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Sentencing in Ireland's First Bid-Rigging Cartel Case: An Appraisal

By

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Abstract

The paper argues that the sentences imposed on 31 May 2107 by the Central Criminal Court in the commercial flooring bid-rigging cartel case and the methodology used in setting those sentences seriously undermines the effective enforcement of competition law in Ireland. The sentence imposed on the individual responsible for initiating and participating for 2 years and 4 months in the bid-rigging cartel was only three weeks wages or €7,500. No gaol sentence was imposed. The undertaking was fined €10,000; the value of the rigged tenders it won totalled €556,000. The Court's reasoning did not justify the low sanctions. Current sentencing norms indicate a custodial sentence and much higher fines for both the individual and the undertaking. This is consistent with the application of EU and US Sentencing Guidelines to the facts of the commercial flooring bid-rigging cartel case. If the sentences imposed by the Central Criminal Court are not successfully appealed as being unduly lenient and appropriate sentencing guidelines developed, then the prospect for competition law enforcement in Ireland is grim. In particular, the effectiveness of the Cartel Immunity Programme, a vital tool for cartel detection and prosecution, will be severely damaged.

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JEL Codes: D43; L13; L41; K21; K41; K42.

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1. Introduction

On 31 May 2017 sentencing in Ireland's first bid-rigging cartel case resulted in fines for criminal infringement of competition law of €7,500 on one individual, Brendan Smith, and €10,000 on one undertaking, Aston Carpets and Flooring (Aston Carpets). No gaol sentence - suspended or custodial - was imposed for these breaches of competition law. In contrast, for perverting the course of justice by impeding a criminal prosecution Brendan Smith received a three month sentence, suspended for two years.

At first glance these sanctions appear to be unduly lenient,¹ no more than a slap on the wrist, in effect a periodic licensing of illegal activity.² However, as with all criminal cases consideration of the adequacy or appropriateness of the sentencing should relate to the facts of the case, framed, of course, by legislation, case law and any submissions made to the Central Criminal Court (the Court) by the defence and the Director of Public Prosecutions (DPP). Thus in order to determine whether or not these initial impressions of the inadequacy of the sanctions are correct careful analysis of these issues should be undertaken.

This paper is aimed at undertaking such an analysis. The paper is structured as follows. Section 2 outlines the facts of the case from the bid-rigging cartel arrangements through to the investigation and prosecution, including the charges and Court imposed sanctions.

Section 3 deals with the legislative and other guidance available to the Court on the sentencing of Brendan Smith and Aston Carpets. Section 4 presents the Court's sentencing methodology. The adequacy of the methodology is considered in Section 5.

The issue of whether or not the sentences imposed on Brendan Smith and Aston Carpets are unduly lenient is addressed in Section 6, the implications for competition law enforcement in Section 7, the DPP in Section 8. Section 9 concludes.

The transcript of the Court's sentencing is reproduced in Annex A, while the application of EU and US Sentencing Guidelines to the commercial flooring bid-rigging cartel is set out in Annex B.

¹ The standard for appeal of a sentence by the DPP is undue leniency, which is discussed in Sections 2.g and 6.

² This phrase was used in a Canadian competition law judgment in 1956 in describing the enforcement by conviction and fines. For further details see Stanbury (1976, p. 572).

2. The Commercial Flooring Case: the Facts

a. Aston Carpets & Carpet Centre

The bid-rigging cartel was operated by two of the leading, if not the two leading, commercial flooring contractors in Ireland: Aston Carpets and Carpet Centre (Contracts) Limited (Carpet Centre).³ Brendan Smith participated on behalf of Aston Carpets; David Radburn for Carpet Centre.

Aston Carpets was established by Brendan Smith in 2003. Over the next three years its sales increased from €1.3 million to €8 million.⁴ In 2007, at the height of the economic boom in Ireland, Brendan Smith sold Aston Carpets for €2.5 million to Crean Mosaics Unlimited Company (Crean Mosaics).⁵

Brendan Smith continued as a director and an employee of Aston Carpets, drawing a salary of €130,000, plus €20,000 in expenses and €20,000 in pension contributions.⁶ However, with the onset of the recession Brendan Smith's salary was reduced to €100,000.⁷

Crean Mosaics was founded in 1968.⁸ It appears that the purchase of Aston Carpets was complementary to Crean Mosaics operations in "*tiling and the like*."⁹ Crean Mosaics is part of the larger Crean Group of companies.

At the time of the bid-rigging Alan Crean, who controls the group, was a director and chairman of Aston Carpets. Furthermore, Aston Carpets and Crean Mosaics "*are registered to the same Mayo address with the same offshore shareholders and also same directors*."¹⁰

Aston Crean – the combination of the operations of Aston Carpets and Crean Mosaics - supplies commercial flooring services across Ireland.¹¹ In 2012 the Crean Group employed 163 persons and had a turnover of €16.15 million.¹²

Aston Carpets ceased trading in 2015, although it is still a company.¹³ Brendan Smith left Aston Carpets in the spring of 2015.¹⁴

³ *DPP v Aston Carpets & Flooring and Brendan Smith*, Sentence Hearing, p. 4. Hereinafter referred to as *DPP v Aston Carpets*, SH.

⁴ *DPP v Aston Carpets*, SH, p. 23.

⁵ *DPP v Aston Carpets*, SH, p. 41.

⁶ *DPP v Aston Carpets*, SH, p. 23.

⁷ *DPP v Aston Carpets*, SH, p. 23.

⁸ Crean Mosaics (2011, p. 3).

⁹ *DPP v Aston Carpets*, SH, p. 20.

¹⁰ Paul (2017).

¹¹ Aston Crean (2015, p. 2).

¹² Aston Crean (2015, Appendix 2 & Appendix 3, p. 6).

¹³ *DPP v Aston Carpets*, SH, p. 30.

Carpet Centre was set up in 1986 with a head office in Dublin.¹⁵ Carpet Centre not only manufactures carpets and rugs but also supplies commercial flooring services. David Radburn has been a director since Carpet Centre's foundation.¹⁶

b. Bid-Rigging Arrangements

Commercial flooring contractors supply the carpets and other flooring products and install said products in buildings. Each transaction reflects the requirement of the buyer in terms of the layout of the building and the flooring products purchased.

The bid-rigging cartel arrangements were initiated by a phone call from Brendan Smith to David Radburn in early 2011. They were terminated on 30 April 2013 when the Competition and Consumer Protection Commission (CCPC) searched the premises of Aston Carpets, Carpet Centre and two other locations. These dates are reflected in the charges against Brendan Smith and Aston Carpets, which run from 1 January 2011 to 30 April 2013.¹⁷

When interviewed during the CCPC's investigation Brendan Smith stated that he selected David Radburn because "*We are the two main guys in this [Dublin] city.*"¹⁸ Brendan Smith and David Radburn communicated with each other by face to face meetings – between 8 to 10 times – and via email and phone.¹⁹

The bid-rigging cartel arrangements concerned commercial contracts for flooring for large industrial premises or office blocks.²⁰ Typically it appears that the purchaser awarded the contracts on the basis of tendering or bidding.

The contracts subject to bid-rigging were those where either Aston Carpets or Carpet Centre held a competitive advantage. These advantages might include having won the early or first phase of a larger contract²¹ or developed "*a particularly good working relationship with the contract company or the quantity surveyor on a particular job.*"²² Hence either Aston Carpets or Carpet Centre "*had a sense that they were going to get those jobs.*"²³

Brendan Smith and David Radburn decided who would submit the more competitive (i.e. lower) bid, with the other firm submitting a higher bid. This practice is known as

¹⁴ *DPP v Aston Carpets*, SH, p. 31.

¹⁵ Sometimes trading as Carpet Centre Contracts.

¹⁶ <https://companycheck.co.uk/company/IE113324/CARPET-CENTRE-CONTRACTS-LIMITED/companies-house-data>. Accessed 14 August 2017.

¹⁷ See Table 1 for details.

¹⁸ *DPP v Aston Carpets*, SH, p. 24.

¹⁹ *DPP v Aston Carpets*, SH, p. 4.

²⁰ *DPP v Aston Carpets*, SH, p. 5.

²¹ *DPP v Aston Carpets*, SH, pp. 4-5.

²² *DPP v Aston Carpets*, SH, p. 5.

²³ *DPP v Aston Carpets*, SH, p. 4.

cover bidding.²⁴ According to the Organization for Economic Cooperation (OECD, 2009, p. 2) cover bidding is the “most frequent way in which bid rigging schemes are implemented.”

In October 2011, for example, Carpet Centre was awarded a flooring contract for €193,000 by Google. After having submitted the tender, David Radburn sent an email to Brendan Smith in order that Aston Carpets could submit a higher bid.²⁵ In another case – a flooring contract for MasterCard – the arrangement was reversed, with Carpet Centre submitting a higher bid than Aston Carpets. In some cases the cover bid would simply consist of adding a euro or two per square metre to the lower bid.²⁶

The CCPC (2017, p. 2) determined that there had been a bid-rigging cartel between Brendan Smith and David Radburn in respect of 16 commercial flooring contracts, which ranged in value from €17,000 to €477,000. These included contracts awarded by large multinational corporate entities such as Google, MasterCard and Paypal.

Two points should be noted about these 16 contracts. First, in two of these contracts, although Aston Carpets and Carpet Centre agreed on the bid-rigging arrangements in tendering for the contracts, neither party was awarded the contract. A third party was successful on these two occasions. Second, the contracts subject to bid-rigging by Aston Carpets and Carpet Centre accounted for less than 10 per cent of their sales.²⁷

c. Investigation

Under competition legislation in Ireland the CCPC²⁸ has responsibility for investigating alleged infringement of the Competition Act 2002 as amended.²⁹ The CCPC can initiate an investigation on its own initiative, irrespective of the source of the grounds for believing that competition law has been breached (e.g. complaint, whistleblower, newspaper report etc). The CCPC has powers, *inter alia*, to search premises and to summon witnesses. The CCPC does not, however, have the authority to bring criminal prosecutions by way of indictment; that is the sole responsibility of the DPP.³⁰

In order to facilitate detection of cartels, the Cartel Immunity Programme (CIP), operated jointly with the DPP, provides immunity from prosecution to a cartel member,

²⁴ Competition Authority (n.d., p. 9; 2009, p. 4) and OECD (2009, p.2). Note that sometimes other terms are used such as complementary bidding, or shadow bidding. Competition Authority (n.d.) was apparently issued sometime in the 1990s.

²⁵ *DPP v Aston Carpets*, SH, pp. 8-9.

²⁶ *DPP v Aston Carpets*, SH, p. 11.

²⁷ *DPP v Aston Carpets*, SH, p. 6, pp. 32-33.

²⁸ The CCPC only come into existence on 31 October 2014 as a result of the merger of the Competition Authority and the National Consumer Agency. It was the Competition Authority that was responsible for the investigation initially and then the CCPC. For convenience the CCPC will be used throughout.

²⁹ The investigatory powers of the CCPC are set out in Andrews, Gorecki & McFadden (2015, pp. 113-144).

³⁰ However, the CCPC can bring summary prosecutions, although in practice these are first discussed with the DPP.

*if they are the first member to come forward and reveal their involvement in illegal cartel activity before the CCPC has completed any investigation and referred the matter to the DPP.*³¹

The CCPC's investigation into the bid-rigging cartel in commercial flooring was occasioned by information received in early 2012 from a so-called whistleblower, part of which included an email exchange between Brendan Smith and David Radburn with respect to the Google flooring contract referred to in Section 2.b. However, it should be noted that the information supplied by the whistleblower appears not to have been supplied under the CIP, suggesting that the whistleblower was an employee rather than a company director.³²

CCPC searches, assisted by gardai, followed in April 2013.³³ Four locations were searched: Carpet Centre; David Radburn's home; Aston Carpets; and, Crean Mosaics.³⁴ During these searches, in which a number of documents and computers were seized, Brendan Smith was overheard making a phone call, which it transpired was to David Radburn, suggesting "*delete all the emails.*"³⁵ Further searches were carried out by the CCPC two months later of another commercial flooring undertaking, Floor Form Ireland.

David Radburn in November 2013 successfully applied for immunity from prosecution under the CIP.³⁶ Such immunity would also have applied to Carpet Centre and its other directors. In return David Radburn would have been expected under the CIP to provide details of the commercial flooring bid-rigging cartel arrangements and, if necessary, present oral evidence in Court should a criminal prosecution require.

Brendan Smith was arrested in April 2014 by gardai under section 4 of the Criminal Justice Act 1984 over allegations of bid-rigging.³⁷ It is likely that various allegations, under caution, would have been put to Brendan Smith and that his responses, if any, would have been recorded and could have been used in evidence.

³¹ <https://www.ccpc.ie/business/contact/cartel-immunity-programme/>. Accessed 14 August 2017.

³² Paul & Hilliard (2017) discuss the whistleblower. There is no reference to this whistleblower in the Court's sentence hearing or in the sentencing of Brendan Smith or Aston Carpets.

³³ Members of the gardai are assigned to the CCPC and assist in the searches conducted under competition law. Only gardai can exercise the powers of arrest under competition law. Andrews, Gorecki & McFadden (2015, pp. 126-131).

³⁴ This paragraph is based on Paul & Hilliard (2013, 2017).

³⁵ *DPP v Aston Carpets*, SH, p. 15.

³⁶ *DPP v Aston Carpets*, SH, p. 3.

³⁷ CCPC (2017) and *DPP v Aston Carpets*, SH, pp. 15-16. See discussion in footnote 33 concerning the powers of arrest of the gardai with respect to competition law. Criminal cartel breaches of competition law only became arrestable offences when the maximum sanction for an individual exceeded 5 years imprisonment with the passage of the Competition Act 2002.

The CCPC investigation lasted two years. There were 200 separate investigative actions. Forty-one witnesses were lined-up.³⁸

In 2014 the CCPC concluded its investigation into bid-rigging in commercial flooring and referred the matter to the DPP.³⁹

d. Prosecution

The decision as to whether or not to prosecute Brendan Smith and Aston Carpets and with what offences is the sole responsibility of the DPP, an independent office. Since David Radburn and Carpet Centre successfully applied for immunity under the CIP, which is jointly administered by the CCPC/DPP, they were not subject to criminal prosecution by the DPP.

In 2015 the DPP decided to bring charges⁴⁰ against Aston Carpets and Brendan Smith for breaching competition legislation and against Brendan Smith for impeding a criminal prosecution.

In the District Court in September 2015, Judge O’Neill sent both accused forward to the Central Criminal Court for trial on the charges contained in the Book of Evidence.⁴¹

On 4 May 2017 at the sentencing hearing the Central Criminal Court heard details of the commercial flooring bid-rigging cartel arrangements recited by a CCPC authorized officer, the range of sanctions and other relevant considerations from the DPP and pleas in mitigation by the defence. Judge Patrick McCarthy then adjourned sentencing until 22 May 2017. For various reasons, however, sentencing did not take place until 31 May 2017.

e. Charges

Brendan Smith and Aston Carpets were charged with offences arising from the same incidents under competition law, while Brendan Smith was charged additionally with perverting the course of justice. The details of the charges are provided in Table 1. Several points can be made.

First, Brendan Smith and Aston Carpets were charged with fixing prices and sharing markets through the use of cover bidding. The first count in Table 1 corresponds to section 4(1)(a) of the Competition Act 2002 which prohibits agreements that “*directly or indirectly fix the purchase or selling prices or any other trading conditions;*” the second

³⁸ These numbers were included in the testimony of the Chairperson of the CCPC before the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach Debate, 20 June 2017. See: http://beta.oireachtas.ie/ga/debates/debate/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2017-06-20/3/. Accessed 14 August 2017.

³⁹ Competition Authority (2015, p. 9).

⁴⁰ CCPC (2016a, p.13).

⁴¹ Carolan (2015).

count to section 4(1)(c) which prohibits agreements that “share markets or sources of supply.”

Table 1
Charges Against Brendan Smith & Aston Carpets by the DPP

Charge Details			
Offence	Product/Service	Geographic Scope	Time Period
<i>“engage in and implement an agreement with Carpets Centre (Contracts) Limited ... which had as its object or effect the prevention, restriction or distorting of competition ... in that it indirectly fixed the selling prices ... provided by both of the said undertakings by means of obliging one party to the agreement when tendering for contracts to bid an amount in excess of that bid by the other party.”</i>	Flooring & carpeting products and services	State	1/1/2011 to 2/7/2012; ^a and 3/7/2012-30/4/2013. ^b
<i>“engage in and implement an agreement with Carpets Centre (Contracts) Limited ... which had as its object or effect the prevention, restriction or distorting of competition ... in that it shared the market ... by obliging one party to the agreement when tendering for contracts to bid an amount in excess of that bid by the other party thereby withdrawing from meaningful competition in respect of the provision of such goods and services”</i>	Flooring & carpeting products and services	State	1/1/2011 to 2/7/2012; ^a and 3/7/2012-30/4/2013. ^b
Brendan Smith/Perverting the Course of Justice			
Offence	Product/Service	Location	Time Period
<i>“that you ... did ... intentionally act in a manner which had the tendency to pervert the course of justice to wit, telling David Radburn to delete all emails or words to like effect in circumstances where you knew that said emails were of relevance to the investigation and prosecution of offences under the Competition Act 2002.”</i>	n/a	Dublin	30/4/2013. ^c

a. Contrary to Sections 4(1), 6(1), 8(1) and 8(6) of the Competition Act 2002.

b. Contrary to Sections 4(1), 6(1), 8(1) and 8(6) of the Competition Act 2002 (as amended by Section 2 of the Competition (Amendment) Act 2012).

c. Contrary to common law.

Source: District Court Summons, 14 August 2015.

Second, Brendan Smith and Aston Carpets were charged with committing these competition law offences between 1 January 2011 and 30 April 2013. However, there were separate charges: one relating to 1 January 2011 to 2 July 2012; and, the other to 3 July 2012 to 30 April 2013. The reason for separate charges for these two periods was that the Competition (Amendment) Act 2012 was commenced on 3 July 2012.⁴²

⁴² S. I. No. 236 of 2012, Competition (Amendment) Act 2012 (Commencement) Order 2012.

The Competition (Amendment) Act 2012 amended the Competition Act 2002 by increasing the sanctions for infringing competition law and making a number of other changes. However, the substantive provisions – section 4 of the Competition Act 2002 – remained unchanged. We will return to the changes brought about by the 2012 legislation in Section 3.b.i.

Third, Brendan Smith was charged with perverting the course of justice by telling David Radburn to delete emails that were likely to be of relevance to the investigation and prosecution of offences under competition law.

f. Guilty Plea/Sanctions

Brendan Smith and Aston Carpets pleaded guilty on 27 February and 24 April 2017, respectively, to indirectly fixing the price of commercial flooring for the period 3 July 2012 to 30 April 2013.⁴³ Brendan Smith also pleaded guilty to obstruction.

The DPP did not proceed with the remaining competition charges. This has occurred in other competition cases.⁴⁴ Such trade-offs are explicitly referred to in the DPPs *Guidelines for Prosecutors*.⁴⁵

The DPP argued that the essence of the case was bid-rigging and this was “*simply set out in different ways*” in sections 4(1)(a) and 4(1)(c).⁴⁶ No explanation was provided for dropping charges relating to 1 January 2011 to 2 July 2012, an issue we return to in Section 4.b.v.

The Court imposed fines for the commission of the competition offences on Brendan Smith (€7,500) and Aston Carpets (€10,000), and on Brendan Smith for the perversion of the course of justice a three month gaol sentence suspended for two years.

g. DPP Appeal

The DPP has decided to appeal the sentences on both Brendan Smith and Aston Carpets on the grounds of “*undue leniency*” under section 2 of the Criminal Justice Act 1993. The appeal will be heard in the Court of Appeal. No date has, as yet, been set.

In such an appeal, according to the DPP (2016, para. 11.5), “*great weight is attached to the trial judge’s reasons for imposing the sentence.*” Furthermore, it is

necessary that there be a substantial departure from the accepted range of appropriate sentences for the offence committed in the circumstances of the case, including the specific elements relating to the offender, or an

⁴³ *DPP v Aston Carpets*, SH, p. 1.

⁴⁴ On heating oil see Gorecki & McFadden (2006, Table 2, p. 639); on Duffy see *Duffy* judgment, paras. 1 to 5. A full citation of the *Duffy* judgment is included in footnote 52.

⁴⁵ DPP (2016, para. 10.2).

⁴⁶ *DPP v Aston Carpets*, SH, p. 1.

error of principle in the way in which the trial judge approached sentencing.

It is an issue to which we will return to in Section 6.

3. Framing the Court's Sentencing: Constraints & Guidance

a. Introduction

The judge in sentencing Brendan Smith and Aston Carpets is constrained and guided, in varying degrees, by the statutory provisions of competition law, case law and submissions of the DPP and the defence. We consider each in turn. We describe the constraint/guidance before turning to the specifics of the commercial flooring case. Our focus will be on the competition law breaches rather than the perversion of the course of justice.

b. Statutory Penalties

i. The Legislation

The maximum statutory penalties for breaching section 4 of the Competition Act 2002 as they have evolved are set out in Table 2. In addition we include the penalties under the Competition (Amendment Act) 1996. Several observations can be made concerning the penalties available to the Court under competition law.

First, the penalties for breaching competition law have been increased for both individuals and undertakings. The Competition (Amendment) Act 2012, for example, raised the maximum gaol sentence for an individual from 5 years to 10 years and the nominal threshold for a fine for an individual and an undertaking from €4 million to €5 million.⁴⁷

The Competition (Amendment) Act 2012 also stated that, *the court shall order the person to pay* the costs of the *“investigation, detection and prosecution of the offence”* unless *“the court is satisfied that there are special and substantial reasons for not doing so.* However, this section was repealed by section 7 of the Competition and Consumer Protection Act 2014.

Second, no statutory guidance is provided to the Court beyond the maximum penalties contained in the Competition Act 2002 as amended, nor are there any sentencing guidelines as exist in the US and the EU with respect to cartel offences.^{48,49} The Court thus has, other things being equal, a considerable degree of discretion within these boundaries.

Third, the maximum fines relate to turnover of the undertaking in the year immediately prior to conviction or a fixed sum whichever is the larger. In other words, the fine does

⁴⁷ In the explanatory memorandum that accompanied the Competition (Amendment) Bill 2011 it was stated that *“the purpose of the Bill is to strengthen competition law enforcement by providing for new and increased sanctions and penalties.”*

⁴⁸ The US and EU Sentencing Guidelines for cartels are discussed in Gorecki & Maxwell (2013b).

⁴⁹ Sentencing guidelines are in their infancy in Ireland. See O'Malley (2014) on recent developments.

not relate to the economic impact or damage (i.e. price-enhancing effect) of the bid-rigging cartel or the volume of sales covered by the bid-rigging cartel. This does not mean, of course, that the Court cannot employ such considerations in sentencing, subject to the statutory maximum not being exceeded.

Table 2
Maximum Sentences, Cartel Cases, On Indictment, Ireland, 1996 -2012^a

Legislation	Individuals	Undertakings ^b
Competition (Amendment) Act 1996	A fine not exceeding the greater of 10 per cent of turnover of the individual ^c in the 12 months prior to conviction or €3.81 million and/or a prison sentence of 2 years or less.	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €3.81 million
Competition Act 2002	A fine not exceeding the greater of 10 per cent of turnover of the individual in the 12 months prior to conviction or €4.0 million and/or a prison sentence of 5 years or less.	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €4.0 million
Competition (Amendment) Act 2012	A fine not exceeding the greater of 10 per cent of turnover of the individual in the 12 months prior to conviction or €5.0 million and/or a prison sentence of 10 years or less. The court <i>"shall"</i> order the person to pay for the costs of the investigation, detection and prosecution unless there are special and substantial reasons for not so doing. ^d	A fine not exceeding the greater of 10 per cent of turnover of the undertaking in the 12 months prior to conviction or €5.0 million

- a. Cartel offences refer to hard core offences such as price fixing, allocating markets, bid-rigging and limiting production or capacity.
- b. Undertaking is the legislative term used for a firm.
- c. The turnover of the individual is not defined. One definition might be the gross income of the individual from all sources.
- d. Repealed by section 7 of the Competition and Consumer Protection Act 2014.

Source: Competition (Amendment) Act 1996, Competition Act 2002, Competition (Amendment) Act 2012 and Competition and Consumer Protection Act 2014.

Fourth, while the individual is reasonably well defined, there is some possible ambiguity concerning the meaning of undertaking. More specifically does the term undertaking in the context of the fine refer to the particular company (e.g. Aston Carpets) that appears in the indictment or does it refer to the larger group of companies (e.g. Crean Mosaics or the Crean Group) to which it may belongs? It appears based on case law that the latter interpretation is correct.⁵⁰

ii. Brendan Smith/Aston Carpets

The discussion of the statutory maximum fines and gaol sentences raises the question of how these apply to Brendan Smith and Aston Carpets. The results are presented in Table 3.

⁵⁰ For a discussion see Andrews, Gorecki & McFadden (2015, pp. 68-71).

In the case of Aston Carpets the turnover figures are based on the Crean Group in view of the definition of an undertaking set out in Section 3.b.i. In this case it is particularly apt since not only was the owner of the Crean Group chairman and a director of Aston Carpets at the time of the bid-rigging cartel but also that Aston Carpets has been wound down with the business transferred to Crean Mosaics.⁵¹ Brendan Smith was reported to have a monthly income of €9,422.

Table 3
Maximum Sentences, Brendan Smith & Aston Carpets, Commercial Flooring Bid-Rigging

Undertaking/ Individual	1 January 2011 - 2 July 2012 (Competition Act 2002)	3 July 2012 - 30 April 2013 (Competition (Amendment) Act 2012)
Brendan Smith <i>Fines</i>	€4.0 million 10% turnover: €11,300 ^a	€5.0 million 10% turnover: €11,300 ^a
<i>Gaol</i>	5 years	10 years
Aston Carpets <i>Fines</i>	€4.0 million 10% turnover: €2.0 million ^b	€5.0 million 10% turnover, €2.0 million ^b

a. Brendan Smith is reported to have a monthly income of at least €9,422. It is not clear if this figure includes income from assets of in excess of a €1 million.

b. The turnover for the Crean Group, which through Crean Mosaics acquired Aston Carpets in 2007, was €20.2 million in 2016.

Source: Aston Carpets (2017, Appendix 3, p. 6), *DPP v Aston Carpets*, S, p. 7, and Table 2.

Table 3 suggests that the Court, if it was so minded, could have imposed a custodial sentence on Brendan Smith of several years and a fine several €100,000s or even a million euro on Aston Carpets without exceeding the maximum permitted under the relevant competition statute.

c. Precedent

In many areas of law there has been a series of cases that have addressed a particular issue. Such a body of case law can result in a set of principles that can be applied to future cases. In the case of sentencing principles for breaches of competition law with respect to cartels, however, there are only two reported precedents: the judgment in the *DPP v Duffy*,⁵² which was part of the Citroen Dealers Association (CDA) cartel; and, the transcript of the sentencing in the *DDP v Hegarty*,⁵³ which was part of the heating oil cartel.

⁵¹ Paul (2017) and *DPP v Aston Carpets*, S, p. 7.

⁵² *DPP v Patrick Duffy and Duffy Motors (Newbridge) Ltd* (2009) IHEC 208. This will be referred to as *DPP v Duffy* or the *Duffy* judgment or the *Duffy* case or *Duffy*. The judgment may be accessed at: <https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/citroen-dealers-cartel/>

⁵³ The transcript of the sentencing in *DPP v Pat Hegarty* may be accessed at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/DPPvPatHegartyJudgement_0.pdf.

The *Duffy* judgment was delivered in the Central Criminal Court on 23 March 2009 by Judge McKechnie. It was concerned with a cartel to fix the prices of Citroen cars in Leinster which was organized through the CDA. Both Patrick Duffy and Duffy Motors pleaded guilty, were fined and in the case of Patrick Duffy given a suspended prison sentence. The judgment deals at some length with the seriousness of cartels, the merits of gaol and other factors that should be taken into account in sentencing.⁵⁴

DPP v Hegarty, which was delivered in the Circuit Criminal Court in Galway by Judge Groarke on 3 May 2012, was the last judgment in the heating oil cartel case.⁵⁵ The sentencing concerned Pat Hegarty who was fined and given a suspended prison sentence. Again the judge stressed the seriousness of the cartel offence in the sentencing.

A few observations can be made concerning these judgments. First, as already noted, competition law breaches are regarded as serious. Second, custodial sentences are appropriate for breaches of competition law although for various reasons in both cases the prison sentence was suspended. Third, compared to the maximum fine allowed, the fines imposed were quite modest. Fourth, there is no clear methodology which links the judge's reasoning to the sanction as exists in the case of EU or US Sentencing Guidelines.⁵⁶

d. DPP & Defence Submissions

i. What Should/Shouldn't Be Submitted

The Courts have constraints and conventions as to what issues and topics should and should not be raised by the prosecution and the defence in their submissions to the Court as to the sentence.

The DPP's role is to draw the attention of the Court to the relevant provisions of the legislation as well as any precedent as to sentencing.⁵⁷ Furthermore the DPP (2016, para. 8.13) is charged with providing the Court with,

all relevant evidence available to the prosecution concerning the accused's circumstances, background, history, and previous convictions, if any, as well as any available evidence relevant to the circumstances in

⁵⁴ For a discussion of the *Duffy* judgment see Gorecki & Maxwell (2013a; 2013b).

⁵⁵ For a discussion of the heating oil case see Andrews, Gorecki & McFadden (2015, pp. 379-392); Gorecki & McFadden (2006).

⁵⁶ For a discussion see Gorecki & Maxwell (2013b). The link is particularly weak for the fine on the undertaking.

⁵⁷ The role of the DPP in sentencing is set out in DPP (2016, paras. 8.13 to 8.19). We return to this issue in Section 6

*which the offence was committed which is likely to assist the court in determining the appropriate sentence.*⁵⁸

The role of the defence in sentencing is to set out for the Court mitigating factors on behalf of their clients. Such factors might include an early plea of guilty thus saving prosecutor's time and resources as well as, of course, the Courts. In addition the personal circumstances of the guilty party such as health problems, marital issues, lack of resources, looking after children and so on may be relevant.

What is also of interest is what the DPP is *not* allowed as prosecutor to argue in Court on sentencing. In particular, in the light of recent judgments, the DPP (2016, para. 8.14) considers that

unless the Court of Criminal Appeal or the Court of Appeal has itself given guidance on the range or band of sentencing for particular offences or classes of offences, it is not appropriate for the prosecutor to submit to the sentencing court bands or ranges of sentencing.

Later the DPP (2016, para. 8.19) states that the "*prosecutor must not seek to persuade the court to impose ... a sentence of a particular magnitude.*"

In the Circuit Criminal Court in Galway before Judge Groarke in the sentencing of Pat Hegarty in the heating oil cartel case on 3 May 2012 an exchange between David McFadden, an authorized officer presenting the background to the case for the DPP, and the judge illustrates the limited role of the DPP in articulating an appropriate sentence.

David McFadden stated that,

Just in relation to the matters in relation to fines, there was a kind of a -- you [Judge Groarke] applied I suppose in some respects a scale. There were a lot of minnows, a lot of small companies in this case. Of course, they all pleaded but there were two large companies - .

At this point the judge intervenes, stating, "*I'm not comfortable with a commentary from the witness on the sentencing policy of the Court.*"⁵⁹

Of course, notwithstanding the above, there is nothing to prevent the Court from asking the DPP to indicate an appropriate range of sanctions and the corresponding methodology.

⁵⁸ Such evidence might include, for example, the damage to consumers, an issue discussed further in Sections 5.d and 6.e.

⁵⁹ *DPP v Pat Hegarty*, p.8.

ii. Brendan Smith/Aston Carpets

The DPP stated, consistent with Table 2 above, that for the competition law offences the maximum fine was €5 million or 10 per cent of turnover, whichever is the higher and/or a maximum gaol sentence of 10 years.⁶⁰ For obstruction the maximum sentence was five years. The DPP drew the Court's attention to the *Duffy* judgment and provided a very brief summary of *DPP v Hegarty*.⁶¹

The counsel for Aston Carpets made a number of arguments in mitigation. The gain to Aston Carpets was only in terms of gross profits, €118,000, operating profit, €31,000.⁶² Comparisons are made with the CDA cartel as outlined in the *Duffy* judgment. The CDA had considerable organizational complexity and geographic scope, compared to the commercial flooring bid-rigging arrangements.⁶³ The adverse financial situation of Aston Carpets should be taken into account.⁶⁴ The fine should be proportionate.

The counsel for Brendan Smith stressed, as did the legal representative for Aston Carpets, the organizational complexity of the CDA and heating oil cartels.⁶⁵ The cover bidding arrangements were no more than "*giving that extra level of veneer of legitimacy to one party.*"⁶⁶ Brendan Smith had only received an "*indirect benefit*"⁶⁷ from the bid-rigging. "*In lean times he kept his job.*"⁶⁸ Other mitigating factors presented included the fact that Brendan Smith had pleaded guilty.⁶⁹

Brendan Smith personal circumstances were also drawn to the Court's attention.⁷⁰ He had developed cocaine and alcohol dependency during the bid-rigging but in 2014 sought treatment which was successful. Brendan Smith's legal representative asked the judge what would be gained by gaoling Brendan Smith who had a new partner, a new baby, a new job and a "*future ahead of him.*"⁷¹ Brendan Smith would, however, be willing to do community service.⁷²

The DPP made no comments on the grounds for mitigation advanced by the defence. As we shall see in Section 4, the Court agreed with the defence's argument that the

⁶⁰ *DPP v Aston Carpets*, SH, pp. 27-28.

⁶¹ *DPP v Aston Carpets*, SH, pp. 41-42.

⁶² *DPP v Aston Carpets*, SH, pp. 43-44. Aston Carpets had introduced two witnesses concerning the financial situation of Aston Carpets. For details see *DPP v Aston Carpets*, SH, pp. 30-41.

⁶³ *DPP v Aston Carpets*, SH, pp. 44-45.

⁶⁴ *DPP v Aston Carpets*, SH, p. 45.

⁶⁵ *DPP v Aston Carpets*, SH, pp. 48-49.

⁶⁶ *DPP v Aston Carpets*, SH, p. 49.

⁶⁷ *DPP v Aston Carpets*, SH, p. 50.

⁶⁸ *DPP v Aston Carpets*, SH, p. 50.

⁶⁹ *DPP v Aston Carpets*, SH, p. 51.

⁷⁰ *DPP v Aston Carpets*, SH, pp. 51-53. Brendan Smith's legal representative prefaced these remarks by stating, "*what I'm about to say in mitigation would have what I would respectfully describe as a very weary familiarity to it in other categories of offences which are before the Court.*"

⁷¹ *DPP v Aston Carpets*, SH, p. 53.

⁷² *DPP v Aston Carpets*, SH, p. 54.

commercial flooring bid-rigging cartel was much less serious than the CDA cartel. Hence much lower sanctions were imposed on Brendan Smith and Aston Carpets compared to the corresponding person/undertaking in the *Duffy* judgment.

4. The Court's Sentencing Methodology⁷³

a. Introduction

The Court sentenced Brendan Smith and Aston Carpets on 31 May 2017. The sentencing took into account testimony as to the facts of the case as recited previously by an authorized officer of the CCPC, the prior submissions by the DPP and the defence and the statement of means of Brendan Smith.

The Court stated that both Brendan Smith and Aston Carpets had pleaded guilty. The Court also stated that it regarded the obstruction of justice by Brendan Smith as “serious,” although this did not “downgrade the seriousness” of the competition law offences, “but this [obstruction] is an offence against public justice and it is doing an act with intent to impede the apprehension or prosecution of a person who has committed an arrestable offence.”⁷⁴

The Court stated that it was assisted in sentencing Brendan Smith and Aston Carpets by the leading case, the *DPP v Duffy*, which elaborated the factors that should be taken into account in sentencing.⁷⁵ The Court argued that since there had been no significant inflation since 2009, the date of the *Duffy* judgment, the fines imposed in that case could be used in sentencing in the commercial flooring bid-rigging cartel.⁷⁶

The Court considered four cartel characteristics. For each characteristic the Court compared the cartel arrangements set out in the *Duffy* judgment with the bid-rigging cartel arrangements entered into by Brendan Smith and Aston Carpets in commercial flooring. The Court concluded that for each of the four characteristics the cartel arrangements entered into by Brendan Smith and Aston Carpets was less serious than those detailed in the *Duffy* judgment.

Based on this analysis the Court concluded that “So, one can see from that [comparison] a vast difference between the seriousness of the present case and that which was being dealt with in the case of *Duffy*.”⁷⁷ Later in the sentencing the Court stated that the conduct exposed in the *Duffy* judgment was “exponentially more serious” than in commercial flooring.⁷⁸

⁷³ The discussion in this section is based on the transcript of the Court's sentencing on 31 May 2017 which is reproduced as Annex A. The transcript will be referred to as *DPP v Aston Carpets*, S. Other sources are cited in the text.

⁷⁴ *DPP v Aston Carpets*, S, p. 1.

⁷⁵ *DPP v Aston Carpets*, S, p. 3.

⁷⁶ *DPP v Aston Carpets*, S, p. 3. The Consumer Price Index increased by 3.7 per cent between 2009 and 2016. For details see: <http://www.cso.ie/px/pxeirestat/Statire/SelectVarVal/saveselections.asp>

⁷⁷ *DPP v Aston Carpets*, S, p. 4.

⁷⁸ *DPP v Aston Carpets*, S, p. 8.

In sentencing the Court also noted the need to take into account the automatic disqualification of Brendan Smith as a company director for five years under company legislation as a result of being found guilty of a criminal competition infringement.⁷⁹

Table 4

Sanctions Imposed on Brendan Smith/Aston Carpets & Patrick Duffy/Duffy Motors (Newbridge) Limited

Sanction	Patrick Duffy	Brendan Smith
Fines	€50,000	€7,500
Gaol	6 & 9 months suspended for five years	None
	Duffy Motors (Newbridge) Limited	Aston Carpets
Fines	€50,000	€10,000

Source: *Duffy* judgment, paras. 71-73 and CCPC (2017).

Based on these considerations the Court imposed much lower sanctions on Brendan Smith and Aston Carpets as compared to Patrick Duffy and Duffy Motors (Newbridge) Limited. Table 4 presents the relevant data. The Court did not discuss or mention whether a gaol sentence was appropriate for Brendan Smith’s breach of competition law and, if so, what length.

The lower sanction in the case of Brendan Smith/Aston Carpets as compared to Patrick Duffy/Duffy Motors is reflected in the differences in rhetoric concerning the seriousness of competition law breaches as between the two cases.

In the *Duffy* judgment hard-core infringements of competition law, where specific reference is made to bid-rigging, are considered “*offensive and abhorrent, not simply because they are malum prohibitum, but also because they are malum in se. They are in every sense anti-social.*”⁸⁰

Equally in *DPP v Pat Hegarty* (p. 13) the judge states that

[W]ell, first of all, the offence. Well, this, I suppose, has to [be] viewed as a very serious matter. There are many victims as a direct or indirect result of the criminal conduct of which Mr Hegarty has been convicted. I speak, of course, obviously that the ordinary consumer is presented with a fake market when competitive forces do not operate, and the motivation for this crime was one of greed.

In contrast, no such statements are made by the Court in sentencing Brendan Smith and Aston Carpets, although reference is made to a passage in the *Duffy* judgment that “*cartel activity robs consumers and other market participants of tangible blessings of*

⁷⁹ *DPP v Aston Carpets*, S, p. 6. On director disqualification see Andrews, Gorecki & McFadden (2015, p. 73).

⁸⁰ *Duffy* judgment, para. 22. The *Duffy* judgment also contains a series of citations from leading authorities on the evils of cartels with which the judge states he strongly agrees (para. 25).

competition.”⁸¹ Rather, the Court seemed more concerned with a phone call Brendan Smith made to David Radburn warning him to delete emails.

b. A Comparison of Four Cartel Dimensions

i. Introduction

The Court summarized its views on the four cartel dimensions on which it compared the CDA and commercial flooring bid-rigging cartels as follows:

So, I think it is obvious from what I have said that this case [Brendan Smith & Aston Carpets] lies on a less significant footing [than CDA]. It was much shorter. [Duration] It didn't involve a cartel. [Organizational Complexity/Effectiveness] It didn't involve the whole country [Geographic Market] and whilst it did involve dealing with individual transactions for individual commercial entities, it did not involve all of the consumers in the country who might have been minded to buy Citroen cars [Consumers v Business as Victims].⁸²

ii. Consumers v Business as Victims

The Court pointed out that an important difference between the *Duffy* case and commercial flooring concerned the identity of the victims of the cartel – i.e. those who were being overcharged. In the *Duffy* case the victims were ordinary consumers whereas in the case of commercial flooring the victims were businesses.⁸³ These businesses in purchasing commercial flooring products and services “were in a position to exercise a serious independent judgment as to whether or not they would contract with the offending parties” and “were capable of exercising such independent judgment because of their commercial capacity.” Hence businesses did not “stand on the same footing as ... consumers in terms of being victims of this type of crime on a practical basis.”⁸⁴

iii. Geographic Market

The geographic market in the *Duffy* case covered the whole country. The CDA divided the country into three regions, including Leinster. As the Court remarked the commercial flooring bid-rigging cartel “didn’t involve the whole country”⁸⁵

⁸¹ *DPP v Aston Carpets*, S, p. 5.

⁸² *DPP v Aston Carpets*, S, p. 5.

⁸³ *DPP v Aston Carpets*, S, pp. 2-3.

⁸⁴ The Court also made a supplementary point that while the CDA cartel covered all purchasers of Citroen cars, the commercial flooring bid-rigging cartel did not cover all commercial flooring contracts.

⁸⁵ *DPP v Aston Carpets*, S, p. 5.

iv. Organizational Complexity/Effectiveness

The Court argued that the cartel in the *Duffy* case was much more highly organized than the commercial floor bid-rigging cartel arrangements. The Court quoted the *Duffy* judgment as to the comprehensiveness of the CDA arrangements with respect to the various prices that were agreed⁸⁶ and the methods used by the CDA including the use of mystery shoppers to detect possible cheating on the prices agreed.⁸⁷ The bid-rigging cartel arrangements in commercial flooring were nowhere near as comprehensive nor did they have mystery shoppers to detect cheating. Indeed, the Court stated that the commercial flooring bid-rigging arrangements “*didn’t involve a cartel.*”⁸⁸

v. Duration

The duration of the cartel arrangements in commercial flooring were “*much shorter*” than those revealed in the *Duffy* judgment.⁸⁹ The commercial flooring charges related to a 2 year 4 month period, the CDA cartel arrangements, 5 years.⁹⁰

In considering sentencing we use 2 years and 4 months for commercial flooring, the period covered by the charges set out in Table 1, rather than the shorter 10 month period, from 3 July 2012 to 30 April 2013, for which Brendan Smith and Aston Carpets pleaded guilty and were convicted.⁹¹ We follow this approach for three reasons.

First, the explanation for the two different time periods reflects plea bargaining between the DPP and Brendan Smith/Aston Carpets. In such situations the DPP’s *Guidelines for Prosecutors* state, in para. 10.3, that, “... *the prosecutor should only agree to such offers to plead guilty on the basis that the remaining counts will be taken into consideration by the court in imposing penalty.*”

Second, during the sentence hearing the full facts of the case were set out for the Court. This included details of all 16 instances of bid-rigging which spanned the period 1 January 2011 to 30 April 2013.

Third, the Court in sentencing Brendan Smith and Aston Carpets stated that, “*Now, this - - these charges, accordingly, these three charges are accordingly representative counts but the period of time over which they -- these unlawful agreements were entered into were -- was indeed quite lengthy and they spanned effectively a period of two years or thereabouts.*”⁹² The three charges referred to were discussed in Section 2.f.

⁸⁶ *DPP v Aston Carpets*, S, p. 4, quoting the *Duffy* judgment para. 7.

⁸⁷ *DPP v Aston Carpets*, S, p. 4, quoting the *Duffy* judgment, para. 18.

⁸⁸ *DPP v Aston Carpets*, S, p. 5.

⁸⁹ *DPP v Aston Carpets*, S, p. 5.

⁹⁰ *Duffy* judgment, paras. 1 to 4, from 24 June 1997 to 18 June 2002.

⁹¹ See Section 2.f for details.

⁹² *DPP v Aston Carpets*, S, p. 1.

5. Comment: Sound Methodology?

a. Introduction

In sentencing Brendan Smith and Aston Carpets the Court used the *Duffy* judgment as a template or a benchmark against which to measure the sanction that should be imposed in commercial flooring. If the bid-rigging in commercial flooring is less/more serious than the cartel in the *Duffy* case then the sanctions imposed on Brendan Smith and Aston Carpets should be lower/higher than those imposed in the *Duffy* case.

At first glance this methodology has a certain intuitive appeal: *if* the *Duffy* judgment is a carefully considered assessment of the appropriate/optimal sanction, *if* the relevant factors as to the impact/effectiveness of a cartel can be identified and *if* the differences in these factors as between the *Duffy* case and Brendan Smith/Aston Carpets can be measured. These are, of course, a lot of *ifs*.

On the first issue there are good arguments that the *Duffy* judgment imposed sanctions that were far too low, given the likely economic damage inflicted by the anti-competitive behaviour and the need to deter future cartelists. Furthermore the *Duffy* judgment relied on a not altogether suitable English precedent. We have set these arguments out elsewhere and do not intend to rehearse them here.⁹³

Notwithstanding these concerns, the *Duffy* judgment is the leading case in sentencing in cartels in Ireland. It is therefore quite proper that the judge in sentencing Brendan Smith and Aston Carpets should have turned to it for guidance. Furthermore, both the DPP and the defence concurred that *Duffy* was a suitable comparator.⁹⁴

We first ask whether the Court's reasoning with respect to the four cartel characteristics dimensions set out in Section 4.b.ii to 4.b.v was correct. Next we consider whether there are any other factors that the Court should have taken into account, given its reliance on the *Duffy* judgment.

b. A Comparison of Four Cartel Dimensions: Is the Court's Analysis Correct?

i. Introduction

Four dimensions are used by the Court to measure the effectiveness and impact of a cartel in terms of its anti-competitive impact. Recall that the offence is to "*prevent, restrict or distort competition*" (Table 1). The greater the restriction the more effective is the cartel in raising prices and damaging consumers.

⁹³ Gorecki & Maxwell (2013a, 2013b).

⁹⁴ *DPP v Aston Carpets*, SH, p. 42, pp. 44-45, pp. 48-49.

In considering each dimension our attention is on the charges for which Brendan Smith/Aston Carpets and Patrick Duffy/Duffy Motors (Newbridge) Limited was convicted. The sanctions imposed will reflect these facts and circumstances.

ii. Consumers v Business as Victims

The Court argues that the CDA's victims were final consumers who did not stand on the same footing as businesses that were the victims of the commercial flooring bid-rigging cartel. Hence the commercial flooring bid-rigging cartel was less serious than the CDA cartel and should therefore be accorded a lower sanction.

There are a number of grounds for arguing, however, that the Court is incorrect.

First, businesses pass on their costs to final consumers in the prices they charge.⁹⁵ Hence, other things being equal, if a bid-rigging cartel raises the price of a product or service that is an input into a consumer product or service, then that cartel-induced price increase will be reflected in higher downstream prices to consumers.

Second, there is an assumption by the Court that businesses are better able to detect cartels and mitigate the impact as compared to consumers. But is this the case?

Businesses may be *less* able to mitigate the impact of the commercial flooring cartel bid-rigging cartel than consumers purchasing vehicles from the CDA. Businesses buying commercial flooring services are likely to be infrequent purchasers of this type of service. Furthermore, since flooring contracts tend to be for bespoke buildings this increases the difficulty of making cost comparisons.

A consumer purchasing a new Citroen vehicle, a relatively large household expenditure, could, in principle, shop various Citroen dealers, observe similarities in vehicle prices, trade in values, accessory prices and so on and report this to the CCPC. Furthermore the consumer has a number of other car brands from which to choose.

In any event the difficulty of detecting cartels which are inherently secretive is signalled by the existence of the CIP. Several of the leading cartels prosecuted by the CCPC/DPP have involved a CIP applicant, demonstrating the difficulty of locating cartels.⁹⁶

Third, a number of jurisdictions have developed sentencing guidelines for cartel offences. An examination of the EU and the US Sentencing Guidelines finds no suggestion that because the victim is a business rather than the final consumer that this should be a mitigating factor.⁹⁷

⁹⁵ On the issue of pass through see McFadden (2013, pp. 53-59) and references cited therein.

⁹⁶ On heating oil see Gorecki & McFadden (2006, p. 637); on CDA Andrews, Gorecki & McFadden (2015, p. 160) & *Duffy* judgment, para. 10; and, the commercial flooring case.

⁹⁷ For a discussion see Gorecki & Maxwell (2013b).

Fourth, the Court's reasoning in paying attention to direct harm to consumers adopts an unnecessarily restrictive view of the scope of competition law. As Whish & Bailey (2012, pp. 19-20) state,

*This does not mean that EU competition law is applicable only where a specific increase in prices to end consumers can be demonstrated. EU law has recognized from the early days that consumers can be indirectly harmed by action that harms the competitive structure of the market, and it continues to do so today; there is no inconsistency between these statements and the proposition that EU competition law is oriented around the promotion of consumer welfare.*⁹⁸

Irish, like EU, competition law, has a consumer welfare objective.⁹⁹

In sum, whether the cartel's victim is a business or a consumer does not indicate whether one cartel is necessarily more serious than the other.

iii. Geographic Market

The wider the geographic area covered by the cartel activity, other things being equal, the greater will be the impact of the cartel. If the commercial flooring bid-rigging relates to a smaller geographic area than the area in the *Duffy* judgment then the former is a less serious competition offence.

In interpreting this condition the Court appears to have made an error in sentencing Brendan Smith and Aston Carpets. The Court argued that the CDA was nationwide. It is the case that the CDA was organized into three separate geographic regions – as set out in the *Duffy* judgment.¹⁰⁰ However, not only did the charges against Patrick Duffy and Duffy Motors relate to the province of Leinster only,¹⁰¹ but also no evidence was presented in the *Duffy* case of any breach of competition law in the two other geographic areas in which the CDA operated.¹⁰²

In contrast, the charges against Brendan Smith and Aston Carpets relate to the State not to any sub-geographic region (Table 1), although in practice the 16 contracts that were the subject of the commercial flooring bid-rigging cartel appear to be located in the greater Dublin area.

In sum, using the geographic scope of the cartel, there is little to distinguish Duffy from Brendan Smith/Aston Carpets.

⁹⁸ Footnotes omitted from the citation.

⁹⁹ *Competition Authority v O'Regan & Ors* [2007] IESC 22, para, 106, which is reproduced in footnote 118.

¹⁰⁰ *Duffy* judgment, para. 6.

¹⁰¹ *Duffy* judgment, paras. 1 to 3

¹⁰² Even if evidence had presented of a cartel activity in the other two CDA regions that would be still be irrelevant in the *Duffy* case which was restricted to Leinster.

iv. Organizational Complexity/Effectiveness

The greater the organizational complexity of a cartel the more likely it is to indicate that the cartel is more effective and hence more serious. By greater organizational complexity we mean that the cartel has an agreement on prices (and/or other dimensions on which cartel members compete), mechanisms for detecting cheating by cartel members, together with punishment procedures for those cartel members that deviate from agreed prices. This should, other things equal, feed through to greater cartel effectiveness, the corollary of which is more damage to consumers and the competitive process.

There can be little doubt that the CDA contained – as noted in Section 4.b.iv - all the hallmarks of a classic cartel in terms of its organizational complexity. By comparison the commercial flooring bid-rigging arrangements seem at first sight somewhat amateurish. However, this comparison is not only deceptive but incorrect for a number of reasons.

In making comparisons in terms of organizational complexity/effectiveness across two cartels like must be compared with like in terms of: the number of cartel members; the schedule of prices to be agreed; the incentive to cheat on any cartel agreement and the ease of detection; and so on. If there are substantial differences in the nature of the two cartels then that must be taken into account in comparing the organizational complexity/effectiveness. The Court failed to do in the evaluating the commercial flooring bid-rigging cartel.

Consider the following reasons why the commercial flooring cartel did not need the same degree of complexity as the CDA cartel but at the same time could operate as an effective cartel.

- There were only two participants in the commercial bid-rigging arrangements, but seven for CDA in the Leinster region.¹⁰³
- There was no necessity for a complex agreed price list as occurred in the *Duffy* case. Brendan Smith (or David Radburn) had the bid of David Radburn (or Brendan Smith) for a particular commercial flooring contract and was only required to bid a higher price.
- Detection of breaches of the commercial flooring bid-rigging cartel was easy and did not require the hiring of a mystery shopper to determine if the Brendan Smith (or David Radburn) had cheated. The winner of a commercial flooring

¹⁰³ The six that were convicted, plus the immunity witness, making seven. See <https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/citroen-dealers-cartel/>. Accessed 14 August 2017.

contract, irrespective of whether or not bid-rigging had taken place, quickly becomes apparent.

- Given the frequency with which Brendan Smith and David Radburn agreed on bid-rigging – on average once every 7 weeks over the period of the bid-rigging arrangements – there is little incentive to deviate from the agreed cover bid in order to gain a competitive advantage.¹⁰⁴
- The punishment mechanism for any deviation by either Brendan Smith or David Radburn, albeit implicit, is a return to competition and the loss of the gains from the bid-rigging cartel arrangements.¹⁰⁵

Bid-rigging cartels such as that operated in commercial flooring are easier to sustain and hence not only arguably more effective but are also more difficult to detect and prosecute as compared to the CDA.

Trust is required between only two individual as compared to a much greater number in the CDA cartel. In the commercial flooring bid-rigging cartel there is less paperwork and other documentation in operating the cartel. The occasional meeting or phone call is enough to fix a bid; in contrast more complex arrangements are required for the CDA leading to a greater likelihood of detection. It also means that the costs of operating the CDA cartel are greater, other things being equal, than the commercial flooring bid-rigging cartel.

In sum, notwithstanding the greater organization complexity of the CDA, the commercial flooring bid-rigging cartel is not only likely to be more effective in restricting competition but also more difficult to detect and prosecute. Indeed, the complexity of the CDA cartel is a reflection of the difficulty of organizing such a multi-member cartel.

v. Duration

The longer the duration of a cartel, other things being equal, the greater the likely impact of the cartel.

There can be little doubt that on this dimension that the CDA cartel was more serious: Duffy's participation lasted for five years while the bid-rigging lasted 2 years and 4 months.

¹⁰⁴ The bid-rigging arrangements took place over 2 years and four months or 28 months (Table 1). Aston Carpets and Carpet Centre agreed on bid-rigging for at least 16 contracts (CCPC, 2017, p. 2). $28/16=1.75$ months or seven weeks.

¹⁰⁵ Given the nature of the market it could be argued that the non-collusive solution would be Bertrand, resulting in prices equal to marginal cost, the perfectly competitive result. For further discussion of the Bertrand paradox see Martin (2010, pp. 77-78).

vi. Conclusion

In conclusion a comparison of the degree of seriousness - using four dimensions - in the CDA and commercial flooring cartels does not provide the Court with justification for imposing lower, let alone strikingly lower, sanctions on Brendan Smith and Aston Carpets compared to the corresponding parties in the *Duffy* case. On the contrary, the evidence, if anything, suggests that there is little to choose between the two cartels.¹⁰⁶ Indeed, it could be argued that the commercial flooring bid-rigging cartel was likely more effective.

c. Are There Other Factors?

i. Introduction

There are a number of relevant factors – given the reliance on the *Duffy* judgment - which the Court in sentencing Brendan Smith and Aston Carpets largely ignored or did not take into account at all. If they had been taken into account, we argue that the Court would have imposed a greater sanction in Brendan Smith and Aston Carpets.

ii. Increased Legislative Sanctions

Charges in the *Duffy* judgment were under the Competition Act 1991 as amended by the Competition (Amendment) Act 1996;¹⁰⁷ in the commercial flooring case under the Competition Act 2002 as amended by the Competition (Amendment) Act 2012.¹⁰⁸ While the substantive competition law provisions with respect to cartels remained unchanged across all of this legislation, the sanctions increased substantially as set out in Table 2. Thus the legislature is sending a strong signal to the Courts that infringements of competition law are serious matters that should lead to commensurate sanctions. Hence, other things equal, it is likely that the sanction for cartels charged under more recent competition legislation will increase.

The importance and relevance of the increase in sanctions is dismissed by the Court when it remarks,

Now I know the penalty in respect of some of these offences of 3 million and I know it was increased to 5 million at a given – in the case of fines

¹⁰⁶ On one of the four dimensions – organizational complexity/effectiveness – the commercial flooring bid-rigging cartel is more serious than the CDA cartel. In contrast, employing cartel duration the reverse conclusion is reached. There is little to distinguish the two cartels in terms of whether or not the victim is a consumer or a business or in terms of geographic market.

¹⁰⁷ *Duffy* judgment, paras. 1 to 4.

¹⁰⁸ Table 1.

*but in the present context I do not regard that as a matter of significance in the nature of the offences.*¹⁰⁹

Furthermore, the Court completely ignores the increase in the maximum gaol term: from 2 years to 5 years and finally to 10 years.

iii. Custodial Sentences: Next Time Will It Be Different?

The Court in the 2009 *Duffy* judgment and in the lower Circuit Criminal Court's 2012 sentencing of Pat Hegarty, both clearly indicated that future cartelists should receive custodial sentences.

It is perhaps worth citing the wording in the *Duffy* case in this respect. At para. 42 the *Duffy* judgment states, "... the availability of a custodial sentence is critical. On this complementary [to fines] form of penalty, I had the following to say in *Manning*:-

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

The Court in the *Duffy* judgment then continues,

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

¹⁰⁹ *DPP v Aston Carpets, S*, p. 4.

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

Further the judge stated in the *Duffy* judgment at para. 67 that two years on from *Manning*, “I say once more that if the first generation of carteliers have escaped prison the second and present generation almost certainly will not.” The *Manning* case concerned a cartel of Ford dealers, but the judge’s remarks were unreported.¹¹⁰

Lest there be any doubt as to the meaning of the judge’s remarks concerning imprisonment in the *Duffy* case, three years later in sentencing Pat Hegarty in the heating oil cartel the judge stated:

*I'm very conscious of the fact that in a recent decision ... in the superior court, Mr Justice McKechnie [in the Duffy case] made an observation that it is but a short time before people who engaged in conduct such as this will end up in prison, and in my view this is a matter which undoubtedly warrants the imposition of a term of imprisonment and I see no reason why I would not impose a two-year term of imprisonment upon Mr Hegarty. That is the maximum provided by the statute. I'm also of the view that a penalty of a financial nature -- as I've said, the motivation for the commission of this crime was clearly greed, and a financial penalty must be imposed in order to teach those who are motivated by greed to commit crime that there can be a serious and painful penalty for them as and when the crime is to be punished.*¹¹¹

It should be noted that in both the *Duffy* case and in the *DPP v Pat Hegarty* that the individual received a suspended rather than a custodial sentence. However, the conditions that led to suspension do not apply with respect to Brendan Smith: no other members of the bid-rigging cartel have been sentenced;¹¹² and, the case came to sentencing two years after the offence was committed rather than 10 years in the case of Pat Hegarty.¹¹³

The Court makes no mention at all of the sentiments expressed in the *Duffy* judgment and confirmed in the *DPP v Pat Hegarty* concerning the use of a custodial sentence in

¹¹⁰ For details see: <https://www.ccpc.ie/business/enforcement/criminal-enforcement/criminal-court-cases/ford-dealer-cartel-conviction/>. Accessed 14 June 2017.

¹¹¹ *DPP v Hegarty*, p. 14.

¹¹² *Duffy* judgment, paras. 68 to 73. In the *Duffy* case on grounds of equity the judge did not feel that he could impose a higher sentence than had already been imposed on Patrick Duffy’s fellow cartelists.

¹¹³ In the case of Pat Hegarty the judge felt that the offences had taken place in 2001 into 2002 and given that sentencing was occurring 10 years later it would be “somewhat invidious and certainly unfair if I was to issue the warrant for Mr Hegarty to serve the term.” (*DPP v Pat Hegarty*, p. 15).

future cartel cases. Indeed, there is no discussion by the Court as to why Brendan Smith did not receive a custodial sentence for breaching competition law.

iv. Director's Disqualification: A Black Box?

As noted in Section 4.a, the Court referred to the fact that a person found guilty of breaching the Competition Act 2002 as amended, is prohibited or disqualified from holding a directorship for five years is "*something which must be taken into account in adjudicating on penalty.*"¹¹⁴ However, the Court gives no indication as to how it took into account automatic director disqualification. Presumably it was to lower the sanction imposed on Brendan Smith.

In the *Duffy* judgment the Court felt that there was no need to take automatic director disqualification into account.¹¹⁵ The Court in the latter judgment states that,

*I do not believe that a definitive view should be given on [director disqualification] 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. In the instant one, I do not believe that it has any real or substantial disabling effect on Mr Duffy.*¹¹⁶

Indeed, in the *Duffy* judgment the Court suggests that "*it might seem a little surprising to say that it [director disqualification] should be taken into account in finalizing the sanction.*"¹¹⁷

Hence if the Court had followed the *Duffy* judgement arguably it should have paid no attention to the automatic director disqualification.

d. Alternative Sentencing Benchmarks: What Do They Tell Us?

The above discussion naturally raises the question of whether a methodology can be developed and applied which in some sense yields an appropriate sanction, taking into account all the anti-competitive impact of the cartel, together with mitigating and aggravating factors. In other words the kinds of dimensions or factors that is relevant in setting the appropriate sanction.

In this connection we consider the appropriate sanction using two sets of sentencing guidelines, the US Sentencing Guidelines and the EU Sentencing Guidelines, as benchmarks. The US legal system with respect to cartels is similar to Ireland in that cartels are criminal offences, with fines and imprisonment as sanctions. In contrast, in

¹¹⁴ *DPP v Aston Carpets*, S, p. 6.

¹¹⁵ *Duffy* judgment, paras. 59 to 63.

¹¹⁶ *Duffy* judgment, para. 62.

¹¹⁷ *Duffy* judgment, para. 60.

the EU cartels are civil offences only punishable through fines on undertakings, since the EU cannot use criminal law with respect to competition enforcement.

Table 5
Sanctions Imposed on Brendan Smith/Aston Carpets by Central Criminal Court & EU & US Sentencing Guidelines

Sanction	Brendan Smith	Aston Carpets
Fines		
Central Criminal Court	€7,500	€10,000
EU Sentencing Guidelines	N/a	€224,540
US Sentencing Guidelines	€5,560 to €27,800, but not less than €16,000	€155,680 - €311,360
Imprisonment		
Central Criminal Court	None	N/a
US Sentencing Guidelines	10-16 months	N/a

N/a=not applicable

Source: Annex B.

The application of these sentencing guidelines to commercial flooring is presented in Table 5. The detailed estimates and underlying assumptions form Annex B. It should be noted that a number of approximations and assumptions were made in applying these sentencing guidelines. However, notwithstanding this, it is clear that the broad conclusions to be drawn from Table 5 – set out below – are valid.

First, the EU and US Sentencing Guidelines are largely consistent with one another. For Aston Carpets application of the EU Sentencing Guidelines yields a fine of €224,540, which falls within the minimum/maximum range yielded by the US Sentencing Guideline range of €155,680 to €311,360.

Second, the sanctions if the US and EU Sentencing Guidelines were applied are less than the maximum available to the Court in sentencing Brendan Smith and Aston Carpets (Table 3). In other words, the Court could have lawfully imposed these sanctions.

Third, the custodial sentence applicable under the US Sentencing Guidelines is consistent with both the *Duffy* judgment and *DPP v Pat Hegarty*.

Fourth, the methodology underpinning the projected fines on Aston Carpets using EU and US Sentencing Guidelines is consistent with the consumer welfare aim of competition policy in Ireland as laid out by the Supreme Court.¹¹⁸ The methodology is grounded in the harm done to consumers.¹¹⁹

¹¹⁸ *Competition Authority v O'Regan & Ors* [2007] IESC 22, which states at para. 106,

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

Fifth, the sanctions imposed by the Court in the commercial flooring case are low, particularly with respect to the lack of a custodial sentence for Brendan Smith and a fine on Aston Carpets that is 6.4 (3.2) per cent of the minimum (maximum) yielded by application of the US Sentencing Guidelines and 4.5 per cent using the EU Sentencing Guidelines.

Sixth, the application of the EU and US Sentencing Guidelines to the Patrick Duffy/Duffy Motors (Newbridge) Ltd in the *Duffy* case results in fines and gaol sentences that substantially exceed the corresponding sanction on Brendan Smith/Aston Carpets in the commercial flooring bid-rigging cartel.¹²⁰ Hence the Court was correct that Patrick Duffy/Duffy Motors (Newbridge) Ltd offence was more serious than Brendan Smith/Aston Carpets, but nevertheless despite this the sanctions imposed by the Court in the commercial flooring case were too low.

economic resources and market power. Competition law does not outlaw economic power, only its abuse. Economic power may, indeed should, be the reward of effective satisfaction of consumer needs. It would be inconsistent with the objectives of free competition that successful competitors should be punished. It is not the existence but the abuse of a dominant position which offends principles of free and open competition.

¹¹⁹ For details see Annex B and Section 6.e.

¹²⁰ The US Sentencing Guidelines in the case of Patrick Duffy resulted in a gaol sentence of 12-18 months and a fine of between €280,00 - €1,400,000, while the fine range for Duffy Motors (Newbridge) Ltd would be between €4,500,000 and €9,000,000. For details see Gorecki & Maxwell (2013b, Table X, p. 369, Table IX, p. 367, Table XI, p. 370).

6. Unduly Lenient?

a. Introduction

The DPP can appeal a sentence as being unduly lenient under section 2 of the Criminal Justice Act 1993. There have been a number of judgments interpreting the meaning of this provision, which constitute the basis for the DPP's advice, set out in Section 2.g.

b. A Clear Divergence from the Norm?

One of the criteria for a sentence being unduly lenient is that it "*connotes a clear divergence by the court of trial from the norm ...*"¹²¹ This of course begs the question of what is the norm. Here we take as an indication of the norm from the sentences imposed in the CDA cartel. As noted above the judge in sentencing Brendan Smith and Aston Carpets drew on the only reported judgment in the CDA cartel. In both the commercial flooring case and the CDA case it is a hard-core cartel offence that is being prosecuted. Furthermore the CDA is the most recent successful criminal cartel prosecution in which the Courts have opined.¹²²

We first consider the sanctions imposed on individuals (Table 6) before turning attention to the undertakings (Table 7).

Table 6
Sentencing in the Citroen Dealers Association Case, Individuals, 2008-2009.

Individual ^a	Fine (Brendan Smith = €7,500)	Gaol Sentence ^b (Brendan Smith=none)
James Durrigan	€0	3 months - suspended for 2 years
Jack Doran	€0	3 months - suspended for 5 years
Patrick Duffy	€50,000 ^c	6 months and 9 months - suspended for 5 years
James Bursey ^d	€80,000 ^e	6 months and 9 months - suspended for 5 years 28 days (imposed for non-payment of fine)
Bernard Byrne	€2,000	9 months - suspended for 1 year
Michael Gibbs	€30,000	6 months - suspended for 3 years
Brian Smyth	€30,000	6 months - suspended for 3 years
John McGlynn	€30,000	6 months and 9 months - suspended for 5 years

- Individuals are listed by sentencing date, from earliest most recent.
- Note that where there are two gaol sentences indicated for an individual (e.g. Patrick Duffy) then that indicates that they have been convicted on two as opposed to one count. Typically this would be a count for entering into an agreement and a count for implementing an agreement. In all cases the gaol sentences were to run concurrently.

¹²¹ *The People (DPP) v McCormack* [2000] 4 IR p. 359. This is consistent with the DPP's *Guidelines for Prosecutors*, cited above, which refers to "*a substantial departure from the accepted range of appropriate sentences for the offence committed in the circumstances of the case.*"

¹²² The sentences in the CDA case were handed down in 2008-2009. The only other criminal cartel sentences imposed since 2008-2009 were in the case of the *DPP v Pat Hegarty* who received a two years suspended gaol sentence and a €30,000 fine. This is consistent with the sanctions imposed on individuals in the CDA case set out in Table 6.

- c. €30,000 on one count; €20,000 on the other.
- d. James Bursery was sentenced to 28 days gaol for non-payment of the fine.
- e. €50,000 on one count; €30,000 on the other.

Source: Competition Authority (2010, Table 2, p. 15).

In terms of Brendan Smith it is hard to argue that, at the very least, the lack of a suspended gaol sentence does not constitute undue leniency. Every individual, without exception, was given a suspended gaol sentence in the CDA cartel case. This applied irrespective of their status: the cartel organizer (i.e. John McGlynn)¹²³; a director but not shareholder of the Citroen dealer (e.g. Bernard Bryne,¹²⁴ Michael Gibbs,¹²⁵ Brian Smyth¹²⁶) or a director and shareholder (e.g. Patrick Duffy,¹²⁷ Jack Doran¹²⁸). Brendan Smith falls into the second category.¹²⁹

While Brendan Smith’s fine of €7,500 is on the low side, in two instances the Court imposed no fine on an individual in the CDA case.

Table 7

Fines in the Citroen Dealers Association Case, by Undertaking, 2008-2009.

Undertaking ^a	Fine (Aston Carpets=€10,000)
James Durrigan and Sons Ltd.	€12,000
Ravenslodge Trading Ltd. t/a Jack Doran Motors	€20,000
Duffy Motors (Newbridge) Ltd.	€50,000 ^b
Bursery Peppard Ltd.	€80,000 ^c
Finglas Motors (M50) Ltd.	€35,000
Gowan Motors (Parkgate) Ltd.	€30,000

a. Undertakings are listed by sentencing date, from earliest most recent.

b. €30,000 on one count; €20,000 on the other.

c. €50,000 on one count; €30,000 on the other.

Source: Competition Authority (2010, Table 2, p. 15).

Aston Carpets’ fine of €10,000 is lower than any of the fines imposed in the CDA case on undertakings. Bursery Peppard Ltd was fined eight times as much. At the other extreme James Durrigan and Sons Ltd fine, the lowest, was 20 per cent more than that imposed on Aston Carpets.

¹²³ McEnaney (2008).

¹²⁴ Independent (2009).

¹²⁵ Irish Times (2009).

¹²⁶ Irish Times (2009).

¹²⁷ *Duffy* judgment, para. 13

¹²⁸ RTE (2008).

¹²⁹ It should be noted that counsel for Brendan Smith argued that Smith had “no financial benefit, there’s no bonus, there’s no sharing in any individual monies that were generated.” (*DPP v Aston Carpets*, SH, p. 50). While correct, it is arguably misleading. Brendan Smith was entitled to a bonus - 25 per cent of the profits of Aston Carpets, but there wasn’t much profit (*DPP v Aston Carpets*, SH, p. 39). However, the prospect of such a bonus may have influenced Brendan Smith’s behaviour. In other words, ex ante incentives need to be taken into account in considering motivation.

In sum, a comparison of the sentences imposed in the CDA and commercial flooring cases suggests that the Court was likely unduly lenient in not imposing a gaol sentence, albeit suspended, on Brendan Smith. The fine on Aston Carpets at only 83 (12.5) per cent of the lowest (highest) fine in the CDA case appears to be lenient, but it is not clear whether it is unduly lenient.

c. Has the Norm Changed?

Norms change through time. Cartel sentencing is no exception. The norm embodied in the 2008-2009 CDA sentences has changed.

First, the norm with respect to sentencing an individual, based on the *Duffy* judgment, reinforced by the subsequent sentencing in *DPP v Hegarty* in the lower Circuit Criminal Court, suggests a custodial sentence should be imposed in future cartel cases.

Second, in the *Duffy* case the charges for which a conviction was secured were under the Competition Act 1991 as amended in 1996. The charges against Brendan Smith and Aston Carpets were brought under the Competition Act 2002 as amended by the Competition (Amendment) Act 2012. The 2002 and 2012 Acts significantly increased the maximum sentences for cartel offences – Table 2 - indicating a new norm of more substantial sanctions.

In sum, the changed norm taken together with the comparison of the sentences in the CDA and commercial flooring cases suggests that the fines on Brendan Smith and Aston Carpets, together with the lack of a custodial sentence on Brendan Smith, are likely to be unduly lenient.

d. The Trial Judge's Reasons

As noted above in considering whether or not a sentence is unduly lenient the DPP's *Guideline for Prosecutors* states that "*great weight is attached to the trial judge's reasons for imposing the sentence.*" In coming to this view the DPP relied on the first case to consider the issue of unduly lenient sentencing.¹³⁰

As noted in Section 4.b the judge's methodology in determining the sentences in the commercial floor bid-rigging cartel case was to use the *Duffy* case as a template to determine whether or not the commercial flooring case was more or less serious. Four dimensions for comparative purposes were selected: consumers vs. business as victims; geographic market; organizational complexity; and duration. In each case the trial judge determined that the commercial flooring bid-rigging cartel was less serious than that revealed in the *Duffy* case. Hence given the less serious nature of the commercial flooring bid-rigging cartel, based on the Court's reasoning, the sanctions should be lower than those in the *Duffy* case.

¹³⁰ *DPP v Bryne* [1995] 1 ILRM 279.

The central argument set out in Section 5.b is that an analysis of the comparison of the degree of seriousness of the CDA and commercial flooring cartels does not provide the Court with justification for imposing lower, let alone strikingly lower, sanctions on Brendan Smith and Aston Carpets compared to the corresponding parties in the *Duffy* case. On the contrary, the evidence, if anything, suggests that there is little to choose between the two cartels. Indeed, it could be argued that the commercial flooring bid-rigging cartel was likely more effective.

e. Specific vs. General Deterrence

In terms of sentencing methodology, in the *Duffy* judgment reference is made to a passage in O'Malley's *Sentencing Law and Practice* (2nd ed) which the judge says is "*particularly apt for offences such as ... competition breaches.*"¹³¹ O'Malley talks about a penalty reflecting general deterrence which, "*aims to demonstrate to potential offenders and to society at large the painful consequences of certain wrongdoing,*" while specific deterrence "*is more concerned with the particular offender, and aims to impress upon him the punishment he will suffer if he re-offends.*"¹³² 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.*"¹³³

On the balance between general v specific deterrence in sentencing in competition law infringements, the *Duffy* judgment comes down decisively on the side of general deterrence. The Court cites, for example, the following passage from Werden,¹³⁴

Cartel 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. (p. 7)

The Court then continues,

In these respects I would agree. Competition crimes are particularly pernicious. Coupled with that, and the low likelihood of recidivism amongst perpetrators, this means that in order to be effective sanctions must be

¹³¹ *Duffy* judgment, para. 36.

¹³² *Duffy* judgment, para. 36.

¹³³ *Duffy* judgment, para. 36.

¹³⁴ *Duffy* judgment, para. 37. Werden presented a paper (which was later published as Werden (2009)), at a conference sponsored by the CCPC, "Sanctions, Fines and Settlements in Cartel Cases: Developments and Deterrence in the EU and Ireland," held in November 2008 in Dublin at which members of the judiciary attended.

designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place.

Two points can be made concerning this discussion of deterrence.

First, the Court in sentencing Brendan Smith and Aston Carpets paid particular attention to specific rather than general deterrence.

Second, the use of general deterrence as the benchmark suggests that the fine for a cartelist should be based on the fraud perpetrated on consumers, which in turn equates to the gains to the cartelists.¹³⁵ This is thus a suitable metric to measure the seriousness of a cartel.

If the fine does not at least equal the fraud or theft the cartelist has an incentive to breach competition law. Too low a fine, to use a phrase in the opening section of the paper, is, in effect, nothing more than the periodic licensing of illegal activity.

This interpretation is strengthened by further examination of the *Duffy* judgment. The judge, for example, remarks, cartels “*cause a transfer of consumer’s money to*” the cartelists.¹³⁶ The judge talks about how consumers were “*de-frauded*” due to the CDA cartel.¹³⁷ Werden, is again quoted approvingly by the judge: “*[C]artel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts a far greater economic harm.*”¹³⁸

While the *Duffy* judgment does not develop a sentencing methodology consistent with these views, it is nevertheless possible to sketch out such a methodology.

The purpose of a cartel is to raise price above the competitive level. This has two costs to consumers:

- First, consumers who continue to purchase the product or service pay a higher price (i.e. the cartel-induced price); and,
- Second, consumers who would have purchased the product or service at the competitive price but cannot afford to at the higher cartel-induced price.

The magnitude of these losses to the consumer is a measure of the damage or fraud that the cartel inflicts on consumers.¹³⁹

¹³⁵ This needs to be qualified as there is also a loss for those consumers that can no longer purchase the product or service at the higher price.

¹³⁶ *Duffy* judgment, para. 22.

¹³⁷ *Duffy* judgment, para. 23.

¹³⁸ *Duffy* judgment, para. 24, but see also the end of para. 25.

¹³⁹ However, note that the loss to consumers – the sum of these two components – is greater than the gain to the cartelist – the first component only.

But how is this magnitude measured? Here we draw on the EU and US Sentencing Guidelines. These guidelines have damage to the consumer at their heart. In both cases a two step approach is used:

- First, the sales of the undertaking of the goods and services to which the infringement relates (S) are estimated. For Aston Carpets it would be the commercial flooring contracts it won over the period 1 January 2011 to 30 April 2013 which were subject to the bid-rigging conviction; and,
- Second, the loss to consumers expressed as a proportion of S. The US Sentencing Guidelines use 0.20, the EU Sentencing Guidelines, 0.25. These proportions are based on the literature on the impact of cartels. It relieves the Court of the burden of estimating the impact of a cartel in each case.

Hence if S is €0.5 million, then the fine would be €100,000 or €125,000.¹⁴⁰ It can then be adjusted to reflect various factors.¹⁴¹

If the approach to setting fines for Aston Carpets is based on the guidance set out in the *Duffy* judgment as embodied in the EU and US Sentencing Guidelines – presented in Table 5 – then the sanctions imposed by the Court are unduly lenient.

It should be noted that the approach in the sentencing guidelines for setting fines based on the damage or fraud committed by the cartelist has been applied by the Revenue Commissioners for fraudulently making incorrect tax returns.¹⁴² Here the Revenue Commissioners impose a fine equal to twice the tax that is owed plus a penalty of €1,500 to €3,000 for corporate entities. Although fraudulently filing income tax returns is a civil not a criminal offence, it is nevertheless a white collar offence like competition law breaches.

f. Conclusion

There can be little dispute that there are strong arguments that the sentences imposed on Brendan Smith and Aston Carpets are unduly lenient. The lack of a gaol sentence (albeit suspended) on Brendan Smith was a clear divergence from the norm established by the CDA case, while the fine on Aston Carpets was low if not necessarily unduly lenient.

Norms, however, change. The increased severity of competition law sanctions and the clear direction in *Duffy* that future cartelists should be gaoled leaves is consistent with the view that the sanctions imposed on Brendan Smith and Aston Carpets were unduly

¹⁴⁰ i.e. 0.20 (or 0.25) \times €0.5 million = €100,000 (€125,000).

¹⁴¹ As set out in Annex B.

¹⁴² The paragraph is based on Law Reform Commission (2016, p.21).

lenient. These conclusions are not altered by an analysis of the trial judge's reasons for imposing these sentences.

Finally, given the *Duffy* judgment's stress on general as opposed to specific deterrence – not followed by the trial court in the sentencing of Brendan Smith and Aston carpets – suggests a methodology consistent with the EU and US Sentencing Guidelines. The application of these guidelines to the facts of the commercial flooring bid-rigging cartel is consistent with the view that the sanctions imposed in this case are too low.

If the sanctions in the commercial flooring are allowed to stand unchallenged they will set a damaging precedent for the effective administration and enforcement of competition law and policy in Ireland. It is therefore welcome that the DPP has announced that the sentences imposed by the Central Criminal Court will be appealed to the Court of Appeal on grounds of undue leniency.

Such an appeal opens up the possibility of the Court of Appeal providing a methodology for determining sentences for breaches of competition law. It is to be hoped that they follow the advice of O'Malley (2014, p. 4) that,

they should continue with the practice of delivering guideline judgments as this is probably the best way of bringing coherence and consistency of approach to sentencing generally.

A corollary of this is that the Court of Appeal should,

give advance notice to the parties when they consider a particular case to be suitable for that purpose. This will allow counsel for both sides to make broader submissions than might be necessary or appropriate if the appeal were confined to the facts of the particular case.

7. Enforcement: Cartel Immunity Programme (CIP)

The sanctions imposed on Brendan Smith and Aston Carpets are likely to reduce the effectiveness of the CIP. This is a setback for cartel enforcement. The CIP is a key tool for cartel detection and prosecution. As noted in Section 5.b.ii the CIP played an important role in a number of criminal cartel prosecutions in Ireland.

The decision of a cartel member to participate in the CIP involves, at least implicitly, a careful weighing of the costs and the benefits. The costs include the forgone returns from cartel membership and probable loss of friendships with business associates who were cartel members. Furthermore in Ireland there is a longstanding stigma to being seen as an informant.¹⁴³ The benefits no criminal record, no legal costs if the case goes to trial, no sanction if the DPP is successful in Court, combined with the possibility of damaging your competitors' reputation and profitability.

Prior to the sentencing of Brendan Smith/Aston Carpets, any legal advice provided to a cartel member as to what sanctions might be imposed by the Court in a cartel case would likely to have been based on the *Duffy* judgment and the sentencing in *DPP v Hegarty*. The legal advice might thus be fines in the order of €10,000s and the strong possibility of a custodial sentence. This advice would have been reinforced by noting the increased sanctions available to the Court due to new competition legislation (Table 2). As the Court noted in the *Duffy* judgment, a custodial sentence "*may act as an incentive to people to offer greater cooperation in cartel investigations.*"¹⁴⁴

The sentencing of Brendan Smith/Aston Carpets confounds this advice. The sanctions imposed on Brendan Smith by the Court were fines that were less than a month's salary and no gaol sentence, not even suspended, for a hardcore breach of competition law. As a result the benefits of participating in the CIP will be lower. Cartels will be harder to detect. Consumers and the competitive process will be damaged.

If the DPP is successful in its appeal that the sentence imposed in the commercial flooring bid-rigging cartel is unduly lenient and a suitable sanction imposed consistent with the EU and US Sentencing Guidelines (Table 5) then this will strengthen the effectiveness of the CIP.¹⁴⁵

¹⁴³ In a defamation case to reach the High Court in 1971 the plaintiff in suing the *Irish Times* stated, "*I cannot think of anything more ugly, more horrible in this life than being called an informer because it is peculiarly nauseating thing in Irish life.*" The case was appealed to the Supreme Court. A 1972 written judgment stated that portraying the plaintiff as a spy and informer was putting him into the "*same category as spies and informers of earlier centuries who were regarded with loathing and abomination by all decent people.*" The discussion and quotes are taken from Mac Cormaic (2016, pp. 144-45).

¹⁴⁴ *Duffy* judgment, para. 42. The relevant passage was cited above. Although the Court is talking about cooperation and not the CIP specifically, nevertheless the point does apply to the CIP.

¹⁴⁵ It will also strengthen the CCPC's emphasis on pursuing bid-rigging cartels. See CCPC (2016b) and Goggin (2017)

8. DPP Submissions: Assistance vs. Guidance

The Courts have held that the DPP in making submissions on sentencing can provide assistance, of the kind set out in Section 3.d.i, but not guidance on the actual sentence.¹⁴⁶ For example in *DPP v Z* [2014] IECCA 13, the Court stated in para. 2.7,

In this Court's view, there is now an obligation on the prosecution to draw to the attention of a sentencing judge any guidance, whether arising from an analysis carried out by this Court or from ISIS [Irish Sentencing Information System] or otherwise, which touches on the ranges or bands of sentences which may be considered appropriate to any offence under consideration and the factors which are properly, at least in ordinary cases, to be taken into account. In many cases, this should not impose any significant burden on the prosecution for the sources ought be easily recognised. In addition, it seems to this Court that it is incumbent on the prosecution to suggest, where such guidance is available, where the offence under consideration fits into the scheme of sentencing identified and why that is said to be the case. Finally, the prosecution should indicate the extent to which it is accepted that factors urged in mitigation by the defence are appropriate and give at least a broad indication of the adjustment, if any, in the overall sentence which it is accepted ought to be considered appropriate in the light of such mitigation.

This it would seem to provide ample opportunity for the DPP to bring to the attention of the Court many of the factors identified here as relevant to the setting of an appropriate sentence in cartel cases. Indeed, with a certain amount of imagination virtually all of the material presented above could be presented.

In this context, for example, the DPP could present the *range* of sanctions yielded by the application of the US and EU Sentencing Guidelines. This applies particularly to the issue of fines for the undertaking where there exists no coherent methodology in either the *Duffy* judgment or *DPP v Pat Hegarty* as to how these should be set. As argued in Section 6.e the application of these sentencing guidelines is consistent not only with competition legislation but also the sentiments expressed in the *Duffy* judgment.

It is difficult to understand why the Court would not welcome such assistance, broadly interpreted, given that the Central Criminal Court is more used to dealing with murder and rape, rather than white collar crime.¹⁴⁷

At the sentencing hearing for Brendan Smith and Aston Carpets on 4 May 2107 the counsel for the DPP took a rather minimalist approach, only referring to the maximum

¹⁴⁶ For further discussion see Bryne (2015) and O'Malley (2014).

¹⁴⁷ <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/9DB0D050D6CBCAD180257FBC004B2BCF?op=endocument&l=en>. Accessed 14 August 2017.

sentences under competition law that applied to Brendan Smith and Aston Carpets, referred but did not discuss the *Duffy* judgment and briefly summarized *DPP v Pat Hegarty*.¹⁴⁸

The appeal by the DPP to the Court of Appeal on grounds of undue leniency provides the opportunity for the DPP to put forward a fuller exposition of the appropriate methodology for determining sanctions under competition law as well as a possible range of sanctions.

¹⁴⁸ *DPP v Aston Carpets*, SH, pp. 27-28, pp. 41-42.

9. Conclusion

The paper started out by asking in Section 1 whether or not the sentences imposed on the Brendan Smith and Aston Carpets was unduly lenient, no more than a slap on the wrist, in effect a periodic licensing of illegal activity. The answer is unequivocally in the affirmative.

What the discussion has also discovered is an inconsistency in sentencing in cartel cases and lack of a coherent methodology in setting sanctions. This has been identified in other aspects of the criminal justice system in Ireland.¹⁴⁹

One obvious alternative is sentencing guidelines of the sort discussed here with respect to the EU and the US for cartels. They attempt to incorporate the latest evidence on the impact of cartels together with an infusion of society's values as to mitigating and aggravating factors.

There are two responses to the criticism that such guidelines limit the freedom of the Court by being too rigid: first, the US Sentencing Guidelines provide a *range* of sanctions rather than a point estimate (Table 5) and second, for US Sentencing Guidelines if the Court wishes to go outside the guidelines, that is permissible provided that the Court explains its reasoning.¹⁵⁰

There is a balance to be struck in sentencing between judicial consistency and judicial independence. Sentencing guidelines, it could be argued, place limits on independence, but secure consistency. However, this is not the case for sentencing guidelines which incorporate sentencing ranges rather than point estimates and permit reasoned departures from the guidelines. Hence it is not clear that they limit independence.

Framing the discussion on sentencing guidelines in terms of consistency v independence mischaracterizes the issue. Rather properly constituted sentencing guidelines have the potential to not only maintain judicial independence and consistency but also promote accountability.

It is to be hoped that the appeal to the Court of Appeal by the DPP with respect to the sentences imposed by the Central Criminal Court on Brendan Smith and Aston Carpets on the grounds of undue leniency will lead to the development of robust evidence-based guidelines for cartel offences. Certainly as we have demonstrated in this paper there is more than enough material available for the development of such guidelines.

¹⁴⁹ See, for example, Cahillane (2013) and Gorecki & Maxwell (2013b, p. 355)

¹⁵⁰ See, for example, the US cartel case cited in Gorecki & Maxwell (2013b, p. 366).

ANNEX A

Bill No: CCDP 82/2015

**THE CENTRAL CRIMINAL COURT
BEFORE THE HONOURABLE MR JUSTICE McCARTHY**

31 May 2017

DIRECTOR OF PUBLIC PROSECUTIONS

v.

ASHTON CARPETS & FLOORING and BRENDAN SMYTH

Counsel for the Prosecution:

Mr R Farrell, SC
Mr L Staines, BL

Counsel for the Defence:

(for Ashton Carpets & Flooring)

Mr P Gageby, SC
Mr P Carroll, BL

(for Brendan Smith)

Mr M O'Higgins, SC
Mr B Gordon, BL

DPP v. Ashton Carpets & Flooring Limited and Brendan Smyth
31 May 2017

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1 REGISTRAR: Bill number 82/2015, Director of Public Prosecutions v. Ashton
2 Carpets and Flooring and Brendan Smyth for sentence.

3 JUDGE: Very good. Well, this matter comes before me for sentence today in
4 circumstances where the accused, and each of them, pleaded guilty to a number of
5 offences in the case of the company to offences under the Competition Acts and in
6 the case of the natural person involved, Mr Smyth, to one charge under the
7 Competition Acts and one which I regard frankly as quite serious which involved
8 interfering with the investigation by means of a phone call which was made.

9
10 Now, I think it's just helpful if I refer to the charges in question and it will be seen
11 that in Count No. 2 the offence is an engagement in an implementation of an anti
12 competitive agreement. That is a case where the indictment is pleaded against
13 Ashton Carpets and Flooring. There is a further offence which -- of a -- of a similar
14 or analogous kind where there are also pleas of guilty and then there is, as I say -- or
15 a plea to an offence which I regard as serious. I do not down grade the seriousness
16 of the others but this is an offence against public justice and it is doing an act with
17 intent to impede the apprehension or prosecution of a person who has committed an
18 arrestable offence. Now, I'll go into more detail in that in a moment.

19
20 Now, this is a case where a series of events or agreements were entered into by
21 the -- Mr Smyth on the basis of effectively the manipulation of quotations but one or
22 other of the two companies involved, that is to say Ashton Carpets and Flooring and
23 Carpet Centre Contracts Limited. The manipulation took two forms. It took the
24 form of, so to speak, Carpet Centre Contracts Limited providing increased quotations
25 on occasion and -- or one or other of them or vice versa or one or other of them
26 giving reduced quotations to the other protagonist, so to speak, in the matter.

27
28 Now, this -- these charges, accordingly, these three charges are accordingly
29 representative counts but the period of time over which they -- these unlawful
30 agreements were entered into were -- was indeed quite lengthy and they spanned
31 effectively a period of two years or thereabouts. Now, it does appear that the matter
32 came before the Competition Authority in circumstances where one of the
33 protagonists, so to speak, the principal which might call him, of
34 the -- of -- came -- came to the Competition Authority under what is called the Cartel

1 Immunity Program. This permits a party to a cartel to communicate with the
2 Competition Authority, effectively as what is commonly known, I suppose,
3 nowadays as a whistle blower and persons who cooperate in that way, they're
4 required to cooperate fully, then give -- or can obtain immunity as occurred in this
5 case from prosecution and the gentleman in question was David Radburn. It appears,
6 in fact, that it was Mr Smyth who made the first move in relation to the sequence of
7 events.

8

9 On occasion what occurred was that a party of the two of them might anticipate, due
10 to his -- the party's relationship with either a client or a quantity surveyor or
11 a contractor that he -- or such party might obtain a contract for the provision of
12 carpets and similar furnishings and the agreement on a number of occasions was
13 entered into so that effectively what was conceived to be the favoured bidder or the
14 party likely to be the favoured bidder would succeed in getting the contracts. Now,
15 there has been much debate, as it were, as to the -- or some debate, at least, as to the
16 total financial benefit which might have accrued as a consequence of these
17 arrangements, but in any event there is evidence to the effect that there was
18 a discussion about some 16 contracts and these then were summarised in evidence.
19 If you just bear with me I'll refer to them.

20

21 All right, the contracts in question ranged in the case of Dell, the contract was
22 fulfilled by the Carpet Centre and the contract was worth some €378,000. There was
23 a further contract involving Carpet Centre of 193,000 and the Ashton contracts
24 extended from 30,000 as far as -- as far as 90,000 and it seems to me, therefore,
25 that -- and there were a number of contracts where neither obtained the -- neither
26 obtained the contract which would not, in fact, have been entirely unusual.

27

28 It is the case, however, that these were not consumers in the commonly understood
29 term, in the commonly understood nature of that term. The -- it seems to me that
30 however criminal or deplorable these activities may be they are, as a matter of public
31 policy, activities which are criminal and can have very significant effects for the
32 health of the economy and the health of business activity, that the individuals, if
33 I might describe them as such, with whom the parties were dealing, were at least
34 parties who were in a position to exercise a serious independent judgment as to

1 whether or not they would contract with the offending parties in this instance and the
2 fact that they were capable of exercising such independent judgment because of their
3 commercial capacity, so to speak, did not in practice mean that they stand on the
4 same footing as, it seems to me, consumers in terms of being victims of this type of
5 crime on a practical basis.

6
7 But it is undoubtedly the case that in dealing with these matters one must take into
8 account the -- what I might describe as the commercial reality of them. It seems to
9 me that there will, by definition, be a difference between a case where, shall we say,
10 modest amounts were gained by the offending parties and indeed lost by the victims,
11 perhaps figures in the order of several thousand, but perhaps not exceeding five
12 figures, and figures involving perhaps many 10s of thousands. Similarly, there will
13 be a difference between an arrangement which persists to the point where it is
14 enforced by agents, so to speak, of a cartel and it is further relevant, it seems to me,
15 that there will be other people active in the market, as I think is evidenced by the fact
16 that the unlawful agreements entered into on a number of occasions gave rise to no
17 contracts in favour of the party, although that is not to exclude, in fact, the consent
18 that the hire price was not paid.

19
20 Now, in dealing with sentencing of this nature I have been assisted by a number of
21 decisions. The leading decision is the decision I think of Mr Justice McKechnie in
22 the case of Director of Public Prosecutions v. Duffy and that decision is
23 comprehensive indeed to the point where he considered not only levels of penalty in
24 this jurisdiction, but also indeed even in civil law jurisdictions and he elaborated the
25 factors which should be taken into account and the figures which might be
26 appropriate in respect of penalty and indeed whether or not, on occasion, a custodial
27 penalty might be appropriate.

28
29 I think it's appropriate to say first of all that the judgment in that case was on the
30 23rd of March 2009. It seems to me that there has not been any, as my
31 understanding is, as a matter of common knowledge, that there has been no
32 significant inflation since that time and hence the figures ultimately arrived at in
33 terms of fine have a meaning which would not otherwise be the case if there had
34 been a high degree of inflation or if the case had occurred many years ago.

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Now, I know the penalty in respect of some of these offences of 3 million and I know it was increased to 5 million at a given -- in the case of fines but in the present context I do not regard that as a matter of significance in the nature of the offences. But I think it's appropriate to refer to the nature of the offences in Duffy. Mr Patrick Duffy was a director of Duffy motors Newbridge Limited and what was involved there was an extraordinary cartel which persisted over a lengthy period of time. There was in existence an organisation called the Citroen Dealers Association and it was geographically divided into a number of regions and a number of meetings were held and this organisation from in or about April 1995 to 2004 was active in relation to the provision of services in relation to Citroen cars and other --

From the outset the position was as followed in Mr Justice McKechnie's words as to the objects: "The setting of maximum discounts from the retail dealers' recommended price list for new Citroen motor vehicles; 2) the setting of delivery charges in respect of such vehicles; 3) the setting of accessory prices; 4) the setting of prices for metallic paint; 5) the setting of prices for trade ins and used stock; 6) the setting of export prices and parts." There were some 48 meetings of the association. Minutes were kept and two independent companies were retained to police this cartel, which was one of a very comprehensive kind, which operated over a lengthy period and effectively it came to light in the spring of 2004.

So, one can see from that that a vast difference between the seriousness of the present case and that which was being dealt with in the case of Duffy. This is not, as it were, to down grade the seriousness of the present case but the point is further made by Mr Justice McKechnie as follows: "It covered the entire country, although regionally based. It existed for the best part of 10 years. It was formal and had an established structure to it. Its members appointed officers who held various positions for different periods. Its purpose was clear cut with intent and deliberately designed so that its core objects could be achieved. It kept detailed records and printed and published new price lists after ever price movement. Realising that there could be no honour, even amongst thieves, the association provided for sanctions or penalties so as to coerce the effectiveness of the goals. Without the fortunate circumstances which led to the authorities' intervention by means of a whistle blower, the activities

1 of the association could well be still ongoing."

2

3 It was, in other words, a highly organised cartel which is, of course, a conspiracy at
4 common law as well as a statutory offence. And Mr Justice McKechnie referred to
5 the fact that a -- that: "Cartel activity robs consumers and other markets' participants
6 of tangible blessings of competition." So, I think it is obvious from what I have said
7 that this case lies on a less significant footing. It was much shorter. It didn't involve
8 a cartel. It didn't involve the whole country and whilst it did involve dealing with
9 individual transactions for individual commercial entities, it did not involve all of the
10 consumers in the country who might have been minded to buy Citroen cars.

11

12 Mr Justice McKechnie took into account the various factors ordinarily relevant. One
13 must take into account the moral culpability of accused persons. In the case of
14 companies the veil cannot be lifted so -- but the moral culpability is not, as it were,
15 different although certain mitigating factors may be absent because one is dealing
16 with a legal, not an actual person, but in any event one must first address the moral
17 culpability of the offence and one must then proceed to address the mitigating
18 factors. In determining the moral culpability one must have regard to the fact that
19 every -- every case is decided subjectively and accordingly one must have regard to
20 the identity of an accused person with all the baggage, I do not use the term
21 pejoratively, which that person has in life, his situation and his personality. This
22 I think is a far more difficult thing to do because of the limited extent to which
23 a legal person may -- may be able, so to speak, to have any perception of these
24 factors.

25

26 All right. Now, Mr Duffy, as I've said, was the Director of the company, obviously
27 large benefits accrued. One can understand the existence of even more serious
28 cartels and one hesitates to take examples because one would not wish to refer to
29 individual cases but I don't think anybody could doubt that that is the position. Now,
30 in the case of Mr Duffy, the learned judge on that occasion imposed a sentence of six
31 months on one of the counts in respect of which he had entered the plea and nine
32 months in respect of a separate plea which was implementing the unlawful
33 agreement. I have effectively -- effectively take the view that in substance these
34 things are the same, but the entirety of it was suspended for a period of five years on

1 the base he is that he would enter into the usual bond, which obviously was to keep
2 the peace and be of good behaviour. Now, he said that he would further impose
3 a fine of €20,000 on Mr Duffy in respect of the implementing plea in one of the two
4 please and a fine of 30,000 with regard to the second plea. With respect to the
5 company he imposed a fine of 20,000 and 30,000 respectfully, effectively on the
6 same basis and he made provision for payment so the totality of the fine in that case
7 was 100,000 for both the company which acted of course through Mr Duffy and also
8 a sentence of imprisonment. I know the disqualification of Mr Duffy as a director is
9 not a matter of punish. As a penalty, but it is something which must be taken into
10 account in adjudicating on penalty.

11

12 I'm going to pause there and say that the solicitor and counsel for the -- for
13 Mr Murphy -- or, sorry, Mr Smyth -- did I say Duffy? In any event, Mr Smyth's
14 solicitor and counsel with that level of integrity for which they are universally known
15 brought to my attention certain matters which had not been brought to their attention
16 by their client, even though it might and undoubtedly was relevant to my assessment
17 of his means which is a relevant factor in a position of fines and indeed for that
18 purpose I was given a statement of means by them and certain submissions were
19 made as to his present status. I do not comment, because it is nothing to do with this
20 case, as to any dispute he may have had with -- in relation to the matter by virtue of
21 his contract of employment with his former employer as the company before me
22 today is, but it is not relevant to me but it seems that there is in existence a company
23 which he effectively operates, even though he is neither a director or share holder
24 and the -- it seems proper to infer that a substantial part of the former business of the
25 carpet company, Aston carpets, is now conducted by that new company and I do
26 not -- this of course is relevant to his means. It seems on the face of the matter,
27 whatever the status of the accused, that he is a person who did -- who does, in fact,
28 have what is, in substance, a controlling degree with another person, I need not
29 mention him, in a new company which he has formed to conduct the same business
30 and indeed seems to be prospering in doing so.

31

32 On a rather imprecise basis it has been determined that the value of that -- his share
33 in the value of that company would be well into six figures, certainly between three
34 and 400,000. I accept that that is perhaps, to a degree, a notional figure but it is

1 indicative of the level of prosperity of the company and accordingly is relevant to his
2 capacity to pay. The company in this instance was bought at a given stage, but the
3 position is that the person who was acting as agent for the company, and thus giving
4 rise to the criminality, was Mr Smyth and even though it is probably not an
5 investment which might have been as successful as the purchaser of the shares from
6 the accused, Creel Mosaics Limited, might have hoped in part because of the
7 recession, it is nonetheless that benefit was obtained. I have read the accounts which
8 have been furnished to me and I have considered the evidence in that regard.
9 I accept that the company is trading only to a limited degree, that is for the purpose
10 of dealing with this offence, and that a very modest amount, I think relatively
11 speaking of 14,000 or thereabouts, exists in the company, its business having been
12 transferred to Creel Mosaics Limited. It has been pointed out to me over a period of
13 recent years the company was loss making. Its business has now been transferred
14 and since it is an unlimited company the share holders in it, Creel Mosaics Limited
15 will have to -- will be responsible ultimately for any liabilities of the company and
16 that is of course something which I will take into account as well.

17

18 So far as Mr Smyth is concerned, he is now prospering. The statement -- he has this
19 stair effectively in a new company. He has a list of assets. He has an asset which
20 was brought to my attention, again by his solicitors which frankly he did not tell
21 them about. Now, it is an asset where the liabilities exceed the value but nonetheless
22 there are a series of other assets which are properties at Dunshaughlin, Lucan,
23 Johnstown and Ballycoolin business park. These are described as having a value of
24 1,480,000 with liabilities of 1,125,000. He has certain non property assets. That is
25 a real estate fund of 46,435. He has a fund which appears to be a German fund
26 worth -- which is described as being -- having a nominal value of 200,000 and two
27 further funds of relatively modest kind, or funds rather in two banks at 4751 and
28 2861.90. There appears to be litigation involving the larger of those investments
29 with the bank or have been and ultimately litigation was resolved on the basis of
30 a payment of a much lower figure.

31

32 But in any event, one of these funds appears to be under -- in liquidation. He has
33 given evidence as to his income and his outgoings. His income is €9,422 per month
34 and 113,074 annually and his outgoings come to somewhat less. His personal

1 circumstances, he is a person who is separated, perhaps now divorced. He has two
2 children, one of whom he has been maintaining, resident with his former wife and he
3 has one young child.

4

5 So, how do I approach this matter? It seems to me that I must be guided by
6 Mr Justice McKechnie's decision and it seems to me, in those circumstances, that
7 since the decision, the conduct he was dealing with was in -- exponentially more
8 serious the appropriate penalty in respect of the company is a fine of €7,500 on each
9 of the two counts.

10

11 Now, in respect of the individual, the human person, as it were, he bears
12 a responsibility for the matter as well. I think an appropriate figure in respect of the
13 charge under the competition acts is the same, which is 7,500, but I do take a very
14 serious view of the -- of what I have described as the offence against public justice
15 and it seems to me that in that case a suspended prison sentence is appropriate and it
16 may be very modest, but such serious offence must be -- must be marked and
17 accordingly, therefore, I will impose a sentence on him, very modest sentence, but
18 nonetheless the seriousness of the matter must be marked of three months
19 imprisonment which I will suspend for a period of two years on his entering into the
20 usual bond.

21 MR GAGEBY: May it please the Court.

22 MR O'HIGGINS: May it please the Court.

23 JUDGE: Yes.

24 MR STAINES: I just have one clarification, I think in relation to the company you
25 said each of the counts to which the company had pleaded, but the company has only
26 pleaded to a single count.

27 JUDGE: No, I thought it -- I'm sorry, I thought -- well, sorry, we're dealing here
28 with a total of 16 transactions, are we not?

29 MR STAINES: Yes.

30 JUDGE: Over a period of time.

31 MR STAINES: Yes.

32 JUDGE: Well, it seems to me that the -- that the -- I had understood that they were
33 reflected, forgive me, it's my error, by two -- by two please but since on -- it seems to
34 me then that the appropriate penalty in respect of one, however, because it's

1 a representative count, I don't think it matters where they're representative counts,
2 I think €10,000 would be the appropriate.

3 MR GAGEBY: May it please the Court.

4 MR STAINES: May it please the Court.

5 JUDGE: Yes.

6 MR STAINES: And just one other thing to say, Judge, is quite unusually the fine in
7 this case is, in fact, made payable to the competent authority who in this case are the
8 CCPC and there's no default provision as such if the fine isn't paid, it's dealt with as
9 though it were a civil matter and the legislation provides for that. So, the order
10 should simply be the fine and the amount and there's no default, so to speak, it will
11 be dealt with in the civil court.

12 JUDGE: I understood so, I understood so.

13 MR STAINES: May it please the Court.

14 JUDGE: The -- the bond, Mr O'Higgins.

15 MR O'HIGGINS: Yes, Judge. He can enter into it now if that's appropriate.

16 JUDGE: Would you mind?

17 MR O'HIGGINS: Yes.

18 JUDGE: Yes, thank you.

19

20 BRENDAN SMYTH (sworn) - Bond entered into by accused

21

22 Q. Mr Smyth, you're going to be asked to enter into a bond now by the registrar which
23 will -- you're entering into a solemn agreement to keep the terms of the bond; do you
24 understand that?

25 A. Yes.

26 Q. Do you understand that if the bond is breached that the Director has power to bring
27 the matter back before the Court and to present any breach to the judge with a view
28 to you serving the sentence which is otherwise suspended?

29 A. Yes.

30 Q. And you understand that and you understand -- you understand in giving your
31 undertaking the consequences of a breach?

32 A. I do.

33 MR O'HIGGINS: Thank you very much.

34 REGISTRAR: Do you acknowledge yourself so bound?

1 ACCUSED: I do.

2 MR O'HIGGINS: And we will explain the conditions a second time, Judge.

3 JUDGE: Thank you. Thank you very much, thank you.

4 MR O'HIGGINS: That sentence, I understand, is referable to the second count.

5 JUDGE: Yes, it's what I've described as the public justice count which, as I evidence
6 indicated, I regard as very serious.

7 MR O'HIGGINS: And the fine is -- is -- I just didn't -- we're a little bit unclear as to
8 the -- it's 70 with respect to each, Judge, is that correct.

9 JUDGE: No, it's 7,500.

10 MR O'HIGGINS: Sorry, 7,500, with respect --

11 JUDGE: No, there's only one fine, Mr O'Higgins.

12 MR O'HIGGINS: There's only one fine.

13 JUDGE: I thought the fine in the light of, you know, the decisions, was the
14 appropriate one for the -- we'll call it the competition matter, by as you've heard
15 I made a distinction there because of my view of the public justice.

16 MR O'HIGGINS: So, my client is obliged to pay --

17 JUDGE: He's obliged to pay 7,500.

18 MR O'HIGGINS: May it please the Court.

19 JUDGE: And he is -- the sentence is suspended on those terms.

20 MR STAINES: And the other figure is 10,000.

21 JUDGE: It is, Mr -- Mr -- I think just to make clear I think it would be accepted by
22 all that if these are representative counts the appropriate thing is to break it down and
23 that probably academic how it's done so it's on that basis that I do that.

24 MR GAGEBY: May it please the Court.

25 MR STAINES: Yes, Judge, I wonder would you provide a period of time too within
26 which to pay.

27 JUDGE: Do you --

28 MR GAGEBY: May it please the Court, yes.

29 JUDGE: Did you say you wanted time, but I suspect --

30 MR GAGEBY: No.

31 JUDGE: No, it will be -- yes. Right, thank you.

32 MR GAGEBY: May it please the Court.

33 MR STAINES: May it please the Court.

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Adjourned
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Annex B

The Application of EU and US Sentencing Guidelines to the Commercial Flooring Bid-Rigging Cartel

B.1 Introduction

In applying the EU and the US Sentencing Guidelines we draw heavily on Gorecki & Maxwell (2013b) where these guidelines were applied to the individuals and firms found guilty under competition law for participating in the Citroen Dealers Association (CDA) cartel in Leinster.

In a number of instances assumptions are made due to lack of data. These are explicit. The reader can readily re-estimate the fine or gaol sentence.

B.2 EU Sentencing Guidelines

EU Sentencing Guidelines¹⁵¹ apply only to undertakings such as Aston Carpets. Of central importance in determining the appropriate fine is the Basic Amount (BA) for each undertaking, defined as follows:

$$BA = aS(T+1)$$

Where

$a = 0.25$,

S = value of sales of the undertaking of goods and services to which the infringement relates, which usually related to the last 12 months, and,

T = total number of years that the undertaking participated in the infringement. Periods of less than six months will be counted as a half year.

In estimating S we are aware that Aston Carpets and Carpet Centre colluded to bid-rig on 16 contracts (CCPC, 2017). The eight contracts that Aston Carpets won were valued, in total, at €556,000.¹⁵² Assuming that the sales were spread out evenly over the 2 years and 4 months of the bid-rigging arrangement, Aston's sales in the last 12 months of the cartel would be €256,616.¹⁵³

T is 2.5 since the cartel, for sentencing purposes, lasted 2 years and 4 months, and hence is rounded to 2.5 years.

¹⁵¹ European Commission (2006).

¹⁵² *DPP v Aston Carpets*, SH, p. 19.

¹⁵³ $12/26 \times €556,000 = €256,616$.

We are now in a position to estimate the BA,

$$BA = 0.25 \cdot \text{€}256,616(2.5 + 1) = \text{€}224,539.$$

In order to estimate the fine under EU Sentencing Guidelines various mitigating, aggravating and other circumstances can be taken into account in adjusting the BA.¹⁵⁴ However, often there is no adjustment to the BA. Furthermore the most frequent reason for a mitigating adjustment – the cartel was facilitated or encouraged by the State – or an aggravating adjustment – recidivism – do not apply in the case of Aston Carpets.¹⁵⁵ Hence we make no adjustment to the BA in setting the fine that Aston Carpets would pay under EU Sentencing Guidelines.¹⁵⁶

B.3 US Sentencing Guidelines

a. Imprisonment/Brendan Smith

The US Sentencing Guidelines for an individual are centred on a Sentencing Table, reproduced at the end of this Annex. In order to estimate the likely gaol sentence that Brendan Smith would serve under these sentencing guidelines two pieces of information are required: the Criminal History Category; and the Offense Level. Once these two are determined then the imprisonment sentence range can be read off the Sentencing Table.

The Criminal History Category ranks defendants on the basis of their prior criminal history, taking factors such as length and seriousness of any prior prison sentences into account and producing a Criminal History Category. Most white collar criminals have no prior criminal convictions and hence fall into category I. So far as we are aware Brendan Smith would also fall into this category.

The Offense Level is calculated using a variety of factors each with a different weight, some positive and others negative, which when summed constitute the Offense Level. The Base Offense Level is first calculated. For a cartel, which includes bid-rigging, the Base Offense Level is 12 consistent with the presumption that the individual will serve a gaol term. This is in line with the views expressed in the *Duffy* judgment and the *DPP v Pat Hegarty*.

A number of adjustments are made to the Base Offense Level which is set out in Table B.1 in the case of Brendan Smith. These lead to offsetting additions of and reductions of three points to the Base Offense Level, resulting in an Offence Level total of 12.

¹⁵⁴ Gorecki & Maxwell (2013b, Table XII, p. 375); European Commission (2006, points 28 and 29).

¹⁵⁵ Gorecki & Maxwell (2013b, pp. 374-375).

¹⁵⁶ If anything these guidelines suggest that the BA should be increased for Aston Carpets. While none of the mitigating factors apply with respect to Aston Carpets, one of the aggravating factors – “*the role of leader in, or instigator of, the infringement*” – does.

Taken together with the Criminal History Category of 1 Brendan Smith would have been sentenced to gaol for between 10 and 16 months.

Table B.1

US Sentencing Guidelines, Prison Sentence, Commercial Flooring Bid-Rigging Cartel, Brendan Smith

Base Offence Level^a	+12
Special Offense Characteristics	
Participation in agreement to submit non-competing bids ^b	+1
Volume of commerce (<\$1.0 million) ^{c,d}	-
Adjustments	
Aggravating Role ^e	-
Mitigating Role ^f	-
Abuse of a position of trust or use of a specialist skill ^g	-
Obstruction or impediment of the administration of justice ^h	+2
Acceptance of responsibility (timely plead of guilty) ⁱ	-3
Offence Level	12

a. Section R21.1 (a).

b. Section R21.1 (b)(1).

c. Section R21.1 (b)(2).

d. The volume of commerce is the sales covered by the infringement of Aston Carpets totalled €556,000. Using the 2012 exchange rate of 1.2848, results in USD714,349. The exchange rates were sourced from the Central Bank of Ireland: <https://www.centralbank.ie/statistics/interest-rates-exchange-rates/exchange-rates>.

e. Section 3B1.1.

f. Section 3B1.2.

g. Section 3B1.3.

h. Section 3C1.1.

i. Section 3E1.1 (a) & (b).

Source: US Sentencing Commission (2011).

b. Fines: Individual/Brendan Smith

The Sentencing Guidelines set a fine for the individual at between one and five per cent of the volume of commerce, but not less than €15,567 (rounded to €16,000).¹⁵⁷ The volume of commerce in the commercial flooring case is €556,000.¹⁵⁸ Hence the range is €5,560 and €27,800.

In terms of where the fine should be sit within the range, the US Sentencing Guidelines (2011, p. 312) state,

In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to

¹⁵⁷ US Sentencing Commission (2011, section R21.1(c)(1).) The minimum fine is USD20,000, which using an exchange rate of 1.2848 yields €15,567. The source of the exchange rate is given in footnote d of Table B.1.

¹⁵⁸ Table B.1, footnote d.

which the defendant personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.

Brendan Smith initiated the bid-rigging arrangements, actively participated in the cartel and has the means to pay a fine at least €16,000. Furthermore Brendan Smith was entitled to a bonus consisting of 25 per cent of the profits of Aston Carpets,¹⁵⁹ although Aston Carpets does not appear to have been especially profitable.¹⁶⁰ However, to some degree that is beside the point, since expectations are likely to play an important role in influencing behaviour.

In sum, given Brendan Smith's heavy involvement in the bid-rigging cartel and his ability to pay a fine, suggests that the fine levied on Brendan Smith should be at least €16,000.

c. Fines: Undertaking/Aston Carpets

Setting the fine for the undertaking under the US Sentencing Guidelines is similar to the process for determining the length of imprisonment. First, the Base Fine is estimated. Second, various factors are considered in reaching a culpability score. Third, this score then is translated into a set of multipliers. Fourth, these multipliers are then applied to the Base Fine to derive the US Sentencing Guidelines fine range for the undertaking.

The application of these four steps to determining the fine range for Aston Carpets is presented in Table B.2.

The Base Fine is 20 per cent the value of commerce or €111,200. The choice of the 20 per cent harm proxy is based on the following rationale,

It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either

¹⁵⁹ DPP v Aston Carpets, SH, p. 39.

¹⁶⁰ DPP v Aston Carpets, SH, p. 31.

*substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.*¹⁶¹

Table B.2

US Sentencing Guidelines, Fine, Commercial Flooring Bid-Rigging Cartel, Aston Carpets

Base Fine (20 per cent of volume of commerce, €556,000)^a	€111,200
Culpability Estimation^b	
Base Score	5 points
Involvement in or tolerance of criminal activity	+ 1 points
Prior history	-
Violation of an order	-
Obstructing justice	+3 points
Effective compliance scheme & ethics programme	-
Self-reporting, cooperation & acceptance of responsibility	-2 points
Culpability Score	7
Minimum & Maximum Multipliers^c	
Minimum multiplier	1.4
Maximum multiplier	2.8
Sentencing Guideline Fine Range (€111,200 x 1.4), (€111,200 x 2.8)	€155,680 to €311,360

a. Section 2R1.1 (d). The value of commerce is referred to in footnote d of Table B.1

b. Section 8C2.5.

c. Section 8C2.6.

Source: US Sentencing Guidelines (2011) and Table B.1.

The culpability score was boosted by the obstruction of justice by Brendan Smith and reduced by the plea of guilty. The culpability score of 7 translated into minimum and maximum multipliers of the Base Fine of 1.4 and 2.8, respectively. Hence the fines range for Aston Carpets is between €155,680 and €311,360.

B.4 Sensitivity Analysis

In applying the EU and US Sentencing Guidelines we have assumed that the duration of the bid-rigging cartel operated by Brendan Smith and Aston Carpets was 2 years and 4 months for reasons set out in Section 4.b.v, despite the fact that Brendan Smith and Aston Carpets were only found guilty of operating the bid-rigging cartel for 10 months, as detailed in Section 2.f.

The use of a longer period is likely to result in higher fines since under the EU and US Sentencing Guidelines fines are related to the volume of sales of the cartel member for the duration of the cartel. In order to estimate the sensitivity of the results to the choice of time period we re-estimate the fines and prison sentences for Brendan Smith/Aston Carpets using

¹⁶¹ US Sentencing Commission (2011, p. 312).

the 10 months period. The results are presented in Table B.3, together with those using 2 years and 4 months.

Two conclusions can be drawn from the comparison.

First, the gaol sentence for Brendan Smith is unaffected, it is still 10-16 months. Irrespective of whether 10 months or 2 years 4 months was used the Volume of Commerce still remained below \$1.0 million.

Second, not surprisingly the fines are lower using 10 months as compared to 2 years and 4 months. Nevertheless, notwithstanding this result, the fines are still substantially above those imposed by the Court on Brendan Smith and Aston Carpets.

Table B.3
Sanctions Imposed on Brendan Smith/Aston Carpets by EU & US Sentencing Guidelines, Two Periods.

Sanction	Brendan Smith	Aston Carpets
Fines		
<i>EU Sentencing Guidelines</i>		
3/7/2012-30/4/2013	N/a	€128,308 ^a
1/1/2011-30/4/2013	N/a	€224,540
<i>US Sentencing Guidelines</i>		
3/7/2012-30/4/2013	€2,138 ^b to €10,692 ^c but not less than €16,000	€59,877 ^d to €119,753 ^e
1/1/2011-30/4/2013	€5,560 to €27,800, but not less than €16,000	€155,68 to €311,360
Imprisonment		
<i>US Sentencing Guidelines</i>		
3/7/2012-30/4/2013	10-16 months	N/a
1/1/2011-30/4/2013	10-16 months	N/a

a. Substitute 1 for 2.5 in the equation for BA in Section B.2.

b. $0.01 \times €213,846 = €2,138$.

c. $0.05 \times €213,846 = €10,692$.

d. $1.4 \times (0.2 \times €213,846) = 59,877$.

e. $2.8 \times (0.2 \times €213,846) = 119,753$.

N/a=not applicable

Source: Tables B.1 and B.2.

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
Zone A	1	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6
	2	0 - 6	0 - 6	0 - 6	0 - 6	1 - 7
	3	0 - 6	0 - 6	0 - 6	0 - 6	2 - 8
	4	0 - 6	0 - 6	0 - 6	2 - 8	4 - 10
	5	0 - 6	0 - 6	1 - 7	4 - 10	6 - 12
	6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15
	7	0 - 6	2 - 8	4 - 10	8 - 14	12 - 18
	8	0 - 6	4 - 10	6 - 12	10 - 16	15 - 21
Zone B	9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24
	10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27
	11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30
Zone C	12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33
	13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37
Zone D	14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41
	15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46
	16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51
	17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57
	18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63
	19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71
	20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78
	21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87
	22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96
	23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105
	24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115
	25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125
	26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 137
	27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150
	28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162
	29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175
	30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188
	31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	
33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	
41	324 - 405	360 - life	360 - life	360 - life	360 - life	
42	360 - life	360 - life	360 - life	360 - life	360 - life	
43	life	life	life	life	life	

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