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An Assessment of the Penalties System for Infringements of EU Competition Law:

Can Personal Sanctions be the Missing Piece of the Puzzle?

Kalliopi Kokkinaki

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Institute for European Studies, VUB
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ABSTRACT

Competition law seeks to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. In order to be successful, therefore, competition authorities should be adequately equipped and have at their disposal all necessary enforcement tools. However, at the EU level the current enforcement system of competition rules allows only for the imposition of administrative fines by the European Commission to liable undertakings.

The main objectives, in turn, of an enforcement policy based on financial penalties are two fold: to impose sanctions on infringing undertakings which reflect the seriousness of the violation, and to ensure that the risk of penalties will deter both the infringing undertakings (often referred to as 'specific deterrence') and other undertakings that may be considering anti-competitive activities from engaging in them (often referred to as 'general deterrence'). In all circumstances, it is important to ensure that pecuniary sanctions imposed on infringing undertakings are proportionate and not excessive.

Although pecuniary sanctions against infringing undertakings are a crucial part of the arsenal needed to deter competition law violations, they may not be sufficient. One alternative option in that regard is the strategic use of sanctions against the individuals involved in, or responsible for, the infringements. Sanctions against individuals are documented to focus the minds of directors and employees to comply with competition rules as they themselves, in addition to the undertakings in which they are employed, are at risk of infringements.

Individual criminal penalties, including custodial sanctions, have been in fact adopted by almost half of the EU Member States. This is a powerful tool but is also limited in scope and hard to implement in practice mostly due to the high standards of proof required and the political consensus that needs first to be built. Administrative sanctions for individuals, on the other hand, promise to deliver up to a certain extent the same beneficial results as criminal sanctions whilst at the same time their adoption is not likely to meet strong opposition and their implementation in practice can be both efficient and effective.

Directors' disqualification, in particular, provides a strong individual incentive for each member, or prospective member, of the Board as well as other senior executives, to take compliance with competition law seriously. It is a flexible and promising tool that if added to the arsenal of the European Commission could bring balance to the current sanctioning system and that, in turn, would in all likelihood make the enforcement of EU competition rules more effective.

Therefore, it is submitted that a competition law regime in order to be effective should be able to deliver policy objectives through a variety of tools, not simply by imposing significant pecuniary sanctions to infringing undertakings. It is also clear that individual sanctions, mostly of an administrative nature, are likely to play an increasingly important role as they focus the minds of those in business who might otherwise be inclined to regard infringing the law as a matter of corporate risk rather than of personal risk. At the EU level, in particular, the adoption of directors' disqualification promises to deliver more effective compliance and greater overall economic impact.

ABOUT THE AUTHOR

Kalliopi Kokkinaki holds a degree in Law from the National and Kapodistrian University of Athens, and joined Athens Bar Association in 2010. She holds a Master in International and European law from the IES-VUB (Magna Cum Laude). Since September 2013 Kalliopi has been a Trainee with DG COMP, European Commission.

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LIST OF ABBREVIATIONS

CDDA	UK Company Directors Disqualification Act 1986
CDO	Competition Disqualification Order
CDU	Competition Disqualification Undertakings
CFI	Court of First Instance
ECHR	European Convention on Human Rights
ECtHr	European Court of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
NCA	National Competition Authorities
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading
OJ	Official Journal of the European Union
SMEs	Small and Medium-sized Enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
PJCC	Police and Judicial Cooperation in Criminal Matters
UNCTAD	United Nations Conference on Trade and Development

1. INTRODUCTION

The main objective of competition law and policy is to promote rivalry between firms as a means of assisting in the creation of markets responsive to consumer signals, and ensuring the efficient allocation of resources in the economy and efficient production with incentives for innovation¹. This is expected to lead to the best possible choice of quality, the lowest prices and adequate supplies to consumers, leading to increased consumer welfare² which would have otherwise been highly damaged by infringements of competition law, such as cartel agreements and abuse of dominant positions. The additional revenue achieved worldwide, for instance, by cartel prices above the competitive equilibrium has been estimated to exceed €25 billion per year³. Efficient allocation and utilisation of resources also lead to increased competitiveness, resulting in substantial growth and development⁴. Consequently, deterring firms from violating competition law and detecting those organisations and individuals that continue to undertake anti-competitive activity is rightfully expected to be one of the most important tasks for competition authorities internationally⁵.

Competition authorities, in turn, should be adequately equipped and have at their disposal all necessary enforcement tools in order to achieve their enforcement role effectively. At the EU level, however, the current enforcement system of competition rules allows only for the imposition of administrative fines by the European Commission (hereinafter the “Commission”) to infringing undertakings. This sanctioning system has recently received severe criticism for being insufficient to successfully deter violators and secure compliance with the EU competition rules. Therefore, the question about whether it is high time that alternative sanctions were added to the Commission’s arsenal could not be more topical.

Since 2006 the Commission, aiming at the maximisation of the effectiveness and uniformity of the sanctioning system at the EU level and the enhancement of its deterrent effect⁶, has opted for an enforcement strategy based on high fines against undertakings. Recently, it has also taken initiatives to promote a parallel system of civil actions for damages filed by victims of competition law infringements^{7,8}. However, despite its best efforts, the Commission has not been able yet to diminish the number of competition law infringements and hence the right mix of enforcement tools and sanctions still remains an unresolved issue at the EU level.

In particular, although it is argued that corporate fines are necessary, as otherwise corporations would do little to prevent infringements by their employees, they are insufficient since the ability of firms to prevent or deter their employees from committing infringements may be limited while there is no evidence that the

¹ OECD, 2003.

² See also Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, p. 97-118, par. 13.

³ Connor and Helmers, 2006

⁴ See also Porter, 1990.

⁵ OFT 2009, 5.

⁶ As also Ortiz Blanco and Lamadrid de Pablo note, “Since its inception -and particularly more so following the entry into force of Regulation 1/2003-, the ability of EU competition law to attain its goals has been conditioned to its effective and uniform enforcement. Recital 1 of Regulation 1/2003 clearly states that ‘[i]n order to establish a system which ensures that competition in the common market is not distorted, Articles [101] and [102] of the Treaty must be applied effectively and uniformly in the Community’. This need for effective and uniform enforcement of the competition provisions of the Treaty was thus the main driver of the reform at a time when the EU was enlarging from 15 to 27 Member States.” Ortiz Blanco and Lamadrid de Pablo, 2011, 7.

⁷ Collins, 2011: “Private actions, although primarily aimed at providing compensation, add to the total liability of a business and as such to the total risk arising from infringement, again boosting the incentives for compliance”.

⁸ On June 11, 2013 the European Commission released a Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [COM(2013) 404 final/2013/0185 (COD)].

increasingly stringent fines have an impact on the number of infringements⁹. Fines against undertakings should thus be complemented with other measures to increase deterrence, in particular sanctions targeting company officers who are responsible for leading the company to commit infringements¹⁰.

There is indeed an increasing willingness around the world to adopt criminal and/or administrative sanctions against individuals. At the EU level, to adopt criminal sanctions against individuals would signify a radical change in the current enforcement system and most importantly, it would be a policy choice not devoid of structural difficulties and legal obstacles making both its feasibility and its desirability at the moment risky. However, to legislate for the disqualification of those individuals responsible for committing competition law infringements is realistically both a more efficient and more effective policy choice for the present level of development in the EU. Based on the UK model of directors' disqualification orders, this paper seeks to analytically test the null hypothesis that competition disqualification orders are the missing piece of the puzzle in EU level.

This paper is structured as follows. Section 2 gives an overview of the goals and targets of the current sanctioning system in EU level and explains the main reasons why the EU should look for alternative sanctions. Section 3 critically assesses the need to combine corporate sanctions with sanctions against individuals in order to better achieve the goals of competition law enforcement. Section 4 examines both the feasibility and desirability of introducing criminal sanctions in EU level and explains why criminalisation is indeed not, at present, the most preferred policy choice. Section 5 argues instead in favour of the adoption of a complementary sanctioning system of directors' disqualification and assesses its added value to the current system. Finally, Section 6 concludes.

2 OPTIMAL SANCTIONS

2.1 The goals and targets of the sanctioning policy of the European Union

Article 101 TFEU provides that agreements and concerted practices “between undertakings” as well as decisions “by associations of undertakings” that restrict or distort competition shall be prohibited. Likewise, pursuant to Article 102 TFEU any abuse “by one or more undertakings” of a dominant position shall also be prohibited. It is thus clear already from the beginning that under EU competition rules only undertakings or other legal persons may be sanctioned. In fact, any undertaking found in breach of EU competition law is faced with the risk of pecuniary fines that according to Article 23(2) of Regulation No 1/2003 can amount up to 10% of that undertaking's total turnover in the preceding business year^{11,12}.

More specifically, pursuant to Recital 4 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (hereinafter the “2006 Commission Fining Guidelines”):

“[T]he Commission must ensure that its action has the necessary deterrent effect. [...] Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other

⁹ Geradin, 2011, 7.

¹⁰ Bruegel Policy Brief, 2013.

¹¹ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹² In order to set the final amount of the fine a two-step procedure is introduced: first, the basic amount of the fine is being determined, based on the gravity and duration of the infringement; second, where appropriate and applicable, the Commission takes also additional adjustment factors into account [Geradin, 2011, 6].

undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence)”¹³.

The basic underlying assumptions of the above explanatory note, which was not explicitly included in the previous version of the Commission’s Fining Guidelines,¹⁴ are two fold: a) that fines form an important and currently the only instrument at the hands of the Commission for the prevention and the punishment of infringements of EU competition rules,¹⁵ and b) that the undertaking is indeed the current focus of deterrence, although there are in theory two potential targets for competition law sanctions, i.e. on the one hand, the infringing undertaking and on the other hand, the individual who fixes prices on behalf of it and/or puts in effect strategies capable of illegally abusing its dominant position.

In these circumstances, it is submitted that the optimal sanction for competition law infringements should be based upon two pillars: first, the total fine must be great enough, but no greater than the necessary, to take the profit out of the infringer. As Judge Ginsburg and Commissioner Wright further note “where the conduct is profitable to the firm, and therefore increases its share price, it is more likely that both firm and the individual perpetrator are rewarded than penalised by the market, thus increasing the total sanction is necessary to provide optimal deterrence”¹⁶. Second, individuals responsible for the alleged infringement of competition rules should be given a sufficient disincentive to discourage them from engaging in that activity. This could take the form of either a fine, incarceration, or, as proposed here, a disqualification order.

2.2 The inadequacy of the current sanctioning system at the EU level

Many scholars and practitioners both in Brussels and abroad have gradually increased their criticism against at least some of the current sanctioning system’s most important features. In particular, the current sanctioning system at the EU level is seen as one-dimensional and thus inadequate to successfully meet its purpose. It is in fact submitted that notwithstanding their recently increased level, fines are still very small compared to what is needed to ensure deterrence, and recidivism proves that point well in practice. At the same time, the obscure and possibly unfair rule on parent liability and of course the alleged violation of some of the most fundamental principles for the protection of human rights only add to the criticism against the sanctioning system now in place at the EU level¹⁷.

¹³ Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 4.

¹⁴ Commission 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.

¹⁵ The prevention of the violations of the antitrust prohibitions is the second and central task of the three-tier role of the enforcement of the antitrust prohibitions. As Wils notes, the first task is to clarify the content of the prohibitions of 101 and 102 TFEU and the third one is dealing with the consequences when violations have nevertheless happened. In order to prevent the violations of the antitrust prohibitions to occur three conditions exist: firstly, a company, or the individual decision-maker on behalf of a company needs to have the opportunity to commit the violation, then the willing to do so and finally the incentives to commit such a violation, meaning that the benefits must exceed the expected costs. Therefore, if one of these three factors can be influenced, proportionately, this can also lead to the prevention of the violations.

¹⁶ Ginsburg and Wright. 2012, 48

¹⁷ When fines are imposed by the Commission the latter needs to have fully abided by the general principles of EU law. Mostly, the Commission needs to comply with the principles of equal treatment and proportionality, the principle of legality and non-discrimination as well as the *ne bis in idem* principle. For more detail on these principles and the way they apply on the calculation of fines processes, see I. Van Bael and J.F. Bellis, *Competition Law of the European Community*, Alphen aan den Rijn: Kluwer Law International, 2010, 1087. For the principle of *ne bis in idem*, see Wils 2003, “The Principle of ‘Ne Bis in Idem’ in EC Antitrust Enforcement: A Legal and Economic Analysis”, 131.

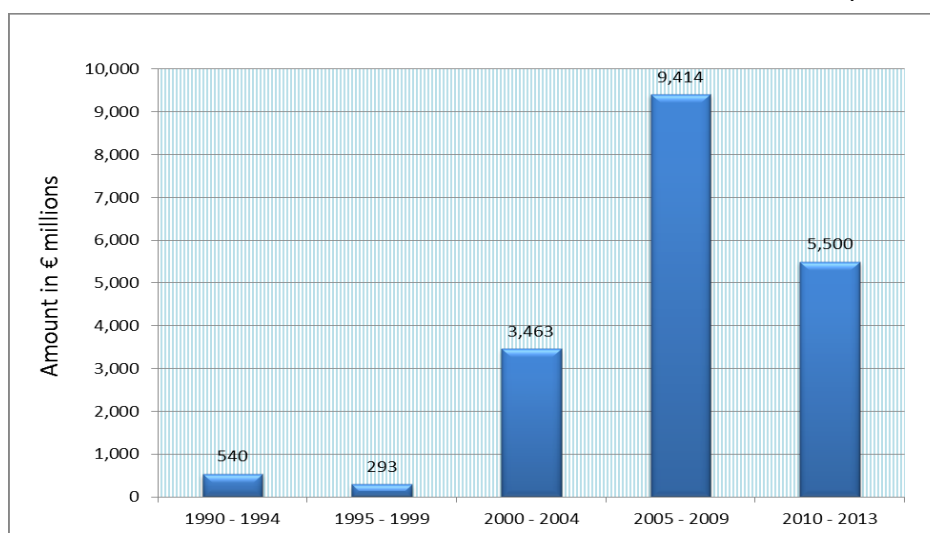
2.2.1 The level of fines

As Wils eloquently notes, by imposing fines to firms which have violated EU competition law the goal of prevention of other infringements may be achieved in three ways. First, fines may have a deterrent effect by creating a credible threat to firms of being prosecuted and fined. This has proved to weigh sufficiently in the balance of expected costs and benefits and ultimately deter calculating companies from committing competition law violations¹⁸. Secondly, the risk of being fined may reduce business people's willingness to commit violations by having a moral effect on them and by sending a message to the spontaneously law-abiding amongst them. Thirdly, through leniency policies and the use of other adjustment factors affecting the final amount of the fine, the balance of expected benefits and costs of violations may alter as the cost of setting up and running cartels in particular would be raised¹⁹.

In general, the EU seems to accept the premise that the most effective and deterrent enforcement policy is the one based on large fines, and that the larger the fine the greater its deterrent effect. As a former and particularly active Commissioner in charge of EU competition policy, Neelie Kroes, has noted:

"Fines were not deterrent in previous decades. [...] Year after year we would catch a cartel and impose a fine that would have little or no effect on a company's incentives. What is the point of that? Now, taking better account of the economic impacts of abuses and cartels, we fine in order to deter, linking the fine to the relevant sales of the infringing company [...] So, in adopting a clear policy basis for deterrent fines and a focus on the most serious infringements of course the fines have increased!"²⁰

In line with this viewpoint, the EU Courts have in the past encouraged and ultimately reinforced the policy of imposing sky-rocketing fines as the right tool for achieving deterrence²¹. Statistics on the Commission's fining practice prove indeed that as of 2006 the amount of fines has increased exponentially:



Source: European Commission's website

¹⁸ This so-called "internalisation" approach is based upon the seminal thesis of Gary S. Becker of 1968 according to which the economic analysis of optimal legal sanctions and criminal punishments is built upon the foundational insight that penalties should be sufficient to induce offenders to internalise the full social cost of their crimes. See Becker, *Crime and Punishment: An Economic Approach*, 1968, 169. See also Landes, *Optimal Sanctions for Antitrust Violations*, 1983, 652.

¹⁹ Wils, 2006, 11.

²⁰ Kroes, 2009.

²¹ Ortiz Blanco and Lamadrid de Pablo, 2011. See also, inter alia, ECJ, *Musique Diffusion Française and others v Commission*, Joined Cases 100/80 to 103/80, paras.106-109.

Economic theory suggests, in fact, that any fine should be equal in probability terms to expected profits. This essentially means that with a 15 percent chance of detection in the case of cartels, for example, fines would need to be 6.7 times the additional profits in order to be at the optimal level²². Therefore, even under a policy of very high fines in nominal numbers as is currently exercised by the European Commission, for a significant number of cartels, fines are still below what would be needed to ensure deterrence, even assuming a 100 percent detection rate²³.

In addition, very high fines may introduce distortions into the market ultimately leading to higher prices for consumers. Again, in the words of Judge Ginsburg and Commissioner Wright “[I]t may simply be that corporate fines are misdirected, so that increasing the severity along this margin is at best irrelevant and might counter-productively impose costs upon consumers in the form of higher prices as firms pass on increased monitoring and compliance expenditures”²⁴. High fines may also be unacceptable as disproportionate and run the risk of exceeding the ceiling of companies' ability to pay²⁵.

Wils explains that, even if fines stay below the level of inability to pay, their imposition may indeed have “undesirable side-effects”²⁶. More specifically, when no perfect markets exist, high fines imposed on a company are expected to have a negative impact on all its stakeholders. Bondholders and other creditors of the infringing undertaking would be clearly in a worst position. The need to cope with the non-predictable but in any case high level of fines would in all likelihood also result in a decrease in the salaries and bonuses of the infringing company's employees. Furthermore, revenues from income tax would be reduced. Finally, as already suggested above, the infringing undertaking in order to partially or fully cover for its losses from a high fine is expected to transfer this extra cost further down the trade chain to the final consumer in the form of higher prices²⁷.

2.2.2 Recidivism: a proof of ineffectiveness of the current sanctioning system

Recidivism²⁸ suggests that in practice even extremely high fines in nominal numbers are not deterrent enough²⁹. Although in the EU the Commission has

²² Bruegel Policy Brief, 2013.

²³ Ibid.

²⁴ Ginsburg & Wright, 2012, 57.

²⁵ See more for “inability to pay” at Grave C. and Jenny Nyberg J., 2011, ‘A company’s “inability to pay” a cartel fine imposed by the European Commission’.

²⁶ Wils also writes about the problem of achieving marginal deterrence with a policy of high fines: “The question could also be raised whether a strategy of very high fines and low probability of punishment would not pose problems for marginal deterrence, in that antitrust violators, once they are committing the violation, could no longer be deterred from making the violation worse, by expanding its scope, duration or intensity, because they would be no possibility left for threatening them with an ever higher fine if they did so. However, this concern may not be of much practical importance, as the expansion of the scope, duration or intensity would increase the risk of detection and punishment, all the more if one (reasonably) assumes that competition authorities will, in selecting which violations to prosecute, give priority to the most serious ones”, in Wils P.J. Wouter, 2006, Optimal Antitrust Fines: Theory and Practice, June 2006, World Competition, Volume 29, Issue 2, 183-208. See for a more general discussion on the issue, Shavell Steven, 1992, A Note on Marginal Deterrence, International Review of Law and Economics, Volume 12, Issue 3, 345-355.

²⁷ Calvino, 2006.

²⁸ According to the EU General Court, “recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements”. See inter alia ECJ Thyssen Stahl v Commission, Case T-141/94, par. 617.

²⁹ Notwithstanding paragraph 28 of the Commission's Fining Guidelines, stating that: “The basic amount [of the fine] may be increased where the Commission finds that there are aggravating circumstances, such as [...] 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 Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established.”

raised the maximum fine surcharge for repeat offenders,³⁰ their number is still considerable:

Cartel (Decision Date)	Firm	Recidivism
Professional Videotapes (20/11/07)	Hitachi	Ignored
Chloroprene Rubber (5/12/07)	Bayer ENI	50% 60%
Synthetic Rubber (23/01/08)	Bayer	50%
Sodium Chlorate (11/06/08)	Atochem/Elf Aquitaine Akzo Nobel	90% Ignored
Candle Waxes (1/10/08)	Shell Repsol ENI ExxonMobile	60% Ignored 60% Ignored
Car Class (12/11/08)	Saint-Gobain	60%
Marine Hoses (28/01/09)	Dunlop Oil & Marine	Ignored
Calcium Carbide (22/07/09)	Akzo Nobel Evonik Degussa	100% 50%
Power Transformers (7/10/09)	ABB Toshiba Hitachi Siemens	50% Ignored Ignored Ignored
Heat Stabilisers (11/11/09)	Elf Aquitaine / Akrema France Akzo Nobel	90% Ignored
DRAM (19/05/10)	Toshiba	Ignored
Prestressing Steel (30/06/10)	ArcelorMittal Saarstahl	60% ?
Airfreight (9/11/10)	SAS	50%

**Source: Veljanovski Cento, Deterrence, Recidivism and European Cartel Fines³¹*

The non-elimination of recidivism at the EU level is at least a strong indication that having opted for an enforcement policy based only on large fines against infringing undertakings may not be as effective as originally envisaged. Those in business seem indeed to regard infringing the law solely as a matter of corporate risk. In the words of Prof. John Connor, “a high rate of recidivism would demonstrate the failure of specific (or special) deterrence, i.e., that many companies sanctioned for cartel offenses nonetheless were not deterred from engaging in future cartel activity. A conspicuous failure of specific deterrence also would suggest that cartel enforcement is failing to achieve its primary goal—general deterrence”³².

³⁰ The Commission has not imposed a penalty surcharge anywhere near that allowed for under the 2006 guidelines. No firm irrespective of the number of prior infringements has been surcharged more than 100%. In fact only one firm (Akzo in Calcium Carbide) has been surcharged 100% and it had four previous offences identified by the Commission, which should have attracted a maximum surcharge of 400% according to revised guidelines. It appears that the Commission treats the maximum 100% as an overall maximum for recidivism rather than for each prior offence. See further Veljanovski Cento, Deterrence, Recidivism and European Cartel Fines, Table 3, page 12. Available at SSRN: <http://ssrn.com/abstract=1758639>.

³¹ Veljanovski, 2011, 12.

³² Connor, 2010, 101.

2.2.3 Parent liability: a negative externality of the current sanctioning system

For the purposes of EU competition law, the term “undertaking” refers to “an abstract term for entities engaged in economic activity, regardless of their legal status”³³. An undertaking is thus an economic entity which may include both a parent company and its subsidiary when the former is able to exert “decisive influence” over later and it actually does so³⁴. Furthermore, pursuant to settled case-law, when a subsidiary is wholly owned by its parent company there is a rebuttable presumption that the latter does in fact exercise such decisive influence over the former³⁵ and as a consequence the conduct of the subsidiary should be imputed to the parent company. The ECJ in the AEG case stated indeed for the first time that “[...] the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company in particular where the subsidiary, although having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.”^{36,37}

The above rule on parent liability clearly has a significant impact both on the way fines are calculated and on their maximum amount given that the level of the fine depends on the amount of sales and the turnover of the infringing undertaking, i.e. both the subsidiary and its parent company³⁸. Some commentators have thus critically confronted the above rule as not abiding by the principles of equal treatment and proportionality and, mainly, as unjust and ineffective. At the core of this criticism lies the perceived anomaly of holding a company liable (the parent company) for actions the management team of which has never been involved in. Hofstetter and Ludescher argue that only if the parent company has had an active role in the alleged infringement can it be rightfully accused for it³⁹. Otherwise, i.e. in the absence of such involvement, the parent company should be held liable only if it had failed to implement a robust compliance programme within its corporate group⁴⁰. Other commentators further note that the lack of certainty which the parent liability doctrine entails and in general the arbitrariness with which liability is being

³³ ECJ, Dansk Pelsdyravlerforening v Commission Case T-61/89.

³⁴ CFI, Tokai Carbon Co. Ltd and others v Commission, Joined Cases T- 71, 74, 87 and 91/ 03, paras 59-60.

³⁵ ECJ, Akzo Nobel NV and others v. Commission, Joined Cases C- 97/08, para 60: “According to the settled case-law of the Court of Justice and the Court of First Instance (ECJ, Stora Kopparbergs Bergslags v Commission Case T-354/94, paragraph 80, confirmed by ECJ, Stora Kopparbergs Bergslags v Commission Case C-286/98, paragraphs 27 to 29), the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power.”

³⁶ ECJ, AEG-Telefunken AG v Commission, Case 107/82, para 49.

³⁷ In order to assess whether a subsidiary has such a dependence relationship with its parent company, a two-step test needs to be undertaken: first, it must be checked whether the parent company is able to decisively influence its subsidiary. Secondly, (after checking that such ability to influence generally exists between these two legal persons), it must be affirmed that such an influence has indeed been exercised in the case at hand. In order to assess whether the parent company has exercised such decisive influence over its subsidiary the Court must evaluate “all the relevant factors relating to economic, organisational, and legal links which tie the subsidiary to the parent company, which may vary from case to case and can therefore not be set out in an exhaustive list” (ibid, para 70). Moreover, as it was established in Akzo Nobel case and was later confirmed in the Arkema & Elf Aquitaine case, the Commission’s decision on the substance must be justified, and in particular it must “set out adequate reasons why the facts or law relied upon were not sufficient to rebut that presumption” (ECJ, Akzo Nobel NV and others v. Commission Case C- 97/08, par. 60-61. ECJ, Arkema & Elf Aquitaine v. Commission, Joined Cases C-520, 521/09, par. 153).

³⁸ See Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, in combination with the 2006 Commission’s Guideline on the method of setting fines.

³⁹ Hofstetter and Ludescher, 2010, 55.

⁴⁰ As Hofstetter and Ludescher note “The implementation of compliance programmes by parent companies should also be taken into account by the Commission. [...] Parent companies that have not participated in the infringement but which exert decisive influence on the conduct of their subsidiaries should thus only be held liable if they failed to monitor the compliance of their subsidiaries with competition law by implementing – or by making sure that its subsidiary implements – a robust compliance programme.” (Hofstetter and Ludescher, 2010, 66)

determined by the Commission in these cases are contrary to the principle of legality and the presumption of innocence under Article 6 (2) and 7 ECHR⁴¹.

Therefore, on account of this bold legal interpretation of the relevant Treaty provisions by the Commission, which was later deemed as justified by the EU Courts, parent companies are assumed to have full responsibility for the illegal actions of their fully owned subsidiaries and this, in turn, makes the potential of imposing exuberant and possibly unfair fines extremely high. The critics of course point out that by deriving full responsibility from decisive influence the current system is in that way unjust and in any case, ineffective in preventing competition law violations. More importantly, it is a paradox that the Commission selects to exert its discretion and form a rule to sanction companies which have not participated in any competition law infringement and which, irrespective of their best effort, may not have been able to prevent the infringement attributed to their subsidiaries, whilst at the same time it [the Commission] totally disregards the role of the individuals actually committing the infringement.

2.2.4 The nature of fines as criminal: does it make any difference?

One last point that could be of significant importance for the purposes of this paper relates to the criminal nature of fines at the EU level and its possible repercussions to the design of the institutional model currently in place for the enforcement of EU competition rules.

Critics based on the so-called "Engel criteria" of the ECtHR⁴² point out that the high level of fines is a clear indication of their punitive and thus criminal nature. As a consequence, they claim that the current institutional architecture of competition law enforcement is unacceptable and should be altered to either a bifurcated administrative or even better a bifurcated judicial model. However, settled case law of the EU Courts has opposed to the above criticism as unfounded. Very recently, in fact, the ECJ explicitly confirmed the above thesis in its judgement of July 18, 2013, in the Schindler case, where it explicitly stated that "the fact that decisions imposing fines in competition matters are adopted by the Commission is not in itself contrary to Article 6 of the ECHR as interpreted by the European Court of Human Rights"⁴³.

Wils had already provided the theoretical background to rebut the above criticism. In short, according to the now Hearing Officer the recent increase in the level of competition law fines imposed by the Commission has no relevance whatsoever in this respect. Even if these fines, Wils continues, were to be increased further in the future, they would still not be "criminal" within the meaning of EU law. And even when they were at their lowest in the past, they were already "criminal" within the meaning of the ECHR. Indeed, the ECtHR has consistently held that, in determining whether a procedure is "criminal" within the meaning of Article 6 ECHR, the assessment of the severity of the penalty, under the third of the "Engel criteria", is to be made by reference to the maximum potential penalty for which the relevant law provides. The maximum fine which can be imposed by the Commission has always been and still is 10% of the undertaking's total turnover in the preceding business year⁴⁴.

⁴¹ Ortiz Blanco, Givaja Sanz & Lamadrid de Pablo, 2011, 11-12.

⁴² ECtHR, *Engels and others v. Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, par. 82.

⁴³ ECJ, *Schindler Holding Ltd and Others v Commission*, Case C-501/11 P par. 33. See also ECJ, *Chalkor AE Epexergasias Metallon v Commission* Case C-386/10 P.

⁴⁴ Wils, 2010, 13.

3 INTRODUCE SANCTIONS TO INDIVIDUALS

Corporate fines are necessary but not sufficient for the effective enforcement of competition rules. Even in exuberant and possibly disproportionate and unfair numbers, fines are not able to achieve deterrence and thus unless the institutional limitation at the EU level to provide only for corporate fines changes suboptimal end results are inevitable. In these circumstances, it should not come as a surprise that more and more commentators now lament the fact that although the role of the individuals involved in competition law infringements is clearly crucial, sanctions against individuals (fines, imprisonment or directors' disqualification) are totally missing from the Commission's arsenal⁴⁵.

This criticism gains in popularity although, at least in theory, under the current sanctioning system at the EU level corporate penalties aim at discouraging the management team and the employees of any firm to participate in anti-competitive behaviour, and at the same time also encourage firms to monitor, detect and prevent their employees from breaching competition law rules⁴⁶. However, this would hold true only if in each and every case, on the one hand, every stakeholder of the infringing firm and not only the final consumers were truly damaged and, on the other hand, the management team of the infringing firm could totally control its employees. This might be the case for SMEs, but when the sanctioned company is a large multinational total control of the management team over the corporate group's employees and lower rank executives is not an easy task. On the contrary, in these circumstances, breaking competition rules may turn out to be a regular phenomenon as the corporate group's employees and lower rank executives have a personal interest to secure a promotion, higher compensation, etc. In addition, shareholders do not form a credible threat in these cases since due to their limited influence over the corporation's everyday operations and on account of the fact that share's ownership change is usually frequent they lack the incentive to control their managers' behaviour⁴⁷.

Therefore, if the threat of fines to infringing undertakings cannot sufficiently prevent price fixing and other competition law violations of comparable profitability and ease of concealment, the question of what could be done to ensure effective deterrence becomes crucial. Arguably, providing for sanctions against individuals in EU level could be the key missing factor for a truly effective sanctioning system as it may provide the missing supplementary incentives to people in business to refrain from infringing competition law and influence their moral commitment to the law.

4 CRIMINAL SANCTIONS

Criminal sanctions against those individuals who have played a key role in the infringement of competition law have been adopted by many countries worldwide. They vary from pecuniary criminal fines to imprisonment. On the one hand, with regard to the former, reference is made here to the criticism reiterated above, according to which fines even when imposed on individuals and even of a punitive nature appear unlikely to achieve effective deterrence unless their level is truly super exuberant and thus from a legal point of view disproportionate and unjust. On the other hand, custodial sanctions are surely the most controversial, although allegedly also the most effective, criminal sanctions and combine two main virtues: they have a significant deterrent

⁴⁵ Ortiz Blanco and Lamadrid de Pablo, 2011, 40.

⁴⁶ As Geradin notes, the undertakings in order to check their employees' compliance with the antitrust rules: "First, firms can check the compliance background of the individuals before hiring (or promoting) them. Second, companies can establish a law-abiding culture where compliance with antitrust rules is one of the top priorities. And third, they can monitor the conduct of their employees and sanction individuals who breach the law" (Geradin, 2011, 20).

⁴⁷ Wils, 2001, 22.

effect and they are also uniquely positioned in strengthening people's moral commitment to the law⁴⁸.

In the EU, a significant number of Member States have already adopted criminal sanctions of some kind for competition law infringements⁴⁹. Other Member States are currently in the process of adopting similar provisions in their competition laws⁵⁰. However, criminalisation of competition law is not a common trend in all EU Member States. Some of them, in fact, have no criminal sanctions in their competition laws⁵¹, others do not qualify the anti-competitive practices as a separate criminal offense⁵² and a few have decided to decriminalise their competition laws^{53, 54}.

It is also interesting to note that in the USA a system of criminal sanctions was introduced already in 1890 with the adoption of the Sherman Act; which provides for both imprisonment and other pecuniary criminal fines for breaching competition law. However, even in USA, imprisonment has become a common practice only during the years after the millennium. To further illustrate this point, it is noteworthy that within a period of nine years (from 2003 to 2012) the US courts sentenced 255 people to a total of 176,526 days of imprisonment, while their average imprisonment time per offender was around twelve months⁵⁵.

In general, the threat of imprisonment seems to have a significant deterrent effect. The US example, for instance, is indicative of the fact that the number of the domestic cartels may decline as a result of the imposition of jail sanctions to individuals, and this has been pointed out as one of the main reasons for which some of the EU Member States have indeed introduced custodial sanctions in their national laws⁵⁶.

Notwithstanding the abovementioned normative strengths and weaknesses of a penalties system with criminal sanctions of any kind against individuals, the adoption of a similar system at the EU level must first take due account of all endemic limitations of the EU political environment. These limitations centre mostly on social, legal and political factors. In essence, before adopting such a system at the EU level two main questions need to be answered: whether the introduction of criminal sanctions to individuals is feasible and if yes, whether it is desirable.

4.1 Is Criminalisation at the EU level feasible?

Before the Treaty of Lisbon came into force and under the pillar structure of the Treaty of Maastricht, the introduction of all measures of a criminal nature fell under the area of Police and Judicial Cooperation in Criminal Matters [PJCC]. Therefore, any new measure introducing criminal sanctions to individuals would need to be discussed and decided under the PJCC. However, this would not have been ideal in the case of criminal sanctions to individuals in the area of EU competition rules. On the one hand, non-competition law experts would have decided on a core policy aspect that could fundamentally alter the balance of the

⁴⁸ Wils, 2001, 28.

⁴⁹ Such as United Kingdom, Slovakia, Greece, see Annex.

⁵⁰ Like in The Netherlands.

⁵¹ Sweden, Lithuania, Finland, see Annex.

⁵² Germany and Italy.

⁵³ Austria.

⁵⁴ Pijnacker Hordijk Erik, 2011.

⁵⁵ The U.S. Department of Justice, 2013.

⁵⁶ Werden Gregory, Hammond Scott and Barnett Belinda, 2011.

whole enforcement system. On the other hand, there would have been a need to cope with the highly complex decision making process that characterised the procedure under the third pillar. In any case, the EU's activity and competence under this pillar was controversial and many Member States were opposed to the idea of "supranational intervention". This criticism, as Dawes and Lynskey have also pointed out, reached the point to question the validity of the decisions made under the third pillar⁵⁷.

Relatively recently, however, the Court of Justice in a case concerning environmental crimes seems to have altered this position. The Court suggested that the then European Community was competent to require Member States to introduce criminal measures where these were "necessary in order to ensure that the rules [...] on environmental protection are fully effective".⁵⁸ The Court explicitly stated that measures against "environmental crimes" can be adopted on the basis of Article 175 EC (today's 192 TFEU), which later also formed the legal basis of Directive 2008/99/EC by the European Parliament and the Council of 19/11/2008 on the protection of the Environment through Criminal Law. Accordingly, it could reasonably be argued that the same legal reasoning could also be applied in an analogous manner to other EU competences⁵⁹, such as competition law. Of course, the proposed analogy above was not undisputed in particular for use in the area of EU competition law.

With the Treaty of Lisbon the picture became somewhat clearer, although not crystal clear. Article 83 of the TFEU forms the legal basis for the introduction of criminal provisions in EU law. More specifically, Article 83 paragraph 2 explicitly states that "minimum rules with regard to the definition of criminal offences and sanctions can be introduced by way of a directive where it proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures". In order to make use of this provision of the TFEU, two conditions need to be satisfied. As Chalmers, Davies and Monti pointed out, this legal provision has two separate conditions⁶⁰. First, the new directive must introduce measures which shall ensure the effective implementation of a Union policy; this has been interpreted as requiring the new measure to be the *ultime refugium* for harmonisation. Secondly, the new measure to be adopted needs to be related with an area which is already subject to harmonisation.

In particular in the area of EU competition law, however, it is hard to unequivocally conclude that these two conditions are indeed satisfied. Firstly, arguably given the current priorities of the EU the possible introduction of criminal sanctions against individuals in competition law proceeding is not automatically seen as essential. Secondly, although the substantive part of competition rules in the EU is up to a certain extent harmonised, the same is not the case with regard to sanctions against individuals⁶¹. Besides, Article 5 of Regulation 1/2003 provides that the Member States, when applying Articles 101

⁵⁷ Dawes and Lynskey 2008, 131.

⁵⁸ ECJ, Commission v Council (Environmental Crimes Framework Decision), Case C-176/03.

⁵⁹ Likewise, the Directive 2009/52/EC on minimum standards on sanctions and measures against employers of illegally staying third-country nationals, was introduced based on Article 79 TFEU, which requires criminal sanctions against employers of illegally residing third-country nationals.

⁶⁰ Chalmers, Davies and Monti, 2010, 617.

⁶¹ While the substantive notion of competition law and the infringements of it, having been harmonised, the sanctions regarding the nature of them and their duration differs among the Member States.

and 102 TFEU, may impose any penalty for which their national law provides. Therefore, in these circumstances, it could safely be argued that the introduction of criminal sanctions in EU competition law is not less legally problematic now than under the Treaty of Nice and its predecessors.

Notwithstanding the above, it has been argued that the introduction of criminal sanctions could be based upon two alternate legal bases, i.e. Articles 103 and/or 352 TFEU⁶². Before examining the substance of this proposal, however, it should be recalled that this is a different, although not totally irrelevant, debate to the one about the possible need for an amendment of Articles 101 and 102 TFEU so as to explicitly provide for sanctions to individuals. With regard to the later, in particular, it is argued that such an amendment should not be deemed necessary since both these Articles make no explicit derogation for individuals. Therefore, the argument goes, there is no reason to believe that individuals are not already a possible target of EU competition law. However, this is not an undisputed legal interpretation of the relevant Treaty Articles. It is submitted that this is a *contra legem* (even “*contra constitutionem*”) interpretation that is totally unfounded and thus illegal. According to this view, therefore, should the EU decided to introduce sanctions on individuals, either of a criminal or an administrative nature, both Articles 101 and 102 TFEU would need to be amended accordingly.

Irrespective of this controversy, however, Article 103 (1) TFEU empowers “the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, to lay down the appropriate regulations or directives to give effect to the principles set out in articles 101 and 102”. This open-ended provision could form the basis for the introduction of individual penalties in EU competition law. However, it is questionable whether the provision of paragraph 2 of Article 103 TFEU would allow for the introduction of prison penalties. Possibly, it could be argued that Article 103 (2) (a) which explicitly states that the regulations or directives referred to in Article 103 (1) “shall be designed in particular: (a) to ensure compliance with the prohibition laid down in Article 101 (1) and in Article 102 by making provision for fines and periodic penalty payments” permits not only the introduction of pecuniary penalties but also the adoption of criminal sanctions like imprisonment again by not specifically denying that. In any case, in the words of Wils: “if the Council were to come to the view that prison sanctions are necessary for effective deterrence, the reference to fines in Article 83(2)(a) [current 103(2)(a)] would not prevent it from adding such sanctions, given the wide mandate in Article 83(1) EC [103(1) TFEU] to lay down any ‘appropriate regulations or directives to give effect to the principles set out in Article 81 and 82 (current 101 and 102 TFEU)’”⁶³. Therefore, according to this view, Article 103 TFEU could rationally be interpreted to include fines solely in the form of an example and not in a limited sense, i.e. as a restriction of the EU’s power to introduce even more types of sanctions⁶⁴.

As already stated above, the second legal basis upon which a system of criminal sanctions could arguably be based is Article 352 TFEU. According to the now Hearing Officer, any measure that is considered necessary to attain the EU’s objectives and for the adoption of which the TFEU has not specifically provided

⁶² Wils, 2001, 37-40.

⁶³ Wils, 2001, 38.

⁶⁴ Ibid, 36-38.

the necessary powers to the Union institutions the Council of Minister is competent under the conditions laid down on Article 352 TFEU. However, even for the creator of this proposal, the use of this Treaty provision for the purposes of introducing criminal sanctions in EU competition law is not deprived of risk. It is in fact not denied that if the new legal act criminalising EU competition law was challenged before the European Courts the outcome could not be safely predicted⁶⁵. In any case, Article 352 TFEU could be considered as a sufficient legal basis for the adoption of criminal penalties only if it is considered as the *ultimum refugium* to achieve the EU's goals.

In addition, for both Articles 103 and 352 TFEU there is yet another and possibly even more serious complexity which stems from the prerequisite for the Council of Ministers to act on a Commission proposal. Both these two legal bases require the Commission to act first. However, as Vice President Almunia has explicitly stated during an interview in 2011 he does not deem it necessary and appropriate to introduce criminal sanctions on individuals and thus the above scenario does not seem for the time being likely. Vice President Almunia has in fact clarified that: "Custodial sanctions are not an option at EU level as this *would not be feasible* under the current legislative framework"⁶⁶ (highlighted added).

It is therefore clear that the question about the mere existence of a legal basis for the introduction of criminal sanctions for competition law infringements at the EU level remains a controversial issue. To be sure, however, an amendment of the Treaty seems to be required in order to safely proceed with the introduction of criminal sanctions to individuals for competition law infringements as the complexities noted above make the other path too risky.

In any case, even if the Commission proceeded with a proposal to the Council of Ministers for the adoption of criminal sanctions it is doubtful whether this could gather the necessary political support given that currently in the EU the decision making process is preferably built upon a consensus on all matters (even when no consensus is legally needed.). For this reason, for matters related to the adoption of new criminal measures, Article 83(3) TFEU introduces an "emergency break" provision, based on which when a Member of the Council of Ministers considers that a draft directive regarding such measures would negatively affect fundamental aspects of its national criminal justice system, it may request the draft directive to be discussed at the European Council level. Therefore, the introduction of criminal sanctions may be blocked at this later stage of the procedure which is indeed not unlikely to occur in practice since reluctance among the EU Member States still exists with regard to the criminalisation of EU competition law. This general reluctance is of course associated with the fact that notwithstanding the pro-criminalisation trend within some of the EU Member States, it is also true that only less than half of the EU Member States have adopted criminal penalties against individuals and at the same time some of the Member States (e.g. France and Luxembourg) consider to totally decriminalise their competition laws⁶⁷. In these circumstances, the introduction of criminal sanctions at the EU level is unlikely to gather the necessary political support.

⁶⁵ Chalmers, Davies and Monti, 2010, 214-219.

⁶⁶ Almunia 2011, 1. It is of course regretful that Vice President Almunia did not elaborate on this matter.

⁶⁷ Wils 2008, 173.

Furthermore, even if in the future the EU supported the introduction of criminal sanctions, there would still be problems regarding their enforcement and more specifically the protection of fundamental human rights of the alleged culpable individuals. In essence, if sanctions against individuals were to be introduced at the EU level the institutional architecture of the new enforcement system would need to be carefully designed. In particular, the crucial question that would necessarily arise would be to decide upon a possible move from an administrative to a judicial system of competition law enforcement or most probably a better mix of these two systems.

This of course resembles the current debate around Article 6 ECHR on the right to a fair trial and whether in fact the current administrative enforcement system at the EU level falls foul of the principles ascribed therein⁶⁸. It is important to note, however, that although the ECtHR has declared sanctions in the form of criminal fines imposed by an administrative authority compatible with Article 6 ECHR, the same cannot be unequivocally inferred also for cases imposing prison sanctions⁶⁹. Imprisonment is a much more onerous and stigmatic sanction than pecuniary fines and this allows us to conclude that the ECtHR would most probably deny to the Commission both the role of a prosecutor and a judge were custodial sanctions to be imposed. In any case, the Commission's power to investigate would in these circumstances be increased and most probably its prosecutorial and adjudicative functions be separated⁷⁰.

To sum up, even if criminalisation of competition law was deemed feasible at the EU level, several problems would still need to be tackled in the enforcement phase. Notwithstanding the correct answer to the above query, another equally or even more important question remains unanswered: is criminalisation desirable at the EU level?

4.2 *Is Criminalisation at the EU level desirable?*

The introduction of criminal sanctions at the EU level under specific circumstances may now be or can certainly in the future become feasible. However, such a radical change of the current sanctioning system seems at first site demanding, costly and hard to implement in practice. A deeper analysis is thus necessary in order to conclude with certainty if this change would even be desirable at the EU level.

On the one hand, due to its intrinsic features, criminalisation of competition law could possibly help the current sanctioning system effectively cope with its inherent problems of under-deterrence. As analysed above, solely the use of fines for undertakings, even when in exuberant numbers, cannot meet the goal of optimal deterrence. Criminal penalties, however, have a strong moral effect both on business people and the general public. The threat of imprisonment, in particular, is unique not only regarding its deterrent effect for the purposes of competition law enforcement but also regarding its impact in strengthening people's moral commitment to the law in general⁷¹. Furthermore, since the ultimate goal of custodial sanctions is to deter future infringements and also to

⁶⁸ Lenaerts and Vanhamme, 1997, 531 at 537.

⁶⁹ ECtHR, *Öztürk v. Germany*, No. 8544/79, §§ 52 and 50 and ECtHR, *Lutz v Germany* No. 9912/82 § 55.

⁷⁰ Wils, 2004, 201.

⁷¹ Wils, 2001, 29.

educate the public about basic standards of legal behaviour, a possible introduction of sanctions of this kind at the EU level may have an even greater impact to the business world and help people in business further develop their inherent (although possibly underdeveloped) sense of justice and even activate the automatic compliance of the law-abiding amongst them⁷².

Moreover, imprisonment is by far the most attractive type of sanction to the media. Quoting Werden and Simon: “prison sanctions not only send a special message not conveyed by fines, they also send it more effectively, as prison sentences for businessmen are much more newsworthy than fines and will thus receive more publicity and be more noted by other businessmen”⁷³. Liman further adds to this point that “to the businessman, prison is the inferno, and controversial risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations”⁷⁴. Of course, as the public attention on prison sanctions is growing there will be an equally significant need for a bigger political support⁷⁵.

On the other hand, as already hinted above, criminalising EU competition law and in particular introducing prison sanctions to individuals would not be devoid of problems. Firstly, the reform process of the current penalty system at the EU level would be expensive given the limited capacity of the existing prisons which would need to be taken into account⁷⁶. It is interesting to note that only for the accommodation of this simple but crucially important need the extra cost could be significant and it would increase even more if new prisons needed to be built.

Secondly, the investigative phase would need to be more intensive, since the standard of proof for the Commission as the prosecutor in criminal cases would of course be higher than the one leading to an administrative fine⁷⁷. This would automatically signify a stiff increase in the administrative burden of the Commission, leading either to the costly solution of hiring and training a lot of new and specialised employees as well as leasing new and bigger offices or de facto making the Commission less effective by limiting its ability to pursue its goals up to a satisfactory level.

Thirdly, the experience in the USA shows that the passing from having a competition law with criminal sanctions against individuals to actually enforce these provisions takes a lot of time and zymosis. It took 100 years to make criminal prosecutions a common practice in the USA. In turn, in the EU the lack of political support would most probably also result to a similar, if not even longer, delay. The lack of political support would also have negative externalities to the reform of other complementary systems the well-functioning of which is indispensable to the effective enforcement of the prison sanctions system in general⁷⁸. In addition, there is a risk of prosecutorial abuse in the immature EU environment that could possibly add to the above delay.

⁷² Dau-Schmidt, 1983, 75-76.

⁷³ Werden and Simon, 1987, 936

⁷⁴ Liman, 1977, 630-631.

⁷⁵ Klawiter, 2010, 83.

⁷⁶ Rosochowicz, 2004, 752.

⁷⁷ Reindl, 2006, 110-132.

⁷⁸ Klawiter, 2010, 83.

Fourthly, custodial sanctions are not appropriate for all the types of infringements. It is best suited against price fixers, but other than for cartel offenders prison sanctions may be seen as too harsh and inequitable. For example, although it might seem appropriate for a price fixer to be sentenced, the case may not necessarily be the same with the director of a dominant company found to have abused its position.

Finally, the general concern with regard to the effects of imprisonment on the society in general applies here as well. The theory behinds this point suggests that when people are put in jail they are diverged from their economic activity and hence they are deprived from offering to the society. The impact is even more substantial in the case of well-educated executives who used to work for companies with a big market share and influence.

The foregoing analysis of both the feasibility and desirability of introducing criminal sanctions at the EU level allows the reader to draw some fruitful conclusions. On the one hand, criminalisation of competition law at the EU level might now be and certainly can in the future become feasible although its implementation and its enforcement is not expected to be devoid of problems. For the effective introduction of criminal sanctions the necessary political support at the EU level needs to be achieved. However, this is not expected to happen in the foreseeable future. The EU Member States fear that their sovereignty would be further restricted by the introduction of such measures at the EU level and thus seem reluctant to adopt measures related to criminal matters at the EU level and at present they would rather see all relevant issues to be left to their sole competence. In any case, such a radical change to the current system would be a slow exercise. On the other hand, even under the premise that criminalisation could be feasible at the EU level it is still doubtful whether criminalisation would be desirable. At least for the present level of development, introducing criminal sanctions at the EU level does not seem to be the most preferred option. Although it is undeniable that corporate fines need to be complemented by credible commitments from the part of the individuals actually responsible for competition law infringements and that criminal sanctions in general have a significant deterrent effect, the high costs and the structural problems of such a radical change seem cannot be ignored. Possibly, criminal sanctions may be introduced at the EU level in the future but enforced only as a measure of last resort at times when no other sanction can be effectively imposed. However, based on the fact that the EU has not exhausted every other option, the introduction of criminal sanctions at the EU level does not seem the best way to go.

5 DIRECTORS DISQUALIFICATION (DEBARMENT)

It is submitted that where individual criminal sanctions do not exist, administrative sanctions against individuals who have breached competition law may be an alternative. The national competition authority in the Netherlands, for example, is able to impose administrative penalties on both companies and individuals, whereas in Sweden while participation in cartels is not a criminal offence it can give rise to individual sanctions in the form of a trading prohibition for between three to 10 years⁷⁹. In this chapter, therefore, the imposition of a “director disqualification order”

⁷⁹ Colins, 2011, 11.

as an administrative sanction against individuals for breaching competition law is examined.

The term “director disqualification” signifies “the conduct of the individual director, who can be prohibited from participating in the management of any company for a specific period, if he/she was involved in anticompetitive activity or failed to take action where he/she knew or ought to have known that it was taking place”⁸⁰. The goal is once again to achieve deterrence although in this case the aim is to deter those infringing competition law and/or those in power to ensure competition law compliance within an undertaking. The underlying reason for such a possibly harsh at first site sanction in particular for the latter category of possible targets is that even if they have not been involved in a competition law infringement themselves, due to their position within the company they ought to have known of any illegal action.

This type of sanctions to individuals is relatively new in the enforcement of competition law among the EU Member States. The UK was in fact a pioneer when in 1986 it adopted the Company Directors Disqualification Act (hereafter CDDA)⁸¹. However, its use in competition law began in June 2003 when the Enterprise Act 2002 came into force. It is also noteworthy that it became a common practice only very recently as up until 2012 it had been implemented only once in the Marine Hose case⁸². In June 2010 the OFT published, in order to increase CDOs’ deterrent effect and potentially to allow for their wider use, a revised version of its first guidance document, on the topic entitled Director Disqualification Orders⁸³ in Competition Cases. According to the law and the relevant guidelines the competent court is authorised to apply a “competition disqualification order” when certain circumstances are met⁸⁴. A competition disqualification order may be sought from the court by the Office of Fair Trading (OFT) or a competent industry regulator.

Because of the comparatively larger experience of the UK with this type of sanctions, in the following sections the UK example will be analysed in order to be used later as a benchmark for the EU sanctions system. More specifically, an analytical assessment about whether the UK system could possibly be used as a model for the introduction of an analogous system of disqualification at the EU level is conducted.

5.1. Definitions and the scope of Disqualification

In order to fully understand the objective of this type of sanction and evaluate its contribution to the fight against competition law violations, it is essential first to clarify its targets and understand its scope.

In the UK, according to the CDDA, a director of a company is any person who acts as a director of it, whatever his/her title is. This includes a shadow director, i.e. any person under the directions or instructions of whom the directors of a company are accustomed to act, but does not include any person who is merely giving advice in a professional capacity if he/she has no real influence in the

⁸⁰ Khan, 2012, 89.

⁸¹ In the UK, around 2,000 directors are disqualified, for various reasons, each year [B. Hannigan (2010), 53].

⁸² This is the only case in which custodial sanctions have also been imposed in the UK.

⁸³ Available at <http://www.oft.gov.uk/OFTwork/consultations/cdq#.Ugk11azM9Cg>

⁸⁴ Enterprise Act, section 204.

corporate affairs of the company⁸⁵. The definition of a "director" includes individuals who act as directors even though they are not validly appointed, or even if there has been no formal appointment to them at all⁸⁶. To establish that a person is a *de facto* director of a company, it is necessary to prove that he has acted on behalf of the company and executed functions that can be done only by a director. In addition, for the same purposes, even an unregistered company falls under these provisions, including also the unregistered subsidiaries or branches of companies which are incorporated outside the UK, as long as they carry on business in the UK⁸⁷.

The purpose of disqualification is to ensure that the recalcitrant director is completely ousted from his/her position of influence within that company and cannot, during the period of his/her disqualification, make use of limited liability to escape the consequences of his/her actions⁸⁸. Essentially, again according to the CDDA, after a director of a company has been disqualified, he/she shall not be director anymore, act as receiver of a company's property, or in any way, whether directly or indirectly, he/she to be concerned or take part in the promotion, formation or management of a company⁸⁹.

The competition law in the UK currently provides for two separate versions of directors' disqualification: a Competition Disqualification Order (CDO) and a Competition Disqualification Undertaking (CDU).

5.2. *Competition Disqualification Orders (CDOs)*

CDOs are governed by section 9A and the rules and definitions already provided above regarding the notion of a director and a company apply here as well. In order for a CDO to be imposed two conditions must be satisfied: first, the undertaking of which the individual is a director must have breached competition law, and second, the individual's conduct must make him/her unfit to be involved in the management of a company⁹⁰. The court can impose a CDO against an individual if it considers that both of these conditions are satisfied although the maximum duration of a DCO cannot exceed a period of fifteen (15) years.

However, the process begins with an assessment by the competent authority about whether a CDO is the most suitable measure in the case at hand, either alone or in combination with sanctions against the infringing undertaking. This process, according to OFT's guidance, is composed of five stages and is worth noting.

5.2.1. The five stages assessment process for the application of CDOs

In short, the first stage of the assessment exercise includes is an attempt to verify whether there is an adequate proof of a breach of competition law which usually takes the form of a decision by the national competition authority or a court. At the second step of this procedure, an assessment of the nature of

⁸⁵ CDDA 1986 [section 9E(5) and section 22(5)]

⁸⁶ Practical Law Company (PLC) Competition 2013

⁸⁷ CDDA 1986 [section 22(2)]

⁸⁸ Bradley 2001, 53

⁸⁹ CDDA 1986 (sections 2)

⁹⁰ CDDA 1096 [section 9A (2) and (3)]

the breach takes place. At the third stage, the possible effects of a CDO upon a leniency request are taken into account. At the fourth stage, the analysis of the director's responsibility for the infringement and the justification of the application of a CDO is considered, and finally, at the fifth stage of the assessment procedure the national competition authority takes into consideration any possible aggravating and/or mitigating factors. For the purposes of this paper, a short analysis of these five steps is deemed necessary and follows below.

Firstly, for the purposes of CDOs a breach of competition law by a company is an infringement of either Chapter I or Chapter II of the 1998 Competition Act or of Article 101 or 102 of the TFEU⁹¹. Hence, non-compliance with the UK merger control rules in Part 3 of the Enterprise Act or the EU Merger Regulation falls outside the scope of CDOs. More specifically, within the first step of the assessment procedure and according to the OFT Guidance, it is considered whether any conviction for a violation of the above competition law provisions has occurred. This may take the form of a decision of the European Commission or a decision of the national competition authority or a judgment of the European Court of Justice or the General Court, or a judgment of the Competition Appeal Tribunal in the UK. Also, the national competition authority will not file for a CDO where the decision for the infringement of competition law is subject to an appeal or before the expiration of the deadline for the parties to lodge an appeal (unless the appeal does not affect the liability of the company for the infringement).

However, in exceptional circumstances this requirement may not be deemed necessary. In fact, even though in the OFT's original Guidance paper it was stated that only upon a final determination of an infringement of the kind mentioned above a CDO shall be imposed, the new OFT Guidance now states that there may be exceptional cases where it is appropriate to apply for a CDO even in the absence of a relevant decision or judgment. In this case the individual involved in the procedure would have the right to file for an annulment of the decision of the national competition authority and would of course benefit from the rights of defense inherent in any court procedure. The relevant authority, on the other hand, would still need to prove before the court that there is indeed an infringement of competition law in this case. These "exceptional cases" are not further explained in the Guidance paper although the OFT mentioned some of these (not in an exhausted list) in its response to the comments it received during the August 2009 consultation, and was the following:

- "It is appropriate to take action in relation to directors of companies that have become insolvent or have otherwise been wound up. This would allow the OFT to take action against directors that sought to avoid responsibility for their action by winding up an existing company and starting a new one.
- A decision or judgment is subject to appeal only in relation to the quantum of a fine and not in relation to the infringement.

⁹¹ CDDA 1986 [section 9A(4)]

- The OFT has decided it is not appropriate to issue a decision would benefit from limited immunity from fines under the Competition Act 1998 (Small Agreements and Conduct of Minor Significance Regulations) 2000.⁹²

In addition, although no territorial nexus can be explicitly found in the CDDA (section 9A), the alleged infringement of competition rules shall have an impact on the UK market. Otherwise, i.e. in the case of an infringement of Articles 101 or 102 TFEU at the EU level with no impact (actual or potential) on the UK markets, it would fall outside the scope of CDOs⁹³.

Secondly, the nature of the breach is considered by the competent authority. The seriousness of the infringement is taken into account and for this purpose the general model for the calculation of financial penalties is followed.

At the third step of the process the effects of a leniency application are taken into consideration. In general, in cases that the undertaking involved has received a partial or total reduction of the fine on account of the fact that it has entered into a settlement agreement with the competent authority a CDO to a company's director cannot be imposed. However, the competent authority retains the right to apply a CDO if the director in question is fired or have left the company or despite his/her obligation to obey during the investigation he/she had failed to do so⁹⁴. What a director may do to diminish the risk of a CDO against him/her is to ensure that his/her company will seek to be benefited from a leniency program⁹⁵.

At the fourth stage of the process an assessment of the director's liability for the alleged breach of competition law provision is made. The purpose of this stage is to determine whether he/she was indeed involved and up to what extend in the decisions' making process and the management of the company. There are three types of conduct on the part of a director that justify the application for a CDO. Firstly, the director in question has acted in a way able to lead to the infringement of competition law. For example, he/she has planned or approved of the specific business activity which constituted the breach of competition law. Secondly, in case the director's behavior has not contributed directly to the competition law infringement, he/she would still be held liable if he/she has had reasonable grounds to suspect that an infringement of competition law could have occurred by his/her company but he/she took no actions to prevent that from happening. This would be the case of a director who knows that an employee of the company has been involved in conduct that breaches competition law but he/she fails to take action to stop these unlawful acts. Thirdly, the director may also be held liable if he/she ought to have known that the company's actions constituted an infringement. The standard of proof in this case is the highest of all three since a certain number of factors need to be assessed, such as the director's role in the undertaking in general and its relationship with the actual infringers, the information that was available to him/her and the knowledge

⁹² OFT 2010, 12-13.

⁹³ OFT 2011, 8-9.

⁹⁴ In this case also other administrative sanctions can be imposed, like administrative fines.

⁹⁵ OFT Guidance 4.12 – 4.15.

and experience that he/she has had as a director. Moreover, although a director is not expected to have deep knowledge of competition law he/she is expected to know that certain actions like price fixing are illegal⁹⁶.

At the fifth and final stage of the process the possibility of applying aggravating or mitigating factors is examined. The analysis of possibly applying aggravating circumstances includes, for instance, whether a director in the past had been directly or indirectly involved in other infringements of competition law or if he/she had unlawfully refused to cooperate with the competent authority during another investigation or whether he/she had destroyed (on his/her initiative or after being ordered by his/her superior) important evidence etc. On the other hand, possible mitigating factors with a positive impact on the application of CDOs are, for example, the fact that the company in question had been coerced to infringe competition law or that the director in question took obedient action against the employees actually responsible for the infringement etc⁹⁷.

5.2.2. The procedure for applying for a CDOs

If the five stages of the above assessment process within the competent authority are successfully satisfied and the competent authority decides to apply for a CDO as the most appropriate sanction, a certain enforcement procedure is provided for in the law. This procedure is similar to the one the Commission follows at the EU level when investigating an alleged infringement by an undertaking which it is interesting to note as well that makes the introduction of a disqualification system at the EU level easier.

Similarly to the procedure before the imposition of a pecuniary sanction to an undertaking, the director's rights of defense is secured through the application of the procedure analytically described at the above OFT's Guidance paper. At first, a section 9C notice⁹⁸ is sent to the director in question in which the details of the accusation are set out. In addition, due care is taken to secure the director's access to the investigation's file, he/she is informed about his/her right to submit written representations or to take part in oral hearings by a certain deadline and that he/she can also be advised by a legal counsel⁹⁹.

5.3. *Competition Disqualification Undertakings*

In addition to the CDO's, the competent authority may also opt for the solution of Competition Disqualification Undertakings (CDU). CDUs are accepted when proposed by the liable director, either in lieu of a CDO or in case the competent authority has already applied for a CDO, instead of pursuing this further, replacing it with a CDU. In general, CDUs can be beneficial for both the competent authority, which in this way expedites the procedure and avoids all extra costs involved in a

⁹⁶ Ibid 4.16 – 4.23

⁹⁷ Ibid 4.24 – 4.29

⁹⁸ CDDA 1986 section 9(A), according which it is mandatory to send such notices.

⁹⁹ OFT Guidance 5.2

CDO process, and the director in question who can at least avoid some of the adverse publicity from appearing before the court.

More specifically, this is a commitment of self-disqualification by the director who accepts not to take part in the management of the undertaking in question for a certain period of time. According to the 1986 CDDA section 9(A) (9), as a result of a CDU an individual for the specified period of time will not: act as a receiver of a company's property; in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company; act as an insolvency practitioner"¹⁰⁰.

In practice, the director would first propose to the competent authority the adoption of a disqualification order and its duration, and the competent authority would in turn decide upon the furtherance of his/her application depending on the specific circumstances of the case at hand and of course the nature of the offer (essentially the suggested duration of the CDU). The duration of a CDU must be analogous to the graveness of the prohibited action of the director¹⁰¹. Possibly, aggravating or mitigating factors will also be taken into account but in any case CDUs cannot exceed a maximum period of fifteen years¹⁰². Furthermore, the director may offer CDUs at any phase of the investigation proceedings. However, in practice, CDUs are usually offered either in response to a section 9C notice or when a petition has been lodged with the court¹⁰³. CDUs, in resemblance to CDOs, are registered in public records kept within the competent authority. In addition, in case of a breach of a CDU, same as with a CDO, the director may either be fined or sentenced up to two years of imprisonment¹⁰⁴.

In any case, the director in question shall also be individually liable for the debts subsisted by the infringing undertaking involved for the period he/she has taken part to the latter's management¹⁰⁵. Furthermore, it is rightly submitted that a person, not being the disqualified director, who is involved in the management of the company and who acts on instructions given by a person whom he knows to be subject to a disqualification order or undertaking also assumes personal liability for the debts or liabilities of the company occurred at that time¹⁰⁶.

5.4. A critical assessment of directors' disqualification

Contrary to a system of criminal sanctions, directors' disqualification seems to be able to form the base upon which an effective individual liability system could be framed, although the threat of disqualification may tend to restrict group thinking within a firm as a director may be expected to protest and resign against decisions he does not support¹⁰⁷.

At first, directors' disqualification helps to significantly improve the compliance efforts of any firm, as their directors realise that otherwise they would be held

¹⁰⁰ Ibid 3.2

¹⁰¹ Ibid 3.5

¹⁰² CDDA 1986 [section 9 (B) (5)]

¹⁰³ OFT Guidance 3.4

¹⁰⁴ Ibid [section 13]

¹⁰⁵ Ibid [section 15]

¹⁰⁶ Practical Law Company (PLC) Competition 2013

¹⁰⁷ Williams 2005, 287

liable for any unlawful actions of their firm. The OFT's Guidance paper clarifies that within the obligations of a director is to be aware of any possibility of a breach from the undertaking which in other words means that he/she must be more effective in managing the firm and that a director must secure that his/her company does not violate competition law provisions in any way.

Moreover, according to Khan, after informal discussions this author has had with solicitors in the UK as part of his research, the threat of CDOs seems indeed to have a strong deterrent effect. An increasing number of directors is in fact documented to have requested from UK solicitors specific advice in order to ensure avoidance of possible personal liability that might at the end result to the application of CDOs.¹⁰⁸ Their main concern was centred on their fear to be subjected to negative publicity and thus face serious difficulties to be employed again in the future. Therefore, although this might be an early first general conclusion, debarment seems to have a strong positive impact towards effective deterrence and thus also help eliminate recidivism better than from a system of criminal sanctions.

Furthermore, the competent authority benefits from entering into less expensive proceedings than those needed in the case of imprisonment or other criminal sanctions. In addition, given the nature of the disqualification order as a civil action, its standard of proof is lower than the one required in a criminal offense, and therefore it is easier, less expensive and less time consuming for the competent authority to apply for a CDO.

Moreover, directors' disqualification seems to be more popular in the general public than criminal sanctions. In fact, a survey in the UK has shown that 48% of the sample preferred the use of a disqualification order instead of the application of criminal sanctions, whilst only 11% of the sample would prefer the opposite¹⁰⁹. Directors' disqualification have also a wide scope and for that reason a CDO can be imposed in the case of both Article 101 and 102 TFEU, whereas custodial sanctions are best suited for violations only of hard core cartels¹¹⁰.

Furthermore, in practice, directors' disqualification may be more easily adopted at the EU level. It can successfully bypass the serious concerns that have at times arisen about possible violations of both the CFR and the ECHR in a system with criminal sanctions. The required political support may also more easily be built. Its enforcement in local level may as well be unproblematic as a personal liability system for violations of General Corporate Law already exists in all twenty eight EU Member States and thus all of them are already acquainted with such an enforcement procedure. In fact, five of them, i.e. Estonia, Romania, Slovenia, Sweden and the United Kingdom, have legislated for the imposition of director's disqualification orders in particular for competition law infringers.

Irrespective of its important advantages, directors' disqualification is not immune to criticism. Firstly, it may dissuade valuable professionals from accepting director positions with high responsibilities. This is even more evident when the relevant legal provision provides that a director shall be punished because he/she ought to

¹⁰⁸ Khan 2012, 93

¹⁰⁹ Stephen 2008, 123.

¹¹⁰ Lawrence and Moffat, 2004, 1

have known of any violation of competition law within the firm. However, because it is undeniable that a firm's actions can possibly harm the society at large, it is also indispensable that its directors are well qualified to supervise the firm's actions and to secure its compliance with the law. Therefore, the balance between the undertaking's actions that a director may control and those that he/she cannot control is "slender". In this context, the OFT Guidelines have differentiated between a director not capable at all to supervise the company's operations and one who failed to prevent the wrongdoing of the company although he/she has such an ability. In the UK, the director is at risk to be sanctioned with disqualification in the latter case¹¹¹.

Moreover, an undertaking in order to benefit from a CDO may be required to have first indemnified the disqualified director for the losses he/she had suffered¹¹². However, even if a firm decided to indemnify the disqualified director, a considerable amount of the company's resources would be appropriated. For this purpose, the possible sources of revenue are two. The first one is to receive this amount from a liability insurance company¹¹³. In practice, of course, this may not be an easy task since the liability insurance contracts usually do not cover cases of anticompetitive activities and in particular for individual remunerations¹¹⁴. Alternatively, this amount may be covered by the undertaking's own resources.

Usually, when a director is removed from his/her position in the firm before his/her contract has expired as a consequence of the imposition of a CDO, the rule on severance payment or "golden handshake" applies, according to which the firm takes over the responsibility to remunerate the removed director. However, this process is on the one hand not easily followed by SMEs, as they cannot afford it, and on the other hand it is considered to be unacceptable as non-appropriate. The latter is based upon the idea that this payment is not deserved to a director who did not hesitate to put the company at risk and brought negative publicity to the firm. Possibly, the company's shareholders may decide to compensate disqualified directors because of their own prior inadequacy or tolerance of the unlawful behaviour in question.

In any case, the stigmatising effects of a CDO or a CDU cannot be undone for the liable director. The reputational damage by the "public naming and shaming" phenomenon cannot indeed be compensated. As a consequence, the disqualified director is expected to face considerable difficulties in finding a new job in the future and this, in turn, reinforces deterrence amongst the remaining directors with the infringing firm. These directors will in all likelihood be required to multiply their supervisory efforts and most importantly they will not be reimbursed in case they become personally liable for a competition law violation when acting on behalf of the firm in the future. Therefore, directors' disqualification seems to have a double power to directors' decision making: on the one hand, there is a possible lose of money and on the other hand, there is a real possibility of not finding a new job in the foreseeable future. Of course, the stigmatising effects necessarily have a negative impact also on the company itself.

¹¹¹ Khan 2012, 95

¹¹² Wils 2002.

¹¹³ The so called Directors & Officers (D&O) Insurance.

¹¹⁴ Many providers seem to limit their responsibility to the legal expenses of the firm only.

Another issue that may need to be tackled by the competent authorities is the tactical re-employment of the disqualified directors. This might occur if the undertaking re-employs the disqualified director in a different position than the one that he/she was holding before the debarment¹¹⁵. In the UK, in order to avoid this phenomenon, the system has introduced a rather strict standard according to which “the disqualified person cannot be part of the management and central direction of a company’s affairs”¹¹⁶. Consequently, the re-employed person shall hold a much lower rank position within the firm and as a consequence his/her salary would be much lower than the one he/she used to earn. As a result, in best case scenario, the individual in question would also suffer from a significant reduction of his/her income.

Equally or even more dangerous is the phenomenon of “shadow directors”, according to which the disqualified individual may still unofficially serve the firm’s interests from the position of the director although he/she will be re-employed in a different position. This might be a real risk for the system and there are no obvious solutions to this problem. However, shareholders are not expected to put their firm in such a risk.

Therefore, it is submitted that due to its positive features disqualification in combination with other pecuniary sanctions to undertakings would be able to make the perfect mix at this stage of development of competition law at the EU level.

5.5. *Can the UK’s Debarment System be transposed at the EU Level?*

To examine whether and under what circumstances it may be possible to effectively transpose the UK system at the EU level, first the appropriate legal basis upon which such a system could be framed needs to be found and analysed. In this context, contrary to criminalisation of competition law at the EU level, debarment can be sufficiently based either on Article 103 TFEU or on Article 352 of TFEU. More precisely, under the former legal basis and given the nature of the debarment as an administrative sanction, both its two requirements, i.e. harmonisation and prior presence of relevant EU policy, are satisfied. In addition, even under Article 352 TFEU the requirement of necessity is more easily satisfied. Therefore, no amendment to the Treaty provisions seems absolutely necessary unless the legal interpretation with regard to the wording of Articles 101 and 102 TFEU so as to explicitly include individuals as targets of competition law prevails.

However, some technical complexities need to be fully resolved for the successful transposition of the UK system or a variant of that at the EU level. In essence, it needs to be decided whether a centralised model, according to which the Commission would have the sole competence to impose similar sanctions, or alternatively, a decentralised model, based upon which the Commission would only adopt soft law instruments so as to inform the EU Member States’ competent authorities on how to impose debarment should be adopted. These two options are further analysed below.

¹¹⁵ Wils 2002.

¹¹⁶ Hannigan 2010, 154.

5.5.1. The Centralised Model

According to the centralised model, the sole competence to impose and enforce debarment would be with the Commission. The latter would have the power to investigate, assess, impose and enforce the disqualification orders, which would in turn ensure the uniformity and efficiency of the system's application among the Member States based on the same rules and principles.

However, a number of obstacles makes this model unlikely to be adopted. Firstly, the Commission would be the only authority responsible for all necessary steps for the application of the disqualification orders and thus its administrative burden would be considerably increased. More specifically, the Commission would be responsible for collecting all required evidence against the suspected directors, formally inform them about the on-going investigation, analyse the written objections received, hold an oral hearing, and ultimately decide whether an infringement did take place so as to impose disqualification orders or not. This is a relatively long procedure and may also be considerably costly and time consuming. As the Commission has *a priori* limited resources, it is highly questionable whether resources for the imposition of sanctions to both undertakings and individuals would be found. As a consequence, a considerably high number of new employees would need to be employed and the expenditures would thus multiply. An impact assessment exercise would of course better identify these administrative costs.

Furthermore, notwithstanding the nature of disqualification as an administrative and civil sanction, violations of fundamental human rights may occur. As debarment results in an inability to be employed for a certain time period, there is an extra need to secure that both the investigative and the adjudicatory phase of the procedure is respectful of due process. In particular, the existence of an oral hearing is considered to be essential. In the words of Aaron Khan "the lack of formal separation between the Commission's investigation and adjudicative powers" brings extra troubles to the competence and power of the Commission to conduct such hearings to individuals. In this context, it might be more appropriate to have the hearing before a Court upon request and/or initiative of the Commission. However, finding the competent court is problematic in itself and it is questionable whether the Member States would end up to a common approach regarding this essential issue. Therefore, it may not be an exaggeration to say that under this centralised system the EU would not be better off than under a system with criminal sanctions.

Most importantly, a centralised model may not be the most appropriate option also on account of the recent movement towards a general decentralisation of the Commission's competences. In line with the general principle of subsidiarity in EU law, the Commission tries to share its competences as much as possible with the Member States. This helps it to be more effective and to ensure its ability to act quickly and efficiently. In view of the above, the centralised model seems not to be the optimal policy choice.

5.5.2. The Decentralised Model

On the other hand, a decentralised model seems to be better suited as it could be able to effectively cope with many of the complexities and problems of the alternative centralised model.

The decentralised model seems in fact to be the most appropriate way to introduce debarment at the EU level. More specifically, under this scenario, the EU would adopt a Directive (or a Regulation, although a Directive may be more appropriate) in order to establish a system of debarment against the directors of an infringing undertaking. The above Directive would leave to the EU Member States the freedom or discretion to establish their own particular measures but define the conditions under which a director may be held liable for a competition law infringement.

A national court would need to be the ultimate arbiter as to whether a disqualification order shall be imposed and its duration, based on the administrative file which would have been composed by the competent national authority and/or in extreme cases the Commission itself. The competent national authority, usually the national competition authority, would be responsible for applying for a disqualification order before the relevant court, acting either on its own initiative or after a proposal from the Commission. If a system similar to the UK's CDUs were also to be introduced, the national competition authority would again be responsible to negotiate and agree upon them.

Such an institutional structure would be perfectly in line with the model currently in use by the Commission and the national competition authorities for the imposition of sanctions to undertakings. The effective application of such a system of debarment has already the advantage of having been successfully tested and the EU Member States have accepted and supported these procedures. Therefore, on the one hand, no fundamental change to the current system would be needed and on the other hand, the fundamental human rights would also be respected by the independent judicial system of each Member State.

Moreover, in order for this system to be effective not only in local level but also at the EU level it seems to be absolutely necessary to create a common register, i.e. a data base which would consist of all relevant evidence, names of undertakings and names of disqualified individuals. This common register would be informed by the national business register of each Member State. Therefore, when a firm decided to employ a director, it could be immediately informed about this individual being in fact disqualified. A system of mutual recognition similar to the one of recognition of civil and commercial decisions may also be needed¹¹⁷. It would thus be useful if the same Directive establishing a system of directors' disqualification would also introduce a system of mutual recognition of the debarment decisions by each Member State.

¹¹⁷ An example and model can be the Brussels I Regulation.

Furthermore, as with all new legislative initiatives, such a system would also need to secure a certain level of political support among the Member States. The best way to succeed in that is by advocating clearly to the Member States the advantages of debarment and also to present to them all possible solutions to those problems that might arise during the implementation process. In all likelihood, as the Member States would keep their sovereignty intact, they are expected to be more open to discuss and understand the advantages of the debarment system. Furthermore, it is now common knowledge that sharing the burden among Member States' national authorities is the best way to secure the desirable, for both the Commission and the Member States, harmonisation of competition law and its enforcement.

Notwithstanding the advantages of a decentralised model, its application is not devoid of drawbacks. Firstly, similarly with sanctions against undertakings, it can prove difficult in practice to coordinate the actions of the national competition authorities among the Member States, where anticompetitive activity involves more than one or multiple Member States. While in the case of undertakings this obstacle was overcome by the use of the European Competition Network, in the case of sanctions to individuals the complexities are expected to be stiffer. Of course, it could be argued that since disqualification is considered a civil and administrative measure the rules of the International and European Private Law apply. Therefore, Brussels I Regulation on jurisdiction, recognition and enforcement of judgements could also apply and as a consequence, based on the principle of *lis pendens* the intervention of multiple courts in the EU would be prevented.

For all these reasons, a system of directors' disqualification based on a decentralised model seems realistically to be the most effective way to introduce sanctions to individuals at the EU level. At present this would fill a rather obvious gap in the EU enforcement system and as a result, in all likelihood, it would help achieve the two main goals of any penalty system in competition law: punishment and deterrence.

5.6. *Debarment in combination with other sanctions*

Debarment alone is not the cure for all vices or a panacea for all possible problems. It works well in a right mixture of multiple sanctions and the USA's example demonstrates this well¹¹⁸. In general, pecuniary and other sanctions against undertakings must exist in any enforcement system which targets violators and aims at deterring future infringements, since as a result of their application firms and their directors realise that they need to comply with competition law by all means and ensure effective supervision of their employees¹¹⁹. Even if criminalisation gains in the future more support and is proved more effective to achieve the goal of optimal deterrence, debarment would in any case be seen as a tool that cannot be missing from the enforcement toolkit. This is the type of sanction that may be used against those individuals who have either taken part in not so malicious infringements of competition law as cartel offences or could also

¹¹⁸ Marsden, 2009.

¹¹⁹ Wils, 2002.

be used in circumstances where the directors ought to have known of the unlawful practice of the firm, where criminal sanctions would thus be difficult to apply.

6. CONCLUSION

The foregoing analysis has illustrated the inadequacy of the current sanctioning system at the EU level for breaches of competition rules and its failure to achieve in practice the ultimate goal of optimal deterrence. The European Commission can only impose pecuniary fines to liable organisations whereas the individuals actually responsible for competition law infringements remain immune from punishment. The recent and highly controversial trend of very high fines has not proved successful and thus further increases in fines cannot be considered as the best way to go. Targeting the corporate executives who are responsible for competition law infringements could instead complement fines and ensure a higher level of deterrence.

Economic theory suggests, in fact, that any fine should be equal in probability terms to expected profits. This essentially means that with a 15 percent chance of detection in the case of cartels, for example, fines would need to be 6.7 times the additional profits in order to be at the optimal level. Therefore, even under a policy of very high fines in nominal numbers as is currently exercised by the European Commission, for a significant number of cartels, fines are still below what would be needed to ensure deterrence, even assuming a 100 percent detection rate. High fines also entail costs for the society and can be difficult to implement in particular in times of economic crises. Furthermore, an increase in fines is likely to have a smaller marginal impact than it might have had in the past. Finally, excessive fines run the risk of being in conflict with the legal principle of proportionality and are therefore not deemed credible as they might be reduced after a judicial review.

The introduction of criminal penalties, such as imprisonment, at the EU level seems not to be the preferred policy choice either at the present level of development. It would signify a radical reform of the enforcement system and in general its costs would well outweigh its potential benefits. In addition, it is unlikely that there will be sufficient political support for any legislative measure, as some EU Member States have recently been active in decriminalising their competition laws. Furthermore, from a corporate governance standpoint, criminalisation does not ensure that the management would instigate a culture of compliance within the firm.

In these circumstances, directors' disqualification could be a more appropriate policy response. Compared to criminalisation, directors' disqualification is suitable for a larger number of both infringements, as it applies equally well to less hard core offences than price fixing, and targets, i.e. not only against those directors who were directly responsible for the infringement but also those who were accountable within the infringing undertaking for the actions of the former. In addition, the risk of being disqualified acts as a strong disincentive to directors who fear having their reputation damaged and most importantly, their career brutally hit and their income severely cut. Finally, directors' disqualification could be cheaper and easier to adopt at the EU level since arguably in this case the amendment of the TFEU would not be absolutely necessary.

At the EU level, the institutional architecture of a system of directors' disqualification would also be better off if designed according to a decentralised model where in line with the network theory in public administration and with respect to the principle of subsidiarity the responsibility for the implementation process would lie with the EU Member States. This model promises to make directors' disqualification easier and faster to implement in practice as the administrative burden would be shared among the competent authorities of the with due respect of EU Member States instead of disproportionately encumber the Commission. Moreover, the decentralised model of

directors' disqualification is more likely to gather the public and political support required to make it a true success story.

Therefore, directors' disqualification has proved to be a flexible and promising tool that if added to the arsenal of the Commission could bring balance to the current sanctioning system at the EU level and that, in turn, would in all likelihood make the enforcement of EU competition rules more effective. The imposition of even higher fines is not a realistic option and for the present level of development criminalisation is not seen as the most preferred policy choice. Directors' disqualification is less controversial and could be applied easier in practice than criminal sanctions. To conclude, it is submitted that on account of its intrinsic positive features and the inconsistencies of the current sanctioning system at the EU level directors' disqualification is the way to go and thus it should indeed be considered as the missing piece of the puzzle at the EU level.

Annex ¹²⁰

Member State	Criminal Sanctions	Other types of penalties
Austria	No ¹²¹	Criminal sanctions, for bid rigging and cartel behaviour qualifying as fraud
Belgium	No	Administrative Fines ¹²² , which may not exceed €10.000
Bulgaria	No	No
Croatia ¹²³	No ¹²⁴	No
Cyprus	No	No
Czech Republic	Yes ¹²⁵	No
Denmark	No	Fines
Estonia	Yes	Fines
Finland	No	No
France	Yes	Fines, up to 3 million €
Germany	No	Fines ¹²⁶
Greece	Yes	Fines
Hungary	Yes	No
Ireland	Yes	Fines
Italy	No	Certain cartel activities may be caught by Italian criminal law provisions ¹²⁷
Latvia	No	No
Lithuania	No	Administrative Fines
Luxembourg	No	No
Malta	No ¹²⁸	No
Netherlands	No ¹²⁹	Fines
Poland	No	No
Portugal	No	No
Romania	Yes	Fines
Slovakia	Yes	Fines
Slovenia	Yes	Fines
Spain	No ¹³⁰	Administrative Fines
Sweden	No	Trading Prohibition ¹³¹
United Kingdom	Yes	Debarment

¹²⁰ Global Competition Review, 2013.

¹²¹ Austria's criminalisation regime was abolished in 2002. However, the criminal sanctions directed towards the persons responsible has remained applicable to violations committed before 1 July 2002.

¹²² In spring 2013 new competition law provisions were introduced in the Belgian Code of Economic Law (Chapter IV, Protection of Competition and Chapter V, Competition and Price Evolution), among which was also the introduction of individual liability.

¹²³ AZTN, Croatian Competition Agency, 2013.

¹²⁴ The Proposal/Draft of Criminal Act (Art 255) was found to be contrary to the Competition Act, according to the NCA of Croatia (CCA). The opinion (011-01/2011-01/006) of the CCA was adopted in 2011 and the participants of the prohibited agreements remain non-criminally liable.

¹²⁵ On 1 January 2010, prison sentences of up to three years were introduced for the individuals acting on behalf of the company entering into agreements with a competitor on price fixing on market sharing, or other (horizontal) agreements with anti-competitive effects (section 248 (2) of the Czech Criminal Code). Since 2012, the criminal liability of legal entities has been introduced into Czech law, covering also various antitrust infringements.

¹²⁶ "Fines levied on individuals for willful participation in a cartel may not exceed €1 million. In cases of negligent infringements, the maximum fine is €500,000. Not all individuals may be fined, only directors, officers and certain senior employees. However, if lower ranking employees have committed the cartel offence and cannot be held responsible, directors or officers can be sanctioned with a fine for breaching their duty of supervision" [Global Competition Review 2013, Germany: Cartels, Michael Dietrich, Philipp von Hülsen-Taylor Wessing].

¹²⁷ "In particular, article 501 of the Italian Criminal Code provides criminal sanctions (including imprisonment for up to three years) for 'market manipulation through the misuse of price sensitive information'. According to article 501 bis of the Italian Criminal Code individuals can be convicted (and liable to imprisonment from six months to three years and fined up to €25,822) for 'speculations on prices and quantities of raw materials and basic food products'. Article 507 of the Italian Criminal Code provides imprisonment (of up to three years) for individuals involved in 'boycotts'. Finally under article 353 of the Italian Criminal Code, bid rigging attracts criminal sanctions (including imprisonment from six months to five years)" [Global Competition Review 2013, Italy: Cartels Alessandro Bosio Caretta, Francesca Sutti DLA Piper]

¹²⁸ In respect with the Maltese Competition Act, if the person found guilty of committing the competition offense is a director, manager, secretary or other officer of the company he/she will be liable for any fine imposed in solidum with the company.

¹²⁹ A legislative proposal for the introduction of criminal sanction to individuals is currently prepared.

¹³⁰ "Nevertheless, the Spanish Criminal Code provides a few exceptions where cartel conduct is sanctioned with imprisonment penalties. For instance, article 284 of the Spanish Criminal Code refers to price distortion impeding free competition, providing imprisonment penalties from six months up to two years, together with fines from one up to two years, and article 262, which refers to bid rigging in auctions and public tenders and provides imprisonment penalties from one year up to three years, together with daily fines from one up to two years and loss of licenses for public bidding. Also, article 281 may be applied to unlawful competition conduct consisting of withdrawing raw materials or essential goods from the market in order to limit supplies or distort prices, with an imprisonment penalty of one to five years and fines of one up to two years." [Global Competition Review 2013, Spain: Cartel Regulation Ramón García-Gallardo SJ Berwin LLP]

¹³¹ The system of "Trading Prohibition" which is applied by the Swedish Competition Authority is similar to the Debarment that is applied in the UK.

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