Case Comment: *D.P.P. v. Duffy and Duffy Motors (Newbridge) Limited*

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Competition law in Ireland was strengthened by the harsher penalties provided for in the *Competition Act 2002*. A number of cases involving anti-competitive arrangements (*i.e.* cartels) have recently come before the courts. While these cases involved the period before the enactment of the *Competition Act 2002*, the High Court in *D.P.P. v. Duffy and Duffy Motors (Newbridge) Ltd.* has signalled that custodial sentences will be imposed for hard-core breaches of competition law such as cartelism. This note outlines how the Court views such anti-competitive behaviour. It gives an overview of the relevant law and the general principles of sentencing that the court will consider. Finally the note will briefly comment on issues in relation to white-collar crime.

I – Introduction

The *D.P.P. v. Duffy and Duffy Motors (Newbridge) Ltd.*[1] case comes amidst the rash of enforcement against cartelism by the Competition Authority of Ireland. It is an important case on three fronts. Firstly, it is the first case involving the criminal conviction of a breach of Irish competition legislation where the judgment has been made available. Secondly, it outlines how seriously the court views such anticompetitive behaviour. Finally, in his judgment the Honourable Mr. Justice William McKechnie[2] gave a very clear signal that the next individual before the Court on such a charge could expect a term of imprisonment and, while so doing, outlined some sentencing guidelines for consideration in cases involving white-collar crime.

II – The Facts of the Case

A. The Establishment of the Cartel

In March 1995 a trade association was established to be known as the Citroën Dealers Association (C.D.A.). It was divided into three regions: North/West, Dublin/Leinster and South. The C.D.A.'s membership consisted of the authorised Citroën dealerships throughout the Republic of Ireland. It had a

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[1] [2009] I.E.H.C. 208 [hereinafter *Duffy*].
[2] McKechnie J. was recently elected president of the Association of European Competition Law Judges.

formalised structure with positions of Secretary, Treasurer and President and it filed detailed records of its activities.[3] The C.D.A. established and maintained a comprehensive scheme to achieve set prices for the following:

(i) The maximum permissible discounts offered by the retail dealers;
(ii) The recommended price list for new vehicles;
(iii) Delivery charges;
(iv) Accessory prices;
(v) The charge for metallic paint;
(vi) Agreed prices offered for trade-ins and the sale of used stock; and
(vii) Export prices and parts.[4]

At each meeting of the C.D.A. prices were agreed in relation to each of these items. The agreed prices were recorded (approximately 48 of the meetings were minuted) and this revised price list was circulated by the Secretary to each member of the C.D.A. In addition to this price list, a pocket card was produced for the use of the sales representatives at each of the dealerships. This was to become known as the "card price."[5] In order to police the agreement, the C.D.A. employed two independent companies to dispatch what are known as "mystery shoppers" disguised as ordinary consumers to survey the actual prices being charged on each members' forecourt. If these mystery shoppers were offered a quoted price outside the parameters of the agreed price list, this would be included in a report to the Secretary of the C.D.A. Any breach would attract a fine of £500 (€635), later raised to £1,000 (€1,270).

B. The Investigation of the Competition Authority

As is the case with many cartel agreements, the investigation was triggered by a disaffected member whom the C.D.A. was attempting to fine for breaching the agreement. This "whistleblower" approached the competition authority and was later joined by two more dealers. The assistance of this dealer led to him making thirteen statements and to produce over 160 relevant documents. On foot of this

[3] *Ibid.* at para. 6.
[4] *Ibid.* at para. 7.
[5] *Ibid.* at para. 8.

substantial amount of evidence, Patrick Duffy was approached in March 2004 and interviewed under caution. The resulting statements made by Mr. Duffy confirmed that he was the sole representative of Duffy Motors (Newbridge) Ltd. on the C.D.A., that he had attended the majority of the meetings and that he acted as Treasurer of the Association for approximately three years. As Treasurer he discharged the outgoings of the C.D.A., the expenses of the Secretary and the cost of employing the mystery shoppers. He had remained a member of the Association until it dissolved around February 2004.

C. The Charges Proffered against Mr. Duffy and Duffy Motors (Newbridge) Ltd.

As a result of the anti-competitive behaviour outlined above, four charges were considered in the judgment, two against Duffy Motors (Newbridge) Ltd., trading as P.G. Duffy & Sons and two against Mr. Duffy as a director of the company. The period that the charges applied to was between the 24th June, 1997 and the 18th June, 2002 inclusive.

(i) Duffy Motors (Newbridge) Ltd.

The first count outlined in the judgment was for "entering into an agreement which had as its object the prevention, restriction or distortion of competition contrary to Section 4(1)" of the *Competition Act 1991* (*1991 Act*), and section 2 of the *Competition (Amendment) Act 1996* (*1996 Act*).[6] The second count as outlined was for "implementing an agreement which had as its object the prevention, restriction or distortion of competition contrary to Section 4(1)" of the *1991 Act*, and section 2 of the *1996 Act*.[7] The particulars of the offence were that Duffy Motors (Newbridge) Ltd. as an undertaking within the meaning of section 3 of the *1991 Act* did enter into and implement such a prohibited agreement.

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[6] *Ibid.* at para. 1, Count No. 5 [emphasis in original]. The counts do not appear in numerical order in the judgment and thus are outlined in the order in which they appear. The *1996 Act* has been amended by the *Competition Act 2002 (2002 Act)*.

[7] *Ibid.*, Count No. 6 [emphasis in original].

(ii) Mr. Patrick Duffy

The third count as outlined was for "being a director of an undertaking which entered into an agreement which has as its object the prevention, restriction, or distortion of competition contrary to Section 4(1)" of the *1991 Act*, and sections 2 and 3(4)(a) of the *1996 Act*.[8] The final count outlined in the judgment was for "being a director of an undertaking which implemented an agreement which had as its object the prevention, restriction or distortion of competition contrary to Section 4(1)" of the *1991 Act*, and Sections 2 and 3(4)(a) of the *1996 Act*.[9] The particulars of the offence were that as a director of the company he consented to and authorised that company to enter into and implement such a prohibited agreement.

(iii) Pleas Entered

On the 26th January 2009, Mr. Duffy pleaded guilty to counts No. 1 and No. 2 on the indictment and as a director of the company pleaded guilty on its behalf to counts No. 5 and No. 6. On these pleas being entered the Director of Public Prosecutions entered a *nolle prosequi*[10] on the other charges.

III – The Relevant Law

Irish competition legislation is based on the establishing European Law. It is Article 101 of the Treaty on the Functioning of the European Union which deals with cartel activity. [11] Article 101 states:

> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention,

[8] *Ibid.* at para. 2, Count No. 1 [emphasis in original].
[9] *Ibid.* at para. 2, Count No. 2 [emphasis in original].
[10] *Nolle prosequi* is defined as follows: "[u]nwilling to prosecute: In criminal proceedings, the entry of a *nolle prosequi* by the prosecution before judgment operates to stay the proceedings it is not equivalent to an acquittal and is no bar to a new indictment at a subsequent date for the same offence"; H. Murdoch , *Murdoch's Dictionary of Irish Law*, 4th ed. (Dublin: Tottel, 2004) at 752 [hereinafter Murdoch].
[11] Treaty on the Functioning of the European Union, O.J. C-115/49 (2008), art. 101 [hereinafter TFEU]; ex. art. 81 of the Treaty Establishing the European Community; (formerly art. 85, Treaty Establishing the European Community <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF> (date accessed: 28 March 2010).

> restriction or distortion of competition within the internal market, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
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> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
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> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
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> - any agreement or category of agreements between undertakings;
> - any decision or category of decisions by associations of undertakings;
> - any concerted practice or category of concerted practices;
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> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
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> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[12]

Article 101 was transposed into Irish law by the *1991 Act*. Section 4 reproduced the provisions of Article 101 *verbatim* followed by applicable administrative provisions. Under Section 3 of the *1991 Act* an "undertaking" is defined as:

> [a] person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service.

The Commission in its decision on the *Re. Polypropylene*[13] cartel case, held that the term "undertaking" was not confined to those entities which possessed legal

[12] *Ibid.*
[13] Dec. 86/398 [1986] OJ L230/1, [1988] 4 CMLR 347 at 402.

personality, but covered any entity which was engaged in commercial activity.[14] It has been held to include: corporations; partnerships, individuals, trade associations, the liberal professions, state-owned corporations and co-operatives.[15] The Competition Authority of Ireland has gone so far as to emphasise that a trade association which is engaged for gain in trade or engaged in economic activity, as the case may be, will be considered an undertaking in its own right, for the purposes of that activity.[16]

The law against anti-competitive behaviour was further strengthened when breaches of competition law were criminalised by the *1996 Act*. Section 2 of the *1996 Act* establishes that it is an offence for an undertaking to breach competition law. Section 3 of the *1996 Act* outlines the applicable penalties. Section 3(a) provides on summary conviction for a fine not exceeding £1,500[17] for an undertaking or, for an individual, such a fine or to a term of imprisonment not exceeding 6 months or both. Section 3(b) provides that an undertaking guilty of an offence under section 2 shall be liable on conviction on indictment:

> (i) to a fine not exceeding whichever of the following amounts is the greater, namely, £3,000,000[18] or 10 per cent. of the turnover of the undertaking in the financial year ending in the 12 months prior to the conviction, or
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> (ii) in the case of an individual, to a fine not exceeding whichever of the following amounts is the greater, namely, £3,000,000 or 10 per cent. of the turnover of the individual in the financial year ending in the 12 months prior to the conviction or, at the discretion of the court, to imprisonment for a term not exceeding 2 years or to both such a fine and such imprisonment.

Section (4)(a) provides that:

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[14] See also Case C-41/90, *Höfner and Elser v. Macroton GmbH*, [1991] E.C.R. I-1979, at para 21, Case C-244/94, *Fédération Française des Sociétés d'Assurance v. Ministére de l'Agriculture et de la Péche*, [1996] 4 C.M.L.R. 536; Cases IV/33.126 and IV/33.322, *Cement Cartel*, [1995] 4 C.M.L.R. 327. See Craig P. & De Búrca G., *EU Law: Text, Cases and Materials*, 3rd ed. (Oxford: Oxford University Press, 2003) at 939.

[15] *Ibid.*

[16] Competition Authority, N-09-002, *Notice on Activities of Trade Associations and Compliance with Competition Law*, (Dublin: Competition Authority, 2009) at 4 <http://www.tca.ie/images/uploaded/documents/N-09-002%20Notice%20on%20Activities%20of%20Trade%20Associations%20and%20Compliance%20with%20Competition%20Law.PDF > (date accessed: on 29 March 2010) [hereinafter *Notice on Activities of Trade Associations*].

[17] This amounts to approximately €2,000 pursuant to the figures contained in Schedule 3 of the *Euro Changeover (Amounts) Act 2001*.

[18] This amounts to €3,810,000 pursuant to Schedule 3 of the *Euro Changeover (Amounts) Act 2001*.

> Where an offence under section 2 of this Act has been committed by an undertaking and the doing of the Acts that constituted the offence has been authorised, or consented to, by a person, being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person as well as the undertaking shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

The *Competition Act 2002* (*2002 Act*) added further teeth to the competition legislation. Under section 11 of this Act, [19] all persons indicted for such offences must now be tried in the Central Criminal Court whereas previously the Circuit Criminal Court also had jurisdiction. Section 4 of the Act reiterates Article 101 TFEU while section 6 restates the offence relating to a breach of competition law by an undertaking. Under section 8 the period of imprisonment has been increased to five years with the specified fine now set at €4,000,000 or 10% of turnover for the relevant year, again not to exceed whichever of the two amounts in greater.

IV – The *Duffy* Judgment

A. The Comments of McKechnie J. on Cartels in General

McKechnie J. devoted seven paragraphs of the judgment setting out the nature of cartels as he stated that there is no standard definition or description of a cartel. They can be formal or informal (a "gentlemen's agreement") but most generally have a compliance mechanism and provide for penalties in the event of non-adherence to the agreement. In what could be extracted as a proposed definition he stated that:

> [c]artels involve a group of competitors who for self gain agree to restrict their individual business freedom and follow a common course of conduct on the market. They can be used for all forms of anti-competitive behaviour but are particularly attracted to price fixing, restricting output/limiting production, bid rigging and market allocation.[20]

He continued to state that cartels are "hard-core" breaches of competition law and they "rightly so have been repeatedly described, as involving odious practices." Due to their anti-competitive nature they discourage new market entrants, deter

[19] The main sections of the Act came into force on the 1st July 2002 under the Competition Act 2002 (Commencement) Order 2002 (S.I. No. 199/2002).
[20] *Duffy*, *supra* note 1 at para. 22.

customer interest in buying products and reduce incentives to compete therefore slowing innovation. All of these factors if left unchecked would result in a negative impact on the economy as a whole. He stated that they are "offensive and abhorrent" not merely because they are a prohibited wrong (*malum prohibitum*) but because they are inherently wrong (*malum in se*). In concluding the paragraph he noted that "Cartels are conspiracies and carteliers are conspirators." The court will therefore treat a cartel as being as serious and detrimental to society as any other criminal conspiracy if not more so.

The foregoing statements are underlined by a quote from his previous judgment in the *D.P.P. v. Manning* (which related to Ford dealerships)[21] where McKechnie J. commented on cartels:

> [t]his type of crime is a crime against all consumers and is not simply against one or more individuals. To that extent it is different from other types of crime: and while society has an interest in preventing, detecting and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect, every individual who wished to purchase, for cash, a vehicle from these dealers over the period which I have mentioned were liable to be defrauded, and many surely were by the scheme and by the practices which unashamedly this cartel operated. These activities in my view have done a shocking disservice to the public at large.[22]

The quote is followed by an excerpt from Gregory J. Werden's paper entitled "Sanctioning Cartel Activity: Let the Punishment fit the Crime."[23] In this passage Werden described cartel activity as constituting a property crime which is in line with McKechnie J's observation that cartels cause an illegal transfer of consumer's money to the carteliers in the price premium that would not exist if there was real competition in the market in question. The passage quoted reads:

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[21] (Unreported High Court, McKechnie J., 9th February 2007) [hereinafter *Manning*]. The Ford dealers had established the Irish Ford Dealers Association which ran along similar lines to the C.D.A. McKechnie J. singled out Kelleher's of Macroom as the only firm to "emerge with dignity from this sad affair" for not participating in the cartel. See M.E. Curtis and J. McNally, "The Classic Cartel – Hatchback Sentence?" [2007] 4(1) Comp. L. Rev, 41 – 50 at 42 <http://www.clasf.org/ComplRev/Issues/Vol4Iss1Art2CurtisMcNally.pdf> (date accessed: 3 April 2010).

[22] *Duffy*, *supra* note 1 at para. 23.

[23] *Ibid.* at para. 24. G.J. Werden, "Sanctioning Cartel Activity: Let the Punishment fit the Crime" *European Competition Journal* Volume 5, Number 1, April 2009, 19 – 36 or see <http://www.justice.gov/atr/public/articles/240611.pdf> March 2009 at 6 (date accessed: 10 April 2010) [hereinafter Werden].

> [c]artel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses. Cartel activity, therefore, is not like tortuous conduct, which is redressed with a liability rule focussing on the harm to victims and providing the incentive to take due care. Like other property crimes, cartel activity should be prohibited rather than merely taxed. As Judge Richard Posner explained of criminal sanctions generally, they 'are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it'.[24]

McKechnie J. then further quoted Whelan who stated that cartels aim "to undermine and destroy a fundamental and political philosophy of Western democracies, i.e. free market capitalism and thus arguably violates prevailing mores." [25] Therefore McKechnie J. established that cartel activity is a "hard-core" breach of competition law as well as being viewed by society as a serious breach of social mores and therefore deserves to be punished accordingly.

B. General Principles of Sentencing

After establishing the serious nature of cartel offences McKechnie J. then went on to examine the general principles of sentencing in (i) The European Union, (ii) The United Kingdom, and (iii) Ireland.

(i) European Union

The relevant implementing regulations are Council Regulations 1/2003, "on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty." [26] The latest revised guidelines on setting fines for such infringements issued under Article 23(2)(a) of the Regulation were published in September 2006.[27] In its Thirteenth Report on Competition Policy 1983, the Commission has stated that: "[t]he purpose of the fines is twofold: to impose a punitive sanction on the

[24] *Ibid.*
[25] P. M. Whelan, "A Principal Argument for Personal Criminal Sanctions as Punishment under E.C. Cartel Law," (2007) 4(1) Competition L.R. 7 at 29; *Duffy, supra* note1 at para. 25.
[26] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (TEC) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF> (date accessed: 28 March 2010).
[27] *Duffy, supra* note1 at para. 28.

undertaking for the infringement and to prevent a repetition of the offence, and to make the prohibition in the Treaty more effective."[28] This is followed by a list of mitigating circumstances which include:

- Where the infringement is terminated after Commission intervention (non-applicable to cartels);
- Where the infringement has occurred through negligence only;
- Where the offender has cheated the agreement;
- Where the offender has co-operated to an extent beyond that which is covered by the scope of the investigation.[29]

McKechnie J. expanded further on the mitigating factors of negligence, which does not apply to this case and that of cheating. He cited the opinion of Advocate General Mayras in *General Motors v. Commission* that:

> [t]he concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them.[30]

With regard to cheating or a substantially limited role he cited *Daiichi Pharmaceutical v. Commission (Vitamins)* [31] that this mitigating factor will be acceptable where a cartelier:

> [a]ctually avoided implementing [the rules] by adopting competitive conduct on the market or, at the very least … clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.[32]

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[28]Commission of the European Communities, 'Thirteenth Report on Competition Policy', Published in conjunction with the 'Seventeenth General Report on the Activities of the European Communities 1983' Brussels/Luxembourg 1984, see< http://ec.europa.eu/competition/publications/annual_report/index.html> (date accessed: 28 March 2010) at para. 62, quoted in Duffy, *ibid.* at para. 29.

[29] *Ibid.*

[30] [1975] E.C.R. 1389 quoted in *Duffy*, *ibid.* at para. 30.

[31] Case T-15-02 *Daiichi Pharmaceutical v. Commission (Vitamins)* (2006) O.J. C-108/25 [hereinafter *Daiichi*]. For a full list of European cartel cases see <http://ec.europa.eu/competition/elojade/cartel/> (date accessed: 28 March 2010).

[32] *Ibid.*

These mitigating factors which may be applicable are followed by an excerpt at paragraph 31 of the *Daiichi* judgment from Faull and Nikpay[33] which summarised a number of arguments put forward which have been rejected as mitigating factors by the European Commission, including:

- Where no benefit actually accrued from the cartel;
- Where there was a positive contribution to the European Economy;
- Where the cartel is mooted as a defensive measure against "Distortions of Competition";
- Where customers are not opposed to the illegal practices;
- In the case of a first time offence;
- Where the cartel ceased operation before the intervention of the relevant authorities;
- Where there was coercion or pressure exerted by the ringleader of the cartel;
- Where there was a gradual drift to illegal practices (e.g. a trade association which was established for *bona fide* trade objectives but slowly drifts into unlawful activities[34]); and
- Where the financial situation of a company is poor (it is especially the case during times of recession and difficult trading conditions that competition must be protected in order to ensure a fair price for consumers).

After summarising the range of acceptable and rejected mitigating factors McKechnie J. emphasised that such circumstances were considered in the environment of administrative sanctions (*i.e.* an enforcement regime where the powers only extend to the levying of fines) and must be read in that way. Ireland and the United Kingdom are distinguished from the circumstances in which the above guidelines and decisions were made, as in addition to fines, they also provide for criminal sanctions.

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[33] J. Faull & A. Nikpay, *The EC Law of Competition*, 2nd ed. (Oxford: Oxford University Press, 2007) at paras. 8.477, 8.681.

[34] For guidance on the boundaries of acceptable practices for trade associations see *Notice on Activities of Trade Associations*, *supra* note 16.

(ii) United Kingdom

McKechnie J. began his consideration of the U.K. provisions with the most relevant decision, that of the Court of Appeal in *R v. Whittle, Alison and Brammar.*[35] The case in question involved a prosecution under section 188 of the *Enterprise Act 2002* which, under section 190, carried when convicted on indictment a maximum sentence of five years and/or a fine without limit.[36] The circumstances of the case prevented Hallett L.J. from laying down any specific guidance as to the duration of the sentence, however she quoted the following from the U.K. Office of Fair Trade *Report on the Proposed Criminalisation of Cartels in the U.K.*:

> [b]y way of general guidelines, we have noted the terms of the Hammond/Penrose Report which suggested the following factors as being relevant to any sentence passed:-
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> - The gravity and nature of the offences;
> - The duration of the offences;
> - The degree of culpability of the defendant in implementing the cartel agreement;
> - Whether the defendants conduct was contrary to guidelines laid down in a Company Compliance Manual; and
> - Mitigating factors, for example, any co-operation the defendant may have provided in respect of the inquiry; whether or not the defendant was compelled to participate in the cartel under duress; whether the offence was a first offence; and any personal circumstances of the defendant which the courts may regard as a factor suggesting leniency.[37]

She noted that while the above list is by no means exhaustive, such considerations are "plainly relevant."[38] It can be seen that several of the mitigating factors mentioned are those as rejected by the Commission. However McKechnie J. stated that as the Commission and European Courts relate to fines only and given the custodial option where general sentencing principles apply, the correct approach would relate more closely to that outline by Hallett L.J. above, despite the justified obviousness "inherent in Europe's position."[39]

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[35] [2008] E.W.C.A. Crim. 2560 [hereinafter *Whittle*].
[36] *Duffy*, *supra* note 1 at para. 33.
[37] *Whittle*, *supra* note 35 at para. 34, quoting A. Hammond & R. Penrose, *Report on the Proposed Criminalisation of Cartels in the U.K.* (Great Britain: Office of Fair Trading, 2001) <http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft365.pdf> (date accessed: 1 April 2010).
[38] *Whittle*, *ibid.* at para. 35.
[39] *Duffy*, *supra* note1 at para. 34.

(iii) Ireland

Having distinguished the guidance of the European Union and having taken cognisance of the situation in the United Kingdom, McKechnie J. turned his attention back to Ireland. He began by stating that it is a long established principle in Irish law that the sentence imposed must fit the crime and the criminal. It must be rational and proportionate.[40] Thus the case must be considered in the light of the seriousness of the offence, the circumstances of its committal, the prescribed punishment and any aggravating or mitigating factors.

He stated that there is no place in the criminal justice system for vengefulness or vindictiveness but there is, however, for deterrence. Here he quoted O'Malley on deterrence:

> [d]eterrence may be general or specific in nature. A penalty motivated by a policy of general deterrence aims to demonstrate to potential offenders and to society at large the painful consequences of certain wrongdoing. Specific deterrence is more concerned with the particular offender, and aims to impress upon him the punishment he will suffer if he re-offends. Both forms of deterrence are grounded on an assumption of rationality. Actual and potential offenders are presumed to have the inclination and capacity to weigh up the likely costs and benefits of any crime they may be tempted to commit.[41]

McKechnie J. further quoted Werden who emphasised the importance of the deterrent as a factor in sentencing:

> [c]artel activity materially differs from other property crimes only with respect to the purpose of sanctions. Rehabilitation and incapacitation are important purposes for most criminal sanctions, but deterrence is the only significant function of sanctions for cartel activity, and the specific deterrence of convicted offenders clearly is secondary to the general deterrence of potential offenders.[42]

McKechnie J. agreed strongly with these sentiments:

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[40] *Ibid.* at para. 35.
[41] T. O'Malley, *Sentencing Law and Practice*, 2nd ed. (Dublin: Thomson Round Hall, 2006) at para. 2-11 at 33 [hereinafter O'Malley].
[42] Werden, *supra* note 23, quoted in *Duffy*, *supra* note 1 at para. 37.

> [c]ompetition crimes are particularly pernicious. Coupled with that, and the low likelihood of recidivism amongst perpetuators, this means that in order to be effective sanctions must be designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place.[43]

It can be seen that the revisions made to the criminal sanctions for a breach of competition legislation by the *2002 Act* were designed to increase the deterrent effect of these penalties. The Court was of the view that these sanctions must be used to their full effect if they are to have any deterrent effect. However it must be borne in mind that the case in question here falls under the provisions of the *1996 Act*.

At this stage McKechnie J. dealt with an interesting point regarding Duffy and Duffy Motors being separate legal *persona* but both entities being guilty of offences arising out of the same prohibited conduct. Any attempt to argue that a penalty imposed on both entities could be considered as double punishment would be rejected. He quoted Hardiman J.'s judgment in *People (Director of Public Prosecutions) v. Rosebury Ltd.* at length which dealt with a similar issue:

> [t]here is no obligation on any person conducting a trade, whether it is the building trade or any other business, to incorporate the business which he is conducting. He is entitled to trade, as no doubt he started, in his own name and to bear personally the risks attaching to that, namely the commercial risks. The director, as many other people, chose not to do this but to incorporate a company for the purpose of interposing the company between himself and various liabilities which might arise in the course of business. That is a thing which a person is fully entitled to do. If someone sued the director in respect of the liabilities of the accused, one can assume the director or his lawyers will be quick to point out that they are two completely different entities. He has drawn down the veil of incorporation, the effect of which is to render him, except in restricted circumstances arising under the Companies Acts, safe from liability for the accused's debts.
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> The same must clearly apply in reverse in circumstances like these. The director and the accused are not 'basically the same thing'. The accused may be the creation of the director's but is created with the express purpose of being a separate legal entity. Moreover, s. 48 of the Act of 1989, as counsel for the prosecutor points out, specifically provides for the liability of an individual who is a director in addition to the liability of a company. That is plainly provided by a statute to which the court must give effect.[44]

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[43] *Duffy*, *supra* note 1 at para. 37.
[44] [2003] 4 I.R. 338 at paras. 339, 340. quoted in *Duffy*, *supra* note 1 at para. 39.

Although the Act in question is different in this case, the competition legislation also provides for the individual liability of directors. There was no question of Mr. Duffy and Duffy Motors as being "identified as one."[45]

C. Consideration of Mr. Duffy's Sentence

There are two forms of punishment available here. It is mentioned that the normal procedure of a sentencing court would be to deal with the fine and only consider a custodial sentence if there was inability to pay the fine or where a fine would have no deterrent effect. However McKechnie J. was of the view that in the present case a mixed type of sentence is preferred. He discussed the option of the fine and noted that the Irish legislation takes the approach of the Commission but without the limitations which are placed on it – the Irish legislation recognises that 10% of the total turnover could exceed €3 million and could seriously impact on an undertaking's business.[46] Despite this level of fine however, McKechnie J. still viewed the availability of a custodial sentence as crucial. He reiterated the comments he made in *D.P.P. v. Manning*:

> [i]n my view, there are good reasons as to why a court should consider the imposition of a custodial sentence in such cases. Firstly, such a sentence can operate as an effective deterrent in particular where if fines were to have the same effect they would have to be pitched at an impossibly high figure. Secondly, fines on companies might not always guarantee an adequate incentive for individuals within those firms to act responsibly. This particular point may not, in some circumstances have the same force where individuals are concerned. Thirdly, knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater cooperation in cartel investigations against, and quite frequently against their employers. Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be a very powerful deterrent and finally, the imposition of the sentence for the type or category of persons above described can carry a uniquely strong moral message. Accordingly, they are in my view some very powerful reasons to custodies an individual who has been found guilty under the Competition Acts.[47]

[45] *Duffy*, *supra* note 1 at para. 39.
[46] For more detailed discussion on fines and corporate offenders see O'Malley, *supra* note 41 at 411 with particular reference to the "spillover" effect at paras. 19 – 07.
[47] *Duffy*, *supra* note 1 at para. 43.

He further re-asserted that he saw no room for any lengthy lead in period before use is commonly made of this supporting form of sanction. In considering Mr. Duffy's sentence McKechnie J. outlined that he must, in principle, be conscious of:

i) the gravity of the offences;
ii) the circumstances in which these offences were carried out;
iii) the nature of the offences;
iv) the continuing duration of their commission;
v) the role played by Mr. Duffy in them;
vi) Mr. Duffy's personal circumstances;
vii) the circumstances of Duffy Motors (Newbridge) Ltd.;
viii) any aggravating or mitigating factor; and
ix) the principles of proportionality and totality.[48]

D. Mitigating Factors

The defence for Mr. Duffy put forward six mitigating factors for which credit was claimed. McKechnie J. noted that the weight which may attach to any one of these will relate to both the individual and the crime therefore their influence on sentencing will differ. He then went on to deal with mitigating factors in relation to cartel offences under seven headings.

(i) The unblemished reputation of the accused – the acts were out of character/unlikely to re-offend.

It was noted that while it is true that the offence is not likely to be repeated, the ongoing and continuous nature of cartel offences would suggest that the behaviour complained of was not out of character. This was not an impulsive act despite his outward law abiding façade, he was engaged in a criminal conspiracy with its object to defraud the general public for financial gain. Such cartels require a high level of planning and concealment. Carteliers are generally well educated astute business owners or in a position of senior management who will have done a benefit/detection appraisal. If this is the *persona* of carteliers it "is very difficult to

[48] *Ibid.* at para. 44.

say that such behaviour is out of character."[49] Further, given that white-collar criminals have a low level of recidivism its absence is "not necessarily a weighty mitigating factor."[50] Thus in this class of case the lack of previous convictions and the low danger of re-offending as well as favourable character references will "in general have less weight because of the type of individual likely to be involved and the type of conduct maintained."[51]

(ii) Distress/Coercion

It was stated that the offences in question were committed in the struggle for survival rather than motivated by outright greed. However McKechnie J. noted that allowing credit for economic distress would be the antithesis of competition and competition in the market would cause hardship to some but ultimately it is the consumer who benefits. Even where such a factor could be taken into account there was no evidence that Mr. Duffy was anywhere near the requisite level of hardship to take the claim seriously. Nor was it accepted that as a Citroën dealer, he had no choice but to join the C.D.A., as merely joining the association did not require him to engage in the anti-competitive practices or assist in their implementation as Treasurer.[52]

(iii) Some lawful aims

The fact that the C.D.A. was initially established with the *bona fide* aims of a trade association did not justify the illegal activities subsequently entered into. Many such trade associations are established under an ostensible aim but are designed to conceal or gradually slide into illegal practices.[53] The acceptable boundaries of trade association activity are outlined in the Irish Competition Authority's *Notice on Activities of Trade Associations and Compliance with Competition Law.*[54]

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[49] *Ibid.* at para. 47.
[50] *Ibid.* at para. 48.
[51] *Ibid.*
[52] *Ibid.* at para. 49.
[53] *Ibid.* at para. 50.
[54] *Notice on Activities of Trade Associations*, *supra* note 16 at 4.

(iv)" Object"/"Effect" Offences

Under the *1991 Act* and the *1996 Act* charges can be brought where the prohibited conduct either by "object" or "effect" interferes with competition. In this case the D.P.P. preferred "object" offences which are defined by their purpose and not by their result. McKechnie J. notes that if the end result (*i.e.* whether the cartel was successful in attaining its goals) could decriminalise the conduct then this type of offence would lack utility and be redundant. In other words, running or implementing a bad cartel is no defence – an incompetent crook is still a crook nonetheless. It is the behaviour which constitutes the offence, not the end result. The ends might not have justified the means but the means are still prohibited.

(v) Cheating on the Cartel

Some piecemeal evidence was offered in support of a claim that Mr. Duffy did not implement the agreement as he cheated on the agreement. The kernel of the evidence presented was that periodically some vehicles would not achieve their list price therefore to some extent there was non-implementation of the price-fixing agreement. This, McKechnie J. stated, had no bearing on guilt however he also gave guidance on when such evidence could be accepted:

> [i]t may be possible however, in certain circumstances, be a factor for which some credit may have to be given. To be considered so, there must be clear and cogent evidence of a direct infringement(s) of the rules: this will not be satisfied by mere generalisation or by the giving of partial or selective data. A complete picture of all relevant material is essential. Whilst any such infringement(s) will be weighted according to circumstances, those which have no positive effect on consumer welfare or no negative impact on cartel activities will be of little interest.[55]

Following on from this it was also noted that Mr. Duffy helped to implement the agreement in an active role as Treasurer for three years and an active member for the full nine year existence of the C.D.A. despite the fact that his contributions were not minuted:

[55] *Duffy, supra* note 1 at para. 53.

> [t]he position of responsibility held by him and his discharge of those functions are reflective only of an active and supporting cartelier. In such circumstances it could not be a correct characterisation to say that he was merely a passive attendee.[56]

(vi) Co-operation with the Investigation

It was put forward that Mr. Duffy was fully co-operative when approached by the authorities. He admitted attending the meetings and voluntarily provided documentation to the investigating officers. This, it was claimed, saved a considerable amount of time and effort. McKechnie J. rejected this claim as he doubted that there was any real value to his co-operation. The whistle blower had already furnished the lion's share of information which led to Mr. Duffy being questioned. In effect he only worked with the authorities once he had been caught and not of his own volition. McKechnie J. continued on to give guidance on when co-operation can be taken on board:

> [f]or co-operation to count, when either considering a prosecution or when passing sentence, it would have to have far greater beneficial value. An obvious example is the way in which the existence of the Association came to light; even if those who contacted or co-operated with the Competition Authority were not granted general or qualified immunity, the giving of such information would have to be reflected by the court. Co-operation must be judged by its *utility* whether in the impending investigation or otherwise. How useful has it been to prevent, detect, halt or disrupt the illegal activity? Its value as measured in this way can then be arrived at. Finally, the Authority's Cartel Immunity Programme could usefully be referred to in this context.[57]

(vii) Guilty Plea

Guilty pleas must be taken into account as they save the D.P.P. a substantial amount of time in trying to prove the case and save the court time in hearing the trial. McKechnie J. also noted that Mr. Duffy's personal circumstances and the circumstances of the company must also be taken into account.[58]

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[56] *Ibid.* at para. 55.
[57] *Ibid.* at para. 57 [emphasis added]. For further information on the Competition Authorities Immunity Programme see <http://www.tca.ie/EN/Enforcing-Competition-Law/Cartel-Immunity-Programme.aspx> (date accessed: on 30th April 2010).
[58] *Duffy, ibid.* at para. 58. The personal circumstances of the defendants are at paras. 12-17.

E. Ancillary Order

Another matter raised in the case was whether the disqualification of Mr. Duffy from holding any directorship for a period of five years under section 160 of the *Companies Act 1990* is reckonable when formulating the punishment. This is not a discretionary punishment – it operates immediately upon conviction whether by plea or conviction. McKechnie J. noted that to take it into account might seem to be almost self-defeating to the section however such a view has not been determinative and some judicial determination has been given to the designation of such ancillary orders. He cited four of the relevant cases:

> (A) *Conroy v. Attorney General and Anor.* [1965] IR 411: where the issue was whether a mandatory disqualification from holding a driving licence for 12 months, following a s. 49 conviction (Road Traffic Act 1961 – incapable of driving due to drink), which otherwise carried a maximum of 6 months and £100 fine, or both, was such as to render the offence "non-minor" for the purpose of Article 38 of the Constitution. The Supreme court held that the ancillary order, although potentially having punitive consequences, was not a punishment when considering the "gravity" of the offence, but rather was essentially a finding of unfitness.
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> (B) *The People (D.P.P.) v. Redmond* [2001] 3 IR 390: Having pleaded guilty to 10 charges of wilfully failing to make tax returns, the accused was fined a total of £7,000. The D.P.P. sought to review the "unduly lenient" nature of the sentence under s. 2 of the Criminal Justice Act 1993. The evidence showed that Mr. Redmond, in respect of undeclared income of £249,000 (to cover the offending and other years), had settled all his outstanding revenue liabilities for the sum of £782,000, which included interest, penal interest and revenue penalties. In dismissing the application the court of Criminal Appeal held that the cumulative amount paid could be taken into account when considering the proportionality of the final penalty.
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> (C) *The People (D.P.P.) v. N.Y.* [2002] IR 310: When sentencing a person who had pleaded guilty to two counts of rape, the Court of Criminal Appeal, having held that the distinction between primary and secondary punishment related to the distinction between minor and non-minor offences (*Conroy's* case), accepted that the notification requirement of s. 10 (to the Gardaí) and the obligation of s. 26 (to prospective employers if the employment involved children) of the Sex Offenders Act 2001, could *"constitute a real and substantial punitive element"* and so were matters *"to which the court is entitled to have regard"* (ibid. at 319).
>
> (D) *Enright v. The Attorney General* [2003] 2 IR 321: This was a case where the notification requirements of the Sex Offenders Act 2001 were again at issue. The High Court, whose judgment was delivered a day before that given in *N.Y.*, held, having reviewed a number of authorities, including the

> influential U.S. Supreme Court decision in *Kennedy v. Mendoza-Martinez* (1962) 372 U.S. 144 at 148, that such provisions were not punitive, either in purpose or effect. Notwithstanding this conclusion however, the Court was of the view that a Judge, when sentencing, is *"probably"* entitled to have regard to them, although given the *"minimal nature of the burden imposed"* these are not likely to *"materially"* affect sentence.[59]

Having considered these decisions McKechnie J. noted that:

> [g]iven the diversity of purpose behind these decisions and noting in particular that the reasoning and conclusions of each Court are specific to the issue in question, it is difficult to extract general principles and apply them to a restriction not dealt with in any of these cases. Since no authority has been opened on Section 160 of the Companies Acts 1990, I do not believe that a definitive view should be given on its provisions unless it is necessary to do so. In my opinion it is not because[,] even if applicable, the disqualification must be weighted in the individual context of each case.[60]

Having distinguished the facts of the present case and deferring from expressing a view on the point until the facts are more appropriate, he concluded that the disqualification does not have any "real or substantial disabling effect" on Mr. Duffy. This is due to the fact that it is for a limited period of time and the fact that he most likely will continue working in the firm – he will not lose his job, he will merely cease to be a director. Due to the circumstances of a family business where the other shareholder is Mr. Duffy's brother, the *status quo ante* will more or less continue.

F. The Principle of Equity or Equality before the Law

This is the final principle at issue contained in the case. Evidence was heard during the case that two other prosecutions had been taken arising out of the C.D.A. cartel. These however were heard in the Circuit Criminal Court because at the time the *2002 Act* had not yet come into force thus all future convictions under sections 4 and 5 of the *1991 Act* were mandated for the Central Criminal Court.[61] Therefore the Honourable Mr. Justice Michael O'Shea dealt with the cases of Mr. Durrigan and Mr. Doran.

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[59] *Ibid.* at para. 61 [emphasis in original].
[60] *Ibid.* at para. 62.
[61] An interesting point to ponder regarding this issue is how a cartel discovered operating in 2004 did not fall under the *2002 Act*.

(i) Mr. Durrigan

On the 8th of May, Mr. Durrigan, who at times was president of the C.D.A., pleaded guilty to one count of authorising his company to "enter" into an agreement for the purposes of price fixing, contrary to section 4 of the *1991 Act* and sections 2 and 3(4)(a) of the *1996 Act*. He was sentenced to three months, suspended for two years. His company which pleaded guilty to one charge of "entering" into such an agreement was fined €12,000.

(ii) Mr. Doran

In October 2008 Mr. Doran, who was President of the C.D.A. on occasions pleaded guilty to the same charge as Mr. Durrigan. He was sentenced to three months imprisonment, suspended for five years. His company Ravenslodge Trading Ltd. pleaded guilty to one count of "entering" into such an agreement. It was fined €20,000 with half to be paid within six months and the remainder before the end of the year.

It was conceded that the corporate and individual charges involved in this case were virtually indistinguishable to counts one and five in this case. In *Manning* McKechnie J. expressed the view that the only real and effective deterrent to such activity, of which price fixing is one of the more heinous examples, might have to include a prison sentence. He mentioned that up to the *Manning* case there had been four cases in which a custodial sentence has been imposed for a breach of the Competition Acts, a penalty available since section 3 of the *1996 Act*, yet no convicted person had spent any time actually serving their sentence. He noted that he saw no need for a long lead-in period for leniency and that the serving of a custodial sentence was near at hand. After two years have passed McKechnie J. reiterated the point that "if the first generation of carteliers have escaped prison, the second and present generation almost certainly will not." [62]

While acknowledging that O'Shea J. was entitled to take the view that he did, McKechnie J. noted that if he himself had been dealing with the case the results for

[62] *Duffy, supra* note 1 at 67.

both the defendants and their companies would not necessarily have been as they were. In light of his experience he viewed fines, unless severe and severely impacting, as not being a sufficient deterrent. While section 3 of the *1996 Act* provides for fines of up to £3,000,000 (€3,800,000) or 10% of turnover, whichever greater, a substantial figure which many companies would not be in a position to discharge and likewise neither would many individuals. McKechnie J. noted that if this level of fine does not have the desired effect of protecting members of the public, in particular customers, then a custodial sentence is the only option.[63] However with regard to the principle of equality he noted that:

> [i]t seems to me that, even making allowances for the differences between Mr. Duffy/his company on the one hand and Messrs. Durrigan and Doran/their companies on the other, a genuine sense of grievance could follow if I were to impose a sentence and demand its service by Mr. Duffy.[64]

In attempting to distinguish the facts of this case from the previous two at issue, McKechnie J. cited Henchy J. in *McMahon v. Leahy*, being one of two judgments he gave in the Supreme Court dealing with Article 40.1 of the Constitution.[65] Henchy J stated that persons coming before the court who cannot be differentiated on the basis of relevant criteria should, broadly speaking, be treated equally and where there is unequal treatment, this must be justified.[66] McKechnie J. identified a distinction in this case that while Messrs. Durrigan and Doran pleaded guilty to a single count of "entering" and authorising the company to "enter" into a price fixing agreement, Mr. Duffy had also pleaded guilty to the charge of "implementing" the agreement. McKechnie J. considered this to be a significant additional crime because it puts in place and seeks to obtain the fruits of the agreement previously entered into.[67] However he further notes that "while this distinction must be reflected in the sentence, it is not such as would demand gaol".[68]

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[63] *Ibid.* at para. 69.
[64] *Ibid.*
[65] *McMahon v. Leahy* [1984] I.R. 525 [hereinafter *McMahon*], cited in *Duffy*, *supra* note 1 at para. 70.
[66] *McMahon*, *ibid.* at 541.
[67] *Duffy*, *supra* note 1 at para 70.
[68] *Ibid.* at para. 70.

G. The Sentence Imposed on Mr. Duffy

McKechnie J. imposed a sentence of six months on Mr. Duffy in respect of the "entering" plea and nine months in respect of the "implementing" plea but suspended in their entirety over a period of five years on him entering into the usual bond. He further imposed fines on Mr. Duffy in respect of the "'entering" plea of €20,000 and €30,000 in respect of the "implementing" plea. With regard to Duffy Motors (Newbridge) Ltd. he imposed a fine of in respect of the "entering" plea of €20,000 and €30,000 in respect of the "implementing" plea. The total fines for both defendants came to €100,000. He compelled both Mr. Duffy and the company to pay half of the fine within three months and the remainder within the next three months. If Mr. Duffy failed to comply he should serve 28 days in default and in the case of the company distress would apply.[69]

V – Comment

White-collar crime is a serious problem which, in the case of competition breaches impacts seriously on consumers. The aim of the *2002 Act* was to provide for tougher sanctions for breaches of competition law. During the Dáil debates on the *2002 Act* Mr. Rabitte TD noted the appropriateness of the harsher sanctions for "hard core cases" such as "blatant cartels which involve price fixing – including agreements on margins."[70] The cases involving breaches of the competition law such as the *Home Heating Oil* case,[71] the *Manning* case[72] and the *Duffy* case[73] were clear examples of blatant cartels, however up to now we have only seen suspended sentences imposed. In fact James Bursey of Bursey Peppard Motors, also part of the Citroën cartel, has been the only person yet to serve a term of imprisonment related

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[69] Distress is where moveable property is seized upon non-payment of the fine.

[70] 550 Dáil Debates col. 59 (28 February 2002) http://historical-debates.oireachtas.ie/D/0550/D.0550.200202280011.html> (date accessed: 28th March 2010).

[71] The *Home Heating Oil* cartel case is actually a series of prosecutions taken against numerous accused for establishing and operating an anti-competitive arrangement relating to the supply of home heating oil in the west of Ireland, one of which is still pending. As such the case is not available in reported form but is nonetheless cited as follows: *D.P.P. v. Michael Flanagan*, *Con Muldoon*, *Muldoon Oil*, *James Kearney*, *All Star Oil*, *Kevin Hester*, *Corrib Oil*, *Mór Oil*, *Alan Kearney*, *Sweeney Oil*, *Gort Oil*, *Pat Hegarty*, *Cloonan Oil*, *Ruby Oil*, *Matt Geraghty*, *Declan Geraghty*, *Fenmac Oil & Transport*, *Michael McMahon*, *Tom Connolly*, *Eugene Dalton Snr.*, *JP Lambe*, *Sean Hester*, *Hi-Way Oil and Kevin Cunniffee*. See for example The Competition Authority: <http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Home-Heating-Oil.aspx> (date accessed: 28th March 2010).

[72] *Manning*, *supra* note 21.

[73] *Duffy*, *supra* note 1.

to a breach of competition law. This however was only for a period of 28 days for non-payment of the €80,000 fine imposed by the court in addition to a 15 month sentence suspended for five years and an €80,000 fine on the company.[74] The *Courts Act (No. 2) 1986* sets out the applicable penalties for non-payment of fines under section 2.[75]

A moral dilemma exists when considering whether to impose a custodial sentence on white-collar criminals. Should the tax-payer have to shoulder the considerable expense of incarceration of the convicted individual, literally shouldering the cost of the cartel's inflated prices and the punishment? However the arguments in favour of prison as a deterrence as set out above, far outweigh the resources argument. There is also the question of the effectiveness of a suspended sentence as a deterrent. A suspended sentence is a sentence which is ordered not to take place immediately, usually on the condition that the offender enter into a recognisance and be well behaved for a specified period.[76] If any of the conditions are breached the sentence will activate. Any conditions attached must be reasonably possible to be fulfilled by the offender. Also a term of imprisonment may not be extended merely because it is about to be suspended.[77] This is perceived however as a light punishment. Due to the nature of the offender in cases such as these, apart from the negative publicity and a criminal record with the usual exclusion from entering certain countries, their *status quo* will more or less be unaffected. McKechnie J. has laid down significant warnings that a custodial sentence will be imposed in the future despite the suspended sentences handed down in recent cases.

The Director of Public Prosecutions, James Hamilton, has also suggested some changes to white-collar trials.[78] Mr. Hamilton, speaking in relation to the recent banking crises, suggested that the issue of complex and lengthy white-collar trials might lead to them being held before a panel of judges or specialist juries. This

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[74] "Former Car Firm Director Jailed for Not Paying Fine" *The Irish Times* (1 December 2009) ('In Short' Section). See also <http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Citroen-Dealers-Association.aspx> (date accessed: 28th March 2010) for a summary of criminal proceedings in relation to the C.D.A.

[75] The non-payment of a fine is an administrative offence and thus does not activate the suspended sentence. Generally the suspended sentence will not be activated unless the individual commits another criminal offence within the relevant period.

[76] Murdoch, *supra* note 10 at 1071.

[77] O'Malley, *supra* note 41 at para. 22-04.

[78] Speaking on "The Week in Politics" RTÉ (16 May 2010); C. Lally, "DPP Moots Changes to White-collar Trials" *The Irish Times* (17 May 2010) 4.

could be also applied to cartels which operate in specialised areas. Also speaking in relation to the financial crisis Minister for Justice Dermot Ahern stated that his department would prioritise white-collar crime.[79]

VI – Conclusion

This case sets out some important principles for future cases. Although it is disappointing that yet another blatant cartelier has received a fine and a suspended sentence, the case illustrates that future breaches of competition law will be punished with incarceration. The acceptability of mitigating factors has been further teased out. Now that we are coming out of a period of "light touch" regulation, it is useful to have the points of law contained within this case clarified. With the Competition Authority's immunity programme for whistle blowers and its guidelines clarifying its position on trade associations, it can only be a matter of time before the next cartel is revealed.

[79] C. Coulter, "Ahern Sets Out Strategy to Combat White-Collar Criminals" *The Irish Times* (22 May 2010) 1; C. Keena, "Pursuing the Pinstriped Pickpockets" *The Irish Times* (22 May 2010) Weekend Review 3; also see "Gardaí to advise Ahern on white-collar crime laws" *The Irish Times* (21 May 2010) <http://www.irishtimes.com/newspaper/breaking/2010/0521/breaking64.html> (date accessed: 2 June 2010).