

Criminal Law and Competition Infringements

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This paper discusses the issue of whether competition infringements should be sanctioned in criminal law. The introductory section deals with illegalities and the possibilities of legal reactions against them in the field of economic activity. The EC regulation of sanctions for competition infringements is then briefly described, starting with the Council Regulation 1/2003 and the sanction systems in effect in Denmark, Finland, Norway and Sweden. These represent quite different solutions. Finland and Sweden advocate a system of administrative fines, whilst in Norway a twin-track system with both administrative and criminal sanctions is in use. The criminal provision even contains the threat of imprisonment. In Denmark fines or an administrative notice of a fine are being used.

In the second section questions of criminal law responsibility are discussed from the perspective of the principles of criminalization. Criminalization requires amongst other things that there is seriously harmful conduct to be prevented, no alternative responses are reasonably available, both the criminal conduct and the penalty can be strictly defined in law text and that human rights are being respected. The paper then moves on to consider some recent tendencies such as the EU's increasing activity in the field of criminal law and the rising popularity of sanction fees (administrative fines). Lastly, some features of administrative delict and sanction are compared with those of crime and punishment.¹

1 Introduction

There are many kinds of violations of law that can occur in economic activity. In criminal law one distinction that has been made is that between economic activity which is in itself is illegal (e.g. pimping and money laundering), and illegal conduct within an in itself legal activity (e.g. tax evasion or pollution of the environment as a consequence of production). The former category can be ignored here. The field of illegal conduct within an in itself legal activity can be analyzed from many points of view. One could name the violated legal interests, modes of act and the relations of the parties affected by the unwanted conduct. In this last respect the illegal conduct can be directed against the state, consumers, parties to a contract, owners, investors, creditors and/or competitors.

Illegal conduct has been addressed in a number of ways through various legal responses which have at least partly different functions. These include:

- punishment;
- forfeiture;
- administrative fines;
- compensation for damages;
- the invalidity of the legal act;

¹ This is a somewhat revised version of my article *Strafferetlige sanktioner ved konkurrenceretsbrud* in Andersen – Christoffersen (red.): *Forhandlingerne ved Det 38. nordiske Juristmøde i København 21.-23. august 2008*. Bind I p. 293-311. – If an infringement is sanctioned in the administrative system I will use the term “delict” for it.

- a trading prohibition;
- loss of position or benefit; and
- a duty to submit to measures necessary for investigating the case.

In addition to these, the act can lead to *informal* sanctions such as loss of good name and reputation. Unfortunately, in reality even others besides the perpetrators may well be affected (e.g. their families).

Different economic violations can meet with different sanctions. Sometimes several types of sanctions are applied. Business activities often take place within the framework of *legal entities*. It is possible that the legal entity faces certain sanctions while the persons behind the company are faced with others. Some sanctions may be imposed in administrative proceedings while others are decided upon by a civil or criminal court. The violation might be assessed in several proceedings.

A company is often active even *abroad*. Thus, legal structures that take this into account are needed. With a view to the needs of co-operation as there might be (for example regarding effective exchange of information within the ECN network) it might prove practical to have a not too divergent set of rules on how to deal with competition irregularities in different countries. It is even possible that international agreements and especially EC/EU law set some limits as to how divergent the different regimes of sanctions may be.² EC regulations have had a major influence on national competition acts. US American law has affected the field greatly.

In 1995 Finland became a member of the EU. Until 1992, certain forms of restricting competition were criminalized as a competition restriction offence. The criminal law model was, however, not deemed an efficient and rational legal consequence in matters concerning restrictions of competition. The few criminal law cases handled by the courts had only led to mild fines and could not be seen as having any larger general preventive effect. Contraventions against the prohibitions could most flexibly be handled in administrative proceedings by authorities specializing in competition matters. To assess economic facts and circumstances as well as the laws of commercial life is difficult without expert knowledge. Moreover, in assessing an act of forbidden restriction of competition, more weight must be given to the harmfulness of the act to economic life than to the blameworthiness of the perpetrator's conduct. Leaning on this kind of reasoning 1992 saw the adoption of a system with a punitive administrative fine (the competition infringement fine) which would be imposed in administrative proceedings. In this reform more forms of restricting the competition were forbidden as well and the Competition Council developed towards an organ for the administration of justice. Nowadays, the sanctions are imposed by the Market Court. The result was also due to the fact that the EC

2 *E.g.* general principles of Community law and the general EC criteria for effective sanctions are probably of interest here. The new parallel competence could cause some friction from the point of view of equality if the level of sanctions in the EC is much higher than the national ones.

operated with a system of administrative fines.³ These arguments represent important themes even today when contemplating what role, if any, criminal law should play in the context of competition infringements.

The transfer to a system of administrative fines in the field of competition law opened *a new chapter* in the modern Finnish history of penalty-like administrative sanctions. Traditionally we have had the punitive tax increase. In the 1970s and 80s certain minor but frequently occurring violations e.g. parking violations were transferred from the heavy criminal law machinery to more summary administrative procedures. There was a serious discussion on questions of legal safeguards, but the violations in question were minor and the cost- and efficiency benefits were great. The adoption of an administrative fine for competition infringements heralded a new era in developing the system with penalty-like administrative sanctions. This time it wasn't a matter of small mass violations and minor fees.⁴

Articles 81-82 ECH constitute the starting point of the EC competition regulation. Bearing in mind the great impact of the EC competition regulation on the national competition rules, one should not forget that the EC has lacked the competence to legislate in the field of criminal law.⁵ The system of implementation of EC competition rules underwent considerable decentralization through the Council Regulation 1/2003 (OJ L 1, 4.1.2003, p 1), which gave rise to the oversight of the national competition acts.⁶ Pursuant to Article 23(2) of the Regulation, the Commission may by decision impose fines on undertakings and associations of undertakings where they, either intentionally or negligently, among other things, infringe Article 81 or 82 of the Rome Treaty. For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its turnover in the preceding business year. In fixing the amount of the fine, regard shall, according to Article 23(3) of the Regulation be had both to the gravity and to the duration of the infringement. Article 23(5) prescribes that decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature. The issue of the nature of these fines is herewith, however, not decided with finality, but it can be discussed whether they still constitute a penalty, an administrative sanction only, or something in between.⁷ In 2006, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 were presented by the Commission (OJ C 210, 1.9.2006, p. 2). In 1996, the Commission introduced a leniency system, which

3 In the Government Bill 11/2004 on the amendment of the Act on Competition Restrictions (p 20) it is stated that the streamlining of the system of sanctions in 1992 has turned out to have been a positive solution.

4 The overload sanction fee introduced in 1982 can, however, be quite considerable.

5 *Zeder*, Die österreichischen Kartellbußen am Maßstab des Kriminalrechts, *Juristische Blätter* 2007 p. 478.

6 On the reform *see e.g. Kjærsgaard – Høj*, *Modernisering af de europæiske konkurrenceregler*, *Juristen* 2003 p. 350 ff.

7 *See e.g. Lorenzmeier*, *Kartellrechtliche Geldbußen als strafrechtliche Anklage im Sinne der Europäischen Menschenrechtskonvention*, *Zeitschrift für Internationale Strafrechtsdogmatik* 2008 p. 20 ff.

was revised in 2002 and 2006 (Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17). In addition, a Model Leniency Programme has been created in order to harmonize the leniency policies.⁸ Article 23(1) of the Regulation deals with other delicts such as supplying the Commission with incorrect or misleading information, and sanctions them with fines not exceeding 1% of the turnover in the preceding business year. These delicts are not discussed further in this paper.

The Danish Competition Act (consolidated act 21.8.2007/1027) legislates in 23 § on fines for those who intentionally or by gross negligence violate among others the prohibition against agreements restricting competition in 6 § or the prohibition against abuse of dominant position (11 §). This does not apply if a more severe penalty follows from another statute. Both persons and legal entities can be held criminally responsible. If a harsher penalty than a fine is not deemed to follow from the act, an administrative notice of a fine may be used (see 23b §).

Pursuant to 7 § of the Finnish Act on Competition Restrictions (480/1992), a competition infringement fine may be imposed on an undertaking violating the prohibition against agreements restricting competition (4 §) or abuse of dominant position (6 §). “Undertaking” here means both natural and juridical persons. In January 2009, the proposal for a new competition act was published by the working group Kilpailulaki 2010, appointed by the Ministry of Employment and the Economy⁹. Whilst issues of criminal liability and trading prohibition are discussed, such sanctions are not actually proposed.

The Norwegian Competition Act (5.3.2004 nr 12) encompasses a system with administrative fines (overtredelsesgebyr, 29 §) and criminal liability (30 §). The administrative fine is imposed on an undertaking, when it or someone acting on its behalf, intentionally or negligently infringes among other things the prohibition against agreements between undertakings that restrict competition (10 §) or the prohibition against abuse of dominant position (11 §). More detailed regulations of the imposition of the administrative fine are given in the “Regulation on the calculation of and leniency from administrative fines (22.8.2005 nr 909)”. Intentional and grossly negligent infringement of among others the prohibition against agreements between undertakings that restrict competition in 10 § is also sanctioned with criminal responsibility pursuant to 30 § of the Competition Act. Criminal liability is possible in respect of both individuals and undertakings. The latter cannot, however, be subjected to both administrative fines and fines. In respect of individuals the criminal provision even entails the threat of imprisonment for up to 3 years. If an infringement of 10 § is made under severely aggravated circumstances, imprisonment for up to 6 years may be imposed.

A new Swedish Competition Act (2008:579) entered into force on November 1, 2008. Pursuant to chapter 3, section 5, the Stockholm City Court may decide

8 See on this e.g. *Gauer – Jaspers*, ECN Model Leniency Programme – a step towards a harmonised leniency policy in the EU, Competition Policy Newsletter 2007 p. 35 ff.

9 Competition Act 2010. Publications of the Ministry of Employment and the Economy. Competitiveness 4/2009 (mostly in Finnish).

to impose an administrative fine (konkurrensskadeavgift) on an undertaking if it, or someone acting in its behalf, intentionally or through negligence has infringed, for example, the prohibition of co-operation that restricts competition in chapter 2, section 1 or of abuse of dominant position (chapter 2, section 7). Both natural and legal persons can constitute an undertaking in accordance with chapter 1, section 5. When the facts of the case are clear, an administrative fine order (avgiftsföreläggande) issued by the Competition Authority and accepted by the company may now be used (chapter 3, sections 16-19). Another novelty is the possibility of imposing a trading prohibition (näringsförbud) on individuals for participation in cartels (see Trading Prohibition Act 1986:436, 2a §).

All systems contain rules on exempting from the sanctions and reducing them.

2 More Criminal Law?

It is probably appropriate at this point to describe in a few words what is normally understood by the concept “punishment”. In conformity with *Vagn Greve* the concept can be characterized through the following four qualities. A punishment is:

- a legal consequence which;
- entails suffering of a personal or economic nature, and which;
- is imposed on a person who is blamed for a performed illegal act;
- so that the intensity of the reaction depends on the gravity of the illegal act.¹⁰

The European Court of Human Rights uses its own, autonomous concept of criminal charge and punishment. This means that the fact that a state does not call a certain sanction a punishment does not prevent the ECtHR from doing so if the nature of the violation and the harshness of the sanction speak for it. Hard administrative competition sanctions might be seen to constitute a punishment according to the ECHR notwithstanding their status under national law. Another thing is what follows from this and whether there are any differences between natural and legal persons here.¹¹

Concerning the *de lege ferenda* perspective, there are, moreover, various alternatives open. Firstly, one might inquire whether one should totally abandon the system of administrative sanctions and opt instead for criminal liability – or vice versa. The question is, in other words, one of preference. Secondly, there is the possibility of supplementing one system with the other, e.g. by means of introducing criminal liability for individual perpetrators whilst keeping the current system of an administrative fine for the delinquent undertaking. Then we would have a variant of a model which could be called *a twin-track system*. A

¹⁰ *Greve*, *Straffene*, 2. ed København 2002 p. 13.

¹¹ See e.g. Odelstingsproposisjon nr. 6 2003-2004 p. 117, *Skoghøy*, *Menneskerettsdomstolens straffebegrep*, *Lov og Rett* 2007 p. 193-194 and *Lorenzmeier* op cit 2008 p. 20 ff.

twin-track system can regard natural persons, legal entities or both. It is even possible to adopt different models of sanctioning for different infringements.

As stated above, different models of sanctioning competition infringements have been in operation in Nordic law. The Finnish and Swedish system can be called administrative operating with one track only. In Danish and Norwegian law both criminal and administrative law forms of sanctions are in use. In Danish law, then, the sanctions are primarily a fine or an administrative fine order. In Norway criminal law is fully implemented in that the criminalization of infringement of the prohibition of agreements that restrict competition contains even the threat of imprisonment. A company can be sanctioned alternatively by means of administrative fines or corporate punishment.¹² Moreover, the system represents a differentiated model since abuse of dominant position is not criminalized.¹³

An interesting issue is whether there is anything relevant from the point of view of criminal law if one for a moment leaves out of account the enacted specific system for sanctioning competition infringements. When the purchaser as a consequence of a bidding cartel is tricked into paying more than he had done but for the cartel, the prerequisites of fraud are perhaps satisfied. If the cartel members periodically check whether everybody has received his share and, when necessary, make the balances even by means of groundless bills and payments, this might constitute a book-keeping crime. There are many ways to make someone join or not leave a cartel.¹⁴ In a sanctions proceeding one perhaps tells lies. All this can be legally assessed in many ways, partly depending on whether the specific system of sanctions for competition violations is penal or administrative or consists of both tracks.¹⁵

In a *Rechtsstaat* introducing criminal liability is deemed to require that *principles of criminalization* have been paid attention to. In other words, these principles constitute part of a theory of legislating rationally in the field of criminal law. The central message of the principles of criminalization can in short and with some simplification be summarized as follows:¹⁶

12 Høivik questions the appropriateness of this twin-track system, see his article Er konkurranselovens tosporede sanksjonssystem overfor foretak hensiktsmessig?, Lov og Rett 2006 p. 360 ff.

13 In English law Enterprise Act 2002 section 188 concerns cartel offence which can be applied to individuals.

14 See also Cseres – Schinkel – Vogelaar: Law and economics of criminal antitrust enforcement: an introduction in Cseres – Schinkel – Vogelaar (ed), Criminalization of Competition Law Enforcement, Cheltenham 2006 p. 11-12.

15 E.g. the Danish Competition Act 23 § encompassing a threat of fine is applicable “provided that a more severe penalty is not applicable under other legislation”. In Finland one seems to be a bit uncertain of whether the introduction of the competition infringement fine in 1992 meant that e.g. people responsible for a bid-rigging cartel cannot be punished for a fraud offence the preconditions of which such conduct might have fulfilled.

16 On principles of criminalization see e.g. Jareborg, Allmän kriminalrätt, Uppsala 2001 p. 45-65 and Lernestedt, Kriminalisering. Problem och principer, Uppsala 2003.

- A criminalization can only be legitimate to suppress harmful conduct which violates or endangers an interest which is safeguarded by law and which ultimately belongs to individuals.
- A criminalization can first be called for as a last resort, that is, when no other socially less costly alternative is reasonably available (the *ultima ratio* principle).
- One has to be able to define clearly the criminal conduct and the penalty in statutory text.
- A criminalization may not have a retroactive impact.
- The penalty scale must mirror the blameworthiness of the act.
- The fundamental and human rights as well as European and international legal obligations must be taken into account.

Conduct which markedly hinders or distorts competition means great monetary damages. The legal value actually protected is market force and healthy competition. They might as such appear somewhat vague and less inclined as objects to be protected in criminal law. The conduct harms, however, even individuals, both directly and indirectly. For instance, the victim of a bidding cartel is harmed directly. Also innocent fellow competitors can be seen as directly harmed. Moreover, the economic system is one of the founding pillars of society. Taken as a whole the protected interests here seem of their nature to be comparable with many other interests that enjoy protection by criminal law.

When considering adequate reactions against harmful conduct one must first ask whether the possibilities of the present system have been fully taken advantage of. If this is not the case, the time might not yet be ripe to consider new, harsher tools. What is the experience gained from say ordering compensation of damages for victims and imposing trading prohibitions in this context? Moreover, less destructive reactions than punishment should be taken into consideration if new methods are needed. One must also assess what kind of consequences – including those which are cost-related – the introduction of criminal liability would have.

One point of departure can also be seen in the *theories on punishment* that is, the theories on the aims, justification and functions of punishment. The general justification for the criminal law system lies with *crime prevention*, i.e. preventing future crime. This prevention can, regarding people *generally*, be achieved negatively through deterrence as well as positively through the function of the criminal law system to create habit and moral aversive to committing crime. *Special* prevention, in turn, means the influence of punishment on the person being punished. But it is important to note that creating a criminal law system is not steered by effectiveness alone. A central value is *justice*, which is manifested among other things in the demands of fault as a precondition of liability as well as of the proportionality between crime and punishment. Moreover, a criminal law system must show *humanity*. Criminal law systems are expensive both in terms of economic and human costs. Some people even think that punishing is such a barbaric business that punishments should be replaced by other legal reactions such as civil and administrative law measures (abolitionism).

The old idea of *deterrence* is based on the idea that a rational person seeks to avoid the unpleasant. One problem is that criminal conduct even in some central areas of criminal law – for example, acts of violence committed under the heavy influence of alcohol – does not always fit in the theory which operates with a delinquent who in a rational way calculates the benefits and disadvantages of the crime. The influence of the threat of punishment depends on two central factors, namely the *severity* and the *probability* (as well as the immediacy) of the punishment. The latter is more important in practice which is why it is more relevant to increase the risk of being caught than to heighten the maximum punishment provided for the crime in the law. Concerning the severity of a punishment one can, moreover, point out that a certain measure does not necessarily have the same importance for everybody. Someone might not care much even about a term of imprisonment, whereas a famous auditing company would not spare any costs trying to avoid an employee being charged for participation in an economic crime even if the likely punishment would be just fines.

Even if deterrence were working and efficient, other criminal law values set limits on increasing the efficiency through deterrence. According to the *principle of proportionality*, it would be unjust to use higher levels of punishment than the penal value of the type of the offence gives rise to. One can not, say, punish shoplifting with 5 years' imprisonment even though this would surely lead to a considerable decrease in shoplifting incidents. Nor should one compensate for a very low risk of detection by raising the maximum punishment.¹⁷

The criminal law system also has the function of *establishing the habit and moral* not to commit crimes. People who do not walk against a red traffic light do so, not because they would fear a punishment, but because doing what the law requires is normal and the ordered conduct has become a habit. Criminal law communicates values. That something is criminalized means that the legislator evaluates the conduct as negative and blameworthy. That such norm communication would successfully take place presupposes among other things that authorities and society are felt to be sufficiently fair and that people have a sufficient awareness of the norms.

Concerning the deterrent function of criminal law, the economic infringements offer a textbook example of where the theory could work. Economic activity is normally conducted as planned and engaging in illegal forms of conduct is often based on a considered weighing of the pros and cons of the conduct. From this point of view criminal liability could in principle offer a suitable sanction for certain competition infringements.

Extensive research has been carried out on the deterrent function in the field of competition infringements. Econometric models have been created concerning what should make optimal fines in the context. Ten per cent of the turnover of a business year as the severest sanction for an undertaking has been considered far too low; in order to really work as a deterrent one should go up to some 150%. This would, however, be unrealistic. It might therefore be asked whether the deficit in deterrence should be compensated through a threat of

¹⁷ Compare points 4, 25, 30, 31 and 37 of the 2006 Guidelines on the method of setting fines, which strongly emphasize the negative general prevention.

punishment for natural persons. Since the undertaking would pay the fines of a natural person, we are rather talking about (the threat of) imprisonment here. On the other hand, the undertaking and individuals might be different as addressees of prevention. A further, related question is how high the punishment level and risk of detection should be in the case of individuals.¹⁸

The question as to what would, then, make effective incentives for the delinquent to break out of a cartel – a further application of the basic ideas of the theory – is eagerly discussed in the context of *leniency rules*. The leniency system has been considered effective. In respect of individual criminal liability, an important question is whether leniency should also be applied to criminal law sanctioning of competition violations. In other words, would it be counterproductive to apply leniency to the company but punish the responsible individuals? My impression is that one is inclined to answer in the affirmative. So it is not merely a case of “adding” criminal law but also about how this is to be done. To implant such a leniency system in criminal law is, however, from a normative point of view, not necessarily so straightforward. This is a point which will be discussed in section 4 below.

An entirely different *normative* question, which to my mind is important, is how the sanctioning of individuals behind the company is related to the structures of responsibility in other kinds of economic infringements, such as fraud, tax fraud, the offences of a debtor or security market offences. Like cases should be treated alike whereas different cases should be treated differently. Are individuals who act in the field of competition law enjoying *an immunity for sanctions* which would not come into question concerning other types of illegalities in the field of economic activity? If the answer is yes, then is such a special position warranted?¹⁹

The *principle of legality* requires that rules on criminal responsibility – concerning both crime and punishment – must be strictly defined in statutory law. The legislator must on the one hand define the prerequisites of criminal responsibility as clearly as possible, but on the other hand express himself so that the regulation can also take into account future modes of the crime. Exactly how difficult a task this is depends of course on what kind of conduct the legislator would be considering to criminalize in the field of competition infringements. Previous proceedings might have revealed points in statutory text which should be stipulated more clearly. If regulations of a hierarchical status below that of parliamentary law are also used when defining the crime or the punishment, the conditions set by the legality principle for legislating in such a way must be met; among other things, references made to such lower regulations must be clear and explicit. One aspect of the legality principle is the prohibition of retroactive criminal law to the detriment of the perpetrator.

18 See *Wils*, Is Criminalization of EU Competition Law the Answer? *World Competition* 2005 p. 138 ff and *MacCulloch*, Honesty, Morality and the Cartel Offence, *European Competition Law Review* 2007 p. 355 ff. See also *Oker-Blom – Pöyry*, En kritisk granskning av de konkurrensrättsliga immunitetsreglerna, *Tidskrift, utgiven av Juridiska Föreningen i Finland* 2004 p. 712-720.

19 See e.g. the report NOU 2003:12 – Ny konkurrenslov p. 128 (opinion of the minority).

In criminal law the punishment shall reflect the blameworthiness/penal value of the crime. So criminal law operates with a *retrospective proportionality*. The legislator realizes the principle of proportionality for example when deciding upon the penal scales. An assessment has to be made as to both how severe a punishment the type of criminal conduct in itself seems to deserve (cardinal proportionality) and how high its penal value is in relation to the penal scales of other types of crime (ordinal proportionality). In criminal codes some type penal scales might be used in order to increase the transparency of the law. For instance, in the Finnish criminal code the penal scale fine – imprisonment of up to one and a half or two years is typical in the penal provisions of property and economic offences. For the aggravated forms of such crimes, the threat of punishment is often imprisonment from 4 months to 4 years. Administrative proportionality means the relation between a means and an end, and might, therefore, differ from the proportionality in criminal law. Thus, an administrative sanction can – as is the case with forfeiture, too – be more severe than a punishment.²⁰

The *responsible subjects* have in criminal law traditionally been natural persons. A construction of criminal liability of legal entities must take into account that legal entities themselves cannot act in a way that gives rise to praise or blame. One can ask for example how severe a punishment a legal entity has “deserved”, which may, in turn, have a bearing on the comparison of the vices and virtues of criminal and administrative liability of legal entities.

The introduction of criminal liability must take place in such a way that the *fundamental and human rights* as well as European and international obligations are taken into account. Firstly, one has to see to it that none of the sanction provisions are in conflict with them. Secondly, the system of sanctions as a whole – for example the combination of an administrative fine for undertakings and criminal liability for natural persons – must be checked in the light of fundamental and human rights.

3 Certain Tendencies

The last ten to twenty years have witnessed a rapid development in the market. During this period many changes, which are interesting from the point of view of the discussion on punishment and sanctions, have taken place, too.

Criminal liability of legal entities, which has long traditions in the Anglo-American world, was introduced in Finland in 1995. It is also in use in Denmark and Norway. In Sweden, a corporate fine for legal entities was introduced in 1986; it is not a punishment but a special legal effect of crime. Criminal liability of legal entities has not been easy to accept for the classic criminal law which stresses culpability. The preconditions for criminal liability of legal entities, for example the relation between the legal entity and its physical representatives, can be structured in a number of ways. The size of the corporate fine was in

²⁰ See e.g. Asp, Two Notions of Proportionality, in Nuotio (ed), Festschrift in Honour of Raimo Lahti, Helsinki 2007 p. 207 ff.

Finland defined as 5,000 to 5,000 000 FIM (corresponding roughly the present corporate fine scale of 850 to 850 000 euros) which was rather in line with the basic scale of the administrative fine for competition infringements (5,000 to 4,000 000 FIM), which was introduced in 1992, according to the Competition Act 8 §. A lack of criminal liability for legal entities would, therefore, not (anymore) stand in the way of criminal liability in the field of competition infringements. Another point is that criminal liability might, for practical reasons and/or reasons concerning desert, not always be applicable to undertakings in the field of competition violations.²¹

The sanction *forfeiture of the proceeds of crime* has been in use for a long time. It has also been possible to impose it on legal entities. Forfeiture of the proceeds of crime, which in many countries is an obligatory legal consequence of a crime, aims, like many administrative fines, to see to it that illegalities would not pay. Moreover, the size of this forfeiture sanction does not primarily depend on the culpability factors but on the amount of the benefit gained. On the other hand, forfeiture of the proceeds of crime is also limited to the illegal benefit, since forfeiture is not a punishment but a precautionary measure.²² It has been pointed out that calculating the amount of illegal benefit of competition infringements is very difficult, but I wonder whether these difficulties are really insurmountable.

The EC has not had competence in the field of criminal law, even though EC/EU law indirectly has been of major importance for criminal law. Since the EC has lacked competence in the field of criminal law, a *law of sanctions* has emerged within the Community. The EC competition law is a good example of this. The EC competition sanctions can be very severe and difficult to distinguish from punishment. Gradually, the EC/EU has also intensified its activity in the field of criminal law. This has been done in several ways. One speaks of EU criminal law and European criminal law. The growing interest of the EU in criminal law means that today the EC/EU would make a weaker case for adopting a non-criminal system of sanctioning competition infringements than it did, say, in 1992. Maybe the EC/EU one day prescribes the criminal law to be applied as the sanction for competition infringements?²³

During the past decade a certain shift from a defensive criminal law to a *tough-on-crime offensive criminal law* seems to have taken place. Globalization and the new era of EU criminal law are among the causes to this. One of the

21 Instructive reading is *Toftegaard Nielsen – Strandbakken – Träskman*, Om selskabsansvar i Norden, Nordisk Tidsskrift for Kriminalvidenskab 2003 p. 1 ff.

22 Compare the 2006 Guidelines on the method of setting fines points 30-31 under the title "Specific increase for deterrence". Pursuant to point 31 the Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount. – A sanction which is limited to taking away the unlawful gain from the undertaking which has participated in a cartel can probably not be *seen* as unjust towards the innocent shareholders.

23 The merits and problems are discussed for example in *Dawes – Lynskey*, The Ever Longer Arm of EC Law: The Extension of Community Competence into the Field of Criminal Law, Common Market Law Reports 2008 p. 151-155. See also *Cseres – Schinkel – Vogelaar* op cit 2006 p. 15-17.

fruits of this development are the rules on extended forfeiture of the proceeds of crime. The basic idea is that when someone is found guilty of a serious crime (inclusive serious economic crimes), in addition to the ordinary forfeiture, even the remainder of his property can be confiscated in as much as it can be suspected to originate from (substantial) criminality. The point is that it has been felt justified to use a lower standard of proof when a very far-reaching criminal sanction is at stake.

Such a lowered standard of proof in criminal procedure seems not to have been deemed to contradict the presumption of innocence, which is a central human right. The ECtHR in turn has a good record in Europe in human rights questions related to punishing and sanctioning. For example, the Court operates with an autonomous concept of punishment which means that the rights of the accused cannot be ignored by calling a sanction something other than punishment.

It might be argued that ordinary courts do not have the *expertise* which is called for in competition cases, which would speak against a criminal law system in the context of competition infringements. An administrative procedure would, by contrast, be competent and effective. It can be pointed out that ordinary courts also handle criminal cases requiring special knowledge. Finnish examples of these are complicated economic crimes (such as security markets offences or, to take a more traditional example, offences by a debtor) and environmental crimes. Even a twin-track system with criminal liability for natural persons as a supplementary element presupposes, of course, that no questions of expertise can be deemed to stand in the way. The question of the availability of necessary expertise is partially an empirical one.

On the other hand, different kinds of *punitive payments* or administrative fines seem to become increasingly popular. The boundaries between criminal law and a law of sanctions do not seem to be crystal clear and might, in fact, be withering away.²⁴ One reason for this is that society is not static but in a state of ongoing factual and legal flux. Meanwhile some countries, including Finland, lack a culture of law of sanctions or administrative criminal law. The phenomenon calls for thorough research, also in respect of what would be advisable in the field of competition infringements. It is worth noting here that Finnish law nowadays contains amongst others the following administrative fines, many of which are also familiar in other Nordic countries:

Pursuant to 11 § of the Act on the Promotion of the Use of Biofuels for Transport (446/2007) a fuel distributor which has not supplied biofuels for consumption in accordance with the Act is imposed an administrative fine of 0,04 euro per megajoule.

Legal entities which intentionally or negligently in a way other than what is enacted in the Criminal Code Chapter 51 on security market offences act in

24 Regarding the legal consequences for competition infringements *see* the discussion around the term “sivilrettslig bot” i Odelstingsproposisjon nr 6 2003-2004 p. 113-114 as well as the reasoning of the Finnish Constitutional Law Committee of the Parliament in respect of authorizations to carry out inspections in premises enjoying privacy of the home due to suspected serious infringement of Articles 81-82 EC; Statement of the Constitutional Law Committee 7/2004 p. 3.

violation of certain national or European security market regulations, can pursuant to the Act on Finance Inspection (587/2003) 26a § be imposed a sanction fee ranging between 500 and 200 000 euros. However, it may not exceed 10% of the turnover of the preceding year. The sanction fee may also be imposed on natural persons, in which case the amount ranges between 100 and 10 000 euros. A sanction fee cannot be imposed if the case is subject to preliminary investigation or examination by the prosecutor or pending in court as a criminal case.

A telecommunications operator that acts in violation of certain obligations imposed in the Communications Market Act (393/2003) may, pursuant to 122 §, be ordered to make a penalty payment between 1,000 and 1,000 000 euros. In more serious cases the maximum amount may be exceeded but it may not be more than 5% of the turnover of the operator in the previous year. Regard shall be had to a competition infringement fine for a similar act.

An equally high sanction fee can be imposed on a practitioner of a TV or radio enterprise who acts in violation of certain provisions in the Act on Television and Radio Enterprise (744/1988, see 36a §).

Through the amendment Act 1163/2005 the oil discharge sanction fee was introduced in chapter 2a of the Act on the Prevention of Pollution from Ships (300/1979). It is imposed on the natural or judicial person who is the shipowner. Its amount is fixed on the basis of the size of the discharge and the gross tonnage of the ship in accordance with a sanction fee table.

Since 2005, an advocate who acts dishonestly or otherwise deliberately violates the interests of another person while practicing advocacy or repeatedly acts in violation of proper professional conduct or commits an act detrimental to the reputation of the bar can, as a disciplinary sanction, be imposed a monetary penalty of between 500 and 15, 000 euros (Advocates Act 496/1958, 7 §).

These systems of sanctioning show different features amongst others in respect of

- the investigation of the violation,
- empowerment to use coercive means,
- the proceedings,
- the subject of liability,
- the preconditions of liability,
- determining the size of sanctions,
- possibilities to reduce or waive sanctions and
- whether there is a specific regulation of their relation to possible criminal liability.

4 Differences Between the Realization of Criminal Liability and Administrative Delict Liability

It is useful to consider what differences there might be between realizing the liability for competition infringements in a system of administrative sanctions on the one hand and in the criminal law system on the other hand. One of the

benefits of this is that the systems might learn from each other. Moreover, it helps to assess whether there are such differences that a twin-track system with both structures of liability could be problematic. In making such a comparison it must be borne in mind that criminal liability has been found and developed as a form of liability for acts of natural persons in the first place, whereas in the field of competition infringements the violations take place within activities of undertakings and collective entities. However, nowadays many countries exercise a regime of criminal liability for legal entities as well.

Crimes are being *investigated* by police authorities pursuant to rules of preliminary investigation. The criminal procedural principle of presumed innocence contains a prohibition against an obligation of self-incrimination. The suspect has no duty to take part in the clarifying of the basis of his liability, for example by answering questions or producing evidence such as documents or the like. There are, however, different kinds of coercive means, some of which are focused on persons or property while others aim at attaining information, even by covert coercive means. In many cases a court's permission is needed to use coercive means. The penal scale of the crime type is often decisive in respect of what means of coercion are available and under whose authorization.

In an administrative model, both the means of investigation and the safeguards of the suspect might be weaker than in the criminal model. A prohibition against an obligation to self-incrimination can even be in force in administrative sanctions proceedings. The competition rules entail, however, duties to co-operate at inspections and so forth.²⁵ Waiving the sanction in the competition delict law requires full co-operation throughout the enquiries. Whether the situation is apt to cause conflicts depends, among other things, on whether both the undertaking and natural persons can be made responsible, what forms of sanctions can be imposed as well as whether the system is single or twin-tracked. What kind of a protection legal entities enjoy concerning for example issues of self-incrimination is probably not quite clear.²⁶

If the rules and means of investigation differ in criminal law and in administrative law the results of the investigation may also differ. Especially in a twin-track system rules are needed to define the extent to which the results of a competition delict investigation may be used in a criminal preliminary investigation and a subsequent criminal procedure (and vice versa).

In a criminal *procedure*, the defendant enjoys corresponding guarantees of rights as in the preliminary investigation. Among them is the principle of presumed innocence which in principle means that the onus of proof lies with the prosecution, which has to prove the preconditions of criminal liability beyond reasonable doubt. In practice, the standard might not necessarily be so high in respect of every theme to be proved. If to some extent different rules concerning the burden of proof are used and/or the standard of proof is not as high in administrative competition delict proceedings, this could mean that the

25 According to the point 28 of the 2006 Guidelines on the method of setting fines, a refusal to co-operate with the Commission in carrying out its investigation constitutes an aggravating circumstance in fixing the amount of the fine.

26 See *Elholm – Sparlund*, Nye EU-konkurrenceregler i strafferetligt perspektiv, Juristen 2005 p. 46 ff.

delict would be proven whereas a criminal charge based on corresponding facts would be dismissed in a criminal procedure. Even in an administrative fine procedure, the burden of proof seems initially to lie with the demanding party. However, pursuant to Article 2 of the Regulation 1/2003, the undertaking claiming the benefit of the Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled. Concerning the standard of proof, the starting point in e.g. the Norwegian administrative fine procedure seems, according to the preparatory works of the law, to be a (clearly) preponderate probability^{27, 28}

The rule on *ne bis in idem* forbids double punishment for the same offence (Article 4 of Protocol 7 to the ECHR). This rule encompasses many intricate problems of application. You have to decide what constitutes the same offence and a punishment as well as the stage at which the protection takes effect. If a conduct is considered over several proceedings one must attach great importance to eliminating risks of double punishment. For example, to impose on an undertaking an administrative fine for cartel conduct on the one hand and then to punish it with a corporate fine could be considered to contradict the *ne bis in idem* prohibition.²⁹

Differences between administrative procedure and criminal procedure are to some extent evened out due to the development of the former and assessing it at least partially against the safeguards of fair trial of criminal procedure as well as due to adopting simplified modes of criminal proceedings.

The *preconditions for criminal liability* and administrative delict liability may differ on certain points. Whether a crime has been committed is assessed with the help of a certain scheme called the structure or *concept of crime*. How the preconditions for liability are organized in a concept of crime can vary both in respect of what its elements are and what they entail. In short, it can be said that a crime is a human act that fulfils the definitional elements of a specific offence (e.g. that of a cartel offence, if such conduct is criminalized), and is unlawful and blameworthy. Accordingly, one operates with the levels of definitional elements, unlawfulness and blameworthiness (guilt). Correspondingly, of interest might be what kind of a *structure of the administrative delict* is used in an administrative sanctioning system.³⁰

For competition delicts too, the starting point is the establishment of the definitional elements of a competition delict, for example that there is a secret agreement to put forward bids with certain contents. Because of the principle of legality in criminal law (*nullum crimen sine lege certa*), the crimes might, however, be defined more precisely in statutory text than the prerequisites of an administrative delict. On the next level, that of unlawfulness, the question is

27 Report NOU 2003:12 p. 130-131 compared with Odelstingsproposisjon nr 6 2003-2004 p. 177.

28 *Elholm – Sparlund*, op cit 2005 p. 45-46.

29 *Zeder*, op cit 2007 p. 480-481. – Problems of construction can also arise when a cross-border cartel has resulted in sanctioning proceedings in several countries.

30 A thorough analysis of questions concerning the delict structure is given in *Asp*, EG:s sanktionsrätt. Ett straffrättsligt perspektiv. Uppsala 1998, Del II.

raised whether there was some ground of justification which would render the conduct lawful even if it fulfilled the definitional elements of a crime and as such presumptively was illegal. Such grounds of justification can be found in different parts of the legal order, although the classic ones within the core criminal law are self-defence, necessity and consent of the victim etc. Principally a corresponding level can be seen in the structure of administrative delicts (among other things Article 81(3) EC).

Differences can be found concerning things that in the concept of crime are assessed at the level of guilt. Criminal liability presupposes that the objective conditions of liability can be imputed to the perpetrator as intentional or, at least, negligent (if there is responsibility for the crime type also when committed negligently). Such a subjective condition is often laid down also in competition delict law, for example in Article 23(2) of the Regulation 1/2003.³¹ Of course “accidental” cartels might be rare because such activity is by nature conscious and purposeful. Even so, it may well be the case that the participants in a cartel do not all share the same knowledge of the facts that can influence the responsibility or its scale. Another important point is that in competition delicts the question of intent/negligence of an undertaking comes up. Thus, one must know what the “intention of an undertaking” is. Correspondingly, the criminal liability of legal entities might operate with some concept of fault in the acts of a company.

Criminal liability also presupposes that the perpetrator has reached a certain age of responsibility and is responsible (the Swedish criminal law takes a special position here). These standards can also be discussed in relation to competition infringements even if such questions might not often come up in practice. At the level of guilt even other circumstances can render the perpetrator blameless. These can be called *grounds of excuse*. One of them is the guiltless mistake of law. In criminal law a manifestly excusable mistake of law can mean that there is no crime or that at least a sanction will not be imposed. Such a mistake is probably also relevant in the administrative competition delict law. Both models set, though, the bar quite high since a mistake of law is seldom considered fully excusable in the perpetrator’s own field of activity.

Criminal law also contains additional modes of responsibility, namely attempt and complicity to crime. The doctrine of concurrence of crime deals with whether a certain conduct constitutes one crime only or several crimes. This, in turn, has an impact e.g. on issues of limitation. Similar questions can be asked in the administrative competition delict law, and there are often explicit rules at least on limitation. One interesting point in competition infringements is that their duration is often prolonged.

In criminal law *sentencing* the starting point is that the punishment must be proportionate to the crime. In any case, the punishment may not exceed what is deemed proportionate. The punishment must be deserved and in a criminal law that respects the principle of guilt, the culpability and just deserts constitute the upper limit of the punishment. Since punishment is something evil it is,

31 For some reason, such a precondition is lacking in the Finnish Competition Restriction Act 7 §. Whether that might be a problem with a view to Article 6 ECHR cannot be discussed here.

however, rational to keep the door open to go below the proportionate punishment when good reasons speak for it. Another question is when the severity of the punishment corresponds with the wrongness and blameworthiness of the crime. A preliminary assessment of this has been made by the legislator when he has set a certain penal scale for a certain type of crime. Since the concept of crime consists of dimensions of wrongness (the two first levels in the concept of crime i.e. those of the definitional elements and the unlawfulness) and blameworthiness of the crime, it is natural that the extent of these is central also in sentencing. Thus, the harmfulness and dangerousness of the offence as well as the guilt manifested in the offence are important factors in sentencing.

Also in the administrative competition delict law the seriousness of the illegal act is very important from the point of view of the sanction to be imposed. Contrary to the criminal law sentencing, the dimension of guilt does not, however, play an equally important role in determining the size of the sanction in administrative competition delict law. There must be a proportionality between the competition delict and the administrative fine, but it is partially another kind of proportionality – an administrative proportionality – that is emphasized. Rather *detailed guidelines* are used when deciding the size of the administrative fine. They somewhat resemble the American sentencing guidelines in criminal law. Guidelines might be in use in criminal law in other countries too, especially for crimes in which a quantifiable dimension plays a major role in sentencing (e.g. speeding, drink driving and even drug-related crimes).³²

The really interesting element in competition law sanctioning, *the leniency system*, makes to my mind an illuminating example of points that call for attention especially in a twin-track system with both administrative sanction liability and criminal liability. The leniency system is based on the principle that the undertaking which first provides the competition authorities with proof of a cartel may avoid the competition breach sanctions. This means that the undertaking discloses and clarifies the illegal conduct both of its own and of others as well as co-operates fully throughout the entire course of the case. Others who co-operate can get their sanction significantly reduced. The system is considered to give the competition authorities better chances to detect cartels and to increase the inner instability that characterizes cartels and thereby achieve a preventive effect.³³

Traditionally, in Continental and Nordic criminal law a more reserved position has been taken towards rewarding with immunity from sanctions the one who discloses his criminal conduct and, especially, that of others. There is a difference between voluntarily confessing one's own criminal conduct and turning in others for reward. The same applies to plea bargaining in general. There are several reasons why a certain aversion has been felt for the so-called

32 On the challenges of taking into account the EC competition fine rules from the point of view of the Danish fine punishment see Elholm, *EU-tilpasning af dansk konkurrencestrafferet* in Wegener Jessen-Steinicke (ed), *EU-rettens påvirkning af dansk konkurrenceret*, København 2008 p. 39 ff.

33 Government Bill 11/2004 p. 10-11, 21, 26 and 38-40.

crown witness system. The administration of criminal law belongs to the duties of the state. Criminal law is based on other values, too, than pure efficiency. Criminal law is a system which is in many respects loaded with morals and operates with things like guilt, responsibility and norm communication. It can be argued that a substantial part of the moral capital of criminal law would vanish if guilt and responsibility became goods to be traded between the state and criminals. Correspondingly, there has been no great enthusiasm for plea bargaining or for example privatizing prisons, and so on. Another cause is that the utterances of a crown witness might not always be entirely trustworthy. However, penalties have been reduced for those who have been willing to promote the clearing up of their own criminal acts. It should of course be mentioned that there might be differences here, as in other issues, between the laws of the Nordic countries³⁴. Moreover, it is possible that the attitude which has until now been quite negative towards the crown witness system becomes in time more positive, at first perhaps concerning terrorism, organized crime (which, by the way, has many features in common with certain competition infringements!) and so on.³⁵

To denounce a cartel means, on the other hand, in many cases not only that an infringement can be cleared up but also that this will put an end to it. In criminal law this could be taken into account in sentencing, even if it probably would seldom lead to a total waiving of sanctions. In the criminal law there is also the somewhat related concept of withdrawal from an attempt. Here the perpetrator, having entered the phase of attempt, voluntarily withdraws from completing the crime.³⁶

It should come as no great surprise that a different attitude towards crown witnesses in an administrative competition sanction system as compared with the criminal law system could cause some degree of friction. Therefore, one should either apply the same principles to the issue or regulate points of conflict as far as possible. In the Norwegian system, the leniency rule in the Competition Act 31 § is applied to the administrative fine and the corporate fine, but not, however, to the criminal liability of natural persons. There is, though, now a proposal sent out for public hearing according to which the scope of the provision would be widened. The Danish Competition Act 23a § is applicable to the criminal fine responsibility of both legal and natural persons.³⁷

34 See e.g. Finnish Penal Code 6:6 point 3 and Government Bill 44/2002 p. 185 and 202 compared with Danish Penal Code 82 § points 9-10 as well as *Toftgaard Nielsen*, Straffelovrådets betænkning om straffefastsættelse og strafferammer, Juristen 2003 p. 398-400.

35 See Report NOU 2003:12 p. 136 and *Strandbakken*, Hvilken strafferetspleie ønsker vi?, Lov og Rett 2008 p. 1-2. See also *Strand*, Lavere straff for medvirkning i rettergangen – plea bargaining, Nordisk Tidsskrift for Kriminalvidenskab 2007 p. 370 ff and *Asp*, Upphöranden och uppgörelser – fragment av en sammanhållen tanke, Nordisk Tidsskrift for Kriminalvidenskab 2007 p. 379 ff.

36 Of interest here are e.g. the German Penal Code 298(3) as well as the Austrian Penal Code 168b(2), see also *Zeder*, op cit 2007 p. 483.

37 See also *Nese – Solberg*, Den norske konkurranseloven – noen særegenheter, Kilpailuoikeudellinen vuosikirja [Yearbook on Competition Law] 2006, Helsinki 2007 p. 58-59 and *Sæveraas – Christiansen*, Developments in Norwegian Competition Law,

5 Conclusions

To sum up, the following points seem relevant to the discussion in hand:

1. It is important to gather experiences from different models of administrative sanctioning and criminal sanctioning of competition infringements (and even of other delicts). The Nordic countries already offer a rich variety of models. It is warranted to consider the issue of sanctioning both separately in respect of each type of infringement and as a whole.
2. EU Member states pay attention to the competition delict regulation of the EC. However, the EC has not had a free hand in building up its system of sanctions but has, for instance, lacked competence in the field of criminal law. Consequently, there is no guarantee that the sanction system of the EC/EU is optimal.
3. There seem to be no significant differences in blameworthiness between certain competition infringements such as bidding cartels and certain forms of behaviour such as fraud and tax fraud which are reckoned to deserve punishment.
4. A cartel criminalization can probably also be defined precisely enough in statutory text. From this and the previous point it still does not follow, though, that personal criminal liability must be introduced.
5. Different models of sanctioning give the potential addressees (undertakings and their representatives) rise to different kinds of strategies of behaviour. Furthermore, it is possible that effectiveness and justice would call for different kinds of measures.
6. A twin-track system (which, however, can be structured in various ways) is likely to cause some points of conflict, which must be paid attention to and resolved, if such a system is chosen.
7. The EC and the co-operation within the EU (and even with other countries) set certain factual and even legal frameworks within which it is rational to form the national systems of competition infringement sanctions.
8. A particularly interesting issue is the relation of the leniency system to personal criminal liability.

Kilpailuoikeudellinen vuosikirja 2006, Helsinki 2007 p. 74. As for the proposal, *see* Forslag om endringer i konkurranselova for å styrkje handhevinga av lova, Fornyings- og administrasjonsdepartementet 12.12.2008.