

LIMITATIONS OF EU COMPETITION LAW AND THEIR INFLUENCE ON RECIDIVISM AND DETERRENCE: ANALYSIS OF THE CONVENIENCE OF A PENAL APPROACH TO CARTELS

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Abstract

Competition law seeks to foster competition and innovation through the sanctioning of antitrust behavior, and it especially seeks to discourage the creation of hardcore cartels. To that effect, the European Union imposes administrative sanctions to cartels, whereas the United States use their penal system against them. This paper will analyze the advantages and limitations of each option, and will determine whether it would be more effective for the European Union to also use its penal system against cartels.

Keywords: *Antitrust law, European Union, United States, sanctions, deterrence*

1. Introduction

Effective competition benefits consumers as it fosters lower prices, higher quality products, a wider selection of goods and services, and innovation. In order to ensure a more effective competition, diverse enforcement systems have been implemented seeking to achieve three main objectives: punishment of antitrust behavior, prevention of recidivism, and general deterrence. There are various ways in which these three objectives can be achieved, and thus it is of particular importance to analyze the approach different jurisdictions choose when confronted with antitrust offences, and more specifically hardcore cartels, in order to establish the benefits and limitations of each approach.

The European Union (EU) and the United States (US) are two major jurisdictions in the sense of (i) having the nominal authority and enforcement capability to compel fidelity to their demands, and (ii) being the most fully developed. Therefore, this empirical study will compare the approach of the European Union to hardcore cartels, which is based on administrative sanctions, with the system used by the United States, which is based on criminal prosecution. This study will then analyze the differences and, based on the results of this analysis, it will endeavor to determine whether the EU antitrust sanctioning system could be improved by adopting approaches more similar to those of the US.

With this aim, first, a contextualization is needed in order to define where we are and expose in a comprehensive manner the most important features of each system. Next, the functioning of the EU system will be addressed through an explanation of the manner in which the European Commission calculates fines, followed by a short exposition on the criticism it has faced. In addition, the positive and negative aspects of the measures used by the US antitrust system will be described and analyzed, with a specific focus on criminal penalties. Finally, a decision will be made regarding the convenience for the EU of adopting a penal approach to antitrust behaviors, detailing whether it would be an improvement of the EU antitrust sanctioning system.

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2. Contextualization

Competition arises when firms fight for customers by offering them a better deal in terms of price, quality, range, reliability and associated services. In this spirit, in Europe, the European Commission (EC) stated that the objective of article 101 of the Treaty on the Functioning of the European Union (TFEU) is to protect competition in the market as a means to enhance consumer welfare⁵⁶⁵.

There are three components of consumer welfare: money –reduction of prices or price maintenance whereas the quality is enhanced–, consumer choice, and innovation. All three elements should be protected since any of them could be endangered by collusive agreements or abuse of a dominant position⁵⁶⁶. Cartels are the main example of collusive agreements, and they generally involve price-fixing, market division, control of output, mitigation of technological improvement and limitation of production. Therefore, they are especially targeted by antitrust regulations.

These regulations establish that the punishment for antitrust behavior should deter future infringements of competition law through the creation of a credible threat of prosecution and punishment, without leading firms to choose an excessive (and therefore costly) level of compliance. There is a broad consent on what should be regarded as an optimal fine: first, it must exceed the social cost of the crime and, secondly, complete deterrence is not desirable⁵⁶⁷; thus, the expected fine will equal the harm of the violation so that the value of the illegal behavior is expected to be zero⁵⁶⁸; in other words, the minimal optimal fine is equal to the expected illicit gain derived from the collusion⁵⁶⁹. POSNER explains this situation by stating that "the penalty for an antitrust violation should be calculated to impose on the violator a cost, whether in pecuniary or non-pecuniary terms, equal to the cost that his violation imposed on society. This criterion is not derived from notions of symmetry or from the biblical notion of an eye for an eye. It is a criterion of efficiency."⁵⁷⁰

3. The European Union: an administrative system

The procedure followed by the Commission has to respect three important points: treaty's competition law provisions cannot be enforced criminally, private litigants cannot file cases before the Commission -the process is strictly civil and administrative- and, finally, the essential coercive power is to order fines. Europe's approach, different from other systems has long been administrative rather than judicial in nature⁵⁷¹.

⁵⁶⁵ It has to be acknowledged, however, that the European Treaty has not placed the maximization of welfare and efficiency at the top rank of its objectives. Far from this, the former Article 3.1.g EC, which has been transformed into Protocol No. 27 by the Treaty of Lisbon, puts the Community under an obligation to establish "a system ensuring that competition is not distorted". Thus, undistorted competition in the internal market is still to be considered as the ultimate goal of European competition law. Basedow, Jürgen and Wurmnest, Wolfgang, "Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid" (2011): 343.

⁵⁶⁶ Kokkoris, Ioannis and Olivares-Caminal, Rodrigo, "Antitrust Law Amidst Financial Crises" (2010): 397.

⁵⁶⁷ There are anticompetitive behaviors that might deserve to be exempted under article 101.3 TFEU due to the efficiencies they might produce. Emmanuel Combe and Constance Monnier, "Fines Againsts Hard Core Cartels in Europe: The Myth of Overenforcement," 56 - 2 (2011): 235-275.

⁵⁶⁸ Ginsburg, Douglas H. and Wright, Joshua D., "Antitrust Sanctions," 6- 2 (2010): 3-39.

⁵⁶⁹ Combe and Monnier explain us that the illicit gain is the additional profit made by a cartel member, which depends on four factors: (1) the increase in price due to collusion (2) the price elasticity of demand (3) the total affected market, and (4) the competitive markup. Combe and Monnier, *Fines Againsts Hard Core Cartels in Europe: The Myth of Overenforcement*, 235-275

⁵⁷⁰ Nonthika, Wehmhörner, "Optimal Fining Policies," (2005). p. 8; see also Robert Kneuper and Langenfeld, James George, "The Potential Role of Civil Antitrust Damage," 18-4 (Summer 2011): 953-986.

⁵⁷¹ Crane, Daniel A., "The European Model" (2011):4.

The process of calculating the fines in the EU is set out in the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (“2006 Guidelines”). As stated in *Archer Daniels Midland v Commission*, even if these guidelines “may not be regarded as rules of law which [the Commission] is always bound to observe, they nevertheless form rules of practice from which [the Commission] may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment”⁵⁷². This process, as explained below, is divided into two basic steps, after which possible benefits –such as immunity from leniency programmes– will be applicable.

A. Process of calculating the fines

When establishing the amount of the fine, in order to ensure that the fines are set at a level sufficient to deter anticompetitive behaviors, the Commission “will have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 23(3) of Regulation (EC) No 1/2003”⁵⁷³. Apart from that, the Commission will also take into account any aggravating or mitigating circumstances for each undertaking. Additionally, it will apply, where appropriate, the Leniency Notice⁵⁷⁴. Finally, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23.2.a of Regulation No 1/2003⁵⁷⁵. The importance of these Guidelines lies in that they contain a two-step methodology to set fines by the Commission.

a. First step

The 2006 Guidelines on fines and settle case law establish that “the basic amounts for each party result from the addition of a variable amount and an additional amount. The variable amount results from a percentage of up to 30% of the value of sales of goods or services to which the infringement relates in a given year (normally, the last full business year of the infringement) multiplied by the number of years of the undertaking’s participation in the infringement. The additional amount (“entry fee”) is calculated as a percentage between 15% and 25% of the value of sales. The resulting basic amount can then be increased or reduced for each company if either aggravating or mitigating circumstances are retained”⁵⁷⁶. In other words, the basic amount of the fine will be determined as a proportion of the value of the sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement⁵⁷⁷.

Graphically, the first step could be shortened with the following formula: $BA = VA + EF$
 $= (VS \times P \times Y) + EF$

Where:

- BA = Basic Amount

⁵⁷² Judgment of the Court of First Instance (Third Chamber), 27 September 2006 II - 3642 “Archer Daniels Midland v Commission”; Wils, Wouter P. J., “Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement,” 34-3 (September 2011): 21.

⁵⁷³ Decision of the European Commission, COMP/39611 “Water management products”, 27 June 2012, par. 59

⁵⁷⁴ Decision of the European Commission, COMP/F/38.645 “Methacrylates”, 31 May 2006, par. 317.

⁵⁷⁵ Decision of the European Commission, COMP/39611 “Water management products”, 1 november 2012, par. 60

⁵⁷⁶ Decision of the European Commission, COMP/39.611 “Water management products”, 1 november 2012, par. 61

⁵⁷⁷ Decision of the European Commission, COMP/38.432 “Professional Videotape”, 20 November 2007, par. 204.

- VA = Variable amount before taxes, which at the same time is the sum of three components:
 - VS = Value of sales: direct and indirect in the EEA related to the infringement of the last full business year of participation in the infringement (unless the figure is not representative).
 - P = Percentage related to the gravity of the offence: it can range from 0-30% and is determined by: the nature of infringement, its geographic scope, implementation of the agreement, and the combined market share of the parties in the relevant market. For hard-core cartels the percentage will generally be set at the higher end of the scale
 - Y = Number of years the undertaking participated in the agreement.
- EF = Entry fee: it is a percentage of 15% to 25% of the value of shares, which is always imposed on hard-core cartel participants and might be imposed on other infringers, too. It will depend, among others, on the nature of the infringement, its geographic scope, the implementation, the parties' combined market shares in the relevant market...

Firstly, the economic importance of a specific business is translated in the value of sales⁵⁷⁸. According to the Commission "the relative strength of each undertaking concerned is determined as the percentage for which its sales of the goods or services to which the infringement relates in the geographic area covered by the cartel account in relation to the aggregate sales in that area of all of the undertakings concerned"⁵⁷⁹.

Secondly, according to the Commission's practice, the percentage related to the gravity of the offence is generally established between 15% and 25% because in accordance with point 23 of the 2006 Guidelines, if we are referring to secret horizontal price-fixing and market-sharing agreements, the rate should be no lower than 15%⁵⁸⁰.

Thirdly, in order to take fully into account the duration of the participation of each undertaking in the infringement individually, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement⁵⁸¹. If a fine has to be imposed on several companies that belong to the same undertaking, "the duration of the infringement should be calculated on the basis of the economic power of that undertaking during the last full year of its participation in the infringement"⁵⁸², in order to ensure it has sufficient deterrent effect. Nevertheless, as the General Court has acknowledged "it is not necessary to establish in practical terms a direct relation between that duration and increased damage to the European Union objectives pursued by the competition rules"⁵⁸³.

Finally, about the entry fee, point 25 of the 2006 Guidelines on fines and settle case law states that "irrespective of the duration of the undertaking's participation in the infringement, the basic amount will include a sum of between 15% and 25% of the value of sales"⁵⁸⁴. This percentage is totally independent of the aforementioned entry fee.

The aim of imposing this amount is to deter undertakings from even entering into such illegal practices, especially in the case of firms with a high turnover or when there are big

⁵⁷⁸ Decision of the European Commission, COMP/39.396 "Calcium carbide", 22 July 2009, par. 296.

⁵⁷⁹ Decision of the European Commission, COMP/39.180 "Aluminium fluoride", 25 June 2008, par. 232.

⁵⁸⁰ Judgment of the General Court (Eighth Chamber) T-199/08 "Ziegler SA v European Commission." 16 June 2011, par. 141.; Judgment of the General Court T-208/08 (Eighth Chamber) "Gosselin Group v Commission" 11 July 2013, par. 131.

⁵⁸¹ Decision of the European Commission, COMP/39.611 "Water management products", 27 June 2012, par. 69

⁵⁸² Judgment of the General Court (Second Chamber), T-122/07 "Siemens and VA Tech Transmission & Distribution v Commission" 3 March 2011, par. 241.

⁵⁸³ Judgment of the Court (Second Chamber), C-389/10 "KME Germany and Others v Commission", 8 December 2011, par. 74.

⁵⁸⁴ Decision of the European Commission, COMP/39611 "Water management products", 27 June 2012, par.. 73

disparities between the size of the undertaking participating in the infringement because although other factors are also taken into account, “the link between, first, undertakings’ size and global resources and, second, the need to ensure that a fine has deterrent effect cannot be denied”⁵⁸⁵.

b. Second step

The Commission will use this second step to adjust the fine taking into account the particular circumstances of the case. This second step can also be shortened with a formula, which is the following: $BA \times AF = \text{fine} \leq 0.1 \times \text{total turnover}$.

- BA = Basic Amount
- AF = Adjusting factors
- 0.1 = 10% ceiling cap

First of all, the 10% ceiling cap, according to article 23.2 of Regulation 1/2003, implies that the fine imposed on each undertaking must not exceed 10% of its total turnover in the preceding business year, independently of the cooperation of the undertaking⁵⁸⁶. This percentage is only applied to the final amount of the fine, and not to the intermediate amounts which can exceed this limit⁵⁸⁷. Therefore, the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance⁵⁸⁸. The Commission has capped the fine in very few cases. Examples of such cases include *Refrigeration Compressors to ACC*; in *Animal Feed Phosphates to Tessengerlo Chemie N.V., Yara Suomi Oy, Yara Phosphates Oy and Quimitécnica.com – Comércio e Indústria Química S.A.*, and to two of the undertakings participating in the *Bathroom fittings and fixtures case*⁵⁸⁹.

Secondly, adjusting factors can be related or unrelated to the infringement. The former are aggravating or mitigating circumstances, which can be organized as shown in the following non-exhaustive table in Figure 1:

Figure 1: Non-exhaustive list of aggravating and mitigating factors on the imposition of EC fines

Aggravating factors	Mitigating factors
Ringleader or instigator.	Limited involvement and non-implementation of the infringement.

⁵⁸⁵ Judgment of the Court (Second Chamber), C-413/08 P "*Lafarge SA v European Commission*", 17 June 2010, par. 102.; Judgment of the General Court (Second Chamber), T-112/07 "*Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v European Commission*", 12 July 2011, pars. 349-350.

⁵⁸⁶ Judgment of the Court of First Instance (Fifth Chamber), T-304/02 "*Hoek Loos NV v Commission of the European Communities*" 4 July 2006, par. 123.

⁵⁸⁷ Judgment of the General Court (Eighth Chamber), T-377/06 "*Comap SA v European Commission*" 24 March 2011, par. 111; Judgment of the General Court (Third Chamber), T-11/06, "*Romana Tabacchi Srl v European Commission*", 5 October 2011, par. 259; Judgment of the Court of First Instance (First Chamber), Joined cases T-217/03 and T-245/03, "*Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission of the European Communities.*", 13 December 2006, par. 255.

⁵⁸⁸ Judgment of the Court (Second Chamber), C-413/08 "*Lafarge SA v European Commission*", 17 June 2010, par. 95.

⁵⁸⁹ Decision of the European Commission, COMP/39600 "*Refrigeration compressors*", 7 December 2011, par. 88; Decision of the European Commission, COMP/38866 "*Animal Feed Phosphates*", 20 July 2010, par. 214; Decision of the European Commission, COMP/39.092 "*Bathroom fittings and fixtures*", 23 June 2010, par. 15 of the Summary Decision.

Refusal to cooperate (it can also lead to the imposition of separate fines for procedural infringements, but not to both a procedural fine and an aggravating circumstance).	Cooperation with the Commission (except for leniency applications requirements).
Coercion or retaliatory measures.	Pressure exercised by other companies.
Infringement continues after the Commission's investigation.	Immediate termination of the infringement, as soon as the Commission intervenes.
Awareness of the illegal nature of the conduct.	Negligence.
Recidivism (the fine can be increased by 100%, for each past infringement, also NCA condemning decisions count; no period of limitation).	Introduction of a compliance policy.
Institutionalized nature of the infringement.	--
Significance of the industry influenced.	--
--	Public authorization/ encouragement.
--	Slow reaction/ excessive length of procedures.

Source: Geradin, Damien, "The EU Competition Law Fining System: A Reassessment." 2011-052, p. 8

All of the factors mentioned in the Figure have been or could have been taken into consideration by the Commission to increase or decrease the basic amount⁵⁹⁰. For example, "the instigator" aggravating circumstance was used in *Bitumen* to increase the fine imposed to Shell by 50%⁵⁹¹. On the other hand, as an example of a mitigating circumstance, in *Prestressing steel* the Commission considered that the role of Proderac and Trame was substantially more limited than that of the other cartel participants and granted them a reduction of 5% of the fine⁵⁹².

Adjusting factors unrelated to the infringement are: (1) the increase for deterrence, in order to ensure that it exceeds the amount of gains improperly made as a result of the infringement; (2) the 10% ceiling cap; and (3) the inability to pay defense, when there is "(i) a specific social and economic context" and "(ii) paying would irretrievably jeopardize the economic viability of the undertaking and cause its assets to lose all their value"⁵⁹³.

c. Leniency programs

When firms decide to collude, it is highly likely that they will continue to collude indefinitely as long as the initial factors that allowed the expected gains to exceed the expected losses do not change. There are essentially three ways in which competition authorities can obtain information from the companies and individuals that have committed

⁵⁹⁰ What is clear is that the word "other" that appears in point 28 of the 2006 Guidelines (when referring to aggravating or mitigating circumstances) highlights the discretion that the Commission has bestowed upon itself. Damien Geradin and David Henry, "The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments," 02/05 (February 2005): 13.

⁵⁹¹ Decision of the European Commission, COMP / 38.456 "Bitumen", 3 october 2007, pars. 342, 349.

⁵⁹² Decision of the European Commission, COMP/38344 "Prestressing steel", 19 november 2011, par. 994, 1026.

⁵⁹³ Geradin, Damien, "The EU Competition Law Fining System: A Reassessment," 2011-052 (October 2011): 8.

the antitrust violations: direct force (for example, inspections or “dawn-raids”), compulsion (for instance, threatened sanctions for refusal to cooperate) and leniency.

This third method deserves special focus because it presents clear advantages: firstly, it can be used to obtain all kind of information –not just existing documents or other existing physical evidence, as it happens in case of resorting to direct force–; secondly, it saves on search costs because it is done by the undertaking and its employees, and thirdly, there is no risk of applicants providing unreliable information, as is the case with compulsion, in which untruthful self-indicting statements are sometimes made in order to escape from the pressure⁵⁹⁴.

According to this program, only one undertaking will benefit from a complete immunity of fines; namely, the first undertaking applying for leniency that submits information and evidence which, in the Commission’s view, will enable it either to carry out a targeted inspection in connection with the alleged cartel or to find an infringement of Article 101 TFEU. Companies which, despite their willingness to cooperate, file their leniency application after another competitor has qualified for immunity, can only hope to obtain a reduction of up to 50% of any fine imposed on them, and this reduction declines for subsequent firms to a maximum of 20%⁵⁹⁵. The incentive of benefitting from immunity for being the first to self-report is supposed to induce undertakings to come forward, over all, when the probability of the rest of the team members being convicted with high fines had increased.

B. Main problems

The Commission’s practice has some problems that should be addressed if we want to improve the deterrent effect of sanctions⁵⁹⁶. In this section we are going to deal with some of the most important ones.

a. Uncertainty and lack of transparency

The EU fining system involves a certain level of uncertainty because it is impossible to predict the amount of the fine that will be imposed.. This problem has not been solved even after the 2006 Guidelines⁵⁹⁷. In 2005, KILLICK stated that “even the best-informed lawyer would struggle to give any more than an approximate range, which could turn out to be half or double the fine ultimately imposed”⁵⁹⁸. GERADIN, to sustain this criticism, uses the example of the 2010 DG Competition Stakeholder Study where “the majority of lawyers and half the companies participating in the survey submitted that, with the possible range of fine levels now available in the 2006 Guidelines, fines became even more difficult to predict”⁵⁹⁹.

⁵⁹⁴ Wils, Wouter P.J., "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis," 30-2 (June 2007): 21.

⁵⁹⁵ European Commission, "Compliance Matters. what Companies can do Better to Respect EU Competition Rules," (November 2011): 18.

⁵⁹⁶ Wehmhörner, Nonthika. "Optimal fining policies" (2005): 8

⁵⁹⁷ As Weber observes “Even some per se violations of the rule are beyond the reach of any meaningful punishment. It is not that antitrust damages are necessarily too high or too low, it is that they vary dramatically and that there is no a priori way to predict where punishment in a particular case or for a particular defendant will come out. This is the real but overlooked incoherence of antitrust punishment” Spencer Weber Waller, "The Incoherence of Punishment in Antitrust," 78 (2003): 208.

⁵⁹⁸ Killick, James, "Is it Now Time for a Single Europe-Wide Fining Policy? an Analysis of the Fining Policies of the Commission and the Member States," 7 (December 2005): 1.

⁵⁹⁹ Geradin, Damien, "The EU Competition Law Fining System: A Reassessment," 2011-052 (October 2011): 18.

Criticism was leveled, for example, at the wording of paragraph 37 of the 2006 Guidelines where it is stated that “in view of the particularities of a given case or in view of the need to achieve deterrence for a specific undertaking, the Commission might be justified to depart from these Guidelines”. Due to the “lack of clarity” of what this exactly involve, or more precisely, what the legislator mean by “particularities of the case” and “deterrence”; it might be said that this uncertainty conflicts with the principle of legality and the protection of the undertakings’ legitimate expectations, Article 7 ECHR, which reads that legislation should be “unequivocal and its application must be predictable for those subject to it.”⁶⁰⁰.

b. Absence of individual sanctions

EU competition law only foresees fines to undertakings. However, natural persons – which can be employees or employers– are the ones naturally engaged in the anticompetitive behaviors. This notwithstanding, it is true that an undertaking might have limited resources to discipline its employees and that they might have left the undertaking by the time the fine is imposed⁶⁰¹. It is also true that once the offence has been committed, it may be difficult to impose sanctions because, for example, as the individuals are not identified in Commission decisions, proving employees’ liability in front of labor courts will not be an easy task⁶⁰². However, according to WILS “it is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing”⁶⁰³.

Besides, in a study carried out by HOJ et al it is clearly stated that “applying sanctions to individuals would increase deterrence”⁶⁰⁴ which is in line with the results from the survey carried out by Deloitte (2007) in the UK, which shows that sanctions which directly affect individuals (such as criminal penalties and director disqualification) are believed to have a greater impact on deterring infringements than sanctions which are imposed on businesses⁶⁰⁵. Furthermore, the moral force of antitrust laws is dramatically reduced by “not holding an individual responsible for his unlawful actions”⁶⁰⁶.

c. Recidivism

In its 2006 Fining Guidelines, the European Commission defines recidivism as the situation “where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed [now Articles 101 or 102 TFEU]”. And, according to the EU General Court, it implies “that a person has committed fresh infringements after having been penalized for similar infringements”⁶⁰⁷.

However, although recidivism will produced an increase on the sanctions, as GINSBURG and WRIGHT suggest, “current sanctions have no more than a transitory impact upon market outcomes and little, if any, deterrent value”⁶⁰⁸, or at least that is the only possible explanation to the high number of firms that are found to be recidivist. In fact, an study carry

⁶⁰⁰ Geradin, Damien, “The EU Competition Law Fining System: A Reassessment,” 2011-052 (October 2011): 18-33.

⁶⁰¹ Geradin, Damien, “The EU Competition Law Fining System: A Reassessment” (October 2011): 15

⁶⁰² Geradin, Damien, “The EU Competition Law Fining System: A Reassessment” (October 2011): 20

⁶⁰³ Wils, Wouter P. J., “Optimal Antitrust Fines: Theory and Practice,” 29- 2 (June 2006): 20.

⁶⁰⁴ Jens Hoj et al., “Product Market Competition in the OECD Countries: Taking Stock and Moving Forward,” 575 (2007): 16.

⁶⁰⁵ Gordon, Fiammetta and Squires, David, “The Deterrent Effect of UK Competition Enforcement,” 156- 4 (December 2008): 411-432.

⁶⁰⁶ Whelan, Peter, “A Principled Argument for Personal Criminal Sanctions as Punishment Under EC Cartel Law,” 4-1 (November 2007): 7-40.

⁶⁰⁷ Judgment of the General Court, T-141/94 11 “Thyssen Stahl v Commission” 11 March 1999, paragraph 617; Wils, Wouter P. J. “Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis,” 35-1 (March 2012): 6.

⁶⁰⁸ Ginsburg, Douglas H. and. Wright, Joshua D., “Antitrust Sanctions,” (Autumn 2010): 3-39

out by GOLUB, DETRE, and CONNOR shows that harsher antitrust penalties for infringing individuals and firms have no effect on the rate of recidivism; or, if they have, it is unobservable due to the fact that it is compensated by the positive effect of antitrust compliance programs⁶⁰⁹.

There is empirical evidence that shows that, for the last two decades, there has been a significant degree of continued cartel formation, as well as multiple convictions of scores of firms for price fixing. However, worldwide data shows that recidivism runs rampant among those convicted. (See Figure 2)⁶¹⁰. Therefore, antitrust authorities must strive to improve existing regulations or to new ways of maximizing deterrence.

Figure 2: The World's leading recidivist (1990-2009)

Company	Number of judgments worldwide 1990-2009
BASF	26
Total S.A. (TotalFina, Elf, Atofina)	18
F. Hoffman-La Roche	17
Azko Nobel	14
Aventis	14
ENI	14
Shell	14
Degussa (Evonik)	13
Bayer	11
Mitsubishi	10
Mitsui	10

Source: Ginsburg, Douglas H. and. Wright, Joshua D., "Antitrust Sanctions." P. 15

4. The United States: a criminal system

Antitrust enforcement in the United States is a mixture of public and private efforts⁶¹¹. Regarding public enforcement, a violation of antitrust laws can result in a wide range of criminal sanctions, which vary from corporate fines and restitution payments to prison, including house arrest and fines for the corporate officials involved⁶¹². Injunctions or cease-and-desist orders are rarely used against naked cartels, as are measures for structural relief such as mandatory divestitures or restructuring of governance structures⁶¹³.

There is no doubt that the most common sanctions used by the US Government are corporate fines, individual fines and imprisonment of responsible managers. The analysis of the US antitrust sanctioning system is especially interesting, at least when it comes to criminal penalties, because, apart from Israel and Japan, it is the only jurisdiction that has served

⁶⁰⁹ Golub, Alla; Detre, Joshua and Connor, John M., "The Profitability of Price Fixing: Have Stronger Antitrust Sanctions Deterred?" (April 2005): 11.

⁶¹⁰ Connor, John M., "Effectiveness of antitrust sanctions on modern international cartels" *Journal of Industry, Competition and Trade* (December 2006): 195-223

⁶¹¹ Blair, Rober D. and Piette Durrance, Christine, "Antitrust Sanctions: Deterrence and (Possibly) Overdeterrence," 53-3 (Autumn 2008): 643 - 661.

⁶¹² Lande, Robert H. and Connor, John M., "Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges," (September 2011): 21.

⁶¹³ Connor, John M., "Global Antitrust Prosecutions of Modern International Cartels," 4-3 (September 2004): 239-267.

prison sentences to a significant number of price-fixers with a well-established record of sending price-fixers to prison⁶¹⁴. More precisely, the Section 1 of the Sherman Act states that “[...] on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court”⁶¹⁵.

The main difference between the US approach and that of the EU having been described, an analysis will be carried out, in order to detail the benefits and negative aspects of criminal sanctions, more specifically imprisonment, in maximizing deterrence of antitrust behavior. The goal is to determine whether European legislation would increase deterrence and solve some of the problems of its current regulatory system, and especially recidivism, were it to adopt some of the US approaches to the issue.

A. Main advantages in relation to the weaknesses of the EU system

Firstly, sanctions are correctly targeted: penalties directed against the individuals involved in the infringements might well have a greater deterrence effect than penalties directed against the corporations. As previously established, the ability of a firm to discipline its employees is rather limited, as employees may have left the firm before the infraction is discovered. Furthermore, reliance on corporate sanctions alone may incentivize lower internal corporate enforcement efforts⁶¹⁶.

Secondly, individual sanctions, and especially imprisonment, provide with stronger incentives to apply for leniency if set appropriately⁶¹⁷. Presently, it could be said that fines imposed by the European Commission are often perceived as a “license fee” paid to access larger (unlawful) cartel profits, whereas in the US individuals who are ultimately responsible for the active implementation of a cartel scheme are held accountable before the authorities for the offence receiving a punishment that fits their conduct⁶¹⁸.

Thirdly, hefty fines may cause the undertaking to go bankrupt because most firms would not have sufficient liquid assets to cover a fine capable of achieving the desired level of deterrence⁶¹⁹. The long-term impact of a fine will vary greatly depending on the firm, reflecting differences in capital structure and other factors affecting the firm's ability to adjust to the payment of the fine, as it is likely that the profits would have been paid out in taxes, dividends, salaries and wages⁶²⁰.

⁶¹⁴ Connor, John M., "Cartels Portrayed: A 21-Year Perspective, 1990 to 2010," (June 23, 2011): 26. However, “in recent years, a wide range of other jurisdictions, at least formally, provide jail time for cartel offenses. Individuals now face potential imprisonment for cartel activity in Australia, Brazil, Canada, Iceland, Indonesia, Israel, Japan, Korea, Norway, Russia, Thailand, and Zambia, in addition to in the U.S. and a majority of E.U. member states” G. C. Shaffer and N. H. Nesbitt, "Criminalizing Cartels: A Global Trend?" 12 (2011): 8.

⁶¹⁵ The Sherman Antitrust Act (July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7) is the American antitrust law passed by Congress in 1890 that regulates monopolies and cartels.

⁶¹⁶ Whelan, Peter, "Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law," 19-2 (2008), 364-376.

⁶¹⁷ Werden, Gregory J, Hammond, Scott D. and Barnett, Belinda A., "Deterrence and Detection of Cartels: Using all the Tools and Sanctions," 56-2 (Summer 2011), 207-234.; Calvani, Terry and Calvani, Torello H., "Cartel Sanctions and Deterrence," *The Antitrust Bulletin* 56- 2 (Summer 2011): 185-206.

⁶¹⁸ Whelan, Peter, "Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law" (2008): 364-376

⁶¹⁹ Werden, Gregory J, "Sanctioning Cartel Activity: Let the Punishment Fit the Cartel," 5-1 (April 2009): 19-36.

⁶²⁰ Wils, Wouter P.J., *Optimal Antitrust Fines: Theory and Practice* p. 19; Catherine Craycraft, Craycraft Joseph L. and Joseph C. Gallo, "Antitrust Sanctions and a Firms Ability to Pay," (1997): 171-183.

Finally, custodial sentences have a social and professional stigmatization effect that might act as a deterrent; however, custodial sentences incur a cost on society and it is said that every prison term has a corresponding fine equally deterring⁶²¹.

B. Main problems of criminal penalties

The first problem relates to jurisdiction because antitrust enforcement is essentially territorial in nature, so criminal sanctions might not deter international and global cartels. When sanctions rely basically on prison sentences, it is more difficult to persuade managers of cartels who reside abroad to submit to US jurisdiction⁶²². This is important because even if the criminalization is perceived as a proportionate response it must lead to convictions. Otherwise, there would be a gap between general public's expectations and the deliveries from the courts which will affect to the normative commitment⁶²³.

Secondly, as a consequence of criminal sanctions, cartelists will be more determined to try to avoid detection and more sophisticated in their methods. As a consequence, it will become more difficult to detect and prosecute them. At the same time, the criminalization of cartels raises the standard of proof required⁶²⁴. It is more complicated to discharge the burden of proof without the active help of cartel members; that is, without admissions and without the agreement of the companies. If criminal proceedings are implemented, there must be an increase in the rights of defense which would render criminal cases more difficult to win than civil or administrative proceedings. As a result, deterrence, rather than increasing, will be diminishing because of the additional hurdles for prosecutors⁶²⁵.

Thirdly, judges might be reluctant to impose prison sentences. As one former Department of Justice official observed, "federal judges were reluctant to sentence price fixers to jail and tended to attempt to come up with alternative 'public service' type sentences" because "antitrust price fixers were often pillars of the community, supporters of charity, and posed no physical danger to other members of society."⁶²⁶

Lastly, we have to consider the existence of options less aggressive than imprisonment because there are other measures that might discourage the employee from committing antitrust violations, while at the same time emphasizing that cartelizing is a serious wrong that ought to have adverse consequences for the wrongdoers –and not just for the companies⁶²⁷. Examples of these options are:

⁶²¹ Dunphy, Patrick Joachim, "Variable Geometry Europe - Patching Together what Works in the Fight Against Hard-Core Cartels: Carrots, Sticks, Custody and Leniency," (February 2007): 14.

⁶²² In the Vitamins cartel "Eleven executives—including six Europeans—went to prison in the United States. It was "the first time a foreign executive agreed to serve time in U.S. prison for his participation in an international cartel" SHAFFER and NESBITT, *Criminalizing Cartels: A Global Trend?*, 14.; "All victims of cartel activity would be allowed to sue in U.S. courts. In fact, foreign cartel participants likely would still face somewhat less liability than domestic cartel participants because foreign cartel members may have the capacity to ignore U.S. judgments, or may be protected by clawback statutes that reduce their liability" Klevorick, Alvin K. and Sykes, Alan O. "United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on Empagran," 42 (July 1, 2007): 45.

⁶²³ Norgren, Claes, "Criminal enforcement of antitrust laws" (2006): 2

⁶²⁴ Morgan, Eleanor J. "Criminal Cartel Sanctions Under the UK Enterprise Act: An Assessment," 17-1 (February 2010), 67-86.

⁶²⁵ Calvani, Terry, "Competition penalties and damages in a cartel context: criminalization and the case for custodial sentences" (2011): 15

⁶²⁶ Stucke, Maurice E., "Morality and Antitrust," 2006 (2006), 443-544. p. 464.

⁶²⁷ Baker, Donald I., "An enduring antitrust divide across the Atlantic over whether to incarcerate conspirators and when to restrain abusive monopolists." (2009):166

- a. Disqualification⁶²⁸: this type of sanctions may dissuade executives from engaging in cartelistic behavior without any cost for society. It goes directly against the individual who has committed the infringement but is less aggressive than imprisonment. Therefore, it could be a solution for systems that do not want to resort to prison sentences. The deterrent effect of disqualification stems mainly from its tendency to deny the offender a substantial part of their income. It must be taken into account that the CEOs who are fined or imprisoned for global price fixing by the US DOJ are often at or near the top of their corporate management structures⁶²⁹.
- b. Internal audits and compliance programs: they rely on the education of employees with no background in competition law so that they learn what forms of contact with competitors are legal and which are prohibited.
- c. Use of private enforcement: this would increase the final amount of the fine. However, the threat of civil damages could create an additional incentive to keep prices elevated once a cartel has been detected since price reductions could be used as evidence of the damages inflicted by the cartel.
- d. Rewards for whistleblowing: these rewards may be an inexpensive means of improving the success of leniency programs because they could be financed cheaply from fines imposed on other cartel members. Nevertheless, it should be born in mind that a bounty could incentivize employees to over-report.
- e. Reputational mechanisms: undertakings, to some extent, trade on their reputation. Therefore, if antitrust enforcement becomes a general value of the society, an illicit behavior may foreclose profitable opportunities in the future.

5. Conclusions

Refinement of antitrust laws requires experimentation and observation of the results. Indeed, banning cartel activity is merely symbolic if the ban is not reinforced with serious sanctions; for that reason, there is no doubt for competition authorities that, regarding offences like price fixing, substantial sanctions are crucial to deter, more so if we take into account the probability of detection.

Imprisonment might be regarded as the ideal option since it increases the value of the sanctions and it could be also regarded as an alternative to avoid problems caused by the imposition of high fines –i.e., bankruptcy–. However, we have to bear in mind that it shows several important drawbacks, the main one being the reluctance of judges to impose prison sentences.

Thus, the application of penal sanctions to antitrust offences would, in the current climate in the EU, create more issues than it would solve. Furthermore, criminal sanctions must always be used as *ultima ratio*. Therefore, the author propounds that the EU should strive to improve preexisting approaches before resorting to new ones, yet untested in the EU.

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⁶²⁸ This would imply an order of a Court banning the individual who has infringed the antitrust law for a stated period from becoming the director of a firm again.

⁶²⁹ Connor, John M., "Global antitrust prosecutions of modern international cartels" (2004): 257

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