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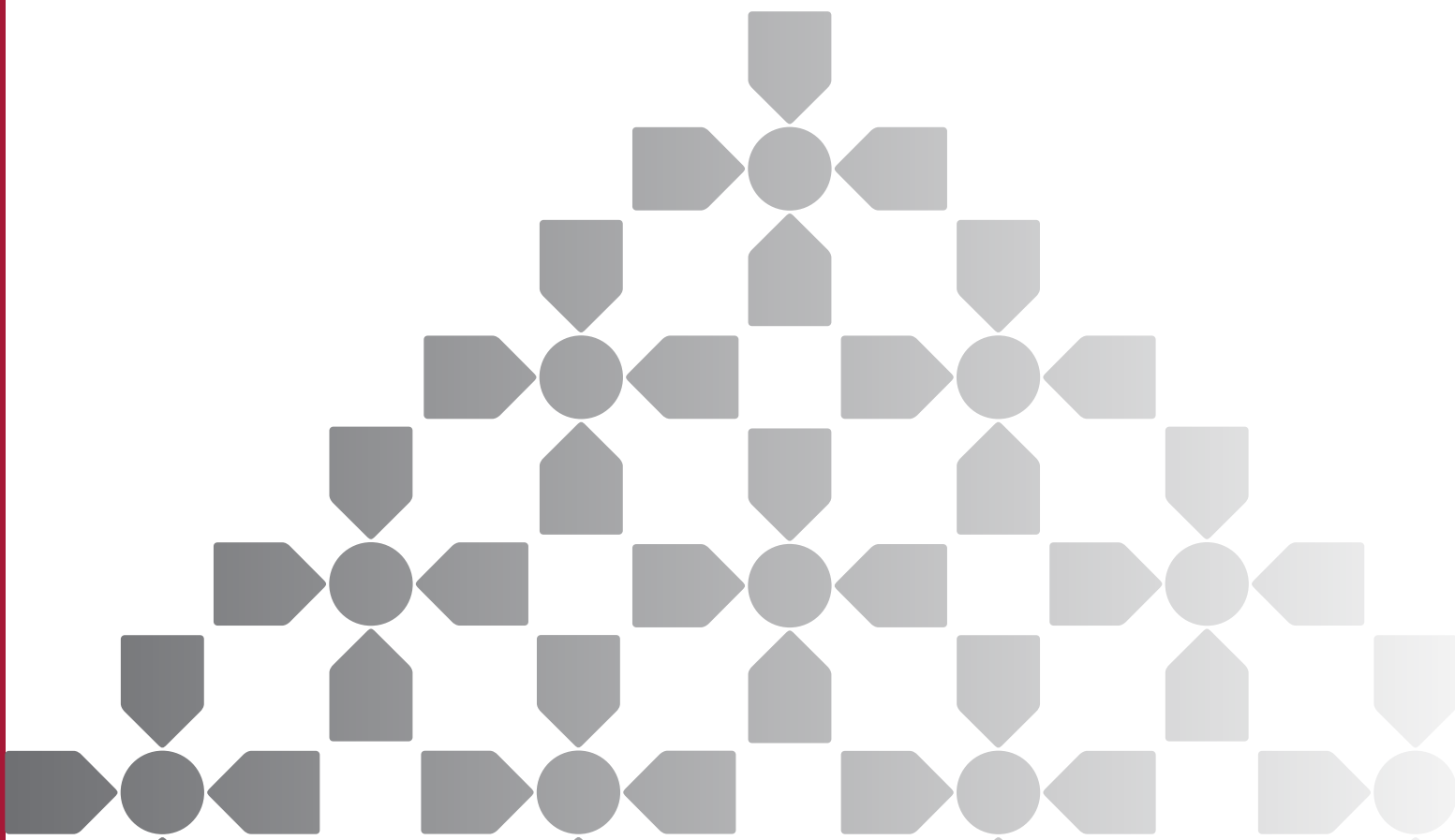
Leniency and Criminalisation of Cartels

- Suggestions for Giving the Commission's Leniency Offer More Leverage

Ingrid Margrethe Halvorsen Barlund.

*Prosjektet har mottatt midler fra det
alminnelige prisreguleringsfondet.*

*Artikkelen er basert på deler av bok av
Barlund IMH "Leniency in Competition
Law, Wolters Kluwer [2020]"*



Leniency and Criminalisation of Cartels*

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1. The Need for both Monetary and Non-Monetary Sanctions

The change in the enforcement climate after leniency was introduced in EU competition law led to a recognition that higher fines were needed to underpin the component of potential punishment and outweigh the component of possible gains.¹ The general level of fines has increased from the introduction of the Commission's first leniency programme in 1996 until now.² In 1998, and even more so in 2006, the Commission revised its guidelines for setting fines to ensure their deterrent effect.³ How high a level of fines the Commission actually has at its disposal has become apparent in recent cases, such as the *Truck cartel* and the *Airfreight cartel* cases.⁴ Note, however, that this is not a trend in all Member States, as pointed out in recital 49 of the ECN+ Directive:

* This article is based on parts of the book by Barlund IMH, "Leniency in EU Competition Law", Wolters Kluwer, [2020].

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¹ For more about the enforcement theories underpinning leniency, see Barlund IMH, "Leniency in EU Competition Law", Wolters Kluwer [2020], Chapter 3.

² Cartel statistics up until 2018, available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [last accessed 11/3-2020]. See also Stephan A and Nikpay A, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities', in Beaton-Wells E and Tran C (editors), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* Hart Publishing [2015], Chapter 8, pp. 147-148.

³ Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty [1998], OJ C 9/3. Competition: Commission revises Guidelines for setting fines in antitrust cases IP [2006] 857. The Fining Guidelines [2006] OJ C 210/2. See also, inter alia, Wils WPJ, 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years', 39 *World Competition: Law and Economics Review* No 3 [2016], available at <https://ssrn.com/abstract=2793717> [last accessed 11/3-2020], p. 16 with further references.

⁴ Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel, IP [2016] 2582. Summary of Commission Decision of 19.7.2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement (Case AT.39824 – *Trucks*) [2017] OJ C 108/6. Summary of Commission Decision of 17 March 2017 — Relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 — *Airfreight*), [2017] OJ C 188/14. Overview of Commission decisions on cartels,

‘The deterrent effect of fines differs widely across the Union, and in some Member States the maximum amount of the fine that can be imposed is very low. To ensure NCAs can impose dissuasive fines, the maximum amount of the fine that is possible to be imposed for each infringement of Article 101 or 102 TFEU should be set at a level of not less than 10 % of the total worldwide turnover of the undertaking concerned. This should not prevent Member States from maintaining or introducing a higher maximum fine that can be imposed.’⁵

Even though the fines imposed by the Commission are now higher, various factors still raise the question of whether, in order to outweigh the gains, the components of punishment can be further improved.⁶ The fines of the Commission are still struggling to achieve deterrence through sufficient punishment and the collection of illegal gains.⁷ This could be because even higher fines are needed, but it most likely shows that the fines the Commission imposes on undertakings at the EU level are insufficient to ensure that the components referred to in the deterrence equation are effective.⁸ The Commission’s fines therefore need to be supplemented. In the following, I will therefore emphasise a few supplements that could prove useful in this regard.

In addition to fines, the public enforcement channel has a huge enforcement potential. Individual sanctions, such as fines targeting individuals, and non-monetary sanctions, such as imprisonment, together with other public instruments directed at both undertakings and individuals, such as administrative disgorgement as seen in Article 34 a) of the German Competition Act, could add to the severity of sanctions, while at the same time reducing the possible gains from an infringement.⁹ If these sanctions are added, the chances of a potential

<http://ec.europa.eu/competition/cartels/cases/cases.html> Cartel statistics up until 2018, available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [last accessed 11/3-2020].

⁵ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11, 14.1.2019, pp. 3-33 (hereinafter ‘The ECN+ Directive’, OJ L 11/3).

⁶ See, for example, Wils WPJ, *The Optimal Enforcement of EC Antitrust Law*, Essays in Law & Economics, Wolters Kluwer [2002], pp. 252-253.

⁷ Kerse C and Khan N, *EU Antitrust Procedure*, Sweet & Maxwell [2012], p. 467.

⁸ Under the theory of optimal deterrence, whether or not someone decides to break the law depends on the probability of detection, the potential punishment and the possible gains from the infringement. For more about this, see Barlund IMH, [2020], Chapter 3, with further references.

⁹ German Act against Restraints of Competition, [2018 (revised version)], available at http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0238 [last accessed 11/3-2020]. For more about this, see, for example, Baker DI, ‘Trying to Use Criminal Law and Incarceration to Punish Participants and Deter Cartels Raises Some Broad Political and Social Questions in Europe’ in Lowe P and Marquis M (editors), *European Competition Law Annual - Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies*, [2011], pp. 41-61, p. 42. See also Department of Trade and Industry (UK), *Productivity and Enterprise. A World Class Competition Regime*, CM 5233, [2001], pp. 39-40. Wils WPJ, [2002], pp. 252-253. Wils WPJ, ‘Is

cartel infringer refraining from entering a cartel may be higher. This could thus make initial participation in a cartel more unattractive since multiple sanctions are likely to deter participation in cartels.¹⁰ For those that already participate in a cartel, it could either have a stabilising effect if the probability of detection is low, or it could have a destabilising effect if, in addition to a high detection rate, for example, the scope of leniency were extended to include more of the added sanctions. I will return to the probability of detection below. For a potential leniency applicant, an immunity offer could be perceived as more lucrative if these sanctions are added, since it could bring the severity of sanctions closer to outweighing the illegal gains of the cartel. This is especially the case as regards the added risk of non-monetary sanctions, primarily imprisonment.¹¹ This raises the question of how these sanctions can be made available, which I will discuss in the following.

1.1 Introducing Criminal Penalties – Three Possible Levels of Criminalisation

In the last few decades, policymakers and academics have discussed how to criminalise cartels under EU Competition Law in order to improve the detection and deterrence of cartels.¹² In the EU, as opposed to the criminal law orientation of US public and private antitrust enforcement, the predominant approach has been to view cartels as an economic problem that is best regulated through public administrative measures directed at

Criminalization of EU Competition Law the Answer?”, 28 *World Competition: Law and Economics Review* No. 2 [2005], pp. 117-159, available at <https://ssrn.com/abstract=684921> [last accessed 11/3-2020].

¹⁰ See, for example, Venit JS and Foster AL, ‘Competition Compliance: Fines and Complementary Incentives’ in Lowe P and Marquis M (editors), [2011], pp. 63-82, pp. 69-70.

¹¹ Hondius E and Janssen A (editors), *Disgorgement of Profits: Gain-Based Remedies Throughout the World*, Volume 8, Springer [2015], p. 4. See also Whelan P, ‘A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law’, 4 *Competition Law Review*, No 1 [2007].

¹² See, for example, the Communication from the Commission, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law’, COM 2011, 573 final, under point 1: Scope for EU criminal law. Wils WPJ, ‘Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment?’, in Claus-Dieter Ehlerman and Isabela Atanasiu (editors), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, [2001], pp. 411–452. Wils WPJ, [2005], pp. 117–159. Gurgun Hakopian, ‘Criminalisation of EU Competition Law Enforcement – A possibility after Lisbon?’, the *Competition Law Review* 7, [2010], pp. 157–173. Several authors in the anthology by Lowe P and Marquis M (editors), [2011], advocate criminalisation. Alison Jones and Rebecca A. Williams, ‘The UK Response to the Global Effort Against Cartels: Is Criminalisation Really the Solution?’, *Journal of Antitrust Enforcement*, Vol. 2, [2014], pp. 100–125. Catarina M.P. Marvão and Giancarlo Spagnolo, ‘Should Price Fixers finally go to Prison: Criminalisation, leniency inflation and whistleblower rewards in the EU’, *CRESSE Conference – Advances in the Analysis of Competition Policy and Regulation*, [2016], available at http://www.cresse.info/uploadfiles/2016_pa5_pa2.pdf (last accessed 11/3-2020).

undertakings.¹³ Article 23 no 2 (a) of Regulation 1/2003 empowers the Commission to impose administrative fines on undertakings for violations of Articles 101 and 102 TFEU.¹⁴ Hence, as opposed to the US Department of Justice, under the current EU regulatory framework, the European Commission does not have the authority to operate as a criminal prosecutor.¹⁵

I discuss three possible ways in which criminalisation could take place. The first is criminalisation at the level of the EU institutions. This means that the Commission would operate as a prosecutor before the CJEU as a criminal court. The second is harmonised criminalisation throughout the Member States. This would entail national prosecutors enforcing EU criminal law before their national courts. The third is criminalisation at the level of the EU Member States. This would mean that national prosecutors, in line with the principle of equivalence, would enforce the Cartel Prohibition of Article 101 together with their national criminalised competition rules before their national courts.¹⁶

Further, there is a distinction between criminalised measures targeting undertakings and criminalised measures targeting individuals. It is the latter – the individual public liability of cartel infringers – that is of particular interest here. I thus limit my focus to individual public penalties, notably custodial sanctions, and the question of how they could be implemented in EU competition law.¹⁷

The competence to legislate within the criminal law area of EU law is set out in Articles 82–86 TFEU under the heading ‘Judicial Cooperation in Criminal Matters’. Importantly, these provisions do not authorise the criminalisation of cartels at the level of the EU institutions.

¹³ See Articles 352, 103 and 105 TFEU.

¹⁴ Treaty on the Functioning of the European Union (TFEU), consolidated version, [2012], OJ C 326/1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1 (Regulation 1/2003, OJ L 1/1).

¹⁵ The EU public antitrust enforcement institutions comprise the Commission acting through its DG Comp as an enforcer of Article 101 TFEU, and the ECJ, in particular in its role as a reviewer of the decisions of the Commission, as well as national competition authorities as co-enforcers together with the Commission and national courts, pursuant to Regulation 1/2003.

¹⁶ Wils WPJ, [2005], p. 27.

¹⁷ On the justification and moral wrongfulness of cartel activity, see, for example, multiple works by Whelan P, such as Whelan P, [2007]; Whelan P, ‘Cartel Criminalisation and the Challenge of Moral Wrongfulness’, 33 *Oxford Journal of Legal Studies*, No 3, [2013], pp. 535–561, and Whelan P, ‘European Cartel Criminalisation and Regulation 1/2003: Avoiding Potential Problems’, in Almășan A and Whelan P (editors), *The Consistent Application of EU Competition Law*, [2017]. See also Stephan A, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’, 37 *Legal Studies*, No 4, [2017], pp. 621–646.

However, Article 103 no 1 TFEU which deals directly with the enforcement of the competition law provisions, allows for '[t]he appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 [...]'. This could have opened for the possibility of criminalisation at the EU institutional level. This is limited, however, to provisions on 'fines and periodic penalty payments' pursuant to Article 103 (2) (a) TFEU. In addition, Article 101 TFEU only targets 'undertakings'. Article 103 TFEU thus only seems to grant the Commission powers of corporate administrative enforcement, as already referred to above under Regulation 1/2003, and not powers of individual, criminal enforcement.

In the last few years, there has nonetheless been a move towards closer integration within the EU in the area of economic crime enforcement. In 2017, the EU adopted Regulation 2017/1939, thereby establishing a European Public Prosecutor Office (EPPO) pursuant to Article 86 TFEU.¹⁸ Article 86 no 1 (1) TFEU states that

'In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.'

There is no obligation for Member States to submit to EPPO, and not all Member States have signed up to it.¹⁹ EPPO is a body that is independent of the EU institutions and the Member States. This means that EPPO does not give the Commission competence to operate as a criminal prosecutor. On the contrary, EPPO will provide its own prosecutors, both at the central EU level and at the national level.²⁰ Whereas the central office will have more of a supervisory role, the decentralised offices will carry out investigations and prosecutions. Prosecutions will only take place before national courts, which means that the CJEU will not be involved in the proceedings.²¹ Cartel activity is not included, however, in 'crimes affecting

¹⁸ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('EPPO'), OJ L 283/1.

¹⁹ Note that Article 86 (1) third sentence allows for 'enhanced cooperation' between a group of at least nine Member States. An overview of the participating Member States so far is available at https://ec.europa.eu/anti-fraud/policy/european_public_prosecutor_en (last accessed 11/3-2020).

²⁰ It is envisaged that EPPO will take up its functions by the end of 2020. More information about this is available at https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en (last accessed 11/3-2020).

²¹ For more about EPPO see Council Regulation (EU) 2017/1939 of 12 October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') OJ L 283/1

the financial interests of the Union’ under Article 86 no 1 (1). Article 2 of Regulation 2017/1939 defines ‘financial interests of the Union’ as

‘[...] all revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them.’

EPPO will mainly be concerned with crimes against the EU budget, such as fraud, corruption and serious cross-border VAT fraud.²² One alternative to more criminalisation could be to extend the EPPO collaboration to include cartel activity as a ‘serious crime’, in line with Article 86 no 4, which states that

‘The European Council may, at the same time or subsequently, adopt a decision amending Paragraph 1 in order to extend the powers of the European Public Prosecutor’s Office to include serious crime having a cross-border dimension and amending accordingly Paragraph 2 as regards the perpetrators of, and accomplices in serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.’

Note that this would grant EPPO competence to prosecute cartels, rather than the Commission. Moreover, prosecution would take place before national courts and not the CJEU.

If the Commission were to be given competence to operate as a criminal prosecutor imposing criminal penalties, this would have necessitated a Treaty provision providing for a regulation to be issued in which the Commission is authorised to impose individual criminal penalties.²³ Further, the CJEU would need criminal law jurisdiction. In my view, Article 352 TFEU can provide the necessary competence in this regard. Article 352 (1) TFEU states that:

‘If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided

²² It is worth mentioning here that, in a green paper put forward by the Commission in 2001, that is the Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor COM 2001, 715 final, under Point 5.2, market-rigging was mentioned together with crimes such as fraud, corruption and money-laundering. For more about this, see Hakopian G, ‘Criminalisation of EU Competition Law Enforcement – A Possibility after Lisbon?’, 7 *The Competition Law Review* [2010], pp. 157-173, pp. 170–171.

²³ About the binding effect of directives and regulations respectively, where the former is only binding upon Member States, see Article 288 TFEU.

the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures [...].’

Such powers would have institutional implications, however. In principle, infringements for which sanctions of a penal nature are imposed – irrespective of whether they are imposed in the criminal, administrative or private channels – will trigger the protection of the fundamental procedural rights set out *inter alia* in Article 6 of the ECHR, and in Articles 47, 48 and 52 of the Charter.²⁴ This includes the right to an independent trial. In general, the fact that the Commission both investigates and makes decisions could be problematic in relation to this requirement. The administrative corporate system of the Commission has been accepted, however, as long as the decisions taken by the Commission are subject to judicial review by the CJEU.²⁵ However, competence to impose criminal fines on individuals, and certainly imprisonment, would entail changing the tasks of the Commission and the CJEU, to bring them more into line with a criminal justice system. I will not discuss such a system in detail here.

The analyses so far indicate that criminalisation of cartel activity at the institutional level of the EU has more to do with the political will to adopt it than with the legal obstacles as such. Granting the EU institutions competence to impose criminal sanctions to enforce the competition rules is thus not as much a legal as a political problem.²⁶ It is important to bear in mind here that criminalisation is a sensitive topic in relation to sovereignty.²⁷ Member States have been unwilling to transfer such criminal law competence to the EU institutions.²⁸

²⁴ The Charter of Fundamental Rights of the European Union (the Charter), [2012], OJ C 326/391. See *Engel and others v. the Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 [1976], 1 EHRR 647. *Saunders v. United Kingdom*, no. 19187/91 [1997], 23 EHRR 313 para. 68. See also Judgment of 8 July 1999, *Hüls v. Commission*, C-199/92 P, EU:C:1999:358, para. 150 with further references.

²⁵ *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, [2011] para. 59. See also Judgment of 18 July 2013, *Schindler Holding Ltd and Other v. Commission*, C-501/11 P, EU:C:2013:522, paras. 33–35.

²⁶ See, however, Michael J Frese, *Sanctions in EU Competition Law: Principles and Practice*, 2014 p. 219. He argues that ‘[t]he introduction of custodial sanctions for individuals involved in infringements of Articles 101 and 102 TFEU may [...] have considerable institutional implications’. Here it is also interesting to mention Wils WPJ, [2005], p. 50 and Wils WPJ [2002], p. 233, who argued that, under the former EC Treaty, criminalisation was possible at the level of the EU institutions, as well as harmonisation throughout Member States. This is more uncertain under the new Treaties, see pp. 51–52.

²⁷ C Kerse and N Khan, *EC Antitrust Procedure*, Sweet & Maxwell, [2005], pp. 367–368. Note that there is a newer edition from 2012, but the wording has been changed.

²⁸ See also Wils WPJ, [2002], p. 233.

It may be easier, however, to harmonise criminal individual cartel enforcement throughout the Member States.²⁹ This would entail the Commission not having competence as a criminal prosecutor, but that the criminal prosecution of cartels would be harmonised to a certain degree and prosecuted by national enforcers in all the Member States. Both EU policymakers and academics have advocated criminal law measures throughout the Member States instead of civil ones.³⁰ The question thus arises of how such harmonisation can be effected.

As touched upon already, Article 83 TFEU, by means of directives, provides legislative authority to harmonise some of the Member States' criminal rules. Article 83 TFEU no 1 (1) and no 2 state that

‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

[...]

If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.’

Both Article 83 no 1 (1) and Article 83 no 2 TFEU allow for harmonisation initiatives through directives establishing minimum rules for ‘the definition of criminal offences and sanctions’. This competence is limited to certain areas of criminal law. Article 83 no 1 (2) explicitly

²⁹ Frese M, [2014], pp. 101–102 and pp. 219–220. In the Judgment of 27 October 1992, *Germany v. Commission*, C-240/90, EU:C:1992:408 concerning the EEC Treaty, Advocate General Jacobs argued in favor of harmonisation throughout the Member States by stating that: ‘Certainly, then, Community law in its present state does not confer on the Commission (or on the Court of First Instance or the Court of Justice) the function of a criminal tribunal. It should be noted, however, that this would not in itself preclude the Community from exercising, for example, powers to harmonise the criminal laws of the Member States, if that were necessary to attain one of the objectives of the Community [...]’, see Opinion of Advocate General Jacobs in C-240/90, *Federal Republic of Germany v. Commission of the European Communities*, EU:C:1992:237, para. 12. Note that this case concerned the authority of the Commission to provide for penalties for farmers who had committed irregularities when applying for financial aid within the agricultural sector and not for cartel arrangements. See also Whelan P, [2013], pp. 143–164 (pp. 146–147).

³⁰ Cf. footnote 12.

refers to the areas of criminal law where such harmonisation initiatives may be allowed, that is '[...] terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime'. As we can see, cartels are not listed here. Article 83 no 1 (3) goes on, however, to state that '[o]n the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.' Cartels can thus be criminalised throughout Member States pursuant to Article 83 no 1 (3) if they are considered to be part of 'the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'; see Article 83 no 1 (1). For this to happen, the Council must unanimously adopt a decision after obtaining the consent of the European Parliament.³¹ This would entail the same competence to issue directives establishing minimum rules as pursuant to Article 83 no 1 (1).

Article 83 no 2 is based, *inter alia*, on the seminal judgment concerning a Council Framework Decision on the protection of the environment through criminal law, based on what was the third pillar prior to the Lisbon Treaty. The ECJ rejected this pillar as a legal basis for such criminalisation, but did not rule out such measures on the grounds of first-pillar legislation. The ECJ stated that

'[a]s a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence [...]. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures -that relate to the criminal law of the Member States, which it considers necessary in order to ensure that the rules, which it lays down on environmental protection are fully effective.'³²

Article 83 no 2 concerns the power to criminalise areas other than those mentioned in Article 83 no 1. These areas may be subject to directives establishing minimum rules for the definition of criminal offences and sanctions '[i]f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of

³¹ Whelan P, [2013], p. 147 and Frese, [2014], pp. 101–102.

³² Judgment of 13 September 2005, *Commission v. Council*, C-176/03, EU:C:2005:542, paras. 47 and 48.

a Union policy in an area, which has been subject to harmonisation measures [...]'. Enforcement of the cartel prohibition has already been subject to harmonised enforcement measures, but, like the case law referred to above concerning the Lisbon Treaty, it has to be proven 'essential' that criminal sanctions are necessary in order to safeguard 'the effective implementation' of the policy of deterring cartels to achieve undistorted competition. Note that the components of effectiveness and essentiality have also been emphasised by the ECJ after the Lisbon Treaty in order to justify criminal sanctions. In the *Taricco* case, the ECJ stated that

'Although the Member States have freedom to choose the applicable penalties – which may take the form of administrative penalties, criminal penalties or a combination of the two – in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected in accordance with the provisions of Directive 2006/112 and Article 325 TFEU (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, Paragraph 34 and the case-law cited), criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner. (my emphasis).'³³

So far, if criminalisation is considered essential, both Articles 83 no 1 and 83 no 2 could thus seem to constitute possible legal grounds for harmonised criminal measures directed at cartels throughout the Member States.

The relationship to Article 103 TFEU remains unclear, however. Either Article 83 no 1 or Article 83 no 2 TFEU could be read as complementing Article 103 TFEU by providing a possible legal basis for harmonising individual penal sanctions for cartel infringements. Article 103 continues to allow for corporate monetary sanctions for infringements of the competition rules, including the cartel prohibition in Article 101 TFEU.

Or Article 103 TFEU could be understood as *lex specialis*, dealing exclusively with the sanctions imposed for infringements of the competition rules. This would mean that it is not possible under the current regulatory framework to harmonise individual criminal sanctions throughout the Member States. Such an understanding would necessitate expanding Article 103 no 2 (a) TFEU to include individual criminal sanctions in order to enable harmonised criminalisation.³⁴ Note that it has been argued that the measures explicitly referred to in

³³ Judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, para. 39.

³⁴ For more about the relationship between Article 83 TFEU and Article 103 TFEU, see Hakopian, [2010], pp. 166–168.

Article 103 no 2 (a) TFEU, i.e. ‘fines and periodic penalty payments’, are merely meant as examples, and do not constitute an exhaustive list of possible measures ‘to give effect to the principles set out in Articles 101 and 102’; see Article 103 no 1.³⁵ Based on this assumption, it would not be necessary to expand Article 103 no 2 (a) TFEU since Article 103 would already provide for competence to criminalise cartels. Note that, because Article 103 allows for the adoption of both regulations and directives, such an interpretation would enable both criminalisation at the EU institutional level and harmonised measures throughout the Member States. That the list in Article 103 no 2 (a) is not exhaustive could also be supported by the need to safeguard the principle of effectiveness, which requires harmonised criminal measures throughout the Member States.

Article 114 also constitutes a possible legal basis for criminalisation. Like Article 103 no 1, Article 114 follows the pattern of allowing regulatory measures in order to ensure the achievement of objectives. Article 114 no 1 TFEU allows for ‘[...] the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’. Pursuant to Protocol 27, undistorted competition is part of the proper functioning of the internal market.³⁶ Hence, if it is necessary to ensure undistorted competition, harmonisation of criminal sanctions throughout the Member States may be possible pursuant to Article 114 no 1.³⁷ As already mentioned, Article 352 TFEU is based on a similar line of reasoning, and constitutes a legal basis for criminalisation at both the EU institutional level and throughout the Member States, by providing for ‘the appropriate measures’ in order ‘to attain one of the objectives set out in the Treaties’.³⁸ The provisions of Articles 114 and 352 TFEU have in common that they more generally allow for measures that are necessary to attain recognised objectives when this is not already provided for. As demonstrated above, it could be argued that Articles 82–86 TFEU and, more specifically, Article 83 TFEU alone or together with Article 103 TFEU

³⁵ See, for example, Wils WPJ, [2005], p. 50 with further references, and Hakopian, [2010], p. 159 and p. 166 with further references.

³⁶ Consolidated version of the Treaty on European Union – PROTOCOLS – Protocol (No. 27) on the internal market and competition OJ 115/309.

³⁷ Frese M, [2014], p. 101.

³⁸ See Wils WPJ, [2005], p. 50 (ante the Lisbon Treaty).

constitute a sufficient legal basis for criminalisation at either the EU institutional level or throughout the Member States.³⁹

Moving to the Member State level, Member States are free to criminalise their own competition rules, including providing for individual public liability and individual penalties.⁴⁰ Under the principle of equivalence, Member States are obliged to provide for the same sanctions apparatus as Article 101 TFEU in their corresponding national laws, which can be criminalised.⁴¹ Even though Article 23 no 5 of Regulation 1/2003 stipulates that the fining decisions of the Commission ‘shall not be of a criminal law nature’, this does not affect national initiatives by Member States to criminalise; see Article 5 of Regulation 1/2003, where it is stipulated that

‘The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

[...] – imposing fines, periodic penalty payments or any other penalty provided for in their national law.’ (my emphasis)

Read together with Article 12 no 3 on the exchange of evidence between the Commission and Member States for the purpose of applying Article 101 TFEU, where it is stated that ‘information exchanged cannot be used by the receiving authority to impose custodial sanctions’, my understanding is that it shows that ‘any other penalty’ allows Member States to use imprisonment to enforce Article 101 TFEU. If this were not allowed, such a limitation on the exchange of information would not have made sense.⁴² When a Member State imposes custodial sanctions for an infringement of national competition rules, this also applies to the enforcement of Article 101 TFEU. This follows from Article 3 no 1 and no 2 of Regulation 1/2003 and the principle of equivalence.⁴³ It is therefore an indirect criminalisation and not a direct criminalisation of Article 101 TFEU.

³⁹ Hakopian, [2010], p. 167.

⁴⁰ Judgment of 8 July 1999, Nunes and de Matos, C-186/98, EU:C:1999:376, para. 14. See, for example, Recital 16 of Regulation 1/2003 which recognises ‘substantially different types of sanctions across the various systems’ throughout the Member States.

⁴¹ Halvard H. Fredriksen and Gjermund Mathisen G, EØS-rett, Fagbokforlaget, [2018], p. 374 (in Norwegian).

⁴² Wils WPJ, [2005] p. 18 and Frese M, [2014], p. 101.

⁴³ For an explanation of the principle of equivalence, see Takis Tridimas, *The General Principles of EU Law*, 2nd edition, [2007], pp. 423–427.

As previously mentioned, certain EU Member States already impose criminal sanctions on undertakings, as well as imprisonment for individuals, as part of their national cartel enforcement, such as Denmark, Estonia, Ireland and the United Kingdom. In some Member States, undertakings and individuals may also be granted amnesty from criminal prosecution as part of their leniency programme; see, for example, Article 23 a) of the Danish Competition Act.⁴⁴

The fact that some Member States already impose both monetary and non-monetary sanctions on individuals enables a collaborative enforcement system whereby the Commission handles the sanctions on an undertaking, while the national competition authorities are responsible for enforcement measures against, for example, directors and managers of the undertaking. Such an enforcement collaboration between the EU level and Member State level is expedient, in my view.⁴⁵ In the *Marine Hose cartel* case, for example, three executives were sentenced to imprisonment and disqualified as directors in the UK, while the Commission took care of the fines on the undertakings.⁴⁶

1.2 More Administrative Proceedings?

Having discussed the criminalisation of cartels, it is also important not to forget administrative sanctions when discussing the huge potential of public enforcement. There are several positive aspects of administrative public enforcement. An administrative procedure is generally less comprehensive than a criminal procedure. If Member States issue decisions through the administrative channel, they will encounter fewer procedural obstacles. The importance of

⁴⁴ The Danish Competition Act, [2015], Consolidation Act No 869 of 8 July 2015.

⁴⁵ See also Whelan P, [2013], p. 148.

⁴⁶ Wils WPJ, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 32 *World Competition: Law and Economics Review*, No 1, [2009], pp. 3–26 (p. 5 with further references), available at <https://ssrn.com/abstract=1296458> (last accessed 11/3-2020). UK Office of Fair Trading press release on the Marine Hose cartel case, <https://www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation> [last accessed, 11/3-2020]. The Commission press release on the Marine Hose cartel case, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_09_137/IP_09_137_EN.pdf [last accessed, 1/3-2020]. See also the recent UK Construction Cartel case <https://www.gov.uk/government/news/construction-cartel-directors-disqualified> [last accessed, 11/3-2020]. In this case two directors were disqualified for respectively 7 years and 6 months, and 6 years and 6 months, for partaking in a secret cartel in the supplying industry of precast concrete drainage products. The undertakings were also fined severely. One party has appealed the Competition and Markets Authority's decision.

having an administrative apparatus that effectively enforces Articles 101 and 102 TFEU is emphasised in Article 23 (5) and in recital 35 of Regulation 1/2003, where it is stated that

‘In order to attain a proper enforcement of Community competition law, Member States should designate and empower authorities to apply Articles 81 and 82 of the Treaty as public enforcers. They should be able to designate administrative as well as judicial authorities to carry out the various functions conferred upon competition authorities in this Regulation.’

Similar encouragement is found in recital 40 of the ECN+ Directive:

‘To ensure the effective and uniform enforcement of Articles 101 and 102 TFEU, national administrative competition authorities should have the power to impose effective, proportionate and dissuasive fines on undertakings and associations of undertakings for infringements of Article 101 or 102 TFEU, either directly themselves in their own proceedings, in particular in administrative proceedings, provided that such proceedings enable the direct imposition of effective, proportionate and dissuasive fines, or by seeking the imposition of fines in non-criminal judicial proceedings. This is without prejudice to national laws which provide for the imposition of sanctions on undertakings and associations of undertakings by courts in criminal proceedings for the infringement of Articles 101 and 102 TFEU where the infringement is a criminal offence under national law and provided that it does not affect the effective and uniform enforcement of Articles 101 and 102 TFEU.’

One example of a procedural obstacle is the evidentiary standard, which is lower in civil cases than in criminal cases. Bear in mind, however, that, even though sanctions are imposed in the administrative channel, this is not decisive for triggering the procedural requirements of the Charter and the ECHR.⁴⁷ The criminal nature of a sanction could, for instance, trigger the standard of proof under the ECHR. Under the presumption of innocence stipulated in Article 6 ECHR, it must be proved beyond reasonable doubt, that is with almost 100 per cent probability, that the crime was committed. As regards the standard of proof, the Commission must satisfy it to find an infringement of Article 101 TFEU and issue a fine. It has been argued, however, that *‘the standard of proof is a high one, although it would be going too far to say that the infringement must be proved to the criminal standard of “beyond reasonable doubt”*. Rather, *‘the Commission must produce “sufficiently precise and consistent*

⁴⁷ See *Engel and others v. the Netherlands* [1976], no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 1 EHRR 647. *Bendenoun v France* [1994], no 12547/86 18 EHRR 54, para. 46. Judgment of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, para. 150. For literature on this topic, see Wils WPJ, [2005], p. 9 with further references. Marquis M in ‘Perchance to Dream: Well Integrated Public and Private Antitrust Enforcement in the European Union’ in Lowe P and Marquis M (editors), [2011], introductory chapter. Kerse C and Khan N, [2012], pp. 109-111 with further references.

*evidence” to support the “firm conviction” that the alleged infringement took place’.*⁴⁸

As already mentioned, the corporate administrative system of the Commission, which allows for review by the CJEU, has been approved by the ECtHR.⁴⁹

Another reason to encourage the use of an administrative apparatus is that a public body such as a competition authority may be in a better position to specialise and acquire more competence in the competition law field, in addition to having more time, than a general criminal prosecutor.⁵⁰ This could enable more efficient enforcement since a specialised agency may be in a position to bring more cases, thereby strengthening the component of potential punishment and outweighing the possible gains.

Like the discussion on criminalisation above, there is a distinction between administrative measures targeting undertakings and administrative measures targeting individuals. Using more harmonised administrative measures against undertakings throughout the Member States is probably unproblematic. Administrative sanctions against undertakings at the EU level, together with individual criminal sanctions at the Member State level is already encouraged. As in the discussion of individual criminal penalties above, however, the question arises of how individual measures in the administrative channel can be harmonised at the EU level throughout the Member States.

When it comes to ensuring stronger individual-oriented enforcement within the antitrust field, it is often criminal sanctions that are referred to. This can probably be at least partly explained by the fact that this is how things have been done in the US for more than 120 years, and by the fact that it is often imprisonment that is referred to. But even in jurisdictions where criminal antitrust rules have been adopted, such as in Denmark, the UK and Ireland, criminal enforcement is not necessarily the only way to punish individual antitrust violators.⁵¹ The components of the deterrence equation that ensure that the potential punishment outweighs the

⁴⁸ Kerse C and Khan N, [2012], p. 576, with further references to case law in footnotes 256-258. See also Wils WPJ, [2005], p. 17.

⁴⁹ *A. Menarini Diagnostics S.R.L. v. Italy* [2011], no. 43509/08, para. 59. See also Judgment of 18 July 2013, *Schindler Holding Ltd and Other v Commission*, C-501/11 P, EU:C:2013:522, paras. 33-35.

⁵⁰ Søreide T and Eriksen B, “Lempning for kartellvirksomhet og korrupsjon”, *Tidsskrift for strafferett* [2012], pp. 62-86, pp. 75-76.

⁵¹ For more about this see, for example, Baker DI, “Trying to Use Criminal Law and Incarceration to Punish Participants and Deter Cartels Raises Some Broad Political and Social Questions in Europe” in Lowe P and Marquis M (editors), [2011], pp. 41-61, p. 59.

possible gains of the cartel can also include individual administrative sanctions. There can be a variety of individual sanctions in the administrative channel, such as individual administrative fines, director disqualifications, removal of retirement savings or other related insurances benefits from the employer, black-listing from employment in the same industry and a prohibition on employer reimbursement of a defendant.⁵² Note that, because there are shortcomings associated with providing these sanctions alone – a director disqualification will not, for example, work on middle management in an undertaking, or in cases where retirement would be the next step in any case – they should be combined with other sanctions. Still, these sanctions are arguably not as effective as imprisonment and depriving an individual of his/her liberty, although a prohibition on employer reimbursement, for example, could increase the perceived risk for an employee of an undertaking engaging in cartel activity, since it would make it more complicated for the employer to compensate the employee for taking the risk of being fined.⁵³

The fact that the institutional requirements of a criminal procedure may not apply to the same extent to administrative procedures, raises the question of whether it would be easier to introduce these measures at the EU institutional level, or at least for the Commission to encourage harmonisation of individual measures within this channel throughout the Member States.⁵⁴ Some argue that a larger degree of harmonisation of administrative sanctions throughout the Member States would be both legally and politically easier to achieve, as well as cost-wise.⁵⁵ Here, a distinction should be drawn between how strict the institutional requirements are when imposing individual custodial sanctions as opposed to individual monetary sanctions. In the Jussila case, the ECtHR stated, with reference to compatibility with Article 6 of the ECHR, that *‘Tax surcharges differ from the hard core of criminal law;*

⁵² For more about this, see, for instance, Baker DI, ‘Trying to Use Criminal Law and Incarceration to Punish Participants and Deter Cartels Raises Some Broad Political and Social Questions in Europe’ *ibid.*, pp. 41-61, p. 59. For more about company director disqualifications, see, for example, UK legislation <https://www.gov.uk/government/publications/company-directors-disqualification-act-1986-and-failed-companies> [last accessed 11/3-2020]. Inspiration on how to introduce some of these sanctions could be drawn from anti-corruption and public procurement legislation.

⁵³ For the pros and cons of some of these sanctions, see Wils WPJ, [2005].

⁵⁴ See Venit JS and Foster AL, ‘Competition Compliance: Fines and Complementary Incentives’ in Lowe P and Marquis M (editors), [2011], pp. 63-82, p. 73.

⁵⁵ For more about this, see, for instance, Baker DI, ‘Trying to Use Criminal Law and Incarceration to Punish Participants and Deter Cartels Raises Some Broad Political and Social Questions in Europe’ in *ibid.*, [2011], pp. 41-61, pp. 58-60.

consequently, the criminal-head guarantees will not necessarily apply with their full stringency".⁵⁶ This is not something I will elaborate further on here.⁵⁷

The analyses above show the enforcement potential of individual sanctions in both channels. I believe, however, that imprisonment is the most effective sanction in terms of strengthening deterrence, and that such a sanction necessitates criminalisation.

1.3 Individual Sanctions and Leniency

If more individual-oriented enforcement with individual sanctions is implemented, a more individual-oriented leniency programme should apply as well. Individual leniency can arguably have a stronger destabilising effect on a cartel due to individual monetary sanctions, but, not least, to the risk of imprisonment and losing one's liberty, as opposed to a merely financial loss. In incentive terms, the risk of individual sanctions may be perceived as personally painful, rather than merely harming the undertaking. It may be a challenge in this regard to communicate the risk of being prosecuted and punished to those who are willing to take legal risks to promote their careers.⁵⁸ It could also be argued that individual leniency, together with strengthening the enforcement apparatus in relation to undertakings without offering lenient treatment to undertakings, may be more economically beneficial in enforcement terms. This is probably true, but because of the personal risk of standing up against one's own undertaking, a combination of leniency towards undertakings and leniency towards individuals, will, in my view, be a more effective way of ensuring the detection of cartels.

The ECN+ Directive emphasises this, as well as the need to ensure incentives to file for leniency. If Member States impose individual sanctions, recital 64 of the ECN+ Directive states, with reference to the interplay between leniency programmes and sanctions against natural persons, that:

‘Legal uncertainty as to whether current and former directors, managers and other members of staff of applicants for immunity are shielded from individual sanctions such as fines, disqualification or imprisonment, could prevent potential applicants from applying for leniency. In light of their

⁵⁶ Jussila v Finland [2006], no. 73053/01 45 EHRR 39, para. 43. This is not something I will elaborate on here.

⁵⁷ See also Bendenoun v France [1994], no. 12547/86 18 EHRR 54, paras. 46. *Janosevic v Sweden* [2004], no. 34619/97 38 EHRR 22, para. 81. Aall J, *Rettsstat og menneskerettigheter* [2018], pp. 437-438.

⁵⁸ For more about this see, for example, Baker DI, “Trying to Use Criminal Law and Incarceration to Punish Participants and Deter Cartels Raises Some Broad Political and Social Questions in Europe” in Lowe P and Marquis M (editors), [2011], pp. 41-61, p. 59.

contribution to the detection and investigation of secret cartels, those individuals should thus, in principle, be protected from sanctions in relation to their involvement in the secret cartel covered by the application imposed by public authorities in criminal, administrative and non-criminal judicial proceedings pursuant to national laws that predominantly pursue the same objectives to those pursued by Article 101 TFEU [...].’

Therefore, Article 23 of the ECN+ Directive on the interplay between applications for immunity from fines and sanctions against natural persons obliges Member States to protect individuals from sanctions imposed in administrative, non-criminal and criminal judicial proceedings if they fulfil certain criteria:

‘1. Member States shall ensure that current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities are fully protected from sanctions imposed in administrative and non-criminal judicial proceedings, in relation to their involvement in the secret cartel covered by the application for immunity from fines, for violations of national laws that pursue predominantly the same objectives to those pursued by Article 101 TFEU, if:

- (a) the application for immunity from fines of the undertaking to the competition authority pursuing the case fulfils the requirements set out in points (b) and (c) of Article 17(2);
- (b) those current and former directors, managers and other members of staff actively cooperate in this respect with the competition authority pursuing the case; and
- (c) the application for immunity from fines of the undertaking predates the time when those current or former directors, managers and other members of staff concerned were made aware by the competent authorities of the Member States of the proceedings leading to the imposition of sanctions referred to in this paragraph.

2. Member States shall ensure that current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities are protected from sanctions imposed in criminal proceedings, in relation to their involvement in the secret cartel covered by the application for immunity from fines, for violations of national laws that pursue predominantly the same objectives to those pursued by Article 101 TFEU, if they meet the conditions set out in paragraph 1 and actively cooperate with the competent prosecuting authority. If the condition of cooperation with the competent prosecuting authority is not fulfilled, that competent prosecuting authority may proceed with the investigation.

3. In order to ensure conformity with the existing basic principles of their legal system, by way of derogation from paragraph 2, Member States may provide that the competent authorities are able not to impose a sanction or only to mitigate the sanction to be imposed in criminal proceedings to the extent that the contribution of the individuals, referred to in paragraph 2, to the detection and

investigation of the secret cartel outweighs the interest in prosecuting and/or sanctioning those individuals.

4. In order to allow the protection referred to in paragraphs 1, 2 and 3 to function in situations where more than one jurisdiction is involved, Member States shall provide that in cases where the competent sanctioning or prosecuting authority is in a different jurisdiction than that of the jurisdiction of the competition authority pursuing the case, the necessary contacts between them shall be ensured by the national competition authority of the jurisdiction of the competent sanctioning or prosecuting authority.

5. This Article is without prejudice to the right of victims who have suffered harm caused by an infringement of competition law to claim full compensation for that harm, in accordance with Directive 2014/104/EU.’

Note that the ECN+ Directive does not interfere in what types of sanctions Member States can impose on individuals, but rather seeks to harmonise their interplay with leniency if Member States do provide for individual sanctions. Further, Member States seem to have more flexibility in terms of how much protection they are willing to offer from individual criminal sanctions, see Article 23 (3). Lastly, it is important to note that, pursuant to Article 23 (5), damages actions under the Damages Directive are not affected.

It is also worth mentioning that, before the ECN+ Directive, the Commission introduced an anonymous whistleblower tool for individuals.⁵⁹ This tool seeks to ‘*make it easier for individuals to alert the Commission about secret cartels and other antitrust violations while maintaining their anonymity [...]*’.⁶⁰ The objective of this tool is thus to detect and gather information about cartels from anonymous individuals reporting suspicious activity. Like leniency, this enforcement instrument increases the likelihood of detection, the component I discuss below, and prosecution, and is therefore capable of deterring the continuation or formation of cartels. Rather than being dependent on the components of the deterrence equation, however, since the reporting individuals is anonymous, this instrument is guided more by a moral compass. The whistleblower instrument, together with the ECN+ Directive, points to

⁵⁹ Anonymous Whistleblower Tool, [2017], available at <http://ec.europa.eu/competition/cartels/whistleblower/index.html> [last accessed 11/3-2020].

⁶⁰ Antitrust: Commission introduces new anonymous whistleblower tool, IP [2017] 591.

more individual-oriented enforcement, in terms of both investigations and sanctions, in the years to come.⁶¹ I find this development positive.

2. Probability of Detection

So far, I have suggested changes aimed at ensuring that the punishment outweighs the possible gains of remaining within the cartel. It does not matter, however, how much the components of potential punishment contribute to outweighing the possible gains, if there is a low probability of detection, the last component. Over the years, leniency has been designated a success by competition authorities, with reference to the increase in the detection of cartels and the deterrent effect of leniency.⁶² It has been estimated that, since 1996, when leniency was first introduced, the proportion of cases detected through the EU leniency programme has steadily increased to approximately 75 per cent.⁶³ This is very positive. It demonstrates the need for and use of such enforcement instruments, but it also poses a threat to the last component: sufficient probability of detection. I will explain this in the following.

From the perspective of a competition authority, it can be tempting to devote a large amount of resources to ensuring leniency, since this arguably leads to the adoption of more infringement decisions, as well as cost and time savings.⁶⁴ However, overreliance on leniency could weaken confidence in the competition authority's ability to investigate cartels on its own. Most importantly, it could weaken the detection component. If leniency is relied on at the expense of traditional enforcement methods, such as surveillance and market monitoring, this could lead

⁶¹ Anonymous Whistleblower Tool, [2017], available at <http://ec.europa.eu/competition/cartels/whistleblower/index.html> [last accessed 11/3-2020]. The ECN+ Directive, OJ L 11/3.

⁶² Kaplow L and Shavell S, 'Optimal Law Enforcement with Self-Reporting of Behavior', 102 *Journal of Political Economy*, vol. 102, no. 3 [1994], pp. 583-606. Monti M, 'Why should we be concerned with cartels and collusive behaviour?', [2000]. Hammond SD, 'Cornerstones of an effective cartel leniency programme', 4 *Competition Law International* No 2 [2008]. Beaton-Wells E and Tran C (editors), [2015]. Wijckmans F and Tuytschaever F, *Horizontal Agreements and Cartels in EU Competition Law*, Oxford University Press [2015]. The Leniency Programme of the Bundeskartellamt [2006], available at http://www.bundeskartellamt.de/EN/Banoncartels/Leniency_programme/leniencyprogramme_node.html [last accessed 11/3-2020].

Cartel statistics up until 2018, available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [last accessed 11/3-2020].

⁶³ Stephan A and Nikpay A, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities', in Beaton-Wells C and Tran C (editors), [2015], Chapter 8, p. 149. Hodges C, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*, Hart Publishing [2015], pp. 98-99.

⁶⁴ For more on the proportion of cases uncovered through leniency at the Commission see Stephan A and Nikpay A, "Leniency Decision-Making from a Corporate Perspective: Complex Realities", in Beaton-Wells C and Tran C (editors), [2015], chapter 8.

to undertakings abusing leniency and participating in cartels, only to seek leniency when they find fit because there is little risk of being held liable for the unlawful behaviour if they do not take the initiative themselves.⁶⁵ This means that, if undertakings do not perceive a sufficient risk of being pursued by the Commission, they may seek leniency for the wrong reasons, for example, if they see that the cartel is failing and want to put their competitors at a disadvantage.⁶⁶ Not only does overreliance on leniency undermine the probability of detection component in the deterrence equation, it could also create incentives to abuse leniency, and infringe, confess and escape sanctions over and over again. Relying too much on leniency thus also has an immoral aspect.⁶⁷ If leniency is granted on the premises of the cartel participants alone, an undertaking that has participated in a cartel may keep its illicit gains and infringe again. Triggered by a lack of fear of being detected, this could encourage a ‘sin, snitch and escape’ system rather than compliance. That is why it is only when competition authorities also prioritise their own investigative capacity that all the components of the deterrence equation are in place, thereby ensuring proper enforcement. Only then can the sufficient risk of detection component of the deterrence equation contribute to destabilising already existing cartels, as well as deterring new ones from arising, thereby ensuring general deterrence and the underlying objective of undistorted competition in the Cartel Prohibition. And only then can leniency function as intended.

The Leniency Notice is dependent on being part of an enforcement system that entails sufficient punishment of cartel participants that do not step forward, and on a strong, independent investigative authority that can pursue cartels independently.⁶⁸ Leniency comes in addition to

⁶⁵ About stabilising effects when low probability of detection see, for example, Chen J and Harrington Jr. JE, ‘The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path’, in Ghosal V and Stennek J (editors), *The Political Economy of Antitrust (Contributions to Economic Analysis, Volume 282)*, Emerald Group Publishing Limited [2007], pp. 59-80, p.18. Hondius E and Janssen A (editors), [2015], p. 4.

⁶⁶ Stephan A, [2009], p. 541. Hondius E and Janssen A (editors), [2015], p. 4.

⁶⁷ Hodges C, [2015], p. 115.

⁶⁸ For more about this, see, for example, Spagnolo G, “Divide et Impera: Optimal Leniency Programs”, CEPR Discussion Paper No. 4840 [2005], available at <ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo.pdf> [last accessed 11/3-2020], p. 9. Hüschelrath K and Schweitzer H, ‘Public and Private Enforcement of Competition Law in Europe - Introduction and Overview’, in Hüschelrath K and Schweitzer H (editors), *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives*, Springer [2014], p. 1-8; p. 3. Schwalbe U, ‘Leniency Programmes and the Structure of Cartels – Remarks from an Economic Perspective’, *ibid.*, pp. 39-51, pp. 41-42.

and does not replace more traditional public investigative methods, such as market monitoring and surveillance.

3. Concluding Remarks

More individual-oriented enforcement should be encouraged. I therefore advocate changes to the current programme of the Leniency Notice of the Commission. Individual leniency can arguably have a stronger destabilising effect on a cartel because of individual monetary sanctions, but, not least, the risk of imprisonment and being deprived of one's liberty, as opposed to a merely financial loss. A system whereby sanctions against undertakings are handled at the EU level, while individual sanctions are taken care of at the Member State level is a good solution. It requires more harmonisation throughout the Member States, however. The ECN+ Directive's coordination of the interplay between leniency and individual sanctions is an important step in this regard. In my view, however, more intervention is also needed in what types of sanctions Member States impose. I believe that the legal basis in EU law is in place, but that the political climate may not be ready yet.

Furthermore, introducing new policies that seek to incentivise cartel participants to step out of cartels and deter new ones from arising will be of little use if the cartel participants do not fear being detected. Statistics indicate that the Commission may rely too much on leniency in its enforcement. It is essential to avoid this. If the mechanisms of antitrust enforcement consist of the Commission passively waiting for leniency applications to arrive, and not actively engaging in market monitoring and surveillance, this creates a situation in which cartels will only be detected on the initiative of cartel participants. Not only does overreliance on leniency thereby undermine the probability of the detection component of the deterrence equation, it can also provide incentives to abuse leniency, and infringe, confess and escape sanctions over and over again. Leniency is and must always be seen as a supplement to more traditional enforcement methods.