them market power and consist of fixing sale or purchase prices or other marketing conditions, limiting production, assigning market zones or quotas, excluding competitors or affecting the result of bidding processes". According to Tapia and Facuse (2017: 20), the wide understanding of this provision was not confirmed until Judgment number 145/2015 (TDLC), *Ginecólogos*.

25. Decree Law 211 (hereinafter Competition Act) established in 1973, set the basis for a modern competition law system in Chile, reforming the previous scarcely enforced Law 13.305 of 1959. See Agüero (2016: 126).

ardless of this, only one cartel case ended up being prosecuted (Agüero, 2016: 129). Some of the reasons held to justify this lack of convictions include the high standards of proof in criminal proceedings (Aydin and Figueroa, 2018: 333), the absence of a full conscience of the seriousness of these conducts, and the lack of the proper institutions in order to address highly complex cases (BCN, 2016: 6). Thus, in the 2003 reform of the Competition Act, all anti-competitive conducts, including cartels, were decriminalised arguing the lack of deterrent effect of the criminal offense (Agüero, 2016: 129).

Nevertheless, the decriminalisation of cartels did not stand the test of time and the idea to amend the Competition Act to reinstate the criminalisation of cartels was submitted to debate between the years 2015 and 2016 as a response to a series of high-profile collusion cases that had recently taken place. During the legislative discussion of the amendment bill that later became Law 20.945, the issue of criminalisation of cartel conduct was debated amongst other topics such as the introduction of a merger control regime, the addition of a new set of investigative powers for the FNE that adjusted the administrative fine systems regarding anti-competitive practices, and adding the possibility for consumers affected by anti-competitive practices to claim damages before the TDLC.

The discussion of the bill began only five months after the Tribunal's judgment on the *Pollos* case,²⁶ a high-profile and widely broadcasted case in which three producers of poultry —that combined held 80% of the poultry meat production market in the country— were fined due to their anti-competitive agreement to limit their production of poultry meat offered to the national market and the assignation of market quotas on the production and commercialization of the product. The agreement was undertaken through the Association of Chilean Poultry Producers, which was ordered to be dissolved by the TDLC's judgment.

The impact of this case, alongside two other high-profile cases, *Farmacias*²⁷ and *Tissue*²⁸, involving anti-competitive agreements regarding pharmaceuticals and toilet paper, respectively, “received significant media coverage, and led to extended public debates, and even protests and boycotts against the companies involved” (Aydin, 2020: 180). As a result, during the legislative discussion these cases, two of which had received judgments by the TDLC —*Farmacias* and *Pollos*—, with *Tissue* still undergoing court proceedings, were constantly mentioned as examples to advocate for the need for advancements in regulation, changes in the administrative treatment of cartels, and the need for the reinstatement of their criminalisation.²⁹

26. *Requerimiento de la FNE contra Agrícola Agrosuper S.A. y otros* (C-236-2011).

27. *Requerimiento de la FNE contra Farmacias Cruz Verde S.A. y otra* (C-184-2008).

28. *Requerimiento de la FNE contra CMPC Tissue S.A. y otra*. (C-299-2015).

29. During the legislative discussion of the bill, *Pollos* was referenced 50 times by different congressmen; *Farmacias* was mentioned 59 times; and *Tissue* was mentioned 64 times.

Following the abovementioned legislative discussion, the Competition Act, in Article 62, was reformed and established a penal figure limited to cartels,³⁰ with imprisonment penalties from three years and one day to ten years. While the offender can access alternative penalties,³¹ especially when mitigating circumstances are present—such as lack of previous conviction or substantial collaboration to the criminal investigation—, the law established a suspension of the possibility to access alternative penalties for a full year, during which the convict must serve their sentence in jail regardless of their fulfillment of the criteria for an alternative penalty (Article 62 of the Competition Act).

Additionally, it was established in Article 64 of the Competition Act that the criminal procedure could take place only after the TDLC has reached a conviction judgment and that it could only be initiated by the FNE—as opposed to the possibility for the Chilean Public Prosecutor to independently start an investigation and prosecution—.

Finally, the leniency programme in Chile after the reinstatement of criminalisation included the exemption of criminal responsibility for the first applicant and a reduction of the sentence to the second, as a complement to the exemption and reduction of fines (Article 63 of the Competition Act). Action for damages was included in the reform but was left out of the leniency programme, which might pose a disincentive for potential applicants to come forward.

Before going any further, it is necessary to briefly overview how the literature has understood some of the structural features of the criminal figure of collusion, especially since there have been no convictions to date and, hence, no jurisprudential development of this figure since its establishment in 2016. As Artaza, Santelices, and Belmonte have stated, “the analysis of collusion as a true economic crime entails, firstly, being able to determine the detrimental potential towards the protected institution, at least to understand the reasons for which it seems legitimate to react to those conducts through punishment” (2021: 20). Therefore, some of the features of the criminal figure of collusion are intrinsically intertwined with the reasons behind its criminalisation.

A first aspect to consider is the legally protected good sought through the penal figure of collusion.³² For García and Tapia, what is protected is “trust on distributive

30. This figure applies to engagement, execution or organisation of an agreement between two or more competitors to fix prices of products or services; limit their production or provision; divide, assign or allocate market zones or quotas; or affect the result of bidding processes.

31. Contemplated in Law 18.216 (1983), including probation, and community services, among others.

32. Artaza, Santelices, and Belmonte (2021: 18) define protected good as “the features of people, things or institutions that are thought to be essential for the free development of personality under the rule of law”.

justice and the fair and egalitarian interaction process of free competition” (2022: 32). Similarly, for other authors the legally protected good is institutional trust on the conditions of distributive and procedural justice (García and Tapia, 2022: 32).³³ For Artaza, Belmonte, and Acevedo (2018: 552), what is protected is competition law,³⁴ which he characterizes as a collective interest and an institution that fulfills an essential role in a market economy from which certain benefits arise for the community (Artaza, Santelices and Belmonte, 2021: 19), namely objectives linked with the proper development of the community, such as increased access for citizens to goods and services (Artaza, Santelices and Belmonte, 2021: 28). Moreover, Artaza (2017: 343) has also characterized competition as a supra-individual legal good that is essential for citizens’ involvement in economic interactions.

A second feature of the cartel as a criminal figure is that it has been considered by the literature as a conduct crime, as opposed to a result crime (García and Tapia, 2022: 32).³⁵ In this sense, as explained by Artaza, Santelices, and Belmonte (2021: 103), the criminal figure of collusion does not require competition to be effectively harmed for the prohibited conduct to be carried out. In other words, the result—in this case, the effect of impeding, restricting, or hindering competition—is not necessary nor will it be subject to evidentiary rules.

Thirdly, this figure is considered to be an abstract endangerment crime (Artaza, Belmonte, and Acevedo, 2018: 569). In fact, “its sanction is not conditioned by a concrete harm on competition, being the capacity for causing said harm enough” (Artaza, Santelices and Belmonte, 2021: 103) and is intrinsically intertwined with the *per se* rule for the analysis of agreements between competitors. This feature of the criminal figure of cartels might be seen as problematic due to its over-inclusiveness. Yet, from a deterrence point of view, the overinclusion of this particular type of anti-competitive wrongdoing that comes from the withdrawal of effective harm from the prohibited conduct, could be justified by the reduction of overall risk on competition. Furthermore, from a retributivist point of view, the conduct itself is blameworthy regardless of its effects (Fissell, 2014: 657).

On a more practical level, considering the level of difficulty that the determination of concrete harm on competition would entail, it is more plausible to determine if a conduct fits an *ex-ante* established model of abstract endangerment of the legally protected good as competition (Artaza, Santelices and Belmonte, 2021: 105).

33. Similarly, Artaza (2017: 355) has stated that the criminalisation of cartels would be justified by the disturbance of distributive justice as an institution.

34. In the same sense see Artaza, Salazar, and Salgado (2016: 808).

35. See also Artaza, Santelices and Belmonte (2021: 103).

The conditions for imprisonment as an effective deterrent for hardcore cartel behaviour: Are they fulfilled in Chile?

The 2016 reform was the result of a legislative debate regarding criminalisation of cartels that had at the core of its mission the attainment of a level of effective or optimal deterrence through imprisonment as punishment (BCN, 2016: 54). As such, this amendment is perhaps too recent to reach conclusions about the efficiency of its objectives in practice. According to Wils' (2008: 189) four conditions for imprisonment for an effective deterrent of hardcore cartel behaviour addressed above, we can analyse which aspects are present and, more importantly, which challenges may lay ahead for competition authorities in Chile.

The need for a dedicated investigator and prosecutor

The goal of this feature of an enforcement system is for the threat of jail to be plausible (Wils, 2008: 189). Since criminal sanctions for cartels have been available in Chile since 2016 there have been no prosecutions to date. Experts on the subject in recent debates have discussed whether the system should be reformed in order for the Public Prosecutor to have the legal power to start a criminal investigation without the need for the FNE to file a petition as in the current system.³⁶

While there is no available data due to the lack of convictions to date, the rate of convictions for economic crimes, in general, shows a 4% condemnation rate from the total of criminal investigations that took place in the 2011-2021 period.³⁷ However, available data shows a decrease in the number of condemnatory sentences, as well as a significant increase in the amount of investigations from the year 2016 onwards, which might suggest a decrease in the level of efficiency in investigations and prosecutions for economic crimes, which in 2020 and 2021 showed an all-time law condemnation rate of 1,6% and 1,7%, respectively.³⁸

The technical capacity of the Public Prosecutor with its current resources to undertake complex investigations in the field of anti-trust, remains yet to be tested. And while there has existed some level of skepticism regarding the lack of resources and

36. Fernanda Cabezón O. and Valentina Céspedes G., «Sanción penal de la colusión en Chile: los desafíos del modelo vigente», *Centro de Competencia UAI*, November 3, 2021. Available at <https://bit.ly/3GTOSQ2>.

37. Calculated based on available data found in annual statistical reports from the Chilean Public Prosecutor Office, available at <https://bit.ly/3tiY8KB>

38. In the 2011-2015 period the condemnation rate average was 5,6% with an average of 74.139 criminal investigations, while in the 2016-2021 period, the average was 2,6% with an average of 135.025 criminal investigations.

consequential overload of the prosecution system,³⁹ the fact that a cartel criminal investigation in Chile is likely to receive an important level of media coverage and social pressure and a potential collaboration between the FNE and the prosecutor, might serve as additional incentives for a successful prosecution.

Adequate powers of investigation

When it comes to powers of investigation of cartels, on an administrative level, the FNE is vested with rather intrusive investigative faculties, which include raids, confiscation of documents and other elements, interception of communications, and the request of communications records from telecommunications companies (Article 39 n) of the Competition Act). Since the criminal investigation can only take place after there is a condemnatory ruling by the TDLC, the following investigation by the Public Prosecutor poses a coordination challenge between the FNE and the criminal authority based on the evidence gathered and the investigation that was undertaken, with different standards of proof that are requested for conviction in criminal and administrative levels.⁴⁰ On a judiciary level, it poses a challenge as well for the TDLC to explain the more technical aspects to the criminal court which is not a specialist in competition law.⁴¹

On this topic, Artaza, Santelices, and Belmonte (2021) have hinted at the existence of synergies that come from the fact that criminal prosecutions can only take place after an administrative condemnation by the TDLC. In this sense, they conclude that “the existence of an agreement, its competition variables and its anticompetitive feature are topics that should have already been part of the judicial ruling pronounced by the TDLC, and eventually the Supreme Court” (2021: 99). Therefore, if the presence of an agreement has already been determined, it should be possible to refer to its constituent elements to substantiate the criminal action.

Another challenge regarding this matter comes from the possible lack of collaboration amongst different public institutions that share different aspects of responsibility generated by the same material events that conformed a cartel. As Kovacic points

39. Josefa Escobar U., «Académicos de libre competencia: Sí al proyecto anti-colusión y no al Ministerio Público», *Centro de Competencia UAI*, May 5, 2020. Available at <https://bit.ly/4aGkbf4>.

40. The standard of proof for a competition law decision is lower than the standard of proof required for a criminal conviction. As Artaza, Santelices, and Belmonte (2021: 99) have pointed out, this difference between standards of proof might entail contradictory judicial decisions, even though the existence of an agreement and its anticompetitive feature, which are broadly analyzed on the administrative level, would provide a useful and relevant precedent for the criminal judge to consider.

41. Fernanda Cabezón O. and Valentina Céspedes G., «Sanción penal de la colusión en Chile: los desafíos del modelo vigente», *Centro de Competencia UAI*, November 3, 2021. Available at <https://bit.ly/3GTOSQ2>.

out, the relationships between public institutions “often are beset, at least initially, with suspicious and jealousies which only a patient and deliberate process of team building can overcome” (2011: 47). In the Chilean case, said rivalry or sense of suspiciousness between the two institutions has taken place since the legislative discussion and remains active to date, especially regarding the inability of the Prosecutor to initiate an investigation without previous petition from the FNE.⁴²

Finally, regarding the leniency programme, arguably one of the best tools available for the fight against cartels, since its introduction in 2009, the FNE has received 19 applications to the leniency programme, and it has only been used for ten investigations undertaken by the entity (from a total of 93 cartel investigations) (Corvalán and Bórquez, 2022: 5-6). Regardless of this number, in the cases that it has been used, the period of investigations has been significantly reduced when compared to investigations with no leniency applications and they have, in most cases, ended up in convictions (Corvalán and Bórquez, 2022: 5). Therefore, albeit not highly used, it is a tool that allows for more effective investigations and, in that sense, is a key instrument for the fight against cartels and was strongly advocated by experts during the period of legislative discussion.⁴³

Judges must be willing to convict

During the legislative debate for the 2016 reform of the Competition Act, a recurrent argument held against the reinstatement of criminalisation of cartels was the fact that during the period in which criminal sanctions were available, there had not been a judicial will to convict, proved by the lack of sentences from 1959 to 2003. While the assessment of such an argument might require a deeper level of analysis, it is sufficient to point out, for our purposes, that the anti-trust scenario was different in that period without a leniency programme, a specialised court as the TDLC, and without the investigative faculties the FNE can currently employ.

However, and given once again the lack of criminal investigation of cartels since their reinstatement as a criminal figure in Chile, we can only speculate that the willingness to convict will be present when the time comes if public support for imprisonment of cartelists is sustained in the future. According to Stephan: “Public perceptions of practices such as price fixing and market sharing also hint how a jury will respond in cartel cases, potentially affecting the competition authority’s willingness to pursue criminal rather than civil sanctions” (2011: 382).

42. Josefa Escobar U., «Académicos de libre competencia: Sí al proyecto anti-colusión y no al Ministerio Público», *Centro de Competencia UAI*, May 5, 2020. Available at <https://bit.ly/4aGkbf4>.

43. See, for instance, the opinions of Agostini and others (2015: 3, 10-11).

The need for political and public support

This condition —the most relevant of all according to Wils and Stephan—encompasses the idea that “criminal liability ought to reflect the culture and values of the people of a country” (Wils, 2008: 191) as well as its legal framework and sensibilities (Kovacic, 2011: 46).

As for political support in Chile, according to Aydin, “since the mid-2000s, an elite-level consensus has emerged on the importance of enforcement against cartels, a consensus which followed the global trends on this issue” (2020: 192). It is widely supported among Chilean lawmakers from the entire political spectrum that it ultimately lead to the reinstatement of cartel criminalization (Aydin, 2020: 192; Agüero, 2016: 130).

Regarding public support, Aydin (2020: 173) suggests that, unlike other countries who have surveyed their population’s opinion, the Chilean case has proved to be quite straightforward in the strong support towards the criminalisation of cartels. Generally, the findings of Aydin’s (2020: 192) research showed that the Chilean public: i) expects that the setting of prices is set independently from other competitors; ii) is aware of the harmful consequences of cartels, displaying a strong level of condemnation towards that conduct; iii) supports tough sanctions, which include long jail sentences;⁴⁴ and iv) finds the cartel conduct comparable to crimes such as fraud, tax evasion, and theft.

Although Aydin did not intend to systematically analyze the reasons behind this support of imprisonment, he does mention the possible effect that the sequence of high-profile cartel cases taking place in the 2000s might have made an impact on the Chilean population, increasing their knowledge of the matter and, more specifically, their censure toward such harmful conduct that had a direct impact in household economies.⁴⁵ Thus, the Chilean case “suggests that enforcement might be a very powerful tool for increasing the public’s awareness and understanding of cartels’ harms, and of competition law and policy more broadly” (Aydin, 2020: 192). This resonates with Stephan’s idea that, if enforcement is also adequately displayed by the media, it will potentially have “the power to educate and influence people’s beliefs, values and reactions to a given behaviour” (2011: 381).

Similarly, Artaza, on the subject of public support, has stated that:

One of the reasons that has allowed to legitimate the criminalisation of collusion in societies where the private sector is mandated -largely- to decide who can access to goods and services and under which conditions, is the greater awareness there is

44. This alternative showed a 73% support amongst the people surveyed, highly above the 28% displayed in similar surveys from European countries and Australia (Aydin, 2020: 185).

45. See, for example, Niklander and others (2019: 1-6); and Checa and others (2012: 6-27).

on the fact that the abuse of such a position may seriously impinge on the reduction of possibilities of participation on the markets, and therefore, of the possibilities of development of those affected (2021: 34).

A mixed approach towards the aim of criminalisation of cartels

During the legislative debate, there was a clear prevalence of deterrence-oriented arguments for criminalising cartels from the very origin of the bill (BCN, 2016: 6). And while most interventions by congressmen and the voices held by experts during the legislative discussion revolved around this theory (Agostini and others, 2015: 3-5, 8, 10, 12, and 13), it is important to point out some arguments held during the debate that encompassed a moral censure of cartels, and the retributive function achieved by imprisonment such as (BCN, 2016: 156-824): “Cartels deserve to be more severely punished since they are usually undertaken by those who have received every possible benefit from society”; “the sanction must properly reflect the social blame that the collusive conduct deserves”; “a cartel is a conduct that is subject of such a level of social condemnation that the least that the person that commits it deserves is a prison sentence”; “a cartel is a crime of an enormous degree of moral cowardice”; “everyone in Chile is expecting the punishment of criminals who offend at large, sheltered by an inoperant State, or by their economic power, or their ethical and moral poverty”.

Additionally, some interventions during the legislative debate compared cartels to other crimes against property (BCN, 2016: 157, 172, 892, and 899), arguing that cartels have similar —and even higher— levels of offensiveness. Such a view carries an undertone of morality that is problematic, among other reasons,⁴⁶ due to the fact that the consumers’ purchase power is diminished after a voluntary act,⁴⁷ which differs from a victim’s diminishment of purchase power after being subject to a crime against property, where there is namely no voluntary act committed by the victim.⁴⁸

Overall, the presence of both groups of arguments —though not raised in a particularly systematic manner— during the discussion of the bill, alongside Aydin’s findings regarding the popular position in favour of imprisonment for cartels, might hint at a mixed perception of the reasons that make this kind of punishment appropriate and fair according to Chilean society, with deterrence as the primary goal but complemented by some moralist elements that display a change in the values of society and their increased level of condemnation towards cartels.

46. For a detailed account for why the vision of collusion as a form of stealing is problematic, see Artaza (2017: 352).

47. Such an act might involve different levels of freedom considering, for instance, the concentration of the market or the type of good or service in question.

48. See Artaza (2017: 353).

Additional arguments have been held by the literature in the years that followed the criminalization of cartels in Chile, which are not based on retributivism or deterrence-oriented theories of punishment but are a response to some of the main particular features of the criminal figure of cartels in question.

García and Tapia, for instance, have stated that:

Restriction of competition is considered as a crime not only due to a systematic damage to markets and reliability of the interactions within them (damage to macro-institutionality), but due to the concrete impact on the conditions of interaction -rivalry- on a market and, additionally, the creation of barriers to entry, obstacles to access to demand or supply or exclusion of other competitors (2022: 32).

Therefore, for these authors, a regulatory treatment of collusion would not be enough since this conduct generates an unacceptable type of social injustice that deserves a criminal treatment (García and Tapia, 2022: 32). A similar view can be extracted from the characterization of the legally protected good sought with the criminalization of cartels as a collective, supra-individual or institutional good —whether it is competition law, distributive justice or fair market access—. In other words, the harm caused by cartels is considered to be larger than the sum of the damage suffered by competitors and/or consumers in a certain market, which might justify a higher moral censure of cartels that is convened by its criminalization, thus implicitly suggesting a more retributivist than deterrence-oriented view.

As for the criminal figure of cartels as both a conduct crime and an abstract endangerment crime, these features are directly derivative from the regulatory or administrative figure on which is based, that applies the anticompetitive label to collusive agreements regardless of its effective materialisation. However, both deterrence and retributivism are compatible with the features inherited by the criminal figure from its administrative predecessor. A mere collusive agreement, whether or not it is materialized or effectively dangerous for competition in the market or consumer welfare is censured as a wrongful conduct, it is compatible with a retributivist view of the criminal figure of cartels. Similarly, disregarding the materialization of the agreement between competitors as necessary for cartels to be anti-competitive, it should provide a higher level of deterrence since it is a simpler, more predictable standard for providers of goods and services to understand and be subjected to.

Conclusions

Through this essay, we analysed the different justifications that have been given to the criminal figure of business cartels, a type of corporate crime that, when compared to other types of crime, might not produce the same level of outrage and an intuitive sense that it is intrinsically criminal. This feature, as well as the economic setting in

which it takes place, might make—in theory—deterrence-oriented theories more optimal as a goal when establishing the legal framework and policy decisions regarding measures to tackle cartels. As for imprisonment as a sanction, there is support in the literature for its complementary role for criminal or administrative fines, but the success of this policy is bound to the fulfillment of other factors related to the institutions—its resources, powers, and coordination— but most importantly to the public support, which serves as an estimative projection of the likelihood of effective prosecution and conviction.

In the Chilean case, when discussing the reinstatement of the criminal figure of cartels, though deterrence was established as the primary aim, there were however indications of the moral condemnation and outrage generated by recent cases of cartels regarding basic goods. This hints at a mixed approach by the Chilean society through its democratically elected congressmen towards the -unsystematically conveyed- reasons behind the need to reinstate the criminalisation of cartels. As for the subsequent academic discussion on the criminal figure of cartels, not enough attention has been paid to the classical theories of punishment and their relevance for the enforcement of this figure. However, relevant arguments regarding the legally protected good sought by the criminal figure of cartels reveal a supra-individual, collective, and institutional notion of the aim of this criminal figure, which seems to be compatible—or at least is not incompatible—with a mixed approach towards the criminalisation of cartels, that comprises both retributivism and deterrence-oriented explanations for punishing this particular conduct. While the criminal figure of cartels in Chile is yet to be applied in practice, this article has tried to contribute to the discussion on the reasons behind the criminalisation of cartels, from the point of view of the classical theories of punishment.

The presence of cartels in the markets is an evolving phenomenon and given the presumption that they are committed by otherwise law-abiding citizens, with access to education and opportunities, its presence serves as a sign of the state of a society. Accordingly, the response by the same society regarding these types of conduct, through their representatives and policymakers, acts as a sign as well. A sign towards other potential or effective cartelists, and a sign to the rest of the public, the onlookers, who can also understand that not even high executives or important business acumen can escape the consequences of their actions. If those actions are better prevented under the threat of jail time since otherwise paying fines will be mere “part of doing business”, then society can, and perhaps should, if properly informed about the harmfulness of cartels for the market and their everyday life, send an effective sign back to cartelists.

References

- AGOSTINI, Claudio, Julio Pellegrini, Juan Pablo Mañalich, Antonio Bascuñán, Aldo González, Nicole Nehme and Daniela Gorab (2015). “¿Cárcel para la Colusión? Seis Opiniones”. *Puntos de Referencia*, 409: 1-13. Available at <https://bit.ly/41vaT12>.
- AGÜERO, Francisco (2016). “Chilean Antitrust Policy: Some Lessons Behind its Success”. *Law and Contemporary Problems*, 79: 123-154. Available at <https://bit.ly/485fSZ3>.
- ARTAZA, Osvaldo (2017). “La colusión como forma de agresión a intereses dignos de protección por el Derecho Penal. Primera aproximación”. *Revista de Derecho* (Universidad Austral de Chile), 30 (2): 339-366. Available at <https://bit.ly/3GV17hX>.
- ARTAZA, Osvaldo, Matías Belmonte and Germán Acevedo (2018). “El delito de colusión en Chile: Propuesta analítica de la conducta prohibida a través de su interpretación como un Acuerdo Anticompetitivo”. *Revista Ius et Praxis*, 24: 549-592. Available at <https://bit.ly/3NAuZkV>.
- ARTAZA, Osvaldo, Andrés Salazar and Hugo Salgado (2016). “Protección de la libre competencia en Chile. Desafíos para el Derecho Penal y las Ciencias Económicas”. *Política criminal*, 11: 794-809. Available at <https://bit.ly/3tkp3Wq>.
- ARTAZA, Osvaldo, Víctor Santelices and Matías Belmonte (2021). *El Delito de Colusión*. Valencia: Tirant Lo Blanch.
- AYDIN, Umut (2020). “Attitudes Toward Collusion in Chile”. *Journal of Competition Law & Economics*, 17 (1): 168-193. DOI: 10.1093/joclec/nhaa022.
- AYDIN, Umut and Nicolás Figueroa (2018). “The Chilean Anti-Cartel Experience: Accomplishments and Challenges”. *Review of Industrial Organization*, 54: 327-352. DOI: 10.1007/s11151-018-9633-0.
- BAKER, Donald (2009). “An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists”. *European Competition Journal*, 5 (1): 145-199. DOI: 10.5235/ecj.v5n1.145.
- . (2011). “Punishment for Cartel Participants in the US”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 27-44). Oxford: Hart Publishing.
- BCN, Biblioteca del Congreso Nacional de Chile (2016). *Historia de la Ley N° 20.945*. Available at <https://bit.ly/4785u1g>.
- BEATON-WELLS, Caron and Ariel Ezrachi (2011). “Why Critical Studies?”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 4-23). Oxford: Hart Publishing.
- CHECA, Laureano, Macarena Peña y Lillo, Claudia Lagos and Cristián Cabalín (2012). “Cobertura de prensa del caso ‘Colusión de las Farmacias’: Análisis de contenido”. *Comunicación y Medios*, 25: 6-27. Available at <https://bit.ly/3TGgDDA>.
- CONNOR, John (2006). “Optimal Deterrence and Private International Cartels”. *Journal of Economic Literature Classifications*, 1-42. DOI: 10.2139/ssrn.1103598.


- CORVALÁN, José Luis and Francisco Bórquez (2022). “Uso y efectividad de la Delación Compensada en Chile: las cifras ante la FNE”. *Centro de Competencia Universidad Adolfo Ibáñez*, 1-13. Available at <https://bit.ly/3NBIMI6>.
- DUNNE, Niamh (2020). “Characterizing Hard Core Cartels Under Article 101 TFEU”. *The Antitrust Bulletin*, 65 (3): 376-400. DOI: 10.1177/0003603X20929121.
- FISSELL, Brenner (2014). “Abstract risk and the Politics of the Criminal Law”. *American Criminal Law Review*, 51 (3): 657-688. Available at <https://bit.ly/3v3p29A>.
- GARCÍA, Gonzalo (2021). “Los Equivalentes Funcionales y el Delito de Colusión del art. 62 D.L. N° 211”. *Doctrina y Jurisprudencia Penal*, 44: 3-28.
- GARCÍA, Gonzalo and Javier Tapia (2022). “El injusto del delito de colusión del art. 62 DL. 211: Una reconstrucción desde la accesoriidad administrativa”. *Revista Jurídica Digital UANDES*, 6 (2): 23-44. DOI: 10.24822/rjduandes.0602.2.
- GHOSAL, Vivek and Daniel Sokol (2016). “Policy Innovations, Political Preferences, and Cartel Prosecutions”. *Review of Industrial Organization*, 48 (4): 405-432. DOI: 10.1007/s11151-016-9516-1.
- GINSBURG, Douglas and Cecilia Cheng (2019). “The Decline in U.S. Criminal Antitrust Cases: ACPERA and Leniency in an International Context”. *Mason Law & Economics Research Paper*, (19-31): 1-25. DOI: 10.2139/ssrn.3460091.
- HARDING, Christopher (2006). “Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels”. *Critical Criminology*, 14: 181-205. DOI: 10.1007/s10612-006-9000-6.
- . (2011). “The Anti-Cartel Enforcement Industry”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 359-379). Oxford: Hart Publishing.
- HARRINGTON, Joseph (2018). “A Proposal for a Structural Remedy for Illegal Collusion”. *Antitrust Law Journal*, 82 (1): 335-359.
- HUDSON, Barbara (2003). *Understanding Justice: An introduction to ideas, perspectives and controversies in modern penal theory*. Milton Keynes: Open University Press.
- JOSHUA, Julian (2011). “DOA: Can the UK Cartel Offence be Resuscitated?”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 129-155). Oxford: Hart Publishing.
- KOVACIC, William (2011). “Criminal Enforcement Norms: US Insights”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 45-73). Oxford: Hart Publishing.
- MAHER, Imelda (2015). “Competition Law Fragmentation in a Globalizing World”. *Law & Social Inquiry*, 40 (2): 553-571. DOI: 10.1111/lsi.12133.
- MASSEY, Patrick and John Cooke (2011). “Competition Offences in Ireland”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 105-128). Oxford: Hart Publishing.

- MONTI, Mario (2000). *Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?*. [Speech at the 3rd Nordic Competition Policy Conference, Stockholm].
- NIKLANDER, Stefanie, Fabiana Rodríguez, Desanka Mestrovic, and Humberto Senarega (2019). “Journalistic Treatment of the Tissue Collusion in Chile: Comparative Analysis Between El Mercurio and El Mostrador”. In *14th Iberian Conference on Information Systems and Technologies (CISTI)* (pp. 1-6). Coimbra: IEEE. DOI: [10.23919/CISTI.2019.8760764](https://doi.org/10.23919/CISTI.2019.8760764).
- OECD (2022). “Recommendation of the Council concerning Effective Action against Hard Core Cartels”. OECD/LEGAL/0452. Available at <https://bit.ly/47idv3A>.
- PARKER, Christine (2011). “Criminal Cartel Sanctions and Compliance”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 239-262). Oxford: Hart Publishing.
- SHAFFER, Gregory, Nathaniel Nesbitt, and Spencer Weber (2015). “Criminalizing cartels: A global trend?”. In Arlen Duke, John Duns, and Brendan Sweeney (editors), *Research Handbook on Comparative Competition Law* (pp. 1-37). Cheltenham: Edgar Elgar. DOI: 10.2139/ssrn.2288871.
- STEPHAN, Andreas (2011). “‘The Battle for Hearts and Minds’: The Role of the Media in Treating Cartels as Criminal”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 381-394). Oxford: Hart Publishing.
- STUCKE, Maurice (2011). “A Behavioural Economics Analysis of Cartels”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 263-288). Oxford: Hart Publishing.
- TAPIA, Javier and Vanessa Facuse (2018). “Exchanges of Information in Competition Law: The Chilean (Incipient) Experience”. *Revista de Defesa da Concorrência*, 6 (2): 13-36. Available at <https://bit.ly/3TsEeaC>.
- VAN DEN BERGH, Roger (2017). *Comparative competition law and economics*. Cheltenham: Edward Elgar Publishing.
- WHELAN, Peter (2007). “A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law”. *The Competition Law Review*, 4 (1): 7-40.
- . (2013). “Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’”. *Oxford Journal of Legal Studies*, 33 (3): 535-561. DOI: 10.1093/ojls/gqt010.
- WILLIAMS, Rebecca (2011). “Cartels in the Criminal Law Landscape”. In Carol Beaton-Wells and Ariel Ezrachi (editors), *Criminalising Cartels* (pp. 289-312). Oxford: Hart Publishing.
- WILS, Wouter (2005). “Is Criminalization of EU Competition Law the Answer?”. *World Competition Law and Economic Review*, 28(2): 117-159. DOI: 10.54648/woco2005010.
- . (2008). *Efficiency and Justice in European Antitrust Enforcement*. Oxford: Hart Publishing.

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