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# UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS, LAW & ART

Southampton Law School

## **The Fining System in the Enforcement of EU Competition Law: A Time for Reassessment?**

by

**Cesar Leines Jimenez**

Thesis for the degree of Doctor of Philosophy

December 2016



UNIVERSITY OF SOUTHAMPTON

**ABSTRACT**

FACULTY OF BUSINESS, LAW & ART

SOUTHAMPTON LAW SCHOOL

**Doctor of Philosophy**

**THE FINING SYSTEM IN THE ENFORCEMENT OF EU COMPETITION LAW: A  
TIME FOR REASSESSMENT?**

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For over more than 50 years the EU Commission has used a deterrence approach in the imposition of fines to enforce EU competition law and pursue the EU competition policy. Although, it has adopted many other instruments to enhance its detection rate and provide more efficient and forward-looking outcomes in pro of competition; the aim to deter in order to achieve prevention has not changed. Nevertheless, empirical evidence has shown that the optimal deterrence framework based on the legal-economic theory is far from even deterring let alone prevent.

Criminology and behavioural economics have provided new insights that call for the adoption of a more realistic approach that seeks to elevate the perception of certainty of punishment by increasing the informal costs for individuals and undertakings' subunits who can prevent competition law violations in the first place. In this regard, a compliance approach that seeks to elevate the immediate costs perception and create a monitoring network that can effectively influence social norms that constraint behaviour, is able to result in a culture of compliance that makes non-compliance a less likely option. By embracing instruments such as compliance programmes, designation of external monitors and availability of whistleblowing rewards among others, the social internalization of compliance norms is feasible and thus, prevention possible.



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## Academic Thesis: Declaration Of Authorship

I, Cesar Leines Jimenez

declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

THE FINING SYSTEM IN THE ENFORCEMENT OF EU COMPETITION LAW: A TIME FOR REASSESSMENT?

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Either none of this work has been published before submission, or parts of this work have been published as: [please list references below]:

Signed:

Date: 20 December 2016.



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To all my friends, thank you so much. You made it all better for me.



## **List of Abbreviations**

ALJ	Antitrust Law Journal
ACLR	American Criminal Law Review
CMLRev	Common Market Law Review
CFREU	Charter of Fundamental Rights of the European Union
CEPS	Centre for European Policy Studies
CJEU	Court of Justice of the European Union
CLR	Columbia Law Review
CMA	Competition and Markets Authority
CrimLR	Criminal Law Review
DoJ	Department of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of human Rights
ELR	European Law Review
EU	European Union
EEA	European Economic Area
GC	General Court
GWLR	George Washington Law Review
JCLP	Journal of Competition Law and Practice
JPE	Journal of Political Economy
OJAE	Oxford Journal of Antitrust Enforcement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TLR	Tulane Law Review
UCLR	University of Chicago Law Review
YLJ	Yale Law Journal



## **Introduction.**

When enforcing competition law in the European Union (EU), undertakings may face mainly three kinds of enforcement procedures for the violation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).<sup>1</sup> First, companies may face an administrative procedure resulting in the termination of the infringement and the adoption of certain remedies in benefit of the competitive process.<sup>2</sup>

Second, firms could be subject of decisions imposing fines on them and third, they can be subjected to private law sanctions, resulting in damages actions or applications for injunctions by the injured parties. However, since the enforcement of the EU competition rules is predominately public rather than private, EU competition law infringements are sanctioned by way of fines imposed to undertakings found guilty by the EU Commission or by the adoption of behavioural or structural remedies.<sup>3</sup>

Until recently, private-law actions were unfeasible and are still not a common practice within EU competition law enforcement. However, the European Parliament has voted the proposal of the EU Commission for a directive that aims to remove a number of practical difficulties that victims frequently face when they try to obtain compensation

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<sup>1</sup> Since merger cases can be addressed with the imposition of remedies and these are not adopted in order to deter and prevent future violations of EU competition law; this work will only refer to remedies and mergers for comparison purposes. The prime focus of this thesis will be on those antitrust infringements and anticompetitive behaviour where sanctions are imposed to prevent future misconduct.

<sup>2</sup> This procedure is undertaken by way of negotiation or with the adoption of an infringement decision as provided in Articles 7 and 9 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the application of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, hereafter; *Regulation No. 1/2003*.

<sup>3</sup> When enforcing both Article 101 and Article 102 TFEU, the EU Commission can impose fines or adopt remedies but in respect to Article 102 TFEU, there is a tendency of decay in the imposition of fines and an increase in the use of remedies and commitments decisions as will be explained in Chapter IV.

for the harm they have suffered.<sup>4</sup> The proposal was sent to the EU Council of Ministers for final approval and it was signed into law on 26 November 2014 and subsequently published in the Official Journal of the European Union on 5 December 2014.<sup>5</sup> The 28 Member States of the EU need to implement the Directive in their legal systems by 27 December 2016 and thus, we may find private damages actions to be a reality in the near future.

However, the above means that nowadays EU competition law is fundamentally applied through public enforcement and fines are the only instrument the EU Commission has to sanction and to deter infringements of EU antitrust law, and the only remedy by which it aims to prevent future violations.<sup>6</sup> Fines are thus, of greater significance for EU Commission's enforcement and play a central role within its deterrence and prevention policies. Fines play a far more important role in the EU than in the United States for instance; where criminal sanctions for individuals and companies are available to combat anticompetitive practices, or the United Kingdom where director disqualification for competition law breaches can be considered.

It has been observed that the EU Commission has, since the beginning of 1980s; considerably increased the level of fines imposed on competition law infringers. Record

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<sup>4</sup> EU Commission, 'Antitrust: Commission welcomes Parliament vote to facilitate damages claims by victims of antitrust violations', Press Release IP/14/455, Brussels 17.04.2014.

[http://europa.eu/rapid/press-release\\_IP-14-455\\_en.htm?&locale=en](http://europa.eu/rapid/press-release_IP-14-455_en.htm?&locale=en) (Accessed 25 September 2015).

<sup>5</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 [2014] OJ L 349/1.

<sup>6</sup> Although the EU Commission can make use of remedies and commitment decisions in order to end an infringement and fix the competitive process, those instruments are only marginally part of the deterrence policy applied by the EU Commission where fines are the main instrument. Nevertheless, the importance and relevance of those enforcement tools will be discussed in Chapter II and IV below.

fines on cartel cases have been imposed such as *Polypropylene*,<sup>7</sup> *Cartonboard*,<sup>8</sup> *Graphite Electrodes*,<sup>9</sup> *Plasterboard*,<sup>10</sup> *Vitamins*,<sup>11</sup> as well as major fines in abuse of dominance cases like *TACA*<sup>12</sup> and *Microsoft*.<sup>13</sup> In fact, fines imposed by the EU Commission have risen at a higher rate in recent years than fines imposed by any other the antitrust enforcement agency in the world, surpassing even the United States. Representative of this situation are cases such as *Carglass*<sup>14</sup> and *Intel*;<sup>15</sup> and experts believe that the turning point was the EU Commission's long-running battle with Microsoft, which resulted in some €2 billion in fines.<sup>16</sup>

While some have argued that these fines are not sufficiently stringent to deter anti-competitive practices,<sup>17</sup> others suggest that these fines are not only high but can even be considered criminal and in violation of some well-established principles of EU law.<sup>18</sup> The evolution of the EU Commission fining system and policy may well be summarized as toughening by increasing the level of corporate fines year after year, which has placed the EU Commission as the top antitrust authority in the world. However, the number of

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<sup>7</sup> *Polypropylene* [1986] OJ L230/1.

<sup>8</sup> *Cartonboard* [1994] OJ L243/1.

<sup>9</sup> *Graphite electrodes* [2001] OJ L100/1.

<sup>10</sup> *Plasterboard* [2002] OJ L166/8.

<sup>11</sup> *Vitamins* [2001] OJ L6/1.

<sup>12</sup> *Trans-Atlantic Conference Agreement* [1998] OJ L95/1.

<sup>13</sup> Commission decision of 24 March 2004, *Microsoft*, not published in Official Journal but on Europa website, Case COMP/C-3/37792.

<sup>14</sup> Commission decision of 12 November 2008, *Carglass*, not published in Official Journal but on Europa website, Case COMP/39125.

<sup>15</sup> *Intel* [2009] OJ C227/13, this last one in the application of Article 102 TFEU.

<sup>16</sup> Tom Fairless, 'EU Displaces U.S. as Top Antitrust Cop: Activism has put the EU in a prime position to shape the Internet' *The Wall Street Journal* (New York City, 03 September 2015).

<http://www.wsj.com/articles/eu-displaces-u-s-as-top-antitrust-cop-1441314254?mod=e2tw> (Accessed September 04, 2015).

<sup>17</sup> Wouter P. J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 2, p. 183 – 208, John M. Connor and Robert H. Lande, 'Cartel Overcharges and Optimal Cartel Fines' (2008) 3 *Issues in Competition Law and Policy* 2203, ABA Section of Antitrust Law, available at SSRN <http://ssrn.com/abstract=1285455> (Accessed on 31 July 2014).

<sup>18</sup> See Ian Forrester, 'A challenge for Europe's judges: the review of fines in competition cases' [2011] 36 *ELR* 2 p. 185, Bo Vesterdorf, 'Article 102 TFEU and sanctions: appropriate when?' [2011] 32 *E.C.L.R.* 11 p. 573.

undertakings that have been found to be recidivists coupled by the fact that more antitrust infringements by non-recidivists are discovered and investigated, may indicate that fines are not the appropriate means to increase deterrence and achieve prevention.

According to *Connor*, recidivism is one way to measure the effectiveness of any antitrust enforcement policy.<sup>19</sup> Indeed, the legal – economic theory of optimal deterrence used in antitrust enforcement, allows authorities to send specific and general deterrent messages. In doing so, companies or individuals, after weighing the probable gains versus expected losses associated with collusion, decide that it would be better to adopt a form of business conduct that does not involve illegal manipulation of markets than to form or join an existing cartel.<sup>20</sup>

Thus, the existence of recidivism is a strong indication that serious flaws exist in cartel enforcement as it fails to even achieve specific deterrence let alone general deterrence.<sup>21</sup> Although it has been argued that there is a high level of recidivism in antitrust infringements at the international level, including both the European Union and the United States,<sup>22</sup> it is important to distinguish the particularities of each case. For instance, the Department of Justice Antitrust Division contradicts what *Connor*, *Wright* and *Judge Ginsburg* argue about high levels of recidivism in the U.S. and considers that on close

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<sup>19</sup> J. M. Connor, ‘A Symposium on Cartel Sanctions: Recidivism Revealed: Private International Cartels 1990-2009’ (2010) 6 *Competition Policy International* 101.

<sup>20</sup> *Ibid* at 106.

<sup>21</sup> This means that the overall goal of antitrust enforcement efforts, that of achieving general deterrence, is to be unsuccessful. This is so because antitrust authorities have incorporated counts of corporate recidivism as an aggravating factor for higher optimally deterring sanctions based on economic theory. The latter considers prior experience in cartel participation as to enhance a participant's ability to conceal its illegal activity and thus, lowering the chance of detection for which higher penalties are needed. If higher sanctions for recidivists do not work, we can assume that lower sanctions for first-time infringers will not do much.

<sup>22</sup> G. Olivier, ‘The Fight against Secret Horizontal Agreement in the EC Competition Policy’ in B. Hawk (ed), *International Antitrust Law & Policy: Fordham Corporate Law* (New York, Juris Publishing 2004) p. 43 and Douglas H. Ginsburg and Joshua D. Wright, ‘Antitrust Sanctions’ (2010) 3 *Competition Policy International* 15.

examination and according to its own records, there is no company with multiple convictions, which has relapsed into cartel activity since May 1999.<sup>23</sup>

In the view of the Department of Justice, the fact that instances of cartel recidivism are not to be found in the U.S. has its origin on the first conviction of a non-U.S. national who was sentenced to a four-month term of imprisonment for participation in international cartel activity in mid-1999.<sup>24</sup> This has been confirmed by interviews made by the DoJ Antitrust Division and Professor *Sokol* to members of international cartels and to their lawyers respectively, who provided first-hand accounts of their participation in cartels that spanned the globe but stopped at the U.S. border because the participants feared going to jail.<sup>25</sup>

However, in Europe where criminal penalties are not available for the EU Commission to impose, recidivism has been observed and it has put into question the effectiveness of EU antitrust enforcement system.<sup>26</sup> Since fines are the only tool to combat this problem, it is no news that sanctions, both in cartels cases and in the field of abuses of dominant position have increased exponentially in the European Union and some jurisdictions have

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<sup>23</sup> G. J. Werden, S. D. Hammond and B. A. Barnett, 'RECIDIVISM ELIMINATED: CARTEL ENFORCEMENT IN THE UNITED STATES SINCE 1999' at Georgetown Global Antitrust Enforcement Symposium, September 22, 2011, Washington D.C.

<https://www.justice.gov/atr/file/518331/download> (Accessed on 15 September 2015).

<sup>24</sup> In regards to the Vitamin Cartel that at the time was the most harmful criminal antitrust conspiracy uncovered. See DoJ Antitrust Division, 'STATEMENT OF ASSISTANT ATTORNEY GENERAL JOEL I. KLEIN' Press release. [https://www.justice.gov/archive/atr/public/press\\_releases/1999/2451.htm](https://www.justice.gov/archive/atr/public/press_releases/1999/2451.htm) (Accessed on 16 September 2015). For a different view arguing that there is in fact, recidivism in the United States based on empirical evidence see: J. M. Connor, 'Oceanic Disparities in Cartel-Recidivism Attitudes and Penalties' (April 1, 2016). Cartel & Joint Conduct Review, Spring 2016. Available at SSRN: <http://ssrn.com/abstract=2757784> (Accessed on 16 September 2016).

<sup>25</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 201 and G. J. Werden, S. D. Hammond and B. A. Barnett, 'RECIDIVISM ELIMINATED: CARTEL ENFORCEMENT IN THE UNITED STATES SINCE 1999' at Georgetown Global Antitrust Enforcement Symposium, September 22, 2011, Washington D.C.

<sup>26</sup> W. Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 World Competition 1 and C. Harding and A. Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 (3) European Law Review 368.

even criminalized anticompetitive conduct within the EU.<sup>27</sup> Nevertheless, fines are the focus of this research due to the fact that public enforcement of antitrust law within the European Union was originally entrusted to the EU Commission<sup>28</sup> and the main instruments it was provided with, to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 TFEU, were fines and periodic penalty payments. Both pecuniary sanctions remain as the key instruments in enforcing EU competition law.<sup>29</sup>

It is true that a complex enforcement system has been developed in the last ten years, and the necessary enforcement tools and mechanisms have been adopted to uncover, investigate, prosecute and put an end to antitrust violations in an effective manner. Nonetheless, such enforcement system still relies on the imposition of fines as the most effective and less costly way to deter EU competition law infringements. Hence, fines are the most important instrument among all the public enforcement tools available to the EU Commission to deter unlawful conduct.<sup>30</sup> The same situation is found if fines are compared against the tools available in private or civil enforcement.<sup>31</sup>

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<sup>27</sup> Countries led by Ireland, United Kingdom and Germany. However, there are also some other jurisdictions where decriminalization took place like Netherlands and Belgium.

<sup>28</sup> Article 105 Treaty on the Functioning of the European Union (TFEU) establishes that the EU Commission shall ensure the application of the principles laid down in Articles 101 and 102 TFEU, which can be interpreted as the basis for centralisation of the EU competition law enforcement system being handed over to the EU Commission. This was later confirmed in Article 2 of Council Regulation (EEC) No. 17 of 6 February 1962, implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204, hereafter *Regulation No. 17*. The latter regulated the central system for more than 40 years until 1 May 2004, the day in which *Regulation No. 1/2003* entered into force thus, replacing Regulation No. 17.

<sup>29</sup> See Article 103 (2) (a) Treaty on the Functioning of the European Union.

<sup>30</sup> These public enforcement tools include permanent or provisional remedies, whether structural or behavioural and commitment decisions, all which do not deter but are adopted to correct the competitive process without preventing future antitrust law violations.

<sup>31</sup> These include damages with stand-alone or class actions. Punitive damages are not considered within the EU competition law enforcement.

The EU Commission and many other national competition agencies, both inside and outside the European Union, have undertaken institutional reforms to adapt their structure and procedures to the standards required by their reformed enforcement system carrying such severe penalties. Within this reform, prioritization has been crucial to the effectiveness of the EU antitrust enforcement system, and although fines have remained the main tool of enforcement, competition law has become even more economics-oriented. This has prompted to invest a significant amount of resources that are now devoted to soft rather than hard intervention and thus, negotiated solutions are on the rise as well as the volume of proposals to encourage private enforcement has ballooned.<sup>32</sup>

This must be welcomed indeed unless such negotiated outcomes and private enforcement efforts make no progress in achieving prevention and promoting compliance. In spite of these improvements, fines remain central not only in the enforcement of EU competition law but also in the implementation of the EU competition policy. In pursuing the latter, a considerable degree of discretion has been left to the EU Commission resulting in uncertainty as the main flaw of the fining system as it is often difficult to understand the logic of the fines imposed by the EU Commission. This situation calls for the implementation of measures towards greater predictability.

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<sup>32</sup> Luis Ortiz Blanco and Alfonso Lamadrid de Pablo, 'EU Competition Law Enforcement: Elements for a Discussion on Effectiveness and Uniformity', 38th Annual Fordham Competition Law Institute Conference on 'International Antitrust Law & Policy', New York City, 2012, Edit. Barry E. Hawk, Fordham Competition Law Institute, Juris 2012 p 49. This is also one of the main features of last generation in Free Trade Agreements like the Trans-Pacific Partnership which includes a provision to authorize national competition authorities to resolve alleged violations voluntarily by consent of the authority and the company subject to the enforcement action. See the competition policy chapter of the Trans-Pacific Partnership <http://www.lexology.com/library/detail.aspx?g=36893846-faea-4e19-8c2c-81b4df095bb6> (Accessed on 01 October 2015).

Although the *EU Fining Guidelines 2006*<sup>33</sup> provide a mechanistic turnover criteria designed to calculate the fines and thus, provide transparency and certainty, it nonetheless provides an inaccurate picture of the undertaking's economic and financial situation. This means that higher levels in the amount of fines may not mean that they are at a restitutive level and possibly will not provide optimal deterrence.

On the other hand, the setting of fines is influenced by the object nature of the antitrust infringement in cartel cases since in order to establish the infringement, there is no need to look at the question of its effect. However, a fine assessment must be based on the effects of the infringement as that would allow the EU Commission to strip very profitable infringers of their gains and impose an appropriate penalty for deterrence. This in turn, would result in identical factual scenarios being treated differently, while different factual scenarios would be offered the same treatment.

In following the above, fines might increase the perception of being just and reasonable in light of the gravity of the infringement committed and be regarded as adequate in accordance with the public interest to punish anti-competitive behaviour. Even if justice is not achieved when fines are imposed on an undertaking in order to deter any anti-competitive conduct, the second best desired outcome would be the imposition of fines that are efficient in regards to punishment in order to fight recidivism and prevent future violations from other undertakings. For this to be achieved, it is fundamental that the fine's calculation process is dominated by a strong proxy of the gain or damage caused by the infringement as an appropriate means of calibrating punishment in a fair way or

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<sup>33</sup> Commission Notice (EC) of 1 September 2006, Guidelines on the Method of Setting Fines imposed pursuant to Article 23 (2) (a) of Regulation No. 1/2003 [2006] OJ C210/2.

for the purpose of deterrence, but mainly to provide justification for imposing sanctions of certain severity.

A further criticism of the EU fining system is that the current fines imposed by the EU Commission amount to the imposition of a sanction of a criminal nature and thus, compliance with higher law, especially with the provisions contained in the European Convention of Human Rights (ECHR) is required. If this is true, then statutory and non-statutory, as well as institutional amendments may be necessary to ensure that compliance with fundamental legal principles.

Although the EU Commission may rely on the imposition of fines as a primary enforcement tool in order to exert compliance with EU antitrust rules, it nonetheless may resort to other remedies available to it. These measures can be behavioural and/or structural remedies and commitment decisions, which must also comply with general principles of law, in particular those of proportionality, due process and equity as provided by the ECHR.

This is important because the overall enforcement system by which the EU Commission seeks to provide a disincentive in order to discourage EU competition law violations; must embrace due process standards and respect for fundamental rights of the parties concerned. This in turn, works for the benefit of the EU Commission's role as the guardian of the competitive process in the EU and the powers it may exert from that very function can be legitimized and reinforce commitment towards compliance.

Hence, fines are only one element, albeit an important one, of an overall system of enforcement, approach to compliance and policy implementation, and it should be seen in that manner. The EU fining system is just one of the means to ensure that companies do not engage in anticompetitive behaviour. To recognize this, means that the effectiveness of the EU fining system should not only be measured by its specific objectives (deterrence and ultimately prevention) but also against its interaction with other remedies and enforcement tools,<sup>34</sup> and with the overall antitrust enforcement system objectives meaning detection, investigation, prosecution, prevention and most importantly, promotion and compliance of EU competition law violations.

In this regard, equilibrium among these objectives is ideal. However, the current EU antitrust enforcement system has shown instances were one objective outweighs the others. For instance, the objective to detect competition violations outweighs the objective to effectively deter such conducts by favouring the granting of immunity and reductions from fines through the leniency notice against the imposition of the whole fine applicable.<sup>35</sup> On the other hand, the objective to prosecute effectively and efficiently has favoured the application of the Settlement Notice in cartel cases against the imposition of the full amount of fines that would have otherwise been imposed.

As will be discussed further below, this too contributes or even works for the benefit of the deterrence trap expressed by *Coffee*, which makes deterrence unworkable to say the

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<sup>34</sup> Among the enforcement tools available to the EU Commission we can find remedies, commitment decisions, the leniency notice, the cartel settlement notice and any other compliance instruments currently in place.

<sup>35</sup> Although it is true that enforcement instruments that alter certainty of punishment have a greater impact than severity of punishment, see D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) Crime & Justice 240. Yet, more than caring about informal costs, undertakings seem to use leniency in a strategic manner, see D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 201.

least.<sup>36</sup> In the same line of argument, we can make the point that the EU Commission has also favoured some kinds of remedies or sanctions over others; this is especially true when enforcing Article 102 TFEU as the EU Commission has favoured the use of commitment decisions instead of the imposition of fines.

Since there was a perceived absence of a competition culture in Europe, the EU Commission was entrusted with the central task to investigate and punish individual infringements as well as the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty.<sup>37</sup> This was necessary five decades ago when the action of a single administrative agency was needed according to the political, legal and economic context of that time. However, this resulted in a predominant reliability on the action of the EU Commission and little was done to promote the use of private actions, which is something that has continued until recently.<sup>38</sup>

Nevertheless, in the case of private enforcement instruments, it seems that undertakings may be increasingly hit by substantial follow-on and stand-alone damages actions brought before national courts due to the damages' directive to come in the near future.<sup>39</sup> This poses a significant risk since the absence of coordination between public and private enforcement may lead to over-deterrence when infringing EU competition rules.

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<sup>36</sup> Coffee, 'No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' [1981] 79 Michigan Law Review 386.

<sup>37</sup> Joined Cases C-189/02, C-202/02, C-205/02 P, C-206/02 P, C-207/02 P, C-208/02 P, C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-05425 para 170.

<sup>38</sup> Since 2005 the EU Commission has promoted the use of private lawsuits to enforce EU competition rules but the process is not straightforward and more needs to be done to facilitate this. For instance, cooperation under the EU Leniency Notice 2006 does not give immunity to infringing undertakings to escape civil liability; nonetheless, it restricts access to the file and the "EU Commission will not at any time transmit leniency corporate statements to national courts for use in actions for damages for breaches of those Treaty provisions". See point 6 and 39 of the EU Leniency Notice 2006 and the Amendments on point 34 and 35a published in the Official Journal on August 5, 2015.

<sup>39</sup> EU Commission, 'Antitrust: Commission welcomes Parliament vote to facilitate damages claims by victims of antitrust violations', Press Release IP/14/455, Brussels 17.04.2014.

[http://europa.eu/rapid/press-release\\_IP-14-455\\_en.htm?&locale=en](http://europa.eu/rapid/press-release_IP-14-455_en.htm?&locale=en) (Accessed on 11 April 2015).

It is important to address the equilibrium issue and provide transparency for greater effectiveness of the cooperation mechanisms such as the *EU Leniency Notice 2006*<sup>40</sup> and the *EU Cartel Settlement Notice*.<sup>41</sup> Although the EU Commission has indicated that the recently adopted EU directive on damages contains a number of safeguards to ensure that facilitating damages actions does not diminish the incentives for companies to cooperate with competition authorities, it will be seen until its actual implementation whether effective coordination exists or not.

The factors mentioned above not only call for a greater degree of efficacy and effectiveness of the overall system, but also raise the issue of whether the EU Commission should turn to other forms of penalties. Criminal penalties for individuals or disqualification orders for directors could be the answer as it is unlikely that corporate fines will deter conduct of an individual who is the main responsible for the competition law violations. It is argued that the best way to increase deterrence is to introduce sanctions against the people who engage in anticompetitive behaviour with due regard to the seriousness of the infringement.<sup>42</sup>

Yet, the EU Commission's deterrence policy is currently being pursued through the imposition of fines and the reality of the present situation is that incidence of recidivism is a sign that even specific deterrence alone is not being achieved. Thus, if the fining

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<sup>40</sup> Commission Notice (EC) of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.

<sup>41</sup> Commission Notice (EC) of 2 July 2008 on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases [2008] OJ C167/01.

<sup>42</sup> Andreas Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' [2014] Oxford Journal of Antitrust Enforcement p. 3.

system is not delivering the deterrence required to achieve the long vowed prevention objective,<sup>43</sup> how can the EU Commission make sure that the overall enforcement system can accomplish that?

*Wils* argues that in order to make an assessment of the overall effectiveness of EU competition law enforcement from the observed incidence of recidivism,<sup>44</sup> one needs to establish what recidivism constitutes, analyse the treatment of recidivism as an aggravating circumstance in setting the amount of fines and the interplay between recidivism and leniency.<sup>45</sup> In this regard, it is clear that recidivism implies that a person has committed fresh infringements after having been penalised for similar infringements.<sup>46</sup> The EU Courts subsequently clarified that the imposition of fine was not needed but merely that a finding of infringement has been made in the past.<sup>47</sup>

As to the notion of similar infringement, an Article 101 TFEU violation cannot be considered as similar to an infringement of Article 102 TFEU.<sup>48</sup> Therefore, based on this premises we can find many undertakings that fulfil the requirements to be considered recidivists. For instance, *Imperial Chemical Industries plc* is one undertaking which has

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<sup>43</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 201, stating that it is not clear what the optimal level of cartel deterrence should be or whether any given cartel has been deterred considering the costs of such deterrence. However, there is a common belief that competition law enforcement has not reached the optimal level. This may be true if we consider the observed incidence of recidivism in Europe. See also K. Høegh, 'Succession of liability for competition law infringements - the Cement judgment' [2004] 25 (9) European Competition Law Review 536.

<sup>44</sup> J. M. Connor, 'Oceanic Disparities in Cartel-Recidivism Attitudes and Penalties' (April 1, 2016). Cartel & Joint Conduct Review, Spring 2016. Available at SSRN: <http://ssrn.com/abstract=2757784>. (Accessed on 16 September 2016).

<sup>45</sup> W. Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 World Competition 1.

<sup>46</sup> Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347 para 617, Case T-66/01 - *Imperial Chemical Industries v Commission* [2010] ECR II-2631 para 378 establishing that recidivism only exists if the second infringement starts or continues after the date on which the EU Commission adopted the decision finding the first infringement.

<sup>47</sup> Case C-3/06 P *Danone v Commission* [2007] ECR I-1331 para 41.

<sup>48</sup> Joined Cases T-101/05 *BASF v Commission* [2007] ECR II-4949 para 64.

been found to have infringed Article 101 TFEU in at least three times.<sup>49</sup> *Solvay* is another company that was involved in four cartel cases at least.<sup>50</sup> *Akzo Nobel NV*,<sup>51</sup> *Arkema*,<sup>52</sup> *ENI* and *Bayer*<sup>53</sup> are some other corporations that have been found to have infringed competition rules more than once.

These cases are a good example of the failure of specific deterrence and what is worse; they actually send the wrong message in respect to general deterrence. According to the EU Fining Guidelines 2006, recidivists can be fined more heavily, each previous violation may be considered for an increase in the basic amount of the fine of up to a 100% and thus, a company with four previous violations would merit an increase of 400%.<sup>54</sup> Yet, the EU Commission has fallen short from this limit and in practice has increased the basic amount by 50% or 60% for previous cartel participation,<sup>55</sup> even when the incumbent undertaking has been found to have infringed cartel rules several times before.<sup>56</sup>

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<sup>49</sup> *Polypropylene* [1986] OJ L 230/1, *PVC II* [1994] OJ L 239/14 and Case COMP/F/38.645 — *Methacrylates*.

<sup>50</sup> *Peroxygen products* [1985] OJ L 35/1, *Polypropylene* [1986] OJ L 230/1, *PVC II* [1994] OJ L 239/14 and *Hydrogen Peroxide and perborate* [2006] OJ L 353/54.

<sup>51</sup> EU Commsision Case COMP/39.396 – Calcium carbide and magnesium based reagents for the steel and gas industries of 22 July 2009 were it was stated that Akzo had participated in at least four cartel infringements prior to this one.

<sup>52</sup> EU Commission, ‘Antitrust: Commission fines sodium chlorate paper bleach producers €73 million for market sharing and price fixing cartel’ Press release IP/08/917 of 11 June 2008.

[http://europa.eu/rapid/press-release\\_IP-08-917\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-08-917_en.htm?locale=en) (Accessed on 25 May 2016).

<sup>53</sup> EU Commission, ‘Antitrust: Commission fines producers of chloroprene rubber €247.6 million for market sharing and price fixing in the EEA’ Press release IP/07/1855 of 5 December 2007.

<sup>54</sup> Commission Guidelines (EC) of 1 September 2006 on Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 [2006] OJ C210/2 point 28.

<sup>55</sup> See EU Commission, ‘Antitrust: Commission fines producers of chloroprene rubber €247.6 million for market sharing and price fixing in the EEA’ Press release IP/07/1855 of 5 December 2007 where it is mentioned that ENI and Bayer receive an increase in the basic amount by 60% and 50% respectively because they had already been fined several times for cartel activities in previous EU Commission decisions. See also W. Wils, ‘Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis’ (2012) 35 World Competition 1, p. 5.

<sup>56</sup> *Akzo Nobel* only received a 100% increase in its basic amount of the fine despite the fact that it already had been fined four times before for cartel participation. See EU Commission, ‘Antitrust: Commission fines suppliers of calcium carbide and magnesium based reagents over €61 million for price fixing and market sharing cartel’ Press Release IP/09/1169 of 22 July 2009. [http://europa.eu/rapid/press-release\\_IP-09-1169\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-09-1169_en.htm?locale=en) (Accessed on 25 May 2016).

Although, Article 102 TFEU infringements have been increasingly dealt with commitment decisions rather than the imposition of fines, the mixed system of consensual and punitive outcomes has shown flaws too. The last fine imposed against Microsoft highlighted this. The EU Commission imposed a fine of €61 million on the US software company for failing to comply with its commitments to offer users a browser choice screen enabling them to easily choose their preferred web browser. This commitment among others, was offered by Microsoft to address competition concerns related to the tying of its web browser, Internet Explorer, to its dominant client PC operating system Windows and became legally binding after a commitment decision was adopted in December 2009.<sup>57</sup>

However, Microsoft failed to comply and the fine was imposed adding to a total of €2.2 billion of EU fines issued against this company over the past decade, making it the world's worst offender of EU antitrust rules.<sup>58</sup> This particular case highlights the ineffectiveness of fines in being an appropriate deterrent instrument. The adoption of administrative or/and criminal sanctions against individuals could enhance the enforcement of EU antitrust but these measures will too be based on severity of punishment in order to promote prevention and; as will be discussed below, certainty is the one element that needs to be altered in order to have a deterrent effect.<sup>59</sup> Hence, perhaps a deterrence policy

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<sup>57</sup> *Microsoft (Tying)* [2013] OJ C 120/15.

<sup>58</sup> Foo Yun Chee, 'EU fines Microsoft \$731 million for broken promise, warns others' *Reuters* (Brussels, 07 March 2013). <http://uk.reuters.com/article/2013/03/07/us-eu-microsoft-idUSBRE92500520130307> (Accessed September 23, 2015). Mentioning that Microsoft could easily have paid the fine out of its \$68 billion in cash reserves at that time, \$61 billion of that cash were outside the United States, much of it in Europe, to take advantage of low tax rates.

<sup>59</sup> The experience in the U.S. is very illustrative on how penalties on individuals are mostly imposed on mid-level employees and the impact on prevention is minimal. Even more, some individuals can be considered as "prison directors" who will return to their post after their penalty has been paid. This casts serious doubts about the effectiveness of sanctions against individuals.

alone, be it against undertakings or against individuals; is the wrong approach to take in order to achieve prevention in EU competition law.

It must be remembered that apart from fines, the EU Commission can also impose structural and behavioural remedies on the basis of an infringement decision or make commitments binding upon the undertakings suspected of having breached competition rules. There are other kinds of sanctions and tools that could be introduced as has been stated above, and the EU Commission may benefit from them when enforcing EU competition law. For instance, private damages actions are set to become more frequent and a greater complementary tool in the near future as damages would serve to compensate victims of antitrust violations and enhance the key roles of competition authorities in uncovering, investigating and sanctioning infringements and thus, achieving prevention together with compensation.

Overall, these fines, remedies and available tools to detect and punish antitrust violations, either public or private; are the main weapons that the EU Commission can use in order to enforce EU competition law and consequently, implement the EU competition policy. However, the procedural matters leading to their adoption and implementation need to be in respect of higher law too. Since enforcement instruments may be affected by the efficiency policy adopted by the EU Commission, such policy may be hindering the respect of fundamental legal principles that render any enforcement system as just, fair and acceptable to the society as a whole.

Nevertheless, the current remedies and tools available and the way they complement each other, are not enough to achieve deterrence and prevention and most importantly,

compliance. Even more, their imposition might overlook the respect and proper observance of fundamental principles of law that serve to accomplish the aim of doing justice, the latter understood as a matter of imposing on offenders; both undertakings and individuals, punishments that are proportionate and retributively appropriate to their wrongdoing.

It must be kept in mind that the influence of economics on EU competition policy and competition law enforcement has sought to establish an optimal system that is the most effective and least costly way to detect, investigate, prosecute and deter antitrust infringements within the EU internal market. However, in order to fulfil its prevention policy, the EU Commission has made use of one remedy primarily; that being the imposition of fines on the beneficiary of violations as the optimal deterrence framework dictates.

No doubt, fines are imposed to punish and to deter, and criminal or administrative sanctions against individuals would serve the very same purpose. However, the lack of effectiveness from the deterrent approach as it is currently being applied, suggests that such punitive instruments cannot operate in a vacuum. Indeed, their study cannot be done apart from the whole enforcement process and without taking into account the set of instruments within such enforcement that are available to the EU Commission.

The ineffectiveness of this deterrent approach also encompasses the situations where the EU Commission acts with a perceived unfair moral leveraging of responsive regulation. The undertakings' perception of unfairness of procedure is able to have a negative impact

on long-term compliance with law as well.<sup>60</sup> An example of this is found in the long standing case against Google where the latter has been subject of antitrust investigation for more than 5 years in a procedure that has proved to be stigmatizing and thus, unfair without an infringement decision even being reached.<sup>61</sup>

Indeed, the effectiveness of the EU fining system and the deterrent approach in general will depend on its interaction with the remaining tools available to the EU Commission such as the leniency programme, the settlement notice, actions for damages, commitment decisions, structural and behavioural remedies. These on their own may pursue different objectives within the overall EU antitrust enforcement system and those objectives must be balanced. Although compromise is ideal, exclusion in case of conflict should be done according to a clear set of rules giving guidance on the qualitative weight of the objectives as well as rules for assessing their quantitative weight.

This thesis will explore the ways in which other remedies and sanctions can interact with the already big body of enforcement instruments available to the EU Commission including the EU antitrust fining system and their potential contribution to or detraction from fines' objective, which is deterrence. Hence, criminal sanctions and disqualification orders against individuals, behavioural and structural remedies, commitment decisions, external monitors and the adoption of compliance programmes will be discussed together with the way they interact with fines imposed by the EU Commission. This will be done

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<sup>60</sup> See C. Parker, 'The Compliance Trap: The Moral Message in Responsive Regulatory Enforcement' [2006] 40 Law and Society Review 591 who argues that another factor of why deterrence is ineffective is the lack of political support for the moral seriousness of the law it must enforce, what she calls the compliance trap.

<sup>61</sup> EU Commission, 'Antitrust: Commission send Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android' Press Release IP/15/4780 on 15 April 2015, Brussels [http://europa.eu/rapid/press-release\\_IP-15-4780\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4780_en.htm) (Accessed July 30, 2015).

in order to increase our knowledge on how to achieve an optimal enforcement system that can help to succeed not only on its prevention goal, but to serve justice too.<sup>62</sup>

This work will also address the interaction and equilibrium or exclusion of the objectives each remedy and sanction seeks to achieve along with the purpose of fines imposed. This in turn, will provide a better understanding on how to accomplish the ultimate prevention objective that the EU Commission has set for the overall EU antitrust enforcement system. A workable scheme will be proposed by which the EU Commission can, not only sanction to increase deterrence, but also monitor, mitigate and most importantly prevent EU competition law infringements.

It will be concluded that fines, whatever the amount set, have not accomplished their aim to deter nor have they prevented future infringements. Deterrence can be part of a broader policy that aims to promote compliance primarily and take advantage of deterrence as a complementary policy. Hence, fines in spite of their limited reach, should not be excluded neither should they be at the centre stage of the whole antitrust enforcement system. The latter should take a responsive approach that targets those who can actually prevent the infringement from happening in the first place rather than focusing on the undertaking that economically benefits the most from the violation.

To this end, in chapter one I will define the concept of the fine and the purpose behind its imposition. I will also endeavour to explain how fines serve a different objective unlike remedies and commitment decisions used by the EU Commission. Private enforcement

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<sup>62</sup> The purpose is to achieve a system where the deterrence trap can be avoided as well as the compliance trap but most importantly, a framework in which prevention is actually achieved through the promotion of compliance.

tools taken by third parties with a legitimate interest will be discussed too. All these instruments might be said to be adopted in order to prevent the recurrence or commission of new EU antitrust law infringements. However, the purpose of this chapter is to understand the difference between the aim of ending a competition law infringement and the punishment for committing it in order to prevent future wrongdoing.

In chapter 2, I will outline the development of the fining system over the decades and the way economics has influenced such development as well as that of the enforcement of EU competition law as a whole. Despite the fact that the modernization reform took place more than 10 years ago, the objective of fines has remained the same as well as its statutory limitation but their amount has increased and the number of infringements detected has been greater than before as well as the level of recidivism. All this casts doubt over the system's effectiveness. The chapter concludes with further proposals and feasible reforms to improve compliance of EU competition law.

In chapter 3, I will draw attention to the rights and principles governing the EU competition law fining system, and the way the EU Commission has limited their expansion even though the fines it imposes are no longer administrative in nature. On the other hand, I will also discuss the fact that the EU Commission has not limited its discretion when imposing fines, commitment decisions, behavioural and structural remedies. This chapter is of particular importance as it seeks to shed light on the evidence that a system that is perceived as being consistent with the respect of fundamental principles of law can reduce antitrust infringements by legitimizing its punitive power so the perceived deterrent effect can be broadened.

In this regard, I will assess the way the General Court and the Court of Justice of the European Union have developed a deferential standard of review, both in the assessment of whether fundamental rights and principles have been respected and in the assessment of the discretionary powers of the EU Commission. This chapter finalises with the conclusion that, although the EU Commission can limit its discretion in order to improve transparency, it is the standard of judicial review that needs to be revised in order to deliver an effective EU antitrust enforcement system able to provide legal certainty.

In chapter 4, I will address the shortcomings of the EU competition law enforcement system taking into account the economic rationale of the deterrence approach that has ultimately delivered the utilitarian sanctioning system in the enforcement of EU antitrust rules. I will assess the current situation in the enforcement of competition law at the international level, and evaluate how it has developed.

It will be concluded that sanctions for antitrust law infringements have increased around the world in a very significant way and the different enforcement systems that have developed, have adopted many other sanctions targeting individuals too but most of those systems make of deterrence the main enforcement policy. However, I will turn to studies on deterrence from a criminologist's point of view and studies on organizational economics to provide evidence that a policy based on deterrence will not deliver efficient result unless such policy targets those people who can prevent the antitrust violation so an active monitoring network that influences corporate and social norms is created.

It will be discussed whether the EU competition law enforcement system and policy should still be focused on deterrence and it will be concluded that, based on the evidence

that fines do not serve their purpose, the EU Commission should adopt a more responsive approach. The latter would seek to build an active monitoring network, which is inclusive of several other instruments that directly or indirectly constrain behaviour towards compliance and where fines are just another tool but not the central enforcement tool.

In chapter 5 it will be concluded that prevention could be achieved adopting a different approach of enforcement that effectively educates and promotes compliance with EU competition law. Responsive regulation provides a more efficient and effective way to use all different instruments in order to target both individuals and companies. This is done by establishing a mechanism on how to choose those instruments and the way they should operate when combined within the scheme so that the EU Commission can get the right mix of penalties and remedies that translates in fair punishment. Indeed, responsive regulation that is focused on compliance will not only achieve prevention but also justice for those directly affected and for the benefit of the enforcement system itself.

## Chapter 1

### Fines and their purpose

#### 1.1 Fines: How important are they?

The importance and significance of fines and the role they have played in the development of the EU antitrust policy and law is undeniable. Article 103 TFEU can be interpreted as the constitutional basis for the EU competition law enforcement system as a whole as it provides that in order to give effect to the principles set out in Articles 101 and 102 TFEU, the EU Council must lay down the respective directives and regulations.<sup>63</sup> Article 103 (2) (a) TFEU contains the special mention that such regulations and directives must be designed in particular to ensure compliance with the prohibitions laid down in Article 101 (1) and 102 TFEU by making provision for fines and periodic penalty payments.

This means that from a constitutional point of view, the only way envisaged to ensure compliance with EU competition law was through the imposition of pecuniary sanctions. The above can be confirmed by the fact that *Regulation No. 17* provided that compliance with Articles 101 and 102 TFEU and fulfilment of obligations imposed on undertakings must be enforceable by means of fines and periodic penalty payments.<sup>64</sup>

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<sup>63</sup> Article 103 (1) TFEU.

<sup>64</sup> Recitals 10 and 12 of Council Regulation (EEC) No. 17 of 6 February 1962 implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204, hereafter Regulation No. 17.

However, *Regulation No. 1/2003*<sup>65</sup> formally introduced another kind of measures called remedies<sup>66</sup> which have enabled the EU Commission to impose positive actions upon undertakings that have been found to infringe Articles 101 and 102 TFEU in order to bring the infringement to an end. Nonetheless, the EU Commission made use of remedies long before their formalization had taken place in the adoption of Regulation No. 1/2003.<sup>67</sup>

Indeed, reference to remedies had been made before, particularly in the context of EU merger control where the first regulation entered into force in September 1990.<sup>68</sup> Nowadays, merger control is one of the most important pillars of the EU competition policy and it is mainly undertaken and enforced through the application of *EU Merger Regulation*,<sup>69</sup> which became effective on 1 May 2004.

EU merger control has been influenced by an economics-oriented enforcement, just like the one used when enforcing Articles 101 and 102 TFEU. However, the extensive economic analysis used in merger control allows the EU Commission to impose *ex ante* remedies as opposed to *ex post* measures normally imposed in the context of abuse of dominant position and agreements that restrict competition.

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<sup>65</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the application of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, hereafter *Regulation No. 1/2003*.

<sup>66</sup> Recital 27 and Article 7 of Regulation No. 1/2003 make reference to coercive measures which the EU Commission may impose, calling them remedies as opposed to sanctions.

<sup>67</sup> Although remedies were regular instruments available in merger control decisions before the adoption of Regulation No. 1/2003, the EU Commission made reference to them when deciding on decisions of Article 101 and 102 TFEU. See for instance *Unisource* [1997] OJ L318/1 para 98, *Eurofix-Bauco v Hilti* [1988] OJ L65/19 para 99.

<sup>68</sup> Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings OJ L395/1 was the first merger control Regulation in the EU referring to remedies.

<sup>69</sup> Council Regulation (EC) of 20 January 2004 on the control of concentrations between undertakings OJ L24/1.

Although remedies were<sup>70</sup> and are still the common tool of enforcement in EU merger control through a set of revised guidelines contained in *EU Merger Remedies 2008*,<sup>71</sup> the EU Commission did not restrict their use to mergers only and it had imposed remedies previously whenever it had decided on cases relating to infringements of Article 101<sup>72</sup> and 102 TFEU.<sup>73</sup>

The EU Commission's power to impose remedies, not only within EU merger control but also when deciding on cases concerning the violation of Article 101 and 102 TFEU, along with the imposition of fines was confirmed by the Court of Justice of the European Union in *Commercial Solvents*.<sup>74</sup> The CJEU agreed that the EU Commission had discretionary powers to impose coercive measures, which can only be determined in relation to the goal laid down in Article 3 (1) of Regulation No. 17.<sup>75</sup>

Hence, the previous decisional practice of the EU Commission based on both Regulation No. 17 and the jurisprudence from the Court of Justice of the European Union; included fines, injunctions and remedies. These instruments were within the non-exhaustive list of

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<sup>70</sup> Commission Notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98 OJ C68/3 of 02.03.2001 this was the first set of guidelines on merger remedies in the world and adopted by the EU Commission.

<sup>71</sup> Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 OJ C 267/01 of 22.10.2008.

<sup>72</sup> *Cartonboard* [1994] OJ L243/1 para 165 where the EU Commission imposed fines for the violation of Article 101 TFEU and it also imposed “cease and desist” orders as remedies, ordering the infringing companies to end the infringement and to abstain from exchanging further information of competitive significance.

<sup>73</sup> *ECS/AKZO* [1985] OJ L374/1 para 99 here the EU Commission considered essential not only to impose a fine but also to specify measures to ensure that the infringement is not repeated or continued.

<sup>74</sup> Joined Cases C-6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR-0223.

<sup>75</sup> *Ibid* para 45; where it was stated that Article 3 (1) of Regulation No. 17 conferred on the EU Commission, the power to adopt decisions ordering measures to ensure that the infringement is brought to an end. In order to make such decision effective, the EU Commission may require any undertaking subject to such decision, to do certain specific acts.

coercive measures that the EU Commission was able to impose in order to effectively bring the infringement to an end either in Article 101 or 102 TFEU cases.<sup>76</sup>

However, despite the availability of different remedies and sanctions, fines have served as the main tool in the EU Commission's enforcement of the EU competition law.<sup>77</sup> The EU Commission, through its guidance on the imposition of fines;<sup>78</sup> has stated that the power to impose fines serves to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles.<sup>79</sup>

For that purpose and based on the case-law, the EU Commission must ensure that its action has the necessary deterrent effect.<sup>80</sup> This all means that the EU Commission's general policy with regards to competition law matters is one based on deterrence since fines, as the main tool to enforce EU competition law, are usually meant to deter and to punish.<sup>81</sup>

Indeed, fines just like periodic penalty payments;<sup>82</sup> are sanctions against specific infringements of individual firms intended to punish and to deter unlawful conduct in the

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<sup>76</sup> See *Napier Brown – British Sugar* [1988] OJ L284/41 para 82 and *ECS/AKZO* [1985] OJ L374/1 para 99 where it was stated too that the power to order such measures is not confined to acts directly involving trade between Member States.

<sup>77</sup> Damien Geradin and David Henry, 'The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgements' (2005) Global Competition Law Centre, Working Papers Series 03/05, p. 2. See also Sven B. Völcker, 'Rough Justice? An analysis of the European Commission's new fining guidelines', [2007] 44 CMLRev 1290.

<sup>78</sup> Recital 4 of Commission Guidelines (EC) of 1 September 2006 on Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 [2006] OJ C210/2.

<sup>79</sup> Case C- 189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rorindustri and Others v Commission* [2005] ECR I -5425 para 170.

<sup>80</sup> Joined Cases 100/80 to 103/80 *SA Musique Diffusion française and others v Commission* [1983] ECR I-01825 para 108 and 109.

<sup>81</sup> Ioannis Lianos, 'Competition Law Remedies in Europe - Which Limits for Remedial Discretion?' UCL CLES Research Paper Series 2/2013, January 2013, p. 16.

<sup>82</sup> Article 24 of Regulation 1/2003.

future which means that the aim of the fine is a preventive effect not just on future actions of the firm but also on other firms that have engaged in similar practices.<sup>83</sup>

Hence, the meting out of fines serves two objectives, the suppression of illegal activity and the prevention of recidivism.<sup>84</sup> The EU Commission has also confirmed this policy stating that fines are ultimately aimed at prevention, and hence they fulfil two objectives, to punish and to deter.<sup>85</sup>

The fact that the policy and enforcement system of EU competition law have a preventive nature based on deterrence gives fines an important relevance over other kinds of remedies available to the EU Commission that differ mostly because of their functionality. Indeed, the punitive character of fines make these unlike any other enforcement instruments, as fines offer punishment that should be escalated to the seriousness of the offense and should be used to deter others and to prevent the companies or individuals from repeating the offense.<sup>86</sup>

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<sup>83</sup> Recital 4 of EU Fining Guidelines 2006 where a distinction is made between specific and general deterrence.

<sup>84</sup> Case C-41/69 *Chemiefarma v Commission* [1970] ECR-I 661 para 173.

<sup>85</sup> EU Commission Factsheet, 'Fines for breaking EU Competition law' November 2011, p. 1.

[http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf) (Accessed on 25 May 2015).

<sup>86</sup> Cesare Beccaria, *Dei delitti e delle pene*, Italy, 1764.



## 1.2 The concept of the fine.

Although the importance of fines is enormous and the role they play is fundamental not only in the enforcement of EU competition law but also in the implementation of a general policy of prevention adopted by the EU Commission; it is imperative to define what a fine is. In order to do this, let us first understand why the fine became a central instrument for law and economics and consequently, competition law. According to *Becker*, fines are to be preferred because they can fully compensate victims so that they are no worse off than if offenses were not committed.<sup>87</sup> In his view, imprisonment is not enough because even if the period of time has been served, the offender's debt to society is not resolved.<sup>88</sup>

However, O'Malley questions the fact that the movement of law and economics does not take into account the different meanings of money and especially the idea that it cannot compensate for certain harms.<sup>89</sup> In his view, this is done so because the aim of the fine is not punishment per se but harm minimisation and thus, fines do not work to prevent future wrongdoing.<sup>90</sup>

As *Ulen* explains, the reason why fines are central to law and economics is because economics provided a scientific theory to predict the effects of legal sanctions upon behaviour. To economists, legal sanctions look like prices and presumably, people respond to these sanctions much as they respond to prices. Thus, heavier sanctions are

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<sup>87</sup> G. Becker, 'Crime and Punishment: An Economic Approach' in G. Becker and W. Landes (eds) *Essays in the Economics of Crime and Punishment* (Columbia University Press, New York, 1974) p. 29.

<sup>88</sup> *Ibid* p. 30.

<sup>89</sup> Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 76.

<sup>90</sup> *Ibid* p. 77.

like higher prices and because people respond to higher prices by consuming less, they argue that people respond to heavier legal sanction by doing less of the sanctioned activity.<sup>91</sup>

These law and economics' principles appear to be ideal in respect to the enforcement of EU competition law due to the fact that only undertakings can be punished for any competition law violation. Since corporations appear to be rational choice actors, they are the most suited to respond to heavier monetary forms of sanction by directing resources to monitoring and preventing the company from engaging in anticompetitive behaviour. In addition, the fact that the corporation has no soul to be damned and no body to be kicked,<sup>92</sup> would make it seem obvious that the fine is the ideal sanction against businesses and their impact is taken for granted on the basis of economic theory assumptions and ultimately, on grounds of efficiency.<sup>93</sup>

With this reasoning, law and economics' scholars have always assumed that fines are the optimally efficient sanction.<sup>94</sup> However, taking into account that the objectives of punishment are retribution, deterrence and denunciation and a fine is a form of punishment, then it becomes clear that money is not only a morally empty medium of exchange because fines against corporations are intended to be loaded with social meaning in political and governmental discourses.<sup>95</sup> Nevertheless, this can be said to be

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<sup>91</sup> T. Ullen, 'The Economics case for corporate criminal sanctioning' in W. Lofquist, M. Cohen and G. Rabe (eds) *Debating Corporate Crime* (Anderson Publishing, Cincinnati 1997) p. 122.

<sup>92</sup> Elizabeth Knowles (ed), *The Oxford Dictionary of Quotations* (6<sup>th</sup> edn OUP, Oxford 2004) p. 550 quoting Baron Thurlow.

<sup>93</sup> K. Elzinger and W. Breit, *The antitrust penalties: A study in law and economics* (Yale University Press, New Haven 1976).

<sup>94</sup> Although empirical research has shown that this is far from being true as will be discussed below in Section 4.3.

<sup>95</sup> Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 68.

in stark contrast with the perception of the wrongdoer who may see such sanction as a price of doing business.

Hence, although fines can be considered to be punitively marginal and thus, not ideal punishment; the functional meaning of fines and in particular, money's underlying critical meaning is that it delivers pain.<sup>96</sup> In this regard, since a fine involves money and money promises or denies pleasure then fines have an impact on the concept of freedom.<sup>97</sup> Indeed, the fine against individuals has an impact on their consumption and fines against corporations have an impact upon profits thus, the fine delivers its punishment in terms of the freedom of the market.

Nevertheless, in the particular case of EU competition law, *Motta* has shown that stock markets react to news of, respectively, a dawn raid, an infringement decision and a court judgment upholding the Commission's decision, by reducing the firm's market value on average by 2 per cent, 3.3 per cent and 1.3 per cent respectively. Overall, therefore, the successful prosecution of a firm might decrease its market value by more than 6 per cent.<sup>98</sup> However, the fine alone only accounts on average for 1 per cent of the capitalisation of the firm, roughly one-sixth of the loss in market value.<sup>99</sup>

Hence, according to *Levitt*, although fines are intended to be delivered as sanctions that should have an impact on the basic value of freedom of the market of any person either corporate or natural; in effect what we see is a price in the form of a fine that is equivalent

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<sup>96</sup> Ibid p. 73.

<sup>97</sup> Ibid p. 110.

<sup>98</sup> M. Motta, 'On Cartel Deterrence and Fines in the European Union' [2008] 28 ECLR 213.

<sup>99</sup> Ibid p. 214 where the author suggest that the fall of value in capital markets is mainly due to the fact that the market expects the firm's profits to drop after it will have to discontinue an illegal practice so the market primarily expects prices to drop and this results in loss of value.

to a tax on privilege.<sup>100</sup> This seems to be confirmed by repeated behaviour of major companies who appear as usual suspects in the world of business cartels, which suggests a culture of business delinquency.<sup>101</sup>

No better example for cartel infringement participation than *Akzo Nobel*, a company that in 2009 was found to have infringed Article 101 TFEU for the fifth time. The above mentioned company received an increase in its basic amount of the penalty of 100% instead of 400% as indicated in the EU Fining Guidelines 2006, just before receiving full immunity for the use of the EU Leniency Notice 2006.<sup>102</sup> According to Court of Justice of the EU case law,<sup>103</sup> the fining system is designed to punish the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other operators from infringing the rules of European Union competition law in future.<sup>104</sup>

As to the enforcement of Article 102 TFEU, similar cases can be found as evidence that the fining system based on legal-economic theory of deterrence needs to go further. Microsoft for instance, a company that received fines in the accumulated amount of €2.2 billion making it the world's worst offender of EU antitrust law over the past decade, one would argue that these fines do have an impact on their profits. However, if we consider

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<sup>100</sup> S. Levitt, 'Incentive compatibility constraints as an explanation for the use of prison sentences instead of fines' [1997] 17 International Review of Law and Economics 188.

<sup>101</sup> C. Harding and A. Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 (3) European Law Review 369.

<sup>102</sup> Sodium gluconate cartel decision of 19/03/02, Organic peroxide cartel decision of 10/12/03, Choline chloride cartel decision of 09/12/04, MCAA cartel decision of 19/01/05 and Calcium carbide cartel decision of 22/07/2009.

<sup>103</sup> Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859 para 16.

<sup>104</sup> Confirmed among others by Case T-214/06 *Imperial Chemical Industries v Commission* published in the electronic reports of cases para 142.

that in 2013, the year in which the last fine was imposed the company had \$68 billion in cash reserves,<sup>105</sup> we cannot say that the impact is significant.

This does not necessarily work against deterrence. According to *O'Malley*, fines are linked to consumption relations and forms proper of the freedom of market, and they have grown faster in application and scale. The author further argues that they now form a ubiquitous and embedded part of everyday life in the consumer society we live now. In this scenario, a money sanction is not meaningless, quite the contrary, it has become prevalent because it has a certain politically acceptable meaning.<sup>106</sup>

In this context, the idea of the fine as a price becomes stronger and more consistent with the thesis that when society wants not to proscribe the activity, but only to reduce its level, it should use prices.<sup>107</sup> Indeed, *Rusche* and *Kirchheimer* consider that fines do not penetrate into the offender's life and the state's sole interest in such offenses is to compel obedience by levying sufficiently large fines. In their opinion, the state levies fines because it dislikes the activity but is not seriously enough to be prepared to put a stop to it.<sup>108</sup> Even more, the cost effective nature of the fines has made them an attractive instrument that has led to their application to more numerous and more serious offenses.<sup>109</sup>

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<sup>105</sup> Foo Yun Chee, 'EU fines Microsoft \$731 million for broken promise, warns others' *Reuters* (Brussels, 07 March 2013). <http://uk.reuters.com/article/2013/03/07/us-eu-microsoft-idUSBRE92500520130307> (Accessed on September 23, 2015).

<sup>106</sup> Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 106.

<sup>107</sup> J. Coffee, 'Paradigms lost: The blurring of the criminal and civil models and what can be done about it' [1992] 101 Yale Law Journal 1886.

<sup>108</sup> G. Rusche and O. Kirchheimer, *Punishment and Social Structure* (Columbia University Press, New York 1939) p. 176.

<sup>109</sup> R. Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, Canberra 1996)

Yet, fines are not moral free instruments but they are part of a complex and highly variable assemblage of procedures, official discourses, tactics and legal responses to problems of bio power, in which monetary penalties are embedded precisely because they inflict pain in the sphere of freedom. This freedom however, is a freedom that differs from liberty, the freedom of market and freedom of choice, which in turn, has made it possible to be enforceable and politically acceptable with the emergence of the consumer society.<sup>110</sup>

Taking the above into account, in the enforcement of EU competition rules the EU Commission does not provide for a definition of fines, instead Regulation No.1/2003 makes a clear distinction among the enforcement tools available to the EU Commission, setting remedies and sanctions under different Chapters.<sup>111</sup> This is particularly important to notice as the word remedy has a functional definition that has been used in a broad sense due to its general corrective and preventive character, which allows it to encompass both remedies in the strict sense, and sanctions including fines within its broad sense.<sup>112</sup>

Just like the EU Commission did in Regulation No. 1/2003 when it made a clear separation between remedies and penalties; the OECD, through one of the documents published during the Competition Policy Roundtables, makes also a clear distinction between remedies and sanctions. The document confirms that “a competition law remedy

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<sup>110</sup> A. Hunt, ‘Police and the regulation of traffic: Policing as a civilizing process’ in M. Dubber and M. Valverde (eds), *The New Police Science: The Police |Power in Domestic and International Governance* (Yale University Press, New York 2006) p. 180. See also Pat O’Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 110, where the author quotes Colin Campbell (1987), on his work concluding that freedom of choice emerges as a prominent category of consumer society. Freedom of choice is a choice among commodities and most specially the commodities associated with surplus income thus, the modern fine is a function of the surplus income of the consuming classes.

<sup>111</sup> Article 7 of Regulation No. 1/2003 provides for structural and behavioural remedies in order to bring EU competition law infringements to an end and they are included under Chapter III related to Commission Decisions. Articles 23 and 24 of Regulation No. 1/2003 provide for the imposition of fines and periodic penalty payments respectively, and they are included under Chapter VI relative to Penalties.

<sup>112</sup> D. Baker, ‘The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging’ [2001] 69 GWLR 693.

aims to stop the violator's illegal behaviour, its anticompetitive effects and its recurrence, as well as to restore competition. Sanctions are usually meant to deter unlawful conduct in the future, and in some jurisdiction, also to force violators to disgorge their illegal gains and compensate victims.”<sup>113</sup> Note that the OECD uses a functional definition too which means that, although both the EU Commission and the OECD do not base their distinction on the nature of the concepts, they clearly identify different functions and purposes for remedies on the one hand and for sanctions and fines on the other.

Even though the distinctions between the two measures have been established, this has not prevented the use of the term remedies as to encompass both remedies in the strict sense and fines or any other pecuniary sanctions in a general sense.<sup>114</sup> According to *Lianos*, the concept of remedies has multiple meanings, some of which overlap: remedies may be corrective or preventive, which is the broad functional definition of the remedy; or they may be considered as an action or a cause of action, a substantive right, a court order or a final outcome.<sup>115</sup>

He further argues that it is the broad preventive function of remedies what makes the punishment of the competition law infringer an objective pursued by competition law remedies.<sup>116</sup> Punishment constitutes one of the three remedial functions, the two others

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<sup>113</sup> Organisation for Economic Cooperation and Development (OECD), ‘Policy Roundtables – Remedies and Sanctions in Abuse of Dominance Cases’, *Competition Law and Policy*, 2006, p.18.

<http://www.oecd.org/competition/abuse/38623413.pdf> (Accessed 25 July 2014).

<sup>114</sup> Thomas O. Barnett, ‘Section 2 Remedies: A Necessary Challenge’ (*Fordham Competition Law Institute 34<sup>th</sup> Annual Conference on International Antitrust Law & Policy* 28/09, 2007).

<http://www.justice.gov/atr/public/speeches/226537.htm> (Accessed 26 August 2014).

<sup>115</sup> Ioannis Lianos, ‘Competition Law Remedies in Europe - Which Limits for Remedial Discretion?’ *UCL CLES Research Paper Series 2/2013*, January 2013, p. 12.

<sup>116</sup> *Ibid* p. 16 and 17.

being the aim to cure the violation of the moral rights of the communities affected by the antitrust violation and remedies as an instrument of justice.<sup>117</sup>

In the same line of argument it could also be possible to conclude that the imposition of fines, as provided in Article 23 of Regulation No. 1/2003, makes such pecuniary sanctions be one kind of remedies in a broad sense as punishment is the main function of fines and a function of remedies.<sup>118</sup> However, for the present thesis it is important to clarify that sanctions are not remedies and we shall follow the distinction done by Regulation No. 1/2003 and the OECD.

Not only do remedies and fines differ according to their functional definition but the distinction between the two can be made from the etymological perspective too. The Latin origin of the word remedy is *remedium*, derived from the term *mederi*, which means: ‘to heal’, and although the aim of fines is to have a preventative effect, it has little to do with the problem of restoring the competitive process in any specific case.<sup>119</sup>

Thus fines, like remedies, have a functional concept and it is the punitive nature of the former which sets them aside from the latter.<sup>120</sup> This is important since, as will be discussed in Chapter 3, the functionality of sanctions and that of remedies may set the

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<sup>117</sup> Ibid p. 18.

<sup>118</sup> It is worth noting that *Lianos* has also used a functional definition, however, he has used it not to differentiate between remedies and fines, but to establish that both remedies and fines share the same definition by focusing on the principal functions of the remedial process which can be perceived broadly as restitution, compensation, punishment and prevention. See Ioannis Lianos (2013) p. 14. For a similar view, see also Erling Hjelmeng, ‘Competition Law Remedies: Striving for Coherence or Finding New Ways?’ [2013] 50 CMLRev. 4 p. 1008.

<sup>119</sup> Per Hellstrom, Frank Maier-Rigaud and FriedrichWenzel Bulst, ‘Remedies in European Antitrust Law’ [2009] 76 Antitrust Law Journal 1 p. 45.

<sup>120</sup> Andrew Torre, ‘Evaluating punishment regimes for competition law offences’ [2013] 34 ECLR 6 p. 309.

basis for a different standard to apply when fundamental principles of EU law ought to be respected as well as a different standard of judicial review for each of them.



### 1.3 The purpose of the fine in EU competition law.

Once the functional definition of the fine is identified, it is easy to understand the objectives of both fines and remedies. On the one hand, a remedy is a coercive measure imposed with the purpose to bring an infringement effectively to an end even if this means to impose a proactive measure.<sup>121</sup> This means that remedies adopted when enforcing Articles 101 and 102 TFEU should be differentiated from the remedies provided under EU merger control, in particular those provided under the EU Merger Remedies 2008 guidelines.<sup>122</sup> They should also be distinguished from provisional injunctions,<sup>123</sup> commitment decisions<sup>124</sup> and sanctions as contained in Regulation No. 1/2003.<sup>125</sup>

Thus, based on the purpose of remedies and the differences with other measures already identified, we can conclude that remedies in the context of Article 101 and 102 TFEU are permanent *ex post* injunctions that are imposed upon undertakings instead of being offered by them, with the sole objective to end the infringement and restore competition. The latter has been confirmed by the Court of Justice of the European Union in *Ufex*.<sup>126</sup>

In this particular case, the CJEU reviewed a decision made by the EU Commission in which the latter rejected a complaint for lack of Community interest on the mere basis

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<sup>121</sup> Opinion of Advocate General Mr. Wagner in Joined Cases C-6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR-0223. Here, the Advocate General was of the opinion that a recommendation made under Article 3 of Regulation No. 17 must be specific, otherwise a recommendation in general terms to cease and desist from the infringement would be pointless.

<sup>122</sup> Recital 2 of Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 OJ C 267/01 of 22.10.2008 describes remedies as particular commitments by the undertakings concerned to modify a concentration where such modifications have as their object to eliminate the competition concerns.

<sup>123</sup> Articles 5 and 8 of Regulation No. 1/2003 provide for interim measures which are also referred to as provisional remedies although, based on the above definition, .

<sup>124</sup> Article 9 of Regulation No. 1/2003.

<sup>125</sup> *Ibid*, Articles 23 and 24.

<sup>126</sup> Case C-119/97 P *Ufex and Others v Commission* [1999] ECR I-1341.

that the alleged infringement took place in the past and such investigation, if undertaken, would only benefit particular interests. This case ultimately provides guidance as to what constitutes putting an end to any competition law infringement. The CJEU disagreed with it and it compelled the EU Commission to assess in each case “how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community.”<sup>127</sup>

The CJEU further stated that “if competitive effects continue after the practices which caused them have ceased, the EU Commission thus remains competent to act with a view to eliminating or neutralising them.”<sup>128</sup> This judgement is particularly important as it sheds light into what means to bring a competition law infringement effectively to an end. In this regard, the effects on the European market must be brought to an end, and thus; the ultimate objective of remedies when enforcing Articles 101 and 102 TFEU is to end the effects on the market caused by the antitrust infringements.

On the other hand, a fine is a legally recognized punitive means by which an attempt is made to ensure compliance with the norms. Hence, the purpose of fines is to punish which means to impose a loss or suffering on the infringer. In the context of EU antitrust law, that punishment is evident from the reading of the *EU Fining Guidelines 2006* where aggravating circumstances are taken into account in order to increase the level of fines

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<sup>127</sup> Ibid para 93.

<sup>128</sup> Ibid para 94, making reference to Case C-6/72 *Europemballage corporation and Continental Can Company v Commission* [1973] ECR-0215 para 24 and 25.

for recidivism, refusal to cooperate or obstruction for being leader or instigator of the infringement.<sup>129</sup>

There is also a specific increase for deterrence in order to ensure that the fines have a sufficiently deterrent effect.<sup>130</sup> This all shows alignment with *Cesare Beccaria's theory* of punishment, which is considered the base for the utilitarian ideas that nowadays govern the EU competition law enforcement as he argued that punishments should be escalated to the seriousness of the crime and should be used to deter others and to prevent the criminal from repeating the crime.<sup>131</sup>

That punitive nature of fines is also present in the EU Merger Regulation in Recital 43 and Article 14, providing in particular that compliance with that regulation should be enforceable by means of fines and periodic penalty payments. Thus, the purpose of the imposition of the fines is to punish and their ultimate aim is to deter. The Court of Justice of the European Union has confirmed this in *Chemifarma*.<sup>132</sup>

On March 6, 2013 the EU Commission decided to impose a fine of €61 million on Microsoft for failure to comply with commitments, pursuant to Article 23 (2) (c) of regulation No. 1/2003.<sup>133</sup> This was the first time a fine had been imposed for lack of compliance with the commitments offered and the purpose of such non compliance was to sanction and punish the undertaking and thus confirming the punitive nature of the fine.

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<sup>129</sup> Recital 28 of the Commission Guidelines (EC) of 1 September 2006 on Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 [2006] OJ C210/2.

<sup>130</sup> Ibid recital 30.

<sup>131</sup> Cesare Beccaria, *Dei delitti e delle pene*, Italy, 1764. Note that his theory refers to the study of criminal law but, as will be discussed in Chapter 3, EU antitrust fines might have a criminal nature.

<sup>132</sup> Case C-41/69 *Chemiefarma v Commission* [1970] ECR-00661 para 173.

<sup>133</sup> EU Commission, 'Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments' Press Release IP/13/196 on 06 March 2013, Brussels. [http://europa.eu/rapid/press-release\\_IP-13-196\\_en.htm](http://europa.eu/rapid/press-release_IP-13-196_en.htm) (Accessed on 15 October 2015).

This case also illustrates the difference in purpose and objective being sought between commitment decisions and fines.

Hence, whereas the purpose of remedies is to cure, correct or prevent unlawful conduct; sanctions and in particular fines' purpose is to penalise or punish undertakings involved in an antitrust violation. This clear differentiation makes the imposition of fines for infringements of Article 101 TFEU be straightforward due to the object based approach by which the anticompetitive effects are presumed and thus, punishment is ideal and warranted.

However, the situation is different when dealing with cases where Article 102 TFEU seems to have been infringed since the enforcement undertaken by the EU Commission is an effects-based approach and it is not always easy to prove whether the effects were indeed restrictive of competition or whether there were any effects at all. Even if the EU Commission were to use an object based approach, infringements of Article 102 TFEU are still hard to prove and thus, a remedy may be more appropriate than the imposition of a fine.

The imposition of fines creates a threat of a penalty that might weigh sufficiently in the balance of expected costs and benefits to deter companies from committing antitrust violation.<sup>134</sup> This threat or subsequent imposition of a penalty is well justified when sanctioning well established violations of Article 101 TFEU. However; as explained above, in the context of Article 102 TFEU and its effects-based approach as established

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<sup>134</sup> Kees Jan Kuilwijk and Diarmuid Rossa Phelan, 'On the tax-deductibility of fines for EC competition law' [2010] 31 ECLR 3 p. 131.

in the *Guidance on Abuse of Dominance Position*<sup>135</sup> raises questions as to the legal justification of punitive fines and begs for the improvement of the EU Commission's reasoning. Perhaps it should create a distinction in its policy when dealing with cartels and abusive behaviour or even a separate set of guidelines.<sup>136</sup>

The importance of the imposition of fines as an enforcement tool of EU competition law has been established, as well as its significance as the main element for the EU Commission to pursue a general EU competition policy. Nevertheless, it should be kept in mind that the EU Commission can resort to other tools that could achieve or promote compliance in a better way than fines do.

The purpose, objective and nature of the fines are different from those of commitment decisions and behavioural or structural remedies, and the EU Commission should be clear and transparent whenever it is deciding to impose or adopt any of them. This is important since the standard of protection afforded by the general principles of EU law and the standard of protection from judicial review from the General Court and the CJEU apply in a different manner for each of them.

In conclusion, the use of fines as an enforcement mechanism can be seen in two different ways, first as an instrument of control if the EU Commission intends to reduce the number of antitrust violations but not entirely prevent them. Second, fines can also be a deterrence instrument that affects undertaking's profits and thus, have an impact on their freedom in order to deter and prevent. In this regards, because fines carry condemnation as well, the

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<sup>135</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.

<sup>136</sup> Frances Dethmers and Heleen Engelen, 'Fines under Article 102 of the Treaty on the Functioning of the European Union' [2011] 32 ECLR 2 p. 86.

monetary sanction is not morally empty and in the consumer society we live in, a fine does have a punitive nature if it has a negative impact on the freedom of the market of any person.

Since it is part of the EU Commission's enforcement policy to use fines to denounce, deter and prevent violation of EU competition law, then fines are not just a price or a tax on privilege but their ineffectiveness in deterring could be influenced by the actual impact those fines have on the undertaking's freedom. Even though the EU Commission has become the top antitrust cop around the world, the impact of its fines have failed to deter irrespective of the amount of the monetary sanction imposed.

Hence, deterrence may not be the best way to achieve compliance and the adoption of remedies might leave some infringements unpunished. Hence, it is for the EU Commission to provide consistent application of the antitrust law and principles with a view to achieve harmony whenever fines are imposed or remedies alone or a mix of both in order to deter but also to restore competition. In doing this, deterrence can only one element of a broader policy that aims to have greater impact in undertaking's freedom to prevent future non-compliance.

## Chapter 2

### The EU experience in the enforcement of EU competition law

#### 2.1 The EU fining system before 1998

To understand how deterrence developed and has become so embedded in the EU competition law enforcement system, it is important to make a historical review of this approach that has been the main vehicle to deliver the aims of EU competition policy. For more than 44 years, monetary sanctions have been the main enforcement tool available to the EU Commission to address antitrust violation and although the statutory limitation in the amount of the fine imposed has remained the same in this period,<sup>137</sup> the process to set up such fines has changed in order to deliver appropriate punishment.

Competition provisions contained in Article 101 and Article 102 TFEU, just like merger control and state aid cases, are an essential legal basis for protecting the free European single market in order to maximize consumer welfare which is the ultimate goal of the EU Commission's antitrust policy. These provisions first appeared in the Treaty establishing the European Coal and Steel Community "ECSC Treaty" in 1951 and later in the Treaty establishing the European Economic Area "ECC Treaty".

In 1962, on the basis of Article 103 TFEU (ex Article 87 of the EEC Treaty), the EU Council adopted *Regulation No. 17*<sup>138</sup> and for more than 40 years the latter governed the enforcement of the competition rules until 1 May 2004 when *Regulation No. 1/2003*

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<sup>137</sup> Article 23 (2) Regulation No. 1/2003.

<sup>138</sup> Council Regulation (EEC) No. 17 of 6 February 1962 implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

entered into force.<sup>139</sup> Regulation No. 17 gave the EU Commission the exclusive power to enforce EU competition law across Europe, thus creating a centralised system.<sup>140</sup>

This allowed the EU Commission to investigate cases where infringements were suspected to have occurred.<sup>141</sup> It too allowed it to decide whether an infringement has been committed<sup>142</sup> and according to Article 15 (2) of Regulation No. 17, it empowered the EU Commission to impose fines on undertakings or association of undertakings for anticompetitive conduct not exceeding 10% of the turnover in the preceding business year for each undertaking participating in the violation.<sup>143</sup> In this respect, it also established that when fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.<sup>144</sup>

From 1962 to 1998 the EU Commission had a vast freedom of manoeuvre when setting fines turning the EU fining policy unpredictable based on the flexible fining parameters contained in Article 15 (2) Regulation No. 17. The EU Commission had great discretion as to the amount to be set; it has been argued that the fining procedure resembled a lottery with random figures simply magically appearing at the end of the decision.<sup>145</sup> Indeed, prior to the adoption of the first set of fining guidelines in 1998, the EU Commission was constantly criticised for the nebulous and vague criteria in determining the fines to be imposed on undertakings infringing the EU competition rules.

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<sup>139</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the application of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

<sup>140</sup> It has to be remembered that until 1 May 2004 competition law enforcement was based on Article 9 (1) of Regulation No. 17 which provided that the EU Commission was the only body able to grant exemptions under Article 101 (3) TFEU. Something that Regulation No. 1/2003 would change, enabling the national competition authorities to apply Article 101 TFEU in full.

<sup>141</sup> Article 14 of Regulation No. 17.

<sup>142</sup> Ibid, Articles 2 and 3.

<sup>143</sup> Later to be contained in Article 23 (2) Regulation No. 1/2003.

<sup>144</sup> Yet again, Regulation No. 1/2003 establishes the same statutory limitation.

<sup>145</sup> Ivo Van Bael, 'Fining a la carte: The lottery of EU Competition Law' (1995) ECLR 16 (4), 237-243.

As a general rule, the EU Commission would provide a long list of factors in justifying the fines without giving reasons how these factors led to the fine to be imposed.<sup>146</sup> Even with a framework of such loose parameters, the EU commission would however, be required to set the amount of the fines respecting fundamental principles of EU law or Community law as referred back then, such as the principle of non-discrimination, the principle of proportionality, equity and the principle of *Ne bis in idem*.<sup>147</sup>

It was until July 1969 that the EU Commission imposed fines for the first time ever in respect to antitrust violations concerning cartels, the sanctions were imposed in *Quinine* decision,<sup>148</sup> and one week later, the second decision imposing a set of fines was adopted in *Dyestuffs* decision.<sup>149</sup> From July 1969 to July 1994, the EU Commission adopted 81 decisions for violations of Articles 101 and 102 TFEU imposing a total of 346 individual fines.<sup>150</sup>

During this 25 years period, fines on individual undertakings were not severe enough at all and it was until 1991 that the highest fine, up to that point, was imposed to a single undertaking in *Tetra Pak II*.<sup>151</sup> As *Geradin* comments, the EU Commission's fining

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<sup>146</sup> Damien Geradin and David Henry, 'The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgements' (2005) Global Competition Law Centre, Working Papers Series 03/05, p. 7.

<sup>147</sup> Unfortunately, back then the General Court and the Court of Justice of the European Union had fewer occasions than today to explicitly discuss the fining policy issues in competition cases. Nevertheless, it has been argued that both courts showed a less deferential standard of review than nowadays. See Ian Forrester, 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases' [2011] ELR 2 at 185.

<sup>148</sup> *Quinine* [1969] OJ L192/5, with fines ranging from 10,000 to 210,000 units of account.

<sup>149</sup> *Dyestuffs* [1969] OJ L195/11, with fines ranging from 40,000 to 50,000 units of account.

<sup>150</sup> Wouter P. J. Wils, *The optimal enforcement of EC antitrust law: A study in Law and Economics* (Kluwer Law International, Brussels 2002) p. 98.

<sup>151</sup> *Tetra Pak II* [1991] OJ L72/1, where the EU Commission imposed a fine of 75 million ECU on Tetra Pak was found to have infringed competition law by using tying in order to obtain market power and exclude its competitors.

policy at the end 1960s and throughout the 1970s was characterised by a light-handed approach towards anticompetitive conduct,<sup>152</sup> but it was the *Pioneer* decision<sup>153</sup> that represented a watershed for a tougher fining policy resulting in higher and higher fines such as *Tetra Pak II* above mentioned.

With the *Pioneer* decision,<sup>154</sup> the EU Commission sent a message that it intended to reinforce the deterrent effect of fines by raising their level thereof in cases of serious infringements, in particular those for which fines had been imposed in the past,<sup>155</sup> such statement was confirmed by the EU Court of Justice.<sup>156</sup> Indeed, the EU Court of Justice made it clear that the fact that the EU Commission had imposed fines of a certain level for certain types of infringements in the past, does not mean that it is stopped from raising the level in future cases. As long as its decisions are within the limits indicated in Regulation No. 17 and are necessary to ensure the implementation of Union competition policy.<sup>157</sup>

After the *Pioneer* decision, the EU Commission's method when determining the amount of the fine, exercised reliance on a percentage of the turnover in the relevant market and

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<sup>152</sup> Damien Geradin and David Henry, 'The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgements' (2005) Global Competition Law Centre, Working Papers Series 03/05, p. 5.

<sup>153</sup> *Pioneer* [1980] OJ L60/21.

<sup>154</sup> The decision imposed fines on 5 of the European subsidiaries and independent distributors of the hi-fi manufacturer Pioneer amounting to a total of nearly 7 million Euros.

<sup>155</sup> EU Commission, 'Thirteenth Report on Competition Policy' (published in conjunction with the 'Seventeenth General Report on the Activities of the European Communities 1983'). [EU Commission - Working Document] para. 62-66. Where the EU Commission announced that it would continue to impose high fines and "to impose a pecuniary sanction on the undertaking for the infringement and prevent a repetition of the offence, and to make the prohibition in the Treaty more effective". As to the term "serious infringements", the EU Commission listed the following: Export bans, market partitioning, and horizontal and vertical price-fixing. In respect to serious violations of Article 102 TFEU, it listed refusal to supply, price discrimination, exclusive or preferential long term supply agreements and loyalty rebates.

<sup>156</sup> Case C-100/80 *Pioneer v Commission* [1983] ECR 1831 para. 104-108.

<sup>157</sup> *Ibid* para. 109.

to a much lesser extent to the illegal gains or the harm produced by the violation.<sup>158</sup> The starting point when determining the fine was a figure of between 2% and 4% of EU turnover in the concerned products depending on the gravity of the infringement and the duration; after this basic amount was obtained a reduction would be applied in the event of cooperation from the concerned undertakings, resulting in the final amount of the fine.<sup>159</sup>

At a later stage of this period, just after the *Pioneer* decision<sup>160</sup> but before the introduction of the *EU Fining Guidelines 1998*,<sup>161</sup> the EU Commission developed a method of calculating the fine as a percentage varying between 2% and 9% of the annual turnover in the product and geographical market concerned by the infringement. This means that the percentage to be considered increased by an average of 5% of the EU turnover more than it had been the previous stage.

Indeed, the *Pioneer* decision meant a turning point since prior to its adoption by the EU Commission, fines were steadfastly pegged at below 2% of the total turnover of an undertaking.<sup>162</sup> Example of this is the *Cartonboard* decision, where the EU Commission imposed a fine for the entire cartel of €139 million, where 9% of the EU turnover was

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<sup>158</sup> EU Commission, 'Twenty first Report on Competition Policy' (annexed to the Twenty-Fifth Report on the Activities of the European Communities 1991 (Report) COM (1991), para. 139. It was here that the EU Commission highlighted the importance of the ill-gotten gains as a starting point when determining the fines to be imposed.

<sup>159</sup> However, the Court of Justice of the EU has never backed this; in fact, it has stated that it is permissible to have regard both to the total turnover of the undertaking and to the proportion of that turnover accounted to the goods in respect of which the infringement was committed. Yet, it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors. See Case C-100/80 *Pioneer v Commission* [1983] ECR I-1831 para 121.

<sup>160</sup> *Pioneer* [1980] OJ L60/21.

<sup>161</sup> Commission Guidelines (EC) of 14 January 1998 on Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No. 17 and Article 65 (5) of ECSC Treaty fines [1998] OJ C9/3.

<sup>162</sup> Opinion of Advocate General Sir Gordon Slynn Joined Cases C-100-103/80 *Musique Diffusion française v Commission* [1983] ECR 1825 at 1946.

applied on undertakings regarded as the ringleaders and 7.5% for the other undertakings involved.<sup>163</sup>

The EU Commission's practice of adjusting the fines on an *ad hoc* basis had been a major factor of concern behind the appeals against the Commission decisions before the General Court and the Court of Justice of the European Union. The EU Commission would enunciate the factors to be taken into account in the setting of the fines without giving reasons how those factors led to the fine as such; even the General Court has lamented the lack of transparency inherent to the method used by the EU Commission.<sup>164</sup>

In *Société des Treillis*, the General Court stated that it was desirable for undertakings, in order to be able to define their position in full knowledge of the facts, to be able to determine in detail, in accordance with any system which the EU Commission might consider appropriate, the method of the calculation of the fine imposed on them. The above mentioned, without being obliged, in order to do so, to bring Court proceedings against the EU Commission decision.<sup>165</sup>

The fact that the EU Commission's method of calculation was brought into light only before judicial review when decisions were on appeal, led the EU Commission to publish the EU Fining Guidelines 1998. The purpose of these guidelines was to improve the transparency and effectiveness of the Commission's decision-making practice and to make the EU Commission's policy on fines more coherent and to strengthen the deterrent effect of the financial penalties.

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<sup>163</sup> *Cartonboard* [1994] OJ L243/1.

<sup>164</sup> Judgements of the General Court in Case T-148/89 *Trefilunion v Commission* [1995] E.C.R. II-1063 para. 142 and Case T-147/89 *Société Métallurgique de Normandie v Commission* [1995] E.C.R. II-1063.

<sup>165</sup> See also Case T-151/89 *Société des Treillis et Panneaux Soudés v Commission* [1995] E.C.R. II-1063.

However, not only did the criticism within the EU, both from the undertakings concerned and EU competition law experts, was the only reason that drove the EU Commission to publish its first guidance ever. The influence of the American ideology based on the Chicago School scholarship led the EU Commission to change the purpose which the EU competition rules are supposed to foster. To that end, it adopted a consumer welfare approach and thus, the sole purpose of EU competition law became to ensure that consumer welfare is not jeopardised by the actions of undertakings or governments which is dealt by state aid rules.<sup>166</sup>

Hence, if the objective of antitrust law is to maximize consumer welfare and the standard approach to enforce competition law is through the imposition of fines, the only element that was left to determine is the appropriate level of the antitrust fine. According to the enforcement theory of *Becker* and *Landes*,<sup>167</sup> the optimal consumer welfare maximising fine equals the sum of the portion of deadweight loss borne by consumers and the monopoly transfer which means that a fine lower than this so called optimal level, fails to deter they monopolizing activity that decreases society's wealth.<sup>168</sup>

In addition, since the economic theory on deterrence takes the view that increasing the rate of probability of detection and effective prosecution entails positive social costs thus damaging consumer welfare while fines are socially costless then, the optimal law enforcement for cartels dictates to set fines to the maximum level. This is proposed in

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<sup>166</sup> Andreas Weitbrecht, 'From Freiburg to Chicago and Beyond: The first 50 Years of European Competition Law' [2008] 2 ECLR 81 and 85.

<sup>167</sup> Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 JPE at 169 to 217 and William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 UCLR at 652.

<sup>168</sup> Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (1<sup>st</sup> edn, Cambridge 2003) p. 44.

order to save on inspection costs irrespective of whether it is the harm caused or the offender's benefit the reference what is taken into account.<sup>169</sup>

Considering the above economic theory, we can identify two main approaches. On the one hand, there is the approach that puts emphasis on compensation and reparation of the harm that infringers have caused to society which may include the cost incurred for detecting and prosecuting the violators, enforcement costs. On the other hand, there is the approach that considers antitrust infringers as a rational agent who weighs the costs and benefits of breaking competition law and thus, the deterrence level of the fine is that level which makes it unprofitable the formation of the cartel or sustainable its continuation.<sup>170</sup>

As exposed above and considering what has been explained before in Chapter 1, the approaches identified by the economic theory are: On the one hand the approach that puts emphasis on compensation which is suitable to be enforced by remedies as the purpose of remedies is to cure, correct or prevent unlawful conduct. On the other hand, the approach that puts emphasis on deterrence would be better enforced by the imposition of fines since the purpose of a fine is to penalise or punish undertakings involved in an antitrust violation. Thus, we can conclude that such economic study of law has also been an influence in regards to the measures available to the EU Commission in order to prevent the violation of antitrust rules.

Therefore, prior to the adoption of the EU fining Guidelines 1998, there were undoubtedly issues originated from the lack of transparency and legal certainty within the EU

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<sup>169</sup> William Landes, 'Optimal Sanctions for Antitrust Violations' [1983] UCLR 50 at 652-678.

<sup>170</sup> Marie-Laure Allain, Marcel Boyer, Rachidi Korchoni, Jean-Pierre Ponssard, 'Are Cartel Fines Optimal? Theory and evidence from the European Union', CIRANO Scientific Series 24, Montreal, July 2013. <http://www.cirano.qc.ca/pdf/publication/2013s-24.pdf> (Accessed on 25 September 2015).

Commission's administrative procedure when setting a fine but it was in this period too that a shift in the objective of EU antitrust law based on economics took place.

On the part of the judicial bodies, the fact that there were no checks and balances within the EU Commission procedures led to the belief that during the period before the adoption of the EU Fining Guidelines 1998, the Court of Justice of the European Union engaged in a more thorough examination of the facts and circumstances involving a case.<sup>171</sup> Of course, the level of intensity by which EU Courts would scrutinise EU Commission decisions will depend on the subject matter that is under review.<sup>172</sup>

For instance, in the *Quinine* decision,<sup>173</sup> where the first fine was ever imposed, the Court of Justice of the European Union took into account the nature of the restrictions on competition, the number and the size of the undertakings concerned, the situation of the market within the Community when the infringement was committed and the respective proportions each company controlled.<sup>174</sup> *Forrester* argues that decisions like this show that the Court of Justice of the European Union was willing to make a review on the full merits of the case. In his view, the penalty itself was under full judicial review prior to

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<sup>171</sup> While Article 263 TFEU (ex Article 230 EC Treaty) establishes that the Court of Justice of the EU shall review the legality of the acts of the EU Commission, Article 261 TFEU (ex Article 229 EC Treaty) confers it unlimited jurisdiction with regard to penalties.

<sup>172</sup> According to Andreangeli, the Court of Justice of the EU has allowed the establishment of ad hoc limits into the otherwise pervasive investigative powers enjoyed by the EU Commission, something that has not been seen in the review of fines and remedies due to the economic analysis done in these matters. See A. Andreangeli, 'The protection of legal professional privilege in EU law and the impact of the rules on the exchange of information within the European competition network on the secrecy of communications between lawyer and client: one step forward, two steps back?' (2005) 2 (1) Competition Law Review 44.

<sup>173</sup> *Quinine* [1969] OJ L192/5, where the EU Commission set a fine of ECU 500,000 in total.

<sup>174</sup> Case C-41/69 *Chemiefarma v Commission* [1970] ECR-00661 para 176. After taking into consideration all relevant factors, the EU Court reduced the fine to ECU 435,000 overall.

the adoption of the first fining guidelines, something that as will be discussed below, has been abandoned in favour of a more deferential standard of review.<sup>175</sup>

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<sup>175</sup> Ian Forrester, ‘A Challenge for Europe’s Judges: The Review of Fines in Competition Cases’ [2011] ELR 2 at 193.

## 2.2 The EU fining system between 1998 and 2004.

The EU Commission's fines had increased steadily over the last years and so too had the demands for greater transparency on its fining policy.<sup>176</sup> Such demands took force after the General Court's judgement in *Trefilunion case*<sup>177</sup> in which the General Court regretted the lack of transparency in the method to set the fine,<sup>178</sup> all of which subsequently led the EU Commission to publish the first fining guidelines to be applied in the European Union.<sup>179</sup>

Up to this point, the statutory framework on which the EU Commission based its fining policy only comprised Article 15 (2) Regulation No.17 which simply stated that in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.<sup>180</sup> An upper limit of the fine to be imposed was also set leaving it at 10% of the undertaking's total turnover in the previous year.<sup>181</sup>

With such limited parameters and fines increasing every time and reaching new records whenever new decisions were issued, the EU Commission adopted the *EU Fining Guidelines 1998*. The latter had as their main purpose: To bring transparency and increase

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<sup>176</sup> Although lack of transparency or predictability of the final amounts of fines has been praised as a virtue, see Luc Gyselen, 'The Commission's fining policy in competition cases' in J. Slot and A. McDonnell (eds) *Procedure and Enforcement in EC and US competition law* (Sweet & Maxwell, London 1993) p. 63. See also John Coffee, 'Corporate Crime and Punishment: A Non Chicago View of the Economics of Criminal Sanctions' [1980] 17 ACLR 419 at 430 and 431.

<sup>177</sup> Case T-148/89 *Trefilunion v Commission* [1995] ECR II-01063.

<sup>178</sup> *Ibid* para 142.

<sup>179</sup> Commission Guidelines (EC) of 14 January 1998 on Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No. 17 and Article 65 (5) of ECSC Treaty fines [1998] OJ C9/3. These guidelines also supplemented the arrangements provided in the first Commission Notice (EC) of 18 June 1996 on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4; hereafter, 1996 Leniency Notice.

<sup>180</sup> Article 23 (3) of Regulation 1/2003 kept these parameters too.

<sup>181</sup> First Article 15 (2) of Regulation No. 17 and later Article 23 (2) of Regulation 1/2003 too establishes the very same limit.

legal certainty for undertakings and their legal advisers, to present non-compulsory guidance for the EU judicial institutions and to supply consistent application of the rules governing the method of calculating the fines.

Overall, the EU Commission's guidelines provided an indicative list of factors to be taken into account within the limits set by Article 15 (2) of Regulation No. 17.<sup>182</sup> The guidelines were based on the determination of a basic amount expressed in ECU, this determination required as a first step that the infringement be classified as either as minor, serious or very serious, depending on its nature, its actual impact on the market, where this could be measured and the size of the relevant geographical market.<sup>183</sup>

Thus, the new methodology introduced in 1998 is no longer based on percentages of turnover other than for differentiation purposes, but directly targets the amount of the fine.<sup>184</sup> In respect to gravity, for minor infringements the likely fines were between €1,000 and €1 million, for serious infringements fines would be set between €1 million and €20 million and above €20 million for very serious infringements. Within this ranges, the basic amount of the fine was set, taking into account the nature of the violation, the gravity, the duration and the need to ensure a sufficiently deterrent effect.

For violations involving multiple undertakings, such as cartels, the basic amount for each enterprise may vary, allowing differentiation between them to reflect the considerable disparity of their sizes in any case. For instance, the EU Commission may group the

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<sup>182</sup> Indeed, the EC Fining Guidelines 1998 constituted an instrument intended to define, while complying with higher-ranking law, the criteria that the EU Commission proposed to apply in exercise of its discretion. See Case T-229/94 *Deutsche Bahn v Commission* [1997] E.C.R. II-1689.

<sup>183</sup> Section 1 A of EU Fining Guidelines 1998.

<sup>184</sup> Wouter P. J. Wils, *The optimal enforcement of EC antitrust law: A study in Law and Economics* (Kluwer Law International, Brussels 2002) p. 251.

different undertakings according to their respective turnover, usually worldwide product turnover so this individualisation reflects the general principles of EU law such as proportionality and equity.<sup>185</sup> Throughout the application of the EU Fining Guidelines 1998, the EU Commission made extensive and increasing use of its ability to differentiate undertakings, something that was backed by the Court of Justice of the European Union.<sup>186</sup>

In order to assess the gravity of the infringement regard must be had to a large number of factors;<sup>187</sup> one criterion was the actual impact of the violation on the market, where this can be measured and the size or economic significance of the relevant geographic market.<sup>188</sup> The duration of the infringements was also a key factor in fixing the basic amount of the penalty and the EU fining Guidelines 1998 draw a clear distinction between short, medium and long term offences. For infringements of short duration, meaning less than one year, there will usually be no increase in the amount indicated by the gravity criteria. Infringements of medium duration ranging from one to five years would have entailed an increase of up to 50% in the amount determined for gravity and violations lasting more than five years will be liable to a maximum increase of 10% per annum in the amount determined for gravity.<sup>189</sup>

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<sup>185</sup> For instance: *Citric Acid* [2001] OJ L239/18 where the starting amounts of the fines were as follows: Haarman & Reimer – €35 million, ADM, HLR and Jungbunzlauer – €21 million and Cerestar – €3.5 million.

<sup>186</sup> See *inter alia*, Case T-213/00 *CMA CGM and others v Commission* [2003] ECR II-913 para. 385, Cases T-236/01 *Tokai Carbon Co. Ltd and Others v Commission* [2004] ECR II-1181 para. 217 and Case C-308/04 *SGL Carbon AG v Commission* [2006] ECR I-05977 para. 54-56.

<sup>187</sup> Joined Cases 100-103/80 *SA Musique Diffusion française and others v Commission* [1983] ECR I-01825 para. 120 and 121.

<sup>188</sup> However, Wils argued that this was probably not a good idea since the burden of prove will always be on the competition authority. Another issue to be considered is the fact that what can be proven is likely to remain systematically below the reality. See Wouter P. J. Wils, *Efficiency and Justice in the European Antitrust Enforcement* (Hart Publishing, Oxford 2008) p. 91.

<sup>189</sup> Section 1 B of EU Fining Guidelines 1998.

In addition, the EU Commission was able to set the fine at such level that it has a sufficient deterrent effect. See for instance the *Pre-insulated pipes* decision<sup>190</sup> where ABB received a minimum fine of €20 million, which was envisaged for a very serious infringement but a multiplier of 2.5 was added for deterrence leading to a starting amount of €50 million. Later on appeal, the Court of Justice of the EU stated that such a multiplier was wholly consistent with the established principle that the gravity has to be ‘determined by reference to numerous factors. Such factors to be considered were the particular circumstances of the case, its context and the dissuasive effect of fines, even though no binding or exhaustive list of the criteria has been drawn up’.<sup>191</sup>

In that regard, the Commission’s power to impose fines on undertakings which, intentionally or negligently, commit an infringement of the provisions of Article 101 (1) TFEU is one of the means conferred to the Commission in order to enable it to carry out the task of supervision conferred on it by Community law.<sup>192</sup> That task also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.<sup>193</sup>

In fact, it was the *Pre-insulated pipes* judgement that gave legitimacy to the application of the EU Fining Guidelines 1998. Since it found that the methodology there contained complied not only with the requirements of Article 23 Regulation No. 1/2003 (ex Article 15 of Regulation No. 17) but also with the general principles of EU law. Mainly, that the

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<sup>190</sup> *Pre-insulated pipes* [1998] OJ L24/1.

<sup>191</sup> Case C- 189/02 P *Dansk Rorindustri and Others v Commission* [2005] ECR I -5425 para 241.

<sup>192</sup> *Ibid* para 170.

<sup>193</sup> *Ibid* making reference to Case T-31/99 *ABB Asea Brown Boveri Ltd v Commission* [2002] ECR II-1881 para 122.

guidelines complied with the principle of retroactivity<sup>194</sup> and that the three available ranges of the basic amount according to the seriousness of the infringement complied with the principle of legality.<sup>195</sup>

Once the Basic Amount was determined, aggravating and mitigating factors were considered. The list of factors that can be held as either aggravating or attenuating was not exhaustive but some examples were given. As aggravating circumstances, the EU Commission would have considered behaviour including recidivism, leading role, retaliatory measures against other undertakings, refusal to cooperate with or attempt to obstruct the EU Commission in carrying out its investigation and others.<sup>196</sup>

On the other hand, mitigating circumstances encompassed passive role, non-implementation of anticompetitive agreement; termination of the offence as soon as the EU Commission intervened, existence of reasonable doubt on the part of the undertaking as to whether restrictive conduct does indeed constitute an infringement, effective cooperation outside the scope of the *1996 Leniency Notice*<sup>197</sup> and other circumstances.<sup>198</sup>

Under the EC Fining Guidelines 1998, the EU Commission sanctioned sixty-three cartels, involving 355 undertakings. On these companies, about €13.7 billion in fines were imposed, before the leniency programme applied.<sup>199</sup> Leniency favoured 55% of these

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<sup>194</sup> Ibid para 168-233 stating that the EU Commission was able to apply the EC Fining Guidelines 1998 retroactively to infringements committed before their publication.

<sup>195</sup> Ibid para 312-314.

<sup>196</sup> EC Fining Guidelines 1998 point 2.

<sup>197</sup> Commission Notice (EC) of 18 June 1996 on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4; hereafter, 1996 Leniency Notice.

<sup>198</sup> Ibid point 3.

<sup>199</sup> Both the 1996 Leniency Notice and the 2002 Leniency Notice.

companies (195 firms) and this led to reduce the total amount by 36% with the result of €8.8 billion in fines after leniency but before appeal to the General Court.

Seventy per cent of the €8.8 billion of all fines imposed by the Commission were contested before the General Court and the Court of Justice of the European Union (CJEU), which led to a further reduction of 12% in the total amount of fines.<sup>200</sup> This means that from the €8.8 billion imposed by the EU Commission as the final amount of fines after leniency, only 67% of it. This means that the General Court and the CJEU upheld only €5.9 billion in fines.<sup>201</sup>

Overall, we can agree that the EU leniency programme was a big break for the EU Commission. From the adoption of its first programme back in 1996, then the second later in 2002 and currently being enforced by its third programme adopted back in 2006, leniency has become its most effective tool against cartels over the years. The 1996 Leniency Notice, although a first and significant step that also meant following the US antitrust enforcement style in bringing down cartels at the international level; it lacked transparency and certainty of the conditions on which a reduction would be granted.<sup>202</sup>

Uncertainty ultimately rendered the first leniency programme ineffective because it was not clear whether the first undertaking to come forward would be awarded with

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<sup>200</sup> Cento Veljanovski, 'European Commission Cartel Prosecutions and Fines, 1998-2006 - An updated Statistical analysis of fines under the 1998 Penalty Guidelines' (2010) Case Associates Working Papers Series 7, p. 4.

<sup>201</sup> Hence, from €13.7 billion euros imposed as fines, less than half that amount is actually imposed as punishment.

<sup>202</sup> It was because of these problems that the EU Commission only received a total of a little more than 80 leniency applications under the 1996 Leniency Notice, compared to 203 applications during the application of the 2002 Leniency Notice.

immunity.<sup>203</sup> Another situation that contributed for the first programme to be partially unsuccessful was the fact that most of leniency applications under 1996 Leniency Notice were made after the EU Commission had undertaken inspections which resulted in a mere reduction of fines, meaning that immunity was granted in a handful of cases.<sup>204</sup>

Nevertheless, despite the deficiencies presented in the first leniency notice, the data reveals that from the €13.7 billion fines based on the EC Fining Guidelines 1998 that the EU Commission imposed on undertakings that infringed Article 101 TFEU; this amount was reduced by almost 57%. After the 1996 and 2002 Leniency Notices were applied and appeals were dealt with by the General Court and the CJEU, the total amount left was of the amount of €5.9 billion. Although it is a significant reduction of fines that would have been imposed if there had not been leniency, the need to discover and to bring down cartels, outweigh the need to impose stringent fines.

Indeed, the 1996 Leniency Notice increased the certainty of punishment as it offered an incentive for co-infringing undertakings to provide all evidence necessary so the infringement could be proved in return for a reduced fine, which prompted all undertakings to apply for leniency. As has been stated before, although most leniency applications were done after an inspection by the EU Commission was carried out, the success of this first leniency programme is based on the fact, that more resources were freed to take all cases possible. In this regard, a faster processing of the evidence would

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<sup>203</sup> Section E (2) of 1996 Leniency Notice provided that only until the adoption of a formal decision would the EU Commission determine whether there would be immunity or reductions for the undertakings' cooperation.

<sup>204</sup> François Arbault and Francisco Peiro, 'The Commission's new notice on immunity and reduction of fines in cartel cases: Building on success', Competition Policy Newsletter, 2002-2, at p. 15.

deliver a speedy infringement decision and overall increase the efficiency of the enforcement system.

The 1996 Leniency Notice was subsequently revised and substituted in February 2002 by the 2002 *Leniency Notice*,<sup>205</sup> which boosted the number of applications even more,<sup>206</sup> resulting in fines being further reduced for one or more firms in each of the 56 cartels discovered. From these, 30 firms received full immunity allowing the EU Commission to uncover, investigate and set fines for 89% of cartels sanctioned during this period.<sup>207</sup> During the 2002 Leniency Notice enforcement, more than half of the applications were made before any inspection had taken place.<sup>208</sup> In most of the cases conditional immunity was granted before reaching a formal decision.<sup>209</sup>

As it has been established, the EU Fining Guidelines 1998 and the 1996 and 2002 leniency programmes were an important step that the EU Commission took; first to uncover cartels and second, to provide transparency in the procedure of setting fines for antitrust violations in the European market. However, the most important change it brought was the fact that it progressively developed a methodology of calculating fines

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<sup>205</sup> Commission Notice (EC) of 19 February 2002 on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3.

<sup>206</sup> 104 applications were made for immunity and 99 for fine reductions. See EU Commission, 'Report on Competition Policy 2006' (Published in conjunction with the General Report on the activities of the European Union 2006) COM (2007) 358 final, Belgium 2007, p 12.

[http://ec.europa.eu/competition/publications/annual\\_report/2006/en.pdf](http://ec.europa.eu/competition/publications/annual_report/2006/en.pdf) (Accessed on 25 April 2015).

<sup>207</sup> Cento Veljanovski, 'European Commission Cartel Prosecutions and Fines, 1998-2006 - An updated Statistical analysis of fines under the 1998 Penalty Guidelines' (2010) Case Associates Working Papers Series 7, p. 14.

<sup>208</sup> Nevertheless, it should be pointed out that Points 8 -10 of 2002 Leniency Notice provided that, even after an investigation was carried out, immunity was still available as long as the information being offered enabled the EU Commission to find an infringement. This nonetheless differs from the trend presented during the enforcement of the 1996 Leniency Notice where most of the applications were done after an inspection was carried out by the EU Commission.

<sup>209</sup> Point 15 of 2002 Leniency Notice.

departing from the earlier practice where the EU Commission often calculated the sanctions as a percentage of each undertaking's affected sales.<sup>210</sup>

Indeed, *Wils* states that before the adoption of the first fining guidelines in 1998, the EU Commission would often set fines based on ratios to the firm's annual turnover in the products concerned by the infringement without further explanation; these percentages appeared to have ranged from 2 to 9%.<sup>211</sup> However, in the application of the EU Fining Guidelines 1998 the fines imposed were equivalent to 11.3% as the mean percentage of affected commerce thus, making them harsher than fines previously imposed.<sup>212</sup>

Another statistic to be considered is the fact that during the application of the EU Fining Guidelines 1998, individual fines were capped for 24 firms in 11 cartels because they exceeded the statutory limit of 10% of the worldwide turnover in the preceding business year.<sup>213</sup> This capping was mostly done to small undertaking based on these guidelines. The highest fine imposed to a single undertaking for cartel activity was in the amount of €396.562.500 on Siemens AG in *Gas Insulated Switchgear*,<sup>214</sup> which only represented 0.6% of value compared to the €75.4 billion the company had as a worldwide annual turnover in the preceding business year.<sup>215</sup>

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<sup>210</sup> Even more so that the CJEU confirmed the legality of such sanctions, see Case C- 189/02 *P Dansk Rorindustri and Others v Commission* [2005] ECR I -5425 para 241.

<sup>211</sup> Wouter P. J. Wils, *The optimal enforcement of EC antitrust law: A study in Law and Economics* (Kluwer Law International, Brussels 2002) p. 201.

<sup>212</sup> John M. Connor, 'Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines' [2011] 32 ECLR 27. Thus, it is no surprise the fact that only small undertakings' fines were capped due to the 10% worldwide turnover.

<sup>213</sup> Article 23 (2) Regulation No. 1/2003. One has to note that such undertakings were small in size and their whole commercial activity concerned the product or products related to the cartel infringement.

<sup>214</sup> *Gas Insulated Switchgear* [2008] OJ C5/7, the fine on ThyssenKrupp was reduce to €19.779.900 by the General Court in Case T-154/07 *ThyssenKrupp Liften v Commission* of 13 July 2011 not yet reported, see also EU Commission Updated Cartel Statistics from 2002 to date

<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (Accessed 12 April 2012).

<sup>215</sup> *Gas Insulated Switchgear* (Case COMP/F/38.899) Non-confidential version published on 24.01.2007, para 524. [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38899/38899\\_1030\\_10.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38899/38899_1030_10.pdf) (Accessed on 15 May 2014).

Even though the EU Fining Guidelines 1998 only applied to cartel cases, it is interesting to find that the EU Commission did use them as reference to impose fines for abuse of dominance infringements. According to Article 15(2) of Regulation No 17, the only criteria to determine fines to be imposed on either Article 101 or 102 TFEU was to consider the gravity and duration of the infringement. This can be observed in the reasoning of the EU Commission in its case against *Microsoft*<sup>216</sup> where the latter was fined with over €497 million euros.

In this particular case, as to its gravity, the breach was regarded to be a very serious infringement just as considered by the EU Fining Guidelines 1998, for which the likely fine was to be set above €20 million, as it was stated in the decision.<sup>217</sup> Although Microsoft had a revenue of €32.1 billion in the last business year of the infringement, the EU Commission decided that, in order to reflect the gravity of the abuse of dominance violation, the initial amount to be considered was €165,732,101.<sup>218</sup>

However, given Microsoft's significant economic capacity and in order to ensure a sufficient deterrent effect, the initial amount was adjusted upwards by a factor of 2 to €31,464,203 as the basic amount.<sup>219</sup> Since the violation lasted 5 years and 5 months, the EU Commission *de facto* followed the EU Fining Guidelines 1998 without making reference to them and considered the infringement to be of long duration<sup>220</sup> and decided

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<sup>216</sup> *Microsoft* (Case COMP/C-3/37.792) Non-confidential version published on 24.03.2004. [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37792/37792\\_4177\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf) (Accessed on 25 June 2015).

<sup>217</sup> See Point 1 A, EU Fining Guidelines 1998.

<sup>218</sup> *Microsoft* (Case COMP/C-3/37.792) para 1075.

<sup>219</sup> *Ibid* para 1076.

<sup>220</sup> Point 1 B, EU Fining Guidelines 1998.

to increase the basic amount by 50% to take account of the duration leaving the final fine in €497,196,304.<sup>221</sup> Again, even though there is no reference to the fining guidelines, the reasoning to reach the final amount of the fine points to them.<sup>222</sup>

To conclude, there is no doubt that the 1996 and 2002 Leniency programmes brought more cartel cases to the attention of the EU Commission and the 1998 Fining Guidelines provided a clear methodology for the first time and allowed the EU Commission to set higher fines than in the previous stage. Hence, certainty and severity of punishment were increased but the result was far from optimal.

Indeed, the above mentioned instruments failed to provide an effective deterrent result due to the low level of differentiation applied thus, falling in the deterrence trap of the system. The deterrence trap argued by *Coffee* refers to instances where punishment will be disproportionate when the crime is not as serious and normally against small and medium size undertakings but it will fail to deter when crime is at its highest and the punishment is not big enough, for instance fines against big corporations.<sup>223</sup> This was more evident with the 1998 Fining Guidelines than ever before.<sup>224</sup>

The deterrence trap meant that the guidelines failed to provide a sense of compliance and respect of general principles of EU law in every particular case. Although the first

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<sup>221</sup> *Microsoft* (Case COMP/C-3/37.792) para 1078 - 1080, such amount represented less than 2% of its annual turnover.

<sup>222</sup> See A. Jones and B. Sufrin, *EU Competition Law: Text, Cases, and Materials* (OUP 5<sup>th</sup> edition, 2014) p. 1226, Ian Forrester, 'A challenge for Europe's judges: the review of fines in competition cases' [2011] 36 ELR 2 p. 188.

<sup>223</sup> J. Coffee, 'No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' [1981] 79 Michigan Law Review 386.

<sup>224</sup> Despite of the relative long cartel life averaging 7.5 years, the EU Commission took account of the duration of antitrust violations by escalating punishment by an average increase of 50% in the basic amount of the fine, which resulted equal increases in fines for all undertaking, without considering the size of companies or economic harm.

paragraph of the EU Fining Guidelines 1998 established that the discretion of the EU Commission “must follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalizing infringements of the competition rules”;<sup>225</sup> the EU Commission failed to treat different undertakings differently due to their particular characteristic.

This one-size-fits-all treatment resulted in the imposition of fines that were closer to the 10% statutory limitation only for small undertakings which inevitably raised suspicion about their proportionality and fairness. As explained in Section 2.3, the purpose of fines is to punish which means to impose a loss or suffering on the infringer. In the context of EU antitrust law, that punishment should be equal to the harm resulting from the infringement adjusted by the probability of detection<sup>226</sup> or to the offenders benefit adjusted by the probability of detection.<sup>227</sup>

Considering that, on the one hand, companies were sanctioned in a similar way without having positive discrimination and due account of the harm caused in each situation. On the other hand, the 1998 Fining Guidelines constituted a tariff based system; then it is understandable why fines adopted by such methodology were set on the top level within any rage there provided. This make them disproportionate in most cases, higher fines for small companies and smaller fines for big companies.

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<sup>225</sup> First paragraph of EU Fining Guidelines 1998. [http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX\\_SESSIONID=hyBLJmGJwhCh99hXSLy1cK2x16hj011LC2pmFH14gr91vp0hnyTh!709117011?uri=CELEX;31998Y0114\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=hyBLJmGJwhCh99hXSLy1cK2x16hj011LC2pmFH14gr91vp0hnyTh!709117011?uri=CELEX;31998Y0114(01)) (Accessed on 16 February 2014).

<sup>226</sup> Gary Becker, ‘Crime and Punishment: An Economic Approach’ [1968] JPE 76 at 169-217, as can be observed here, this is the formula for the optimal deterrence framework.

<sup>227</sup> A. M. Polinsky and S. Shavell, ‘A Note on Optimal Fines when Wealth Varies Among Individuals’ (1991) American Economic Review 81, 618-621. Either harm or when this is hard to determine, the benefit extracted from the violation.

Such situation led the EU Commission to introduce a new set of fining guidelines<sup>228</sup> and a third leniency notice<sup>229</sup> with the purpose of achieving effective deterrence and prevention within the Treaty principles. This after all, was the main goal of the modernisation programme as will be discussed below. Whether the deterrence trap was avoided, will be discussed in the following paragraphs.

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<sup>228</sup> Commission Guidelines (EC) of 1 September 2006 on Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 [2006] OJ C210/2; hereafter, *EU Fining Guidelines 2006*.

<sup>229</sup> Commission Notice (EC) of 8 December 2006 on Immunity from Fines and Reduction of fines in cartel cases [2006] OJ C298/17; hereafter, *EU Leniency Notice 2006*.



## 2.3 The EU fining system since 2004.

Although the EC Fining Guidelines 1998 meant a huge improvement and the first sign of transparency in the imposition of fines, many issues remained. Among these problems, the ones that stood out the most were, on the one hand, the high level of recidivism from big corporations and low incentives for competition law abiding companies due to the apparent lenient punishment that large infringing undertakings received by non-deterrent fines which ultimately resulted in the non-implementation of an effective EU competition policy.

On the other hand, the disproportionate and excessive fines on small and medium size undertakings caused by a tariff based system that treated all undertakings equally according to the seriousness of the infringement and setting the very same basic amount of the fine for all led to a deterrence trap. In this context, modernisation was urgent and the need for a new approach ultimately led the EU Commission to seek the modernisation of the whole system of competition law enforcement.<sup>230</sup>

In May 2004, Regulation No. 1/2003 came into force.<sup>231</sup> It replaced Regulation No. 17 because of the fact that the EU Commission was functioning on a model that was put in place 40 years earlier through Regulation No. 17, which did not allow it to accomplish the Treaty goals in the new century since the enforcement of EU competition law was

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<sup>230</sup> EU Commission “White Paper on Modernisation of the Rules Implementing Article 101 (ex 85) and 102 (ex 86) of the TFEU (ex EC Treaty)” of 28 April 1999, COM (99)101 final, hereafter *White Paper on Modernisation*. [http://europa.eu/documents/comm/white\\_papers/pdf/com99\\_101\\_en.pdf](http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf) (Accessed on 25 September 2015).

<sup>231</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the application of rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, hereafter; Regulation No. 1/2003, the so-called “Modernisation Regulation”.

centralised. This centralization was specially burdensome since the EU Commission was the only authority able to apply Article 101 and 102 TFEU in full. The fact that both the *1996 Leniency Notice* and the *2002 Leniency Notice* increased the number of cartels being detected and prosecuted; meant that over the years, the workload that resulted from those leniency and clearance applications was enormous and unbearable for just one institution.

This need increased due to the fact that the EU Commission was becoming more sophisticated and effective as it was opening new cases resulting from its own investigations. The above mentioned also contributed to the realization that the enforcement of EU competition law was ineffective and lacking the proper platform to face the new challenges, in particular, the challenge to bring down international cartels.

Regulation No. 1/2003 brought key reforms to decentralise the enforcement system and gave the EU Commission greater autonomy to set its enforcement priorities.<sup>232</sup> In particular, Regulation No. 1/2003 was meant to fulfil the objectives stated in the White Paper on Modernisation; mainly the achievement of a rigorous enforcement of competition law focused on fighting the most serious restrictions of competition. At the same time, the put in place of an effective decentralised system while maintaining consistency in the implementation of the EU competition policy throughout the internal market and to ease administrative burdens on firms without sacrificing legal certainty.<sup>233</sup>

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<sup>232</sup> Although Regulation No. 1/2003 could be characterised as revolutionary, *Giorgio Monti* argues that such regulation was not so. Instead, the EU Commission had been attempting to change its enforcement procedures since early days of competition law enforcement and the regulation was merely the last and decisive step towards a different policy model from that which had been put in place 1962. See *Giorgio Monti*, *EC Competition Law* (1<sup>st</sup> edn, CUP, Cambridge 2008) p. 394 where he mentions the minimis rule, the Block Exemption Regulations and procedures for settling notifications informally as previous steps towards modernisation.

<sup>233</sup> EU Commission “White Paper on Modernisation of the Rules Implementing Article 101 (ex 85) and 102 (ex 86) of the TFEU (ex EC Treaty)” para 42.

In order to achieve those goals, the EU Commission abolished the notification procedure and adopted an enforcement policy of *ex post* application of competition law coupled with deterrent elements.<sup>234</sup> The purpose was to focus on serious infringements such as cartels and it was necessary to eliminate the EU Commission's exclusivity in the enforcement of EU competition law<sup>235</sup> and in doing so, Regulation No. 1/2003 also provided clarity as to the supremacy of EU competition law over national competition law.<sup>236</sup> Although decentralisation was the core of Regulation No. 1/2003, it also ensured that the EU Commission would be the one to define the development and direction of EU competition law and policy.<sup>237</sup>

The modernisation reform and all it entailed, especially the enforcement decentralisation, the abolition of the notification system, the focus on the most serious infringements and the adoption of a policy based on deterrence; was complemented by greater enforcement tools. Indeed, Regulation No 1/2003 brought greater investigatory powers allowing the EU Commission to carry out unannounced inspections in company's headquarters as well as private homes;<sup>238</sup> it empowered the EU Commission to seal any business premises,<sup>239</sup> ask for oral explanations<sup>240</sup> and, with the parties' consent, carry out interviews.<sup>241</sup>

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<sup>234</sup> Monti further argues that such a change in policy was nothing but an alignment with the US style enforcement based on deterrence, making the EU Commission to adopt a proactive policy rather than reactive as it had been in the previous years. See Giorgio Monti, *EC Competition Law* (1<sup>st</sup> edn, CUP, Cambridge 2008) p. 405.

<sup>235</sup> Article 3 (1) Regulation No. 1/2003 makes it compulsory for the Member States and National courts to apply Article 101 and 102 TFEU in parallel with national competition law.

<sup>236</sup> Article 3 (2) Regulation No. 1/2003 thus provide legal certainty. See also Article 16 where uniform application of EU competition law is provided.

<sup>237</sup> See Article 16 Regulation No. 1/2003 and Case C-344/98 *Masterfoods Ltd. v HB Ice Cream Ltd.* [2000] ECR I-11369 para 46.

<sup>238</sup> Also known as dawn raids, see Articles 20 and 21 of Regulation No. 1/2003, respectively.

<sup>239</sup> Article 20 (2) (d) of Regulation No. 1/2003.

<sup>240</sup> Article 20 (2) (e) of Regulation No. 1/2003.

<sup>241</sup> Article 19 of Regulation No. 1/2003.

Whether modernisation reform took place with the coming into force of Regulation No. 1/2003 or whether it was the conclusion of a process that started long before its adoption,<sup>242</sup> it did not make many statutory changes in respect of the penalties to be imposed. The same limitations were kept in place, which seems surprising considering that the improvement of the deterrence approach was one of the main drivers in the reform towards an effective enforcement of competition law.

In fact, Regulation No. 1/2003 kept the very same parameters contained in Regulation No. 17 as to the limit in the amount of the fines to be set when infringements of competition law had been proven.<sup>243</sup> However, the EU Commission has used soft law instruments to make fundamental changes as it regards it to be part of its discretion when it comes to its fining policy. As had been discussed above, EU Fining Guidelines 1998 classified infringements as “minor”, “serious” and “very serious” based on their nature, their actual impact on the market and the extent of the infringements. That basic amount would then be adjusted to reflect the undertaking’s overall revenue and its share in the cartelized market and then the amount was increased depending on the infringement duration but normally with an average increase of 5 to 10 percent per year.

Under such methodology, one can see that the EU Fining guidelines 1998 failed to reflect the damage inflicted on the European market since the significance of the categorization as to the seriousness of the infringement was unclear and did not allow differentiation

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<sup>242</sup> Neelie Kroes, ‘The First Hundred Days’, (Brussels, Speech/05/205 Europa website 2005) [http://europa.eu/rapid/press-release\\_SPEECH-05-205\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-05-205_en.htm?locale=en) (Accessed on 14 May 2013). Here it was mentioned that the deterrence based policy began earlier actually, noting that in just 4 years beginning in mid-2001, which means almost 3 years before Regulation No. 1/2003 entered into force; the EU Commission had adopted 31 new decisions against cartels imposing nearly €4 billion in fines. That translates to some 35% of all cartel cases since the *Quinine* decision was adopted back in 1969.

<sup>243</sup> Both regulations kept the upper limit of the fines imposed as well as the criteria to be considered, mainly the gravity and duration of the infringement.

between undertakings.<sup>244</sup> In addition, the duration of the infringement could only marginally increase the fines for each additional year of the company's participation in the cartel resulting in an insufficient disincentive to continuing the infringement.<sup>245</sup>

Not only did the first fining guidelines failed to reflect the damage on the European market. The fact that even the General Court deemed cartels among the most serious kind of infringements that the EU Commission must seek to tackle, in pursuit of a proactive policy that was embraced with the adoption of Regulation No. 1/2003 at the core of the modernisation programme.<sup>246</sup> Considering that the EU Commission found itself in need to provide sufficient deterrent effect on repeat offenders as well as to send a message of effective enforcement that could not be materialised with the EU Fining Guidelines 1998; it is no surprise that modernisation reform also resulted in the adoption of a new set of guidelines.

Therefore, in June 2006 the EU Commission adopted the successor to the 1998 fining guidelines, the *EU Fining Guidelines 2006*.<sup>247</sup> Just like the EU Fining Guidelines 1998 were a significant departure from the EU Commission's *ad hoc* fining practice towards a path of legal certainty and clarity in the method used to set a fine; the EU Fining Guidelines 2006 meant to be a step further. The latter were adopted in order to improve

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<sup>244</sup> Under the EU Fining Guidelines 1998 one company with annual revenue of €300 million would have been fined using the categorization of "very serious" infringement just like some other company with annual revenue of €30 billion, with a minimum fine of €20 million.

<sup>245</sup> Sven B. Völcker, 'Rough Justice? An analysis of the European Commission's new fining guidelines', [2007] 44 CMLRev 1290.

<sup>246</sup> Joined Cases T-49/02 to T-51/02 *Brasserie Nationale v Commission* [2005] ECR II-3030 para 178 and 179 where the General Court in fact stated that, according to the EU Fining Guidelines 1998, very serious infringements do not require actual impact or effects produced in a particular geographic area making all cartels fall under the categorization of very serious infringements.

<sup>247</sup> Commission Guidelines (EC) of 1 September 2006 on Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 [2006] OJ C210/2. It should be remembered that these guidelines applied to all infringements of Article 101 and 102 TFEU where a Statement of Objections was sent after 1 September 2006, the day on which such guidelines were published in the Official Journal.

transparency but most importantly, it meant a decisive move to increase the amount of fines to enhance the deterrent effect of competition law.

In fact, it was the need to increase the deterrent effect the main driver for the adoption of a new set of guidelines as the EU Commission recognised the importance to reach an appropriate level of fines that ensures sufficient deterrence.<sup>248</sup> To that end, the new guidelines were conceived to better reflect the economic significance of the infringement as well as the share of each firm involved.<sup>249</sup>

Thus, the EU Commission seeks to punish and deter any company involved in a competition law infringement. In this regard, a specified two-step process will construe the fines. In a first step, the basic amount of the fine is determined primarily by a company's relevant turnover defined as the pre-tax value sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.<sup>250</sup> Depending on the type infringement; meaning the gravity, this base amount can be up to 30% of relevant turnover in the last year prior to the end of the cartel. The base amount is then multiplied by the number of years over which the violation took place and finally the resulting amount is increased by 15 to 25% for price fixing, market sharing and output limitation infringements, the so called "entry fee".<sup>251</sup>

On a second step of this process, the base amount is adjusted by applied increase and discounts by the EU Commission when evaluating the presence of aggravating or

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<sup>248</sup> Recital 4 EU Fining Guidelines 2006.

<sup>249</sup> Neelie Kroes, 'Commission revises Guidelines for setting fines in antitrust cases', (Brussels, Speech/06/857 Europa website 2006) [http://europa.eu/rapid/press-release\\_IP-06-857\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-06-857_en.htm?locale=en) (Accessed on 16 April 2015).

<sup>250</sup> EU Fining Guidelines 2006 section 1 A.

<sup>251</sup> EU Fining Guidelines 2006 section 1 B.

mitigation factors. Among the non-exhaustive list of aggravating circumstances we can find recidivism,<sup>252</sup> ring leader or coercing or instigating role<sup>253</sup> and refusal to cooperate since the undertaking is subject to an obligation to cooperate actively.<sup>254</sup> As mitigating factors, the EU Commission will consider the immediate termination of the violation as soon as the EU Commission discovers the infringement,<sup>255</sup> Negligence,<sup>256</sup> encouragement by public policy legislation, limited involvement and not implementation of the anticompetitive agreement and cooperation outside the 2006 Leniency Notice, which will be discussed further below.

Additionally, three special adjustment factors are provided in these guidelines. An exceptional deterrence multiplier where the EU Commission will again increase the adjusted fine for particularly large undertakings that have a large turnover beyond the sale of goods or services to which the violation relates so it makes sure that the fines exceeds the excess gains. Secondly, if the adjusted fine exceeds the 10% of the company's total annual turnover, then a statutory capping applies even if the above described process leads to a higher fine.<sup>257</sup>

Third, the EU Commission may take into account the inability to pay of the firm being sanctioned; this reduction will only be granted when the inability to pay is connected to

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<sup>252</sup> The basic amount can be increased by 100% for each previous infringement established both, by the EU Commission or any National competition Authority.

<sup>253</sup> Case T-236/01 *Tokai Carbon and Others v Commission* [2004] ECR II-1181 para. 301 where the General Court establishes that when determining the fine regard must be had to the role of each undertaking.

<sup>254</sup> Articles 18, 20, 21 among others of Regulation No. 1/2003.

<sup>255</sup> EU Fining Guidelines 2006, para 29(c).

<sup>256</sup> Case C-279/87 *Tipp-Ex v Commission* [1990] ECR I-261 para 2 where it was stated that the company could be considered negligent if it could not have been unaware of its conduct's anticompetitive object or effect.

<sup>257</sup> It is worth saying that the capping occurs before a further reduction is applied under the 2006 Leniency Notice.

the general and social context.<sup>258</sup> The latter is particularly important since the lack of such connection would allow inefficient firms to operate in a competitive market. According to *Motta*, the undertaking that is sheltered by a collusive agreement and becomes inefficient in a competitive environment, should exit that market which in the overall is good for society in general as it increases the productive efficiency of the firms and pushes them to improve production, invest and generally be more efficient.<sup>259</sup>

As mentioned above, the EU Fining guidelines 2006 were adopted to meet the deterrence demands set by the modernisation reform that surrounded Regulation No. 1/2003. In this respect, the 2002 Leniency Notice was no longer appropriate and needed to be improved and in December 2006, the EU Commission published the 2006 Leniency Notice.<sup>260</sup> It could be argued that this new leniency programme was adopted in response to the *OECD Competition Committee Report 2003*, which identified key elements for the success of a leniency programme.<sup>261</sup> Although the 2002 Leniency Notice seems to have complied with such elements,<sup>262</sup> the 2006 Leniency Notice further improved transparency.

The main innovations included in the 2006 Leniency Notice were among others, the clarification as to what kind of information and evidence the immunity applicant must

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<sup>258</sup> *Prestressing steel* [2011] OJ C339/7 was the first EU Commission decision to grant reduction on the basis of inability to pay for 3 undertakings from 13 that applied, reducing the fine 25, 50 and 75% respectively.

<sup>259</sup> Massimo Motta, 'On cartel deterrence and fines in the European Union' [2008] 28 ECLR 209.

<sup>260</sup> Commission Notice (EC) of 8 December 2006 on Immunity from Fines and Reduction of fines in cartel cases [2006] OJ C298/17.

<sup>261</sup> OECD, 'Hard Core Cartels – Recent progress and challenges ahead', OECD Publishing, Paris, May 2003, p. 22. Where the following is enlisted: Complete immunity for the first applicant, substantial gap in rewards between the first and subsequent applicants, immunity available even when the competition authority has already initiated an investigation, confidentiality and maximum degree of transparency and certainty.

<sup>262</sup> It should be remembered that the 2002 Leniency Notice already took into account the conclusions drawn from the OECD Competition Committee, 'Report on Leniency Programs to Fight Hard Core Cartels', 2001. See also OECD Report, 'Fighting Hard Core Cartels: Harm, effective Sanctions and Leniency Programmes', 2002. <http://www.oecd.org/competition/cartels/1841891.pdf> (Accessed on 25 May 2014).

submit, it also provides for a marker system<sup>263</sup> and a procedure to protect corporate statements from the risk of recovery in civil damages proceedings.<sup>264</sup> The first cartel infringement decision to which the current leniency notice applied was *Marine Hoses* decision<sup>265</sup> and since then, more than 80% of cartel investigations have been based on leniency applications.

Notwithstanding the possibilities to reduce the fine already available,<sup>266</sup> in June 2008 the EU Commission announced the implementation of the EU Cartel Settlement Notice.<sup>267</sup> The latter applies to cartel cases allowing involved undertakings to reach a common understanding with the EU Commission in order to speed up the procedure for adoption of a cartel decision when the parties admit to the EU Commission's objections. In return, companies receive a 10 per cent reduction in the fine.<sup>268</sup> This settlement procedure is expected to reduce litigation before the General Court and the CJEU.<sup>269</sup>

In the overall assessment, the EU Fining Guidelines 2006 are more objective than the categorization approach adopted in the EU Fining Guidelines 1998. The former's methodology allows setting fines in accordance to the principle of proportionality by

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<sup>263</sup> Point 15 of 2006 Leniency Notice.

<sup>264</sup> Ivo Van Bael, *Due Process in EU Competition Proceedings* (Kluwer Law International, Great Britain 2011) p. 259.

<sup>265</sup> *Marine Hoses* (Case COMP/39.406) published on 28.01.2009. Where the first company to apply for immunity was granted with it, *Manuli Rubber Industries* received 30% reduction of its fine, as it was the second to apply despite the fact that it did make its leniency application 2 days after the EU Commission conducted unannounced inspection. Two more companies did not provide evidence with significant value and hence did not receive reductions.

<sup>266</sup> One has to remember that mitigating factors may decrease the amount of the fine after the basic amount is established; then the statutory 10% cap applies, leniency or reductions.

<sup>267</sup> Commission Notice on the conduct on settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases [2008] OJ C 167.

<sup>268</sup> Even if companies benefit from the application of the settlement notice, a further reduction may be available due to inability to pay adjustment. See point 35 of EU Fining Guidelines 2006.

<sup>269</sup> DG Competition Press Release, "Antitrust: Commission introduces settlement procedure for cartels" IP/08/1056 of 10.06.2008.

linking the value of sales to the fines and sanctioning infringements of short duration or infringements affecting small markets with lower fines than the previous set of guidelines.

The new methodology also seeks to impose very high fines on repeat infringers and on very large undertakings as it is based on a deterrence policy while also respecting fundamental principles of law. Indeed, the previous method could be categorized as unfair, imposing fines representing an average of 6.5% of the firm's relevant turnover for small and medium sized enterprises and setting fines of 0.8% on average, on the very large undertakings' revenue.<sup>270</sup>

As mentioned previously, this is what has been called the deterrence trap because the deterrence approach will often fail in cases where a clear message needs to be sent such as those cases where big undertakings are involved or where the most damage is done.<sup>271</sup> Thus, this failure has two counterproductive results. First, specific deterrence is not achieved but provides a lesson for big companies that violating antitrust law does pay. Second, general deterrence is perceived as rather unfair, immoral and illegitimate as small and medium size undertakings are punished harsher than transnational corporations are.

On the other hand, abuse of dominance infringements contained in Article 102 TFEU are also punished with fines which are imposed based on Article 23 (2) (a) of Regulation No. 1/2003, and the same statutory limitation of 10% of the total turnover in the last business year is applicable.<sup>272</sup> The methodology to be used is the one contained in the EU Fining

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<sup>270</sup> Cento Veljanovski, 'European Commission Cartel Prosecutions and Fines, 1998-2006 - An updated Statistical analysis of fines under the 1998 Penalty Guidelines' (2010) Case Associates Working Papers Series 7, p. 14, where he makes reference to cartel cases.

<sup>271</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 118.

<sup>272</sup> Sanctions will be imposed after dominance and its abuse had been established, either intentionally or negligently.

guidelines 2006 where a calculation of the value of sales will be performed taking into account the last full business year of the infringement from which a proportion<sup>273</sup> will be used to be multiplied by the number of years the infringement lasted.<sup>274</sup> After the basic amount has been calculated, mitigating factors can be taken into account.<sup>275</sup>

See for instance the *Intel* decision,<sup>276</sup> where in 2009 the EU Commission imposed the fine of €1.06 billion on a single company for breach of Article 102 TFEU. In setting such fine, the EU Commission indicated that the gravity of the infringement was of a very serious nature due to the fact that Intel had a multifaceted strategy with the goal of anti-competitively foreclosing AMD from the market; a market that generated revenues of above USD30 billion and in which Intel held 80% market share.<sup>277</sup>

It was also stated that Intel engaged in anti-competitive practices aimed to eliminate or restrict market access and made a recollection of the naked restrictions that constituted violations by object such as in the *Michelin* case.<sup>278</sup> Taking into account such factors, the EU Commission decided to apply 5% of the value of sales multiplied by 5.5 to take account of the duration, which resulted in the basic amount of €1.06 billion without reductions as no mitigating circumstances applied.

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<sup>273</sup> That proportion depends on the gravity of the infringement. See points 20 and 22 of EU Fining Guidelines 2006.

<sup>274</sup> Point 19 EU Fining Guidelines 2006.

<sup>275</sup> Ibid point 29 where other types of possible mitigating circumstances are enlisted although those apply mainly to cartels.

<sup>276</sup> *Intel* [2009] OJ C227/13.

<sup>277</sup> *Intel* (Case COMP/37.990) Non-confidential version published on 13.05.2009 para 1780.

[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37990/37990\\_3581\\_18.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_18.pdf) (Accessed on 25 May 2016).

<sup>278</sup> See also Case T-203/01 *Michelin v Commission* [2003] ECR II-04071 para 241.

One must remember that neither leniency nor the settlement notice applies to infringements of Article 102 TFEU. However, infringements of abuse of dominance can be dealt with by way of remedies instead of fines. Article 7 (1) of Regulation No. 1/2003 requires undertakings to bring the infringement to an end and for that purpose, the EU Commission may impose on them any behavioural or structural remedies. However, the EU Commission is increasingly making use of commitment decisions based on Article 9 of Regulation No. 1/2003.

Such remedies appear to represent a route of avoidance of fines for the undertakings finding themselves under investigation by the EU Commission. On the other hand, for the EU Commission, commitment decisions represent a way to impose proactive remedies that not only allows it to *de facto* end the infringement but they also allow it to correct and prevent further unlawful conduct by improving the market conditions that result from behavioural restrictions or structural modifications that the incumbent firm must undertake.

As has been explained in Chapter 2 above, this approach must be differentiated from the deterrent approach used when fines are imposed. Although a dialogic enforcement is more efficient especially when there is no clear-cut evidence of an antitrust violation or when fast moving markets need immediate correction, this approach does not promote compliance nor does it promote compensation. It merely seeks to end the infringement by not declaring there is an infringement in the first place and seeks to improve the competitive process in the relevant market.

Nevertheless, as has been stated before; both Regulation No. 1/2003 and EU Fining Guidelines 2006 were conceived to provide wider enforcement tools in order to ensure necessary and sufficient deterrent effect as well as efficient outcomes when enforcing Articles 101 and 102 TFEU. However, recidivism is present in EU antitrust law enforcement and a number of companies do seem to be regular infringers.<sup>279</sup>

Instead, when it comes to cartels, the EU Commission has increased the level of fines, bringing them close to the statutory limit even for big undertakings, with no apparent evidence of a general let alone specific deterrent effect to be successful though.<sup>280</sup> The above mentioned can be a very short-sighted as an argument can be made that fines are very low or non-existent giving way to a deterrence trap phenomenon. It has been argued that EU Fining Guidelines 1998 did little to punish recidivism. However, The EU Fining Guidelines 2006 had not done better as also stated before in cases against *ENI, Alzo Nobel* and *ArcelorMittal*.

The latter was involved in the *Prestressing Steel* cartel<sup>281</sup> for eighteen years, until 2002. Adding to this fact, *ArcelorMittal* was recidivist as it was found to have participated in cartel violation twice before for which it only received a 60% increase in its basic amount

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<sup>279</sup> It is also true that the EU Commission has not made full use of the possibilities offered by the EU Fining Guidelines 2006 when it comes to recidivism. In practice, the EU Commission has limited itself to increase fines by 50% in case of 1 prior violation, 60% in case of 2 prior violations, 90% in case of 3 prior violations, which is below the 100% increase per previous infringement. See E. Barbier de La Serre and C. Winckler, 'Legal issues regarding fines imposed in EU competition proceedings', [2010] 1 JCLP 327 at 336.

<sup>280</sup> For example, see case *TV and computer monitor tubes* [2013] OJ C 303/13 where 7 undertakings received fines amounting to €1.47 billion after leniency applied. See also EU Commission, 'Antitrust: Commission fines banks €1.71 billion for participating in cartels in the interest rate derivatives industry', Press release IP/13/1208 of 04.12.2013, where 8 financial institutions were fined for 2 cartels, even though the fines were significant, they could have been heavier since both leniency and settlement notices applied. [http://europa.eu/rapid/press-release\\_IP-13-1208\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1208_en.htm) (Accessed on 15 September 2015).

<sup>281</sup> Case COMP/38.344 – Prestressing Steel of 04 April 2011.

of the fine. *Saarstahl* was also a recidivist undertaking in the same case but received full immunity from the benefit of the Leniency Notice 2002.

Although it can be recognized that there has been an improvement in respect to proportional justice as compared to fines issued under EU Fining Guidelines 1998 against small and medium size undertakings.<sup>282</sup> It can also be said that severity of punishment had been replaced as the main objective by certainty of punishment, but does it work in actually preventing? In the case of infringements of abuse of dominance, the story is not different and although the EU Commission has imposed fines on a handful number of times as compared to cartel cases; it has not stopped it from imposing stiff ones.<sup>283</sup>

Indeed, the overall level of fines imposed are significantly higher today than 10 or 18 years ago<sup>284</sup> and, although some authors argue that nowadays most fines imposed by the EU Commission are high enough to deter,<sup>285</sup> *Wils* states that one should keep in mind that it will never be possible to achieve complete deterrence in competition law infringements. He argues that even if competition authorities manage to detect as many violations and to impose such high fines that could actually deter and prevent companies from committing

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<sup>282</sup> *Ibid.* Because of the long duration of the cartel, fines on several companies were capped at the legal maximum of 10% of the 2009 turnover. In addition, three undertakings received discount for their inability to pay.

<sup>283</sup> *Intel* [2009] OJ C227/13 as discussed above, *Telefonica* [2008] OJ C83/6 and *Telekomunikacja Polska* (Case COMP/39.525) Non-confidential version published on 22.06.2011 para 921. [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39525/39525\\_1916\\_7.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39525/39525_1916_7.pdf) (Accessed on 25 June 2015).

<sup>284</sup> Douglas J. Miller and John M. Connor, 'The Predictability of Global Cartel Fines', [2010] 2 *Concurrences: Review of Competition Law* 59 p. 63.

<sup>285</sup> Marie-Laure Allain, Marcel Boyer, Rachidi Kotchoni and Jean-Pierre Ponssard, 'The Determination of Optimal Fines in Cartel Cases: The Myth of Under deterrence', Conference in honour of Michel Moreaux, Toulouse, 18 November 2011.

[http://idei.fr/doc/conf/inra/2011/conference\\_moreaux/presentations/presentation\\_boyer.pdf](http://idei.fr/doc/conf/inra/2011/conference_moreaux/presentations/presentation_boyer.pdf) (Accessed on 25 june 2015).

violations, the situation will not last, as memory of those successful prosecutions will fade and infringements will be committed again.<sup>286</sup>

The latter may seem to be backed by the fact that even with record high level of fines; the EU Commission seems to receive more immunity applications and uncover more cartels with its own investigations and sector inquiries, all of which can only suggest that monetary sanctions will increase.<sup>287</sup> If fines can only increase then their appropriateness and fairness is a matter that should be taken seriously under assessment as it has impact upon the effectiveness of the competition law system.

Thus, if complete deterrence is impossible,<sup>288</sup> and higher fines do not seem to be effective in bringing down the incidence of anticompetitive practices, then the EU Commission should consider other kinds of measures within another kind of approach. It has been suggested that other types of sanctions or remedies could boost the effectiveness of the antitrust system than further increasing fines against undertakings, in particular penalties for individuals, either administrative or criminal.<sup>289</sup>

However, for such changes to be implemented in the European Union as a whole, a radical movement is needed,<sup>290</sup> something that is not impossible if fines keep reaching record

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<sup>286</sup> Wouter P. J. Wils, *Efficiency and Justice in the European Antitrust Enforcement* (Hart Publishing, Oxford 2008) p. 53, 54 and 60.

<sup>287</sup> From 2005 to 2009 period, the EU Commission imposed fines totalling €0.4 billion and in the period 2010 to 2014, the amount of fines has been €7.3 billion so far and we can expect the previous amount to be surpassed by the end of the year.

<sup>288</sup> See also Wouter P. J. Wils, 'Recidivism in EU Antitrust Enforcement: A legal and Economic Analysis', [2012] 35 World Competition 1, p. 24.

<sup>289</sup> Andreas Stephan, 'Disqualification Orders for Directors Involved in Cartels', (2011) Journal of European Competition Law & Practice 2 at 529 and Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (1<sup>st</sup> edn Hart Publishing, Oxford and Portland Oregon 2011) p. 3.

<sup>290</sup> Criminal and administrative sanctions against individuals are available at the national level within the European Union such as Germany, Ireland and United Kingdom for example and across the Atlantic,

amounts, the possibility shall be discussed later on in Chapter 5. Nonetheless, within the current legal framework, the EU Commission has used other kinds of remedies instead of fines, especially in the enforcement of Article 102 TFEU where commitments<sup>291</sup> seem to be the rule as opposed to decisions based on Article 7 of Regulation No. 1/2003 by which the EU Commission may impose behavioural or structural remedies.

Commitment decision have become the most favoured remedy for the EU Commission when dealing with cases of abuse of dominance in the recent years, in fact the last fine it imposed for such kind of infringements was in *Telekomunikacja Polska*<sup>292</sup> where the sanction amounted to €127 million imposed on a dominant telecom operator in Poland that systematically held back competitors. After that decision, the EU Commission has made use of Article 9 Regulation no. 1/2003 in many times dealing with high profile cases including a case against Google with whom negotiations lasted 5 years until a statement of objections was adopted as shall be discussed below.<sup>293</sup>

In December 2012, the EU Commission accepted legally binding commitments from Apple and 4 other publishing companies over concern that they may have limited retail price competition for e-books in the European Economic Area.<sup>294</sup> In May 2010, the EU Commission made Visa Europe's commitments to cut interbank fees for debit cards

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Canada and United States have had a great experience in combining sanctions against firms as well as individuals.

<sup>291</sup> Article 9 Regulation No. 1/2003.

<sup>292</sup> *Telekomunikacja Polska* (Case COMP/39.525) Non-confidential version published on 22.06.2011.

<sup>293</sup> EU Commission, 'Antitrust: Commission send Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android' Press Release IP/15/4780 on 15 April 2015, Brussels [http://europa.eu/rapid/press-release\\_IP-15-4780\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4780_en.htm) (Accessed July 30, 2015).

<sup>294</sup> *E-BOOKS* [2013] OJ C73/17.

legally binding and in May 2013, Visa Europe offered further commitments to cut interbank fees for credit cards.<sup>295</sup>

The current most notable of cases against a global firm is that against Google which could not avoid the infringement procedure and now could be sanctioned with possibly the highest fine ever for the violation of EU competition law.<sup>296</sup> Google offered commitments in three different occasions in order to escape the infringement procedure and escape fines. However, commitments were not approved.<sup>297</sup> Samsung too offered its own commitments on 17 October 2013 regarding the use of standard essential patents.<sup>298</sup>

Because commitment decisions provide quick results for the development of a more competitive market and hence, they work for the benefit of consumers, they nonetheless constitute instruments that also present some drawbacks. Yet, Article 102 TFEU violations are hard to prove and commitments represent an instrument by which the EU Commission can save resources and thus, they entail an efficient way to end an antitrust infringement.

Decisions based on Article 7 of Regulation No. 1/2003 as opposed to commitment decisions based on Article 9 Regulation No. 1/2003, clarify the legal situation and serve

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<sup>295</sup> *Visa Europe* (Case COMP/39.398) Non-confidential version published on 08.12.2010 and later on 14.05.2013.

<sup>296</sup> Foo Yun Chee, 'Exclusive: Google close to settling EU antitrust investigation – sources' *Reuters* (London 29 January 2014) mentioning that Google could be sanctioned with a \$5 billion fine if its third offer of commitments are not accepted by EU Commission.

<sup>297</sup> Nevertheless, the first Google antitrust settlement proposal was announced in 2013 and as of 29 September 2014, a commitment decision has not been taken and it is now doubtful whether there will be one in an already four year antitrust investigation by the EU Commission. See Charles Arthur, 'European commission reopens Google antitrust investigation' *The Guardian* (London, 08 September 2014).

<http://www.theguardian.com/technology/2014/sep/08/european-commission-reopens-google-antitrust-investigation-after-political-storm-over-proposed-settlement> (Accessed on 28 December 2015).

<sup>298</sup> EU Commission, 'Antitrust: Commission consults on commitments offered by Samsung Electronics regarding use of standard essential patents', Press Release IP/13/971, Brussels 17.10.2013. [http://europa.eu/rapid/press-release\\_IP-13-971\\_en.htm](http://europa.eu/rapid/press-release_IP-13-971_en.htm) (Accessed on 12 January 2016).

as public censure. They too facilitate further private litigation before national courts.<sup>299</sup> Commitment decisions, however efficient they might be; they do not offer the benefits entailed by the imposition of remedies in the adoption of a decision based on Article 7, especially in regards to antitrust victims and the respect of fundamental rights of undertakings concerned conferred by EU law. As will be discussed later on in Chapter 4 below, the limits of the EU Commission's discretion are not unambiguous from the wording of the TFEU or Regulation No. 1/2003 and the case law has not been helpful in clarifying them.

The EU Commission's decision-making process is affected by a substantial degree of administrative discretion, both in the adoption of commitment decision and the administrative procedure to determine the amount of fines being imposed.<sup>300</sup> This could lead to the perception that the EU Commission is abusing this wide discretion in violation of general principles of law.<sup>301</sup> Whether Article 9 of Regulation No. 1/2003 commitments and the fines derived from the EU Fining Guidelines 2006 are fair or not or whether they comply with higher principles of law as all remedies ought to do, that is a topic that shall be discussed in Chapter 3.

In conclusion, the EU Fining Guidelines 2006 focus on deterrence just as the first guidance published back in 1998 did. However, the main purpose of the EU Fining Guidelines 1998 was to provide transparency and legal certainty. Whereas the EU Fining

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<sup>299</sup> Hubertus Von Rosenberg, 'Unbundling through the back door... the case of network divestiture as a remedy in the energy sector' [2009] 30 ECLR 237 p. 13.

<sup>300</sup> Note that the EU Commission's discretion does not affect decisions imposing behavioural or structural remedies according to Article 7 Regulation No. 1/2003 but since there are significantly less of these in number; I will address them when necessary and will focus on commitment decisions and fines.

<sup>301</sup> Alex Barker, 'Brussels hits legal limit on Google deal' *Financial Times* (Brussels 21 July 2014) <http://www.ft.com/cms/s/0/46019982-0e99-11e4-ae0e-00144feabdc0.html> (Accessed on 29 September 2014).

Guidelines 2006 purpose is to expand transparency and ensure impartiality while increasing the amount of fines to be imposed and making them as proportionate as possible. This is done by linking the fines to the value of sales of each company, all of which must be done in respect of the general principles of EU law that confer rights on undertakings and impose obligations on the EU Commission.

Although, we can track the roots of legal economic theory of the Chicago School back to 1960 with the publication of the seminal article ‘The Problem of Social Cost’ by *Ronald Coase*,<sup>302</sup> in Europe, the story is different. Here antitrust law was not even duly enforced except for Germany whose competition law principles became the base of the broad EU competition framework to be adopted in 1962 by Regulation No. 17. Since EU antitrust rules were intended to protect economic freedom in the market place and aimed at market integration, the favouring of administrative intervention was central in the adoption of Regulation No. 17.<sup>303</sup>

It was until the end of the 1970’s that Chicago School became a dominant force in U.S. antitrust based on the proposition that markets were superior to authority intervention. This efficiency approach was not adopted in Europe until mid-1990s and throughout the beginning of the new century, the EU Commission adopted legal instruments that could be said to pursue that efficiency goal. The EU Fining Guidelines 1998 and 2006 have been part of these instruments. However, they have also made it difficult for the EU

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<sup>302</sup> See G. L. Priest, ‘The Limits of Antitrust and the Chicago School Tradition’ in D. Sokol and I. Lianos (eds), *Global Limits of Competition Law* (Stanford Law Books, Palo Alto CA 2012) p. 17. Although previous work from A. Director in: ‘The Parity of the Economic Market Place’ in 1953 is considered to contain the fundamentals of the Chicago School.

<sup>303</sup> W. Sauter, *Coherence in EU Competition Law* (OUP Oxford, 2016) p. 38. According to this author, Article 101 TFEU reflected the French thinking on decentralization while Regulation No. 17 embraced a centralized system in the hands of the EU Commission, which was more in line with the perspective taken by Germany.

Commission to effectively enforce EU competition law and integrate the imposition of a deterrent and effective fine within a system that fully respects EU legal principles meaning, the respect of fundamental rights that undertakings enjoy in the EU antitrust proceedings and under EU law overall.

Thus, although EU competition rules and the EU enforcement system differ in their origin and aim from the respective applicable rules and enforcement system in the U. S.,<sup>304</sup> convergence towards the efficiency approach has developed. The reliance on theoretical economic models has resulted in the adoption of instruments that can be traced today, in the application of antitrust law on both sides of the Atlantic.

Indeed, the punitive nature of fines was the result of the reliance of the legal economic theory that has served as the main driver to pursue the current EU competition policy and enforce EU competition law. The EU Fining Guidelines 2006 favour this special focus on deterrence. This is in line with the argument that the EU Commission appears to have replaced ordo-liberal principles by neoliberalism and efficiency-enhancing rationale in EU competition policy.<sup>305</sup>

In addition, the preference of economic principles of efficiency and efficacy over the effective observance of EU principles of law makes deterrence less effective. This has

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<sup>304</sup> Since the Ordo-liberal philosophy that influenced Germany and EU competition enforcement system, preferred that both the political and the economic powers be spread among several private interests as the basis for economic stability and freedom, and economic freedom as the basis for political freedom. In Europe, it was believed that only law could provide and maintain the conditions needed and therefore, authority intervention in business life was needed in order to uphold such principles. This is in stark contrast with what had developed in the U.S where non-intervention is preferred. See D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press, London 1998) p. 239.

<sup>305</sup> D. Bartalevich, 'The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy' [2016] 54 Journal of Common Market Studies 267.

been a major topic in the literature on the economic analysis of law worldwide and the matter that entails to reconcile legal principles and economic theory of law enforcement has been undertaken but needs further development.<sup>306</sup>

On the other hand, Regulation No. 1/2003 has formally introduced other kind of measures that seek to end antitrust violations in an efficient manner and restore competition, which is something that fines cannot achieve. However, remedies can also fall short from the observance of general principles of EU law and the respect of fundamental rights as the EU Commission could misuse its powers to extract remedies that may go beyond what is necessary and appropriate in order to end the infringement. Indeed, the EU Commission can enhance its bargaining power with the argument that it not only seeks to restore competition in the single market but it also seeks to improve the competitive process by even making market changes that run counter to what justice as a value means.

The damages directive is about to come into force and it is considered to be a milestone in the evolution of EU competition law enforcement and will make it easier for anyone affected to claim damages if they are victims of infringements of EU antitrust rules.<sup>307</sup> This increases the tools available in public and private enforcement and should provide the remedial effect for victims that has been missing in EU antitrust procedure and should complement the enforcement system overall.

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<sup>306</sup> See for instance Harold Houba, Evgenia Motchenkova and Quan Wen, 'Legal Principles in Antitrust Enforcement' TI Discussion Papers, Amsterdam, August 2013 p. 2. <http://papers.tinbergen.nl/13178.pdf> (Accessed on 15 February 2015).

<sup>307</sup> Joaquin Almunia, 'Presenting the Annual Competition Report' Speech before the European Parliament – ECON Committee, European Commission, Speech/14/615, Brussels 23 September 2014. [http://europa.eu/rapid/press-release\\_SPEECH-14-615\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-615_en.htm) (Accessed 29 September 2014).

Thus, punishment alone is not the solution and even if the EU Commission adopted an enforcement system based on remedies alone; such system would also produce undesirable effects that would ultimately render it disproportionate and ineffective due to the considerable administrative discretion enjoyed by the EU Commission. Hence, public enforcement of EU competition law should allow for a real combination of penalties and remedies that target both undertakings and individuals as reliance on one measure alone has proved not to be efficient or fair in regards to due process guarantees. Public enforcement should be enhanced by promoting actions for damages in private enforcement, something that shall be a reality in the short term.

Overall, there has been a great evolution in the enforcement of EU competition law over more than 50 years. Although the EU Commission has adopted many instruments that have helped it to improve its investigatory and sanctioning functions and thus, provide for more effective outcomes in order to keep an unrestricted market; the fact remains that economic principles in the optimal deterrence framework have continued central to pursue the EU competition policy and enforce EU competition law.

Indeed, efficiency has increased but rather than punishing either undertakings or individuals, the governing aim to prevent antitrust law violations and promote compliance should prevail. This should be done by creating an active monitoring network that is able to build a culture of compliance. Certainty of punishment is important as long as a perception of effective enforcement is spread otherwise; the prospect of generating residual deterrence is minimal.<sup>308</sup>

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<sup>308</sup> C.S. Koper, B.G. Taylor and D.J. Woods, 'A randomized test of initial and residual deterrence from directed patrols and use of license plate readers at crime hot spots' (2013) 9 (2) Journal of Experimental Criminology 213.

To this end, the instruments already adopted can add to a coordinated use of internal and external, public and private tools working within a bigger enforcement system that empowers those who can prevent violations so a cultural design is achieved where non-compliance is not a viable option. Here, deterrence will play an important part but not a central one and respect for EU principles of law will be warranted to build legitimacy of the system. For this reason, it is important to understand how that respect has worked in the deterrence framework and how it can be expanded in a broader enforcement system.

It has been argued that cartel recidivism is a problem that can be found both in the EU and in the U.S. Nevertheless, it has been a major concern for the EU Commission than for the Department of Justice.<sup>309</sup> Whether instances of recidivism are lower in one jurisdiction than in the other is unclear but it is important to understand how the problem of cartel is approached in the first place, before we can evaluate the effectiveness of each system by analysing perceptual deterrence they originate.

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<sup>309</sup> Connor offers empirical evidence contradicting what the DoJ denies about cartel recidivism in the United States. See J. M. Connor, 'Oceanic Disparities in Cartel-Recidivism Attitudes and Penalties' (April 1, 2016). Cartel & Joint Conduct Review, Spring 2016. Available at SSRN: <http://ssrn.com/abstract=2757784> (Accessed on 15 May 2016).



## 2.4 A Different Approach – North America

It is not uncommon to treat antitrust violations as crimes and prosecute them as such.

Across the Atlantic, both Canada and the United States (U.S.) have long developed competition law systems in which cartels are considered a criminal offence. In Canada for instance,<sup>310</sup> recent amendments that entered into force have turned the Canadian antitrust regime to be one of the most severe around the world with certain horizontal agreements to be treated as illegal *per se* and penalties for convicted individuals that go up to 14 years' incarceration.<sup>311</sup>

Nonetheless, it is the antitrust law system in the United States the one that has proved to be the most effective for more than a hundred years. The main piece of legislation that provides for unrestricted competition in the U.S. market is the Sherman Act,<sup>312</sup> which considers antitrust violations as felonies and for these, individuals can receive a fine of up to \$1 million and up to 10 years imprisonment. In respect to corporations, a company can receive a maximum corporate fine of \$100 million.<sup>313</sup>

This limitation however, is not applicable according to the Alternative Fine Statute, which provides an enhanced fine of twice the gross pecuniary gain or twice the gross pecuniary

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<sup>310</sup> Canada's cartel offence is the oldest of its kind in the developed world, predating the U.S. Sherman Act by 14 months. See *Case R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 para 648 where the Supreme Court of Canada stated that "in fact, the 1889 Act came into force before the American Sherman Act, generally seen as primogenitor of competition law."

<sup>311</sup> Canada's Competition Act 1985 s 45 (2).

<sup>312</sup> The Sherman Antitrust Act has stood since 1890, and is the second oldest set of competition rules in the world. It contains penalties for Section 1, trusts in restraint of trade and Section 2, for monopolizing. <http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf> (Accessed on 14 January 2016).

<sup>313</sup> Sherman Act, last modified by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 providing for new limitations that entered into force on 22 June, 2004. <http://www.law.cornell.edu/uscode/text/15/1> (Accessed on 26 February 2016).

loss.<sup>314</sup> Under this statute, the Department of Justice of the U. S. (DoJ) Antitrust Division has been allowed to obtain settlements with negotiated fines of up to \$500 million imposed on one undertaking alone in the *Vitamins* case in 1999.<sup>315</sup>

Corporations could face significant criminal fines and tough probation terms while individuals risk lengthy imprisonment sentences. According to *Bill Baer*, the U.S. courts have imposed criminal fines on corporations totalling as much as \$1.4 billion in a single year and the average jail term for individuals now stands at 25 months, double what it was in 2004.<sup>316</sup>

In spite of the high fines, the criminal penalties available and the private and state civil suits seeking treble damages and other collateral consequences of the antitrust criminal conduct,<sup>317</sup> the success of the U.S. antitrust enforcement systems lies on the high perceived risk of being caught. It has to do with the vigorous efforts by the U.S. Department of Justice and an amnesty programme that receives much attraction from conspirators in order to avoid being imprisoned and fined.<sup>318</sup>

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<sup>314</sup> 18 U.S.C. § 3571(d), where it is stated that the gain or loss must be proven by the Anti-trust Division of the U.S. Department of Justice to a jury beyond a reasonable doubt.

<http://www.justice.gov/criminal/fraud/fcpa/docs/response2-appx-m.pdf> (Accessed on 11 January 2014).

<sup>315</sup> See the case against F. Hoffmann-La Roche, Ltd. (1999) in which the German firm, BASF Aktiengesellschaft also pleaded guilty and paid a \$225 million fine. In 2012, another fine of \$500 USD was imposed on AU Optronics as will be discussed below.

<http://www.justice.gov/opa/pr/1999/May/196at.htm> (Accessed on 11 January 2014).

<sup>316</sup> Bill Baer, 'Prosecuting Antitrust Crimes' in remarks as prepared for the 8<sup>th</sup> Annual Conference Georgetown University Law Center Global Antitrust Enforcement Symposium, Washington, 10 September 2014. P. 1. <http://www.justice.gov/atr/public/speeches/308499.pdf> (Accessed on 11 January 2014).

<sup>317</sup> The U.S. legal system gives states the right to bring a *parens patriae* action on behalf of its natural persons residing in such state as provided in 15 U.S. Code § 15c - Actions by State attorneys general.

<http://www.law.cornell.edu/uscode/text/15/15c> (Accessed on 11 January 2014).

<sup>318</sup> It is worth mentioning here that the DoJ Antitrust Division is able to make use of all investigatory tools available to the Federal Bureau of Investigation (FBI) thus, the being under the action of this body is deterrent enough that increases the risk of being caught.

Since 1993, the U.S. immunity programme has provided strong incentives for firms<sup>319</sup> and individuals<sup>320</sup> to reveal the existence of unlawful arrangements which means that low level employees, even those who participated in illegal cartel meetings; can avoid prosecution in return for testimonies implicating their superiors or the companies they work for. This is taken seriously by the firms involved in cartel infringements as they not only face a \$100 million corporate fine or double-the-loss or double-the-gain mechanism according to the alternative fine provision,<sup>321</sup> but they also face treble damages in private litigation, something that is also provided by the Clayton Act.<sup>322</sup>

Hence, the U.S. antitrust law system provides for harsh criminal penalties both for individuals and corporations and punitive remedies available to victims as well and it is the threat of their imposition but mostly the fact that the chances of being caught are increased, what makes the leniency programmes a success story.<sup>323</sup> Despite this fact, the Antitrust Division of the U.S. Department of Justice has additional measures that further encourage self-reporting of illegal cartel activity. This undeniably comes as a result of the roles and reputation played by the Federal Bureau of Investigation and other U.S. enforcers.

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<sup>319</sup> The Anti-trust Division of the U.S. Department of Justice has separate policies for undertakings and individuals; the Corporate Leniency Policy was announced on 10 August 1993 and grants automatic immunity from prosecution to an immunity applicant after satisfying certain conditions. <http://www.justice.gov/atr/public/guidelines/0091.htm> (Accessed on 26 December 2015).

<sup>320</sup> On 10 August 1994 the Individual Leniency Policy was announced and it allows individuals to approach the Anti-trust Division on their own behalf to seek immunity from prosecution in return for reporting antitrust activity. <http://www.justice.gov/atr/public/guidelines/0092.htm> (Accessed on 26 December 2015).

<sup>321</sup> 18 U.S.C. § 3571(d) <http://www.justice.gov/criminal/fraud/fcpa/docs/response2-appx-m.pdf> (Accessed on 26 December 2015).

<sup>322</sup> Section 4 of the Clayton Act, 15 U.S.C.S. § 15. However, an applicant that provides satisfactory cooperation to the private civil damages claimant within its immunity application qualifies for a reduction in damages from trebling to actual damages.

<sup>323</sup> The chances of being caught are increased because individuals and corporations, whatever their interests; can apply for leniency and let the authority know about the infringement. Yet, Bill Baer has recently said that more than a third of the DoJ Antitrust Division investigations have begun without a leniency applicant. See above speech before Georgetown University Law Center Global Antitrust Enforcement Symposium on 10 September 2014, p. 2.

In 1999, an “Amnesty plus” programme was announced as an extension of the Corporate Leniency Policy by which a company caught for competition restrictions is offered incentives to conduct an internal investigation across other related products to identify additional violations. Therefore, if that company is the first to report illegal cartel activity in a second product line in respect of which illegal activity has not previously been disclosed by another undertaking, it will receive immunity for that second conduct and a substantial reduction in its fine on the initial investigation.<sup>324</sup>

The Sherman Act contains the maximum statutory penalties to be imposed in the commission of antitrust infringements in both Section 1 and Section 2. However, it is up to the judges to decide the specific amount to be paid in case of fines, either for individuals or corporations; or the specific term of imprisonment for an individual. To that end, from 1987 to 2005 the U.S. federal judges were given a mandatory sentencing system to follow, the U.S. Sentencing Guidelines.<sup>325</sup> The mandatory character of these guidelines was rendered unconstitutional after the judgement was delivered in *United States v Booker*.<sup>326</sup> and thus, the guidelines may recommend a sentence but not require it.

Nevertheless, such guidelines are very much alive and are still the main reference for sentencing purposes. They treat antitrust infringements as very serious felonies and assist

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<sup>324</sup> At the other end of “Amnesty plus” we can find “Penalty plus” which is an increase in the penalty for failing to self-report illegal cartel activity in respect of a second cartel when another undertaking has already disclosed its existence and received the benefit of “Amnesty plus”. See also “Affirmative Amnesty” and “Omnibus question” in Michael O’Kane, *The Law of Criminal Cartels: Practice and Procedure* (1<sup>st</sup> OUP, Oxford 2009) p. 207.

<sup>325</sup> United States Sentencing Commission Guidelines and Policy Statements’ November 1, 1987 as amended through November 1, 2014, (USSG), Chapter 8 Sentencing of Organizations, Part C Fines USSG §8C2 <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> (Accessed on 25 June 2016)

<sup>326</sup> *United States v Booker* 543 US 220 (2005).

judges on the sentencing of individuals and undertakings convicted of antitrust offences under Section 1 of the Sherman Act.<sup>327</sup> For instance, in respect to the setting of fines against a corporation: First, a fine range is established by calculating a base fine by reference to the ‘Offense Level Fine Table’, mainly the financial gain of the company<sup>328</sup> or 20% of the volume of affected commerce.<sup>329</sup> Second, an adjustment to the base fine is made after a culpability score is determined. An undertaking starts with a culpability score of 5, which is later increased or decreased depending of certain factors.

The score will increase if high-level personnel are found to have been involved in the commission of the infringement, if there is evidence that the company is in the habit of committing criminal offences and whether the company has obstructed justice during the investigation.<sup>330</sup> On the other hand, the score will decrease if there was cooperation and self-reporting.<sup>331</sup> Then finally as a third step, the base fine is multiplied by a minimum and maximum multiplier, depending on the culpability score which results in the fine range.<sup>332</sup>

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<sup>327</sup> USSG §2R1.1 refers to bid rigging, price-fixing or market-allocation agreements among competitors.

<sup>328</sup> As has been mentioned before, U.S. Department of Justice would seek to use double-the-loss or double-the-gain mechanism when it is able to prove it however, it has used this leverage to obtain higher negotiated fines in settlements too.

<sup>329</sup> To that end, on 1 November 2005 the U.S. Sentencing Commission, following the Congress lead to account for the \$100 million maximum corporate penalty and the enormous volumes of commerce affected by international cartels; introduced multiple volume of commerce enhancements and there are now additional enhancements for affected volumes of commerce from over \$250 million to \$1.5 billion.

<sup>330</sup> USSG §8C2.5.

<sup>331</sup> Ibid. Other factors to be considered can be found in the U.S. Principles of Federal Prosecution of Business Organization, Title 9, Chapter 9-28.000.

<http://www.justice.gov/sites/default/files/opa/legacy/2008/08/28/corp-charging-guidelines.pdf> (Accessed on 26 December 2015).

<sup>332</sup> USSG §8C2.6. Usually, the multipliers range from a low of 0.75 to a high of 4.00. See also USSG §2R1.1(d)(2).

The U.S. Sentencing Guidelines point system also applies in the same way with respect to individuals' sentencing.<sup>333</sup> The base offence level for individuals convicted of antitrust violation is 12 and this level allows for the imposition of a sentence of 10 up to 16 months incarceration. However, there can be increases starting from a 2 level increment up to 16 additional levels.<sup>334</sup> If the volume of affected commerce is more than \$1 million and less than \$10 million, the level is adjusted by additional 2 levels, and if the volume of affected commerce is more than \$1.5 billion, it results in the maximum increase of 16 level increments.

As it happens to undertakings, different factors are taken into account so that multiple adjustments take place, which are ultimately used to increase or decrease the offence level of individuals and thus, the duration of their prison terms. These factors may include but are not limited to the importance of the defendant's role in the infringement, whether there are multiple counts of conviction, criminal record, abusing a position of trust or using a special skill, obstructing or impeding justice, accepting responsibility or providing assistance to law.<sup>335</sup>

On the other hand, the recommended amount of fines for individuals varies although they are not affected by the adjustments in the offence level that determines prison terms. The base fine corresponding to a base offence level of 12 for individuals convicted of antitrust

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<sup>333</sup> See Beryl A. Howell, 'Sentencing of Antitrust Offenders: What does the data show?' US Sentencing Commission 2010 on November 2009 at 11, where a comprehensive description of the way the guidelines work is outlined for sentencing both individuals and organizations.  
[http://www.ussc.gov/sites/default/files/pdf/about/commissioners/selected-articles/Howell\\_Review\\_of\\_Antitrust\\_Sentencing\\_Data.pdf](http://www.ussc.gov/sites/default/files/pdf/about/commissioners/selected-articles/Howell_Review_of_Antitrust_Sentencing_Data.pdf) (Accessed on 27 August 2014).

<sup>334</sup> Although, USSG §2R1.1(b)(1) provides only for 1 level increment for bid-rigging.

<sup>335</sup> USSG §2R1.1. It must be borne in mind that the DoJ Antitrust Division also takes into account the factors provided in the Principles of Federal Prosecution such as the employee's role in the conspiracy, his seniority in the corporation and his assistance in bringing other participants in the conspiracy to justice.  
[http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm) (Accessed on 27 August 2014).

violation is a minimum of 1 to 5 per cent of the volume of affected commerce but not less than \$20,000.<sup>336</sup>

It must be noted that there are no Guidelines for convictions under Section 2 of the Sherman Act which relates to the prohibition to monopolize. Although the Sherman Act nominally makes all violations of Section 1 and Section 2 subject to criminal prosecution, the U.S. Department of Justice has made clear that it does not currently prosecute anything other than hard core cartel activity which harms consumers the most.<sup>337</sup>

However, even when the U.S. Department of Justice only seeks to prosecute Section 1 infringements with hefty fines and long terms of imprisonment,<sup>338</sup> the reality is that in the last 2 decades, over 90% of corporate entities charged with a Sherman Act violation have reached a plea agreement with the Antitrust Division and pleaded guilty without going to trial.<sup>339</sup> The above mentioned is more surprising for the fact that the immunity program allows the U.S. Department of Justice to obtain evidence against a corporation or individual for whom immunity is no longer available. Thus, the immunity program allows it to prosecute them and most probably get a successful conviction against them if the case goes to trial and yet, cases rarely reach that stage. Plea agreements are binding agreements between the prosecution authority and the defendant by which the latter

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<sup>336</sup> USSG §2R1.1 (c).

<sup>337</sup> See the U.S. Antitrust Modernization Commission (AMC) Report and Recommendations, April 2007 p. 294 to 297. “The DOJ has in recent years forgone criminal prosecutions of unilateral conduct under Section 2.” [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) (Accessed 16 February 2014).

<sup>338</sup> If only in paper in regards to Section 2 violations. Due to the policy to prosecute only the “supreme evil of antitrust”, it seems clear why violations of Section 2 of the Sherman Act are not enforced through the criminal procedure due to the lack of clarity of the infringement and only very serious antitrust violations are penalised. See *Verizon Communications Inc v Law Offices of Curtis V. Trinko*, 124 S. Ct. (2004) at 879.

<sup>339</sup> Scott D. Hammond, ‘The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All’ (Speech at OECD Competition Committee France 2006) <http://www.justice.gov/atr/public/speeches/219332.htm> (Accessed 16 February 2014).

agrees to the criminal charges against him and makes factual admission of guilt all of which is subsequently approved by a judge knowing the matter.<sup>340</sup>

Plea agreements have had a great evolution that can be particularly appreciated when prosecuting international cartels. In the mid-1990s, the U.S. Department of Justice Antitrust Division began cracking down on international cartels. This wave of international cartel prosecutions started with *Lysine* cartel case, which led to the investigation and prosecution of the *Citric Acid* cartel,<sup>341</sup> which at the same time, led to the prosecution of *Sodium Gluconate* cartel.<sup>342</sup> Since this domino-effect cartel prosecution, an enforcement state has developed where it seems that potential international cartel participants may have to live with the growing risk of ending up in a U.S. prison if caught.

Nonetheless, during that early period of the 1990s, the Antitrust Division allowed defendants to obtain no prison sentencing recommendations in their plea agreements. This was done by the fact that a no prison deal was necessary for the Antitrust Division to secure access to an important foreign witness or key foreign located documents.<sup>343</sup> Since then, the willingness and ability of the Antitrust Division to prosecute criminal antitrust violations has developed to what we now can describe as an aggressive approach in

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<sup>340</sup> There are two kinds of plea agreements, type B and type C. See in Michael O’Kane, *The Law of Criminal Cartels: Practice and Procedure* (1<sup>st</sup> OUP, Oxford 2009) p. 209.

<sup>341</sup> An executive from the company Archer Daniels Midland Co. (ADM) provided vital evidence to effectively prosecute the cartel. See James M. Griffin, Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice, ‘An Inside Look At A Cartel At Work: Common Characteristics Of International Cartels’ Speech at the American Bar Association, Section of Antitrust Law, 48th Annual Spring Meeting, Washington, D.C. April 6, 2000. <http://www.justice.gov/atr/speech/inside-look-cartel-work-common-characteristics-international-cartels> (Accessed July 30, 2014).

<sup>342</sup> For full details see M. R. Joelson, *An International Antitrust Primer: A Guide to the Operation of United States, European Union and other Key Competition Laws in the Global Economy* (3<sup>rd</sup> Ed. Kluwer Law International, 2008) p. 133.

<sup>343</sup> Scott D. Hammond, ‘Charting New Waters in International Cartels Prosecutions (Speech at the Twentieth Annual National Institute on White Collar Crime by the ABA Criminal Justice Section, 2 March 2006) <http://www.justice.gov/atr/public/speeches/214861.htm> (Accessed 20 February 2014).

prosecuting individuals who participate in international cartels and those companies who employ them which at the same time, seems to have benefited non U.S. costumers as well.<sup>344</sup>

Nowadays, the Antitrust Division of the U.S. Department of Justice insists on jail sentences for all defendants.<sup>345</sup> Note for instance that in the *Airfreight* cartel, whilst the EU Commission fined 11 undertakings for cartel activity with a final amount in the fine of €799.4 million,<sup>346</sup> the U.S. DoJ Antitrust Division got 19 carriers who pleaded guilty to price fixing that resulted in over \$1.27 billion in criminal fines for the firms. In addition, top-level employees of 9 carriers pleaded guilty and 6 executives agreed to serve a total of 56 months in jail in the United States.<sup>347</sup>

In the *Marine Hose* decision, the EU Commission fined 6 companies with €131.5 million in total for a market sharing and price fixing cartel.<sup>348</sup> In the United States though, the Department of Justice obtained criminal fines amounting to \$40.3 million plus nine executives entered plea agreements to pay criminal fines and serve prison sentences ranging from 12 to 30 months.<sup>349</sup> It is worth noting that 2 defendants decided not to plead

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<sup>344</sup> See Donald I Baker, 'Punishment for Cartel Participants in the US: A Special Model' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (1<sup>st</sup> edn Hart Publishing, Oxford and Portland Oregon 2011) p. 42 and 44.

<sup>345</sup> As noted previously, the average jail term for individuals is now 25 months.

<sup>346</sup> *Airfreight* (Case COMP/39258) Press release published on 09.11.2010. [http://europa.eu/rapid/press-release\\_IP-10-1487\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en) (Accessed 28 February 2014).

<sup>347</sup> Anti-trust Division of the U.S. Department of Justice, 'MAJOR INTERNATIONAL AIRLINES AGREE TO PLEAD GUILTY AND PAY CRIMINAL FINES TOTALING MORE THAN \$500 MILLION FOR FIXING PRICES ON AIR CARGO RATES', press release of 26 June 2008. [https://www.justice.gov/archive/atr/public/press\\_releases/2008/234435.htm](https://www.justice.gov/archive/atr/public/press_releases/2008/234435.htm) (Accessed 28 February 2014).

<sup>348</sup> *Marine Hoses* (Case COMP/39406) Commission Decision of 28.01.2009. [http://europa.eu/rapid/press-release\\_IP-09-137\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-09-137_en.htm?locale=en) (Accessed 28 February 2014).

<sup>349</sup> Anti-trust Division of the U.S. Department of Justice, 'Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products' Press Release of 10 December 2008.

<http://www.justice.gov/opa/pr/2008/December/08-at-1084.html> (Accessed 28 February 2014). See also DoJ Antitrust Division, 'Former Marine Hose Executive Who Was Extradited to United States Pleads

guilty and went to trial were a jury acquitted them. It is difficult to assert whether this is the beginning of a tendency to contest proceedings and avoid entering plea agreements or whether it is just an isolated decision, in any case, no less worthy of consideration.

Nevertheless, it is expected that the DoJ Antitrust Division will approach new cases and plea agreements more aggressively than in the past and perhaps a 2.5-year incarceration or more will be the norm for negotiated sentences against companies and individuals. The above could take place taking into account the victory of the Antitrust Division in the *LCD* case.<sup>350</sup> Here, one Taiwanese undertaking, *AU Optronics*, was indicted by a federal grand jury for the violation of the Sherman Act and it was found that the conspiracy resulted in an illicit gain of \$500 million USD. This was the first time that the Department of Justice was able to prove the illicit gain from a conspiracy before a jury.

This way, after proving the illicit gain, a criminal fine could have been expected to be of up to \$1 billion,<sup>351</sup> something that could otherwise had resulted in a fine of up to \$100 million, the maximum statutory fine for a Sherman Act violation.<sup>352</sup> Nevertheless, the \$500 million corporate fine was confirmed and subsequently joined by the individual convictions of two executives for fixing prices in the LCD industry in July 2014.<sup>353</sup>

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Guilty for Participating in Worldwide Bid-Rigging Conspiracy', Press Release of 24 April 2014. [http://www.justice.gov/atr/public/press\\_releases/2014/305376.htm](http://www.justice.gov/atr/public/press_releases/2014/305376.htm) (Accessed on 13 March 2013).

<sup>350</sup> *United States v AU Optronics Corp. et al.* delivered 13 March 2012.

<sup>351</sup> As it can be remembered, this triggers the application of the alternate fine provision contained in the Comprehensive Crime Control Act and the Criminal Fine Improvements Act, 18 U.S.C. § 3571(d) in order to use double-the-gain method to set a fine. However, in this particular case the judge imposed a \$500 million fine instead of the \$1 billion fine requested by the U.S. Department of Justice, stating that the latter was substantially excessive while the former was not grossly disproportional to the needs of the matter. Despite the fact that it was proven that the illegal conduct affected more than \$2 billion in U.S. commerce. See *United States v AU Optronics Corporation*, Brief for the United States, 5 April 2013 p. 158. <http://www.justice.gov/atr/cases/f295500/295524.pdf> (Accessed on 13 March 2014).

<sup>352</sup> Yet, the incumbent firm would have entered in to plea agreement so the DoJ would have extracted a higher amount in fines.

<sup>353</sup> *United States of America v AU Optronics Corporation* Case No. 12-10492 2014 U.S. (9th Cir. July 10, 2014) <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/07/10/12-10492.pdf> (Accessed on 15 October 2015).

As has been mentioned above, more than 90% of the cases dealt by the Antitrust Division have entered into plea agreements and that tendency does not seem to decrease in the near future. This means that the Department of Justice avoids going into lengthy procedural issues in order to prove the actual loss or gain from the violation and instead obtains a fraction of the fine and prison terms that would have been imposed in court without the latter being certain.

On the other hand, companies and individuals obtain shorter imprisonment terms and fines than those that would have been imposed in court as long as they accept responsibility and they provide substantial cooperation to assist the DoJ Antitrust Division with the case. Thus, we can distinguish two different elements for the companies to fulfil in order to access a plea agreement and the second element must translate into actual help for the Antitrust Division to investigate and prosecute antitrust crimes as provided in Chapter 2 of the Sentencing Guidelines.

Hence, the importance of *AU Optronics* is such that it could dramatically change the conditions for a negotiated sentence in plea agreements. Until now, the U.S. Department of Justice has obtained 25 fines greater than the statutory maximum of \$100 million but it has obtained them only through negotiated plea agreements,<sup>354</sup> never at trial until *AU Optronics*.<sup>355</sup> This case now offers the possibility for the U. S. Department of Justice to

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<sup>354</sup> See cases such against Yazaki Corporation (2012), LG Display Co., Ltd and LG Display America (2009), Bridgestone Corporation (2014) <http://www.justice.gov/atr/public/criminal/sherman10.html> (Accessed on 15 October 2015).

<sup>355</sup> Ray V. Hartwell and Djordje Petkoski, 'US Anti-Cartel Enforcement' in The Antitrust Review of the Americas (2013) 2 Global Competition Review p. 9. [http://www.hunton.com/files/Publication/c750b4ed-6d9f-434a-8c50-9cae0650ea27/Presentation/PublicationAttachment/a7c0da13-15cd-4b7a-b08b-9ddaccdf5cd/US\\_Anti-Cartel\\_Enforcement.pdf](http://www.hunton.com/files/Publication/c750b4ed-6d9f-434a-8c50-9cae0650ea27/Presentation/PublicationAttachment/a7c0da13-15cd-4b7a-b08b-9ddaccdf5cd/US_Anti-Cartel_Enforcement.pdf) (Accessed on 15 October 2015).

exert an enhanced bargaining power against the infringers in order to obtain higher fines for corporations and longer terms of imprisonment for individuals. This is so due to the fact that the Antitrust Division was successfully able to demonstrate the pecuniary gain in the indictment and probe it without reasonable doubt to a jury according to the *Apprendi* doctrine.<sup>356</sup>

In respect to antitrust violations this is a major development since the *Apprendi* doctrine applies in all cases where a sentence may be increased beyond the statutory maximum including fines from antitrust violations provided in 18 U.S.C. § 3571(d).<sup>357</sup> Although one would think that the case against *AU Optronics* means that the tendency of having much more plea agreements than cases going to trial could be stopped or even reversed in the U. S. now that the main obstacles associated with taking the case to trial seemed to have been overcome.<sup>358</sup> What is most likely to happen is an increased advantage on the part of the Antitrust Division of the U.S. Department of Justice to obtain heavy fines and terms of imprisonment even in plea agreements.

It is important to point out that the DoJ Antitrust Division can make use of another effective remedy to competition in civil proceedings and that is the disgorgement of ill-gotten gains. Although, the Supreme Court of the U.S. had previously held that the U.S. government can bring antitrust claims seeking the disgorgement of any proceeds causally related to antitrust infringements when other private remedies do not suffice to take away

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<sup>356</sup> *Apprendi v New Jersey*, 530 U.S. 466 (2000). Such doctrine prohibited judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury beyond a reasonable doubt.

<sup>357</sup> Jed S. Rakoff, Jonathan S. Sack, Linda R. Blumkin and Richard A. Sauber, *Corporate Sentencing Guidelines: Compliance and Mitigation* (12<sup>nd</sup> LJP, New York 2005) p. 430.

<sup>358</sup> Mainly the perceived difficulty to obtain hefty fines, the less certain outcome and potentially more lenient sentences.

all the illegal profits of the violator;<sup>359</sup> either through the Federal Trade Commission (FTC) or the DoJ Antitrust Division.<sup>360</sup> The DoJ Antitrust Division had never used this remedy until February 2010 against *KeySpan*.<sup>361</sup>

The case is relevant as the anti-competitive conduct was established and the Antitrust Division refrained from imposing punitive sanctions in favour of a remedy. It seems that the Antitrust Division intends to seek disgorgement in situations where private relief is not available to redress the harm.<sup>362</sup>

This is particularly important as it shows that the DoJ Antitrust Division not always seeks to enforce antitrust laws through its criminal system by imposing substantial monetary penalties against corporations or lengthy prison terms against individuals but it also seeks compensation through the civil enforcement. This is done when it seems that compensation might not be available in private proceeding, which means that there are situations where criminal procedure will not be appropriate and a mix remedies may be more suitable.

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<sup>359</sup> *United States v Paramount Pictures* 334 U.S. (1948) 131, 171–72, *United States v. United Shoe Machinery Corp.* 391 U.S. (1968) 244, 250 and *United States v Grinnell* 384 U.S. (1966) 563, 577.

<sup>360</sup> To this end, the FTC issued a Policy Statement on Monetary Equitable Remedies in Competition Cases in 2003, which established three factors before seeking equitable monetary remedies. Nevertheless, such policy statement was withdrawn by the FTC in July 2012 and thus, has no legal value at all. See FTC: 'FTC Withdraws Agency's Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law' Press Release of 31 July 2012. <http://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies> (Accessed on 15 October 2015).

<sup>361</sup> *U.S. v KeySpan Corp.* (2010). The case involved a settlement with KeySpan that required the latter to disgorge \$12 million in profits for its role in the antitrust infringement, which was approved by the court in February 2011. Seven months later, another settlement for the disgorgement was reached for the same violation against Morgan Stanley for \$4.8 million.

[http://www.justice.gov/atr/public/press\\_releases/2011/275740.htm](http://www.justice.gov/atr/public/press_releases/2011/275740.htm) (Accessed on 15 October 2015).

<sup>362</sup> Bill Baer, 'Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes' Speech prepared for the Georgetown Law 7<sup>th</sup> Annual Global Antitrust Enforcement Symposium, Washington, 25 September 2013, p. 9. <http://www.justice.gov/atr/public/speeches/300930.pdf> (Accessed on 15 October 2015).

In this respect, *Elhauge* has stated that the fact that disgorgement of ill-gotten gains remedy has a reasonable basis for calculating the amount of the remedial payment, that alone represents an important advantage to disgorgement suits over claims for damages.<sup>363</sup> Indeed, the basis is a factor that can often be met and even where the analysis is difficult, it could be easier to calculate the amount of illicit profits than it is to calculate the amount of harm to each victim.<sup>364</sup>

Although he identifies some political bias as a potential problem in the use of disgorgement, *Elhauge* ultimately argues that alternative remedies are often more ineffective and burdensome and even if disgorgement is too modest a remedy, he further argues that an optimal deterrence system does not exist and disgorgement claims can at least reduce some of the shortfall in deterrence.<sup>365</sup>

Another measure that has been mentioned above and can too reduce the shortfall of deterrence is probation, as was seen in the case against *Apple*. In this case, it was established that Apple had agreements with five of the U.S. largest publishers to stifle retail price competition for e-books. In April 2012, the DoJ Antitrust Division filed suit against them and on September of the same year the five publishers entered into settlements with it that required the publishers to terminate its agency agreements with Apple in order to restore competition.<sup>366</sup>

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<sup>363</sup> Einer Elhauge, 'Disgorgement as an Antitrust Remedy' [2009] 76 Antitrust Law Journal 01 at 81.

<sup>364</sup> Ibid at 83.

<sup>365</sup> Ibid at 95.

<sup>366</sup> See for example Final Judgment as to *Defendants Hachette, HarperCollins, and Simon & Shuster*, §§ V.A.-C, *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826) , 6 September 2012. <http://www.justice.gov/atr/cases/f286800/286808.pdf> (Accessed 20 October 2014).

However, Apple rejected to settle and fought the Antitrust Division before the U.S. District Court for the Southern District of New York. In September 2013, judge Cote delivered the final judgement in which it was stated that the DoJ Antitrust Division was able to show that Apple participated in the conspiracy to fix prices and it granted the remedy sought by the Division. Mainly a remedy to ensure that Apple put in place the training and internal compliance controls needed to prevent recidivism and to that end, it specifically requires major improvements to Apple's antitrust compliance program including the designation of an external compliance monitor.<sup>367</sup>

Judge Cote appointed Michael Bromwich for a period of two years and whose salary and expenses will be paid by Apple, with the task to keep the company within the limits of antitrust laws by evaluating Apple's antitrust compliance policies and training programs and recommending changes to ensure their effectiveness. The appointment of an external monitor is perhaps the most intrusive remedy imposed by the DoJ Antitrust Division in order to prevent recidivism in antitrust cases and the results of this monitoring should be analysed intensely in respect to the prevention goal it seeks to achieve but also in respect to the collateral consequences it may originate.<sup>368</sup>

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<sup>367</sup> See Final Judgment as to Plaintiff United States' Final Judgment and Plaintiff States' Order entering Permanent Injunction United States v. Apple, Inc. et al., (S.D.N.Y 2012) (No. 12-cv-2826) (Sept. 5, 2013). <http://www.justice.gov/atr/cases/f300500/300510.pdf> (Accessed 20 October 2014).

<sup>368</sup> According to Apple, Michael Bromwich, the monitor imposed by Judge Cote, charged \$138,432.40 in his first two weeks of work and this has shed light into the role of monitors since they seem to cost millions of dollars to companies and they might have an incentive to drag out and expand the scope of their work to bill more hours. In 2013, six independent monitors were installed in corporate settlements and plea agreements and it seems that the imposition of this measure will be more common in the coming years. See Christopher M. Matthews, 'Apple E-Books Case Shines Light on Compliance Monitors' *The Wall Street Journal* (California 20 January 2014).

<http://online.wsj.com/news/articles/SB10001424052702304027204579332732558574644> (Accessed 20 October 2014).

In the case against *AU Optronics* mentioned above, not only did the Antitrust Division obtained a fine of \$500 million after proving the harm against American consumers but it also got the district court to agree that probation was necessary and a compliance monitor was appropriate for a period of three years. This monitor was ordered to report to the court and the Antitrust Division.<sup>369</sup>

The case is particularly interesting, as the Antitrust Division seems to put great attention on the fact that the offending corporations cannot be believed to make laudable efforts to put in place effective compliance and ethics programs if they keep culpable senior executives and employ indicted fugitives in positions of substantial authority.<sup>370</sup> We can agree that there is a reasonable assumption that they can be able to repeat the antitrust offence and thus, external monitors are needed. This policy seems to target guilty executives and seeks to take them out from the corporate decision making arena where they can engage in antitrust activities again by giving incentives to the undertakings not to keep them around and imposing costs on them when they fail to do so.

Although the U.S. has both a civil and a criminal system to enforce antitrust laws, the DoJ Antitrust Division will study the nature of the conduct cause of the infringement, so it can adopt the most adequate remedy. This assessment will focus on the substance of the violation, the business purpose if any and the harm caused by such conduct irrespective of whether it seems to be a *per se* infringement or an infringement by its effects.

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<sup>369</sup> See Bill Baer, 'Prosecuting Antitrust Crimes' in remarks as prepared for the 8<sup>th</sup> Annual Conference Georgetown University Law Center Global Antitrust Enforcement Symposium, Washington, 10 September 2014, p. 9.

<sup>370</sup> Ibid p. 8. In respect to the functions that the external monitor should have. See Bill Baer, 'Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes' in remarks as prepared for the Georgetown Law 7<sup>th</sup> Annual Global Antitrust Enforcement Symposium, Washington, 25 September 2013, p. 8. <http://www.justice.gov/atr/public/speeches/300930.pdf> (Accessed 20 October 2015).

This way, the DoJ Antitrust Division makes sure that whatever the measure taken, it will be appropriate and tailor made to address any wrongdoing either through the imposition of punitive instruments or through remedies either pursued by public institutions or encouraged to be taken in private enforcement, that target both corporations and individuals equally. One could even argue that enforcement has developed to be more stringent against individuals, as they are the ones who actually decide to commit the antitrust crimes.

Nevertheless, it must be noted that in the last 5 years, U.S. antitrust enforcement is focusing mostly on how to prevent recidivism. Indeed, U.S. antitrust enforcement has turned to take account of the behavioural insights in order to improve the shaping of remedies and sanctions so these can have a greater impact in preventing future infringements.

This does not mean that traditional enforcement is replaced but it has been complemented. The fact that this approach relies on the evidence of the actual impact of the traditional deterrence enforcement and its limitation, makes the new enforcement approach be based on a more reliable foundation. Hence, although there could be an increased perception that punishment is growing against individuals who are involved in the commission of antitrust violations, this is only a result of the increased focus on behavioural insights in the enforcement of U.S. antitrust law.

This focus on the actual impact of sanctions has taken the DoJ Antitrust Division to adopt other kinds or remedies that may seem more interventionists but rely on the evidence

that the “invisible hand” of the optimal deterrence framework has limitations and does not prevent future violations. The EU Commission should follow this lead too. In the next section I will discuss the developments that national competition authorities within Europe have undertaken in order to improve compliance rather than focusing on punishment alone.

## 2.5 Ireland and the United Kingdom.

Being the most successful criminal system dealing with antitrust violations, not only prosecuting national but also international cartels, the U.S. antitrust law enforcement system is not the only one with punitive sanctions. In Europe, there are competition law infringements that can be considered as crimes as well. Although EU competition law system only considers pecuniary sanctions for antitrust violations to be imposed on undertakings, there are certain competition law infringements that are considered as crimes at the national level, for which individuals could be accountable for.

In Ireland for instance, the Competition (Amendment) Act 1996 criminalised breaches of the provisions that mirrored the ones contained in the current Articles 101 and 102 TFEU; which up to that point had been subject to civil sanctions only in the form of injunctive or declarative or financial relief in the form of damages under the Competition Act 1991. The Competition Act 2002 replaced the two above mentioned Acts and increased the applicable penalties, rendering it an offence to breach Articles 101 and 102 TFEU.<sup>371</sup>

A further reform took place and the penalties were made bigger; the applicable fine for summary convictions has been increased to €5,000. The applicable fine for conviction on indictment increases from €4 million to €5 million for individuals and undertakings or 10% of turnover in the preceding fiscal year; and in the case of individuals the term of imprisonment on indictment increases from 5 to 10 years, applicable as an alternative or in conjunction with a fine.<sup>372</sup>

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<sup>371</sup> Anna-Louise Hinds and Sinead Eaton, 'Commitment issues – new developments in EU and Irish competition law' [2014] 35 ECLR 1 p. 38 and the references there provided.

<sup>372</sup> Section 2 of the Competition Act 2012, amending s.8 of the Principal Act.

In the United Kingdom (UK), the Competition and Markets Authority (CMA),<sup>373</sup> has the power to impose financial penalties on infringing undertakings in order to enforce Articles 101 and 102 TFEU and Chapter I Prohibition and Chapter II Prohibition of the Competition Act 1998. To that end, it can also apply to the court<sup>374</sup> to disqualify the directors of such companies for acting as a director of any undertaking for up to 15 years. The OFT, now the CMA as of 01 April 2014, further published a Penalty Guidance at the end of 2004 in order to provide transparency and predictability based on 5 steps procedure. However, it could depart from its methodology at any time as long as it substantiates the reasons. This guidance was later replaced in September 2012.<sup>375</sup>

The Penalty Guidance 2012 now contains a six-step methodology when calculating the amount of the fine to be imposed when an undertaking intentionally or negligently breaches competition law.<sup>376</sup> First, it will make the calculation of the starting point having regard to the seriousness of the undertaking and the relevant turnover. Second, there will be an adjustment for the duration of the violation, (iii) the CMA will make an adjustment for aggravating and mitigating factors, (iv) it will make a further adjustment for specific deterrence and proportionality where it will consider the undertaking's financial position or ability to pay or the use of the minimum deterrence threshold.<sup>377</sup> In the fifth step, the

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<sup>373</sup> The CMA substituted the now extinct Office of Fair Trading (OFT) and the Competition Commission (CC) on 1 April 2014 to deal with antitrust law matters in the UK.

<sup>374</sup> In England and Wales "court" means the High Court. In Scotland "court" means Court of Session. See section 9E(3) of the Company Directors Disqualification Act 1986 as amended by the Enterprise Act 2002.

<sup>375</sup> The Penalty Guidance 2004 was later replaced by Office of Fair Trading, 'OFT's guidance as to the appropriate amount of penalty', OFT 423 September 2012. Hereafter 'Penalty Guidance 2012'. [http://www.oft.gov.uk/shared\\_oft/business\\_leaflets/ca98\\_guidelines/oft423.pdf](http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf) (Accessed on 11 April 2015).

<sup>376</sup> The CMA does not have to prove whether there was negligence or intent. See *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 para 484 and 485.

<sup>377</sup> In the third step of the Penalty guidance 2004, the OFT would use a mechanism it referred to as a 'minimum deterrence threshold' by which the OFT increased the penalty, if after step 1 and 2 the amount represented a small proportion of the undertaking's worldwide turnover. According to the Penalty

CMA will amend the amount of the penalty so it does not exceed the limit of 10% of the undertaking's worldwide turnover in its last business year as to avoid double jeopardy.<sup>378</sup>

In the final step (vi), the CMA will make adjustments for leniency and settlement discounts, if any.

It is worth noting that the CMA may not impose financial penalties on small agreements in relation to infringements of the Chapter I prohibition as provided in Section 39 of the Competition Act 1998 and for conduct of minor significance in respect of infringements of the Chapter II prohibition as provided in Section 40 of the same act. However, the limited immunity for these violations does not apply to any infringements of Articles 101 and 102 TFEU or to infringements related to price fixing, and the CMA in certain circumstances, can further withdraw such immunity. Such circumstances are contained in the guidance as to the circumstances in which it may be appropriate to accept commitments.<sup>379</sup>

The UK Competition Appeal Tribunal (CAT) can impose, revoke or vary the amount of the fine imposed by the CMA and this decision can be appealed before the Court of Appeal. On the other hand, because the CMA does not consider that higher fines alone are the means to achieve greater competition law compliance;<sup>380</sup> directors of companies

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Guidance 2012, this deterrence threshold is contained in step 4 and considers the gains accrued from the violation.

<sup>378</sup> If the EU Commission or any other national competition authority or the national court to the EU Member States have already imposed a fine in respect of an agreement or conduct, the OFT must take that into account when setting its own penalty.

<sup>379</sup> See Competition law application and enforcement: OFT407, 1 December 2004. <https://www.gov.uk/government/publications/competition-law-application-and-enforcement> (Accessed 22 April 2013).

<sup>380</sup> John Fingleton, 'The appropriate balance between corporate and individual sanctions and business education in incentivising compliance with competition law' (Mentor Group's London Forum Paper September /2010) [http://www.oft.gov.uk/shared\\_oft/speeches/689752/speech1010.pdf](http://www.oft.gov.uk/shared_oft/speeches/689752/speech1010.pdf) (Accessed 22 April 2013).

that participated in a cartel in the UK face disqualification from acting as a director of any company for up to 15 years.<sup>381</sup>

Disqualification can take place by a court order, which are known as Competition Disqualification Orders (CDO) and by consent of the relevant director, which are known as Competitor Disqualification Undertakings (CDU). Both of them work as a deterrent but also in protecting the public, in particular the CDU since it allows for a quick and earlier disqualification of unfit directors and it avoids unnecessary court proceedings and reduces costs where the parties agree on an appropriate length of disqualification.<sup>382</sup>

During the period in which a person is subject to a CDO or CDU, it is a criminal offence for him or her, to be the director of a company. People under this restriction cannot act as a receiver of a company's property or directly or indirectly be connected or take part in the promotion, formation or management of a company unless the court has authorised it. It is also a criminal offence for him or her to act as an insolvency practitioner.<sup>383</sup> It is important to note that CDOs are mandated by the court, and CDUs may be offered to the CMA and if accepted, the CMA would not make an application to the court for the adoption of a CDO.

In spite of the fines and disqualification orders provided, these instruments are just sanctions of administrative nature. The availability of penalties of criminal nature for

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<sup>381</sup> As provided in the Company Directors Disqualification Act 1986 (CDDA 1986).

<sup>382</sup> See CMA, Guidance Document, 'Director Disqualification Orders in competition cases', OFT510, 1 June 2010. <https://www.gov.uk/government/publications/competition-disqualification-orders> (Accessed on 15 May 2015).

<sup>383</sup> Section 13 (1) CDDA 1986, stating that persons convicted of this offence are liable on conviction on indictment, to imprisonment for not more than two years or an unlimited fine or both; and on summary conviction to imprisonment for not more than six months or a fine of up to the statutory maximum or both.

specific competition law infringements took place after the entry into force of the Enterprise Act 2002 in June 2003. This piece of legislation provided that it was criminal offence for an individual to dishonestly engage in cartel agreements pursuant to the cartel offence.<sup>384</sup> Not surprisingly, the term “dishonestly” presented an obstacle, which proved impossible to be overcome and was subsequently removed as will be explained below.

Nonetheless, since June 2003 the UK promised to be a leading enthusiast of criminal cartel enforcement with predictions of six to ten convictions a year.<sup>385</sup> Instead, there has been only one successful conviction relating to the cartel offence, the *Marine Hose* case above mentioned,<sup>386</sup> where three UK directors pleaded guilty to the commission of the cartel offence in a negotiated arrangement with the U.S. Department of Justice in the first place.<sup>387</sup>

The requirement of ‘dishonesty’ contained in the cartel offence, was recognised as a serious obstacle to the back then, OFT’s ability and willingness to bring individuals to trial.<sup>388</sup> This was evident in another high profile case, the *British Airways/Virgin Passenger Fuel Surcharges* case in which there were no plea agreements but instead, proceedings were contested resulting in the collapse of the trial.<sup>389</sup>

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<sup>384</sup> Section 188 of the Enterprise Act 2002 provided that it was a criminal offence for an individual dishonestly to agree with another person that two or more undertakings will engage in one or more reciprocal hard core cartel arrangements such as price fixing, limiting supply and production, market sharing and bid rigging. <http://www.legislation.gov.uk/ukpga/2002/40/section/188> (Accessed on 15 May 2014).

<sup>385</sup> Anthony Hammond and Roy Penrose, ‘Proposed criminalization of cartels in the UK’, Report prepared for the Office of Fair Trading (OFT), November 2001 para 3.6. [http://www.oft.gov.uk/shared\\_oft/reports/comp\\_policy/oft365.pdf](http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft365.pdf) (Accessed on 15 May 2014).

<sup>386</sup> *R v Whittle and others* [2008] EWCA Crim 2560.

<sup>387</sup> Scott D. Hammond, ‘The Evolution of Criminal Antitrust Enforcement over the Last Two Decades’ National Institute on White Collar Crime, ABA Criminal justice Section, Miami, February 2010. <http://www.justice.gov/atr/public/speeches/255515.htm> (Accessed on 15 May 2014).

<sup>388</sup> Andreas Stephan, ‘How Dishonesty Killed the Cartel Offence’ [2011] Criminal Law Review 446.

<sup>389</sup> Office of Fair Trading, ‘OFT withdraws criminal proceedings against current and former BA executives’ press release 47/10 of 10 May 2010.

Under the Enterprise Act 2002, the cartel offence applied only in respect of horizontal agreements and individuals who are convicted of the offence face a maximum sentence of 5 years of incarceration or an unlimited fine or both.<sup>390</sup> As stated before, the cartel's offence main component was the element of dishonesty on the part of an individual, this means that what is provided for here is not the same as what is provided in Article 101 TFEU.

The test for dishonesty was that adopted by the Court of Appeal in *R v Ghosh*,<sup>391</sup> where a two-part test for dishonesty was set down, one objective and another one subjective.<sup>392</sup> However, the *Ghosh* test must now take account of the House of Lords judgement in the *Norris* case,<sup>393</sup> where it was stated that the mere undeclared participation in a cartel did not amount to an offence of conspiracy to defraud.

In this case, it was argued that the requisite 'dual criminality test' (both subjective and objective test of dishonesty) in relation to the extradition request from the U.S. to face charges for a Sherman Act violation, was not met. Since at the time of its occurrence, the cartel offence had not yet entered into force and the offence of conspiracy to defraud could not be a match to price fixing hence the interpretation of dishonesty needed further clarification.

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<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2010/47-10> (Accessed on 15 May 2014).

<sup>390</sup> ss 188-202, Part 6 of the Enterprise Act 2002.

<sup>391</sup> *R v Ghosh* [1982] QB 1053. However, the first time that the meaning of the word dishonesty was determined by the British courts was in *Feely* [1973] QB 530 where an objective test for dishonesty was laid down, meaning the defendant was judged according to a standard set by the jury.

<sup>392</sup> The objective test is the same as the one established in *Feely*; in the subjective test though, the jury must consider whether the defendant himself must have realized that what he was doing was by objective standards, dishonest.

<sup>393</sup> *Norris v The Government of the United States and others* [2008] UKHL 16.

Hence, in light of these issues, in March 2011 the Department for Business, Innovation and Skills (BIS) arranged for a consultation on reform of the UK competition system.<sup>394</sup>

In March 2012, the UK government responded to the consultation concluding that the most important but not the only factor, responsible for the lack of criminal cases and the ineffectiveness of the cartel offence's deterrent effect had been the incorporation of the dishonesty element into the offence.<sup>395</sup>

Thus, the OFT subsequently went ahead with the reform of the Enterprise Act 2002 and removed the dishonesty requirement, adding statutory exclusions and defences to the offence and excluding agreements made openly, all of which was materialised with the publication of the Enterprise and Regulatory Reform Act 2013 (ERRA 2013), which will now be enforced by the CMA.<sup>396</sup>

The ERRA 2013 provides for three defences contained in s.188B. The first one is that the individual did not intend that the nature of the arrangements would be concealed from customers. Second, there was no intent to conceal from the CMA and third, before making the agreement, the individual took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice.<sup>397</sup> In respect to the latter, *Whelan* points out there is no obligation on

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<sup>394</sup> BIS, 'A Competition Regime for Growth: A Consultation on Options for Reform', March 2011. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf) (Accessed on 15 May 2014).

<sup>395</sup> BIS, 'Growth, competition and the Competition regime: Government response to consultation', May 2012 para 7.8. The government has reached this conclusion despite the lack of evidence of difficulties arising during the course of a trial if the proceedings are contested.

<sup>396</sup> See the Enterprise and Regulatory Reform Act 2013, Part 4, Chapter 4, s 47 which replaces the Enterprise Act 2002 s 188. <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted> (Accessed on 15 May 2014).

<sup>397</sup> Section 47, Cartel Offence, defences to the commission of cartel offence. <http://www.legislation.gov.uk/ukpga/2013/24/section/47/enacted> (Accessed on 15 May 2014).

that individual to show that they took reasonable steps to act on that legal advice which would mean that it may be even harder to prosecute and secure convictions than under the standard of dishonesty.<sup>398</sup>

Nevertheless, according to *Stephan*, the fact that the UK Government did not scrap the cartel offence *per se* and the success in reforming the offence without opposition, suggests there is still an appetite for giving effective criminal cartel enforcement a good shot. The creation of a new UK competition authority, the Competition and Markets Authority (CMA) should also allow future enforcement to distance itself from the perceived failings of the OFT.<sup>399</sup>

Indeed, the OFT was closed on 1 April 2014 and many of its responsibilities passed to a number of different bodies. Thanks to ERRA 2013, from April 2014 the Competition and Markets Authority has become the UK's lead competition and consumer body, bringing together the Competition Commission, which was also closed on 1 April 2014, and the competition and certain consumer functions of the OFT into one single institution.<sup>400</sup>

However, despite the legal and institutional reforms, it has been argued that the most fundamental problem has been that the government has not engaged sufficiently with the question of why criminalization is necessary and appropriate at all for individual cartel

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<sup>398</sup> Peter Whelan, 'Does the UK's New Cartel Offence Contain a Devastating Flaw?' Competition Policy Blog (21 May 2013) <http://competitionpolicy.wordpress.com/2013/05/21/does-the-uks-new-cartel-offence-contain-a-devastating-flaw/> (Accessed on 15 May 2014).

<sup>399</sup> Andreas Stephan, 'Publication Review: The Criminal Law of Competition in the UK and in the US: Failure and Success', [2013] ECLR 11 p. 607.

<sup>400</sup> On 25 June 2014 the OFT and the Competition Commission published their final annual reports covering the period from 1 April 2013 to 31 March 2014. The CMA notes the publication of the final editions of the OFT and the CC annual reports and accounts, covering 2013 to 2014.

<https://www.gov.uk/government/news/office-of-fair-trading-and-competition-commission-final-annual-reports-published> (Accessed on 15 May 2014).

behaviour.<sup>401</sup> According to *Stephan*, the government has underestimated the substantive and practical problems arising from criminalization and from the operation of parallel civil and criminal cartel regimes.<sup>402</sup>

In this respect, *Stephan* further states that at least in the UK, although 73 per cent of respondents to a public survey recognized that price-fixing was harmful, only eleven per cent felt imprisonment was an appropriate sanction and 25 per cent of respondents strongly felt that price fixing was dishonest.<sup>403</sup> *Jones* and *Williams* have further mentioned that regard should be had at the failure of the British Airways prosecution case, which appeared to have resulted most immediately from procedural failings, matters that were not addressed by the 2013 reform and they might still persist.<sup>404</sup>

Indeed, because of the particular characteristics of the UK competition law system, *Furse* is emphatic to conclude that the availability of a parallel civil procedure in the UK makes it less likely, that the CMA will ever bring criminal cases to trial considering the advantages of the former. In his view, a jurisdiction should commit to a whole scale criminalization of cartel laws in relation to corporations and individuals rather than opting for a mixed system like the one in the UK.<sup>405</sup>

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<sup>401</sup> Andreas Stephan, 'Cartel Criminalisation: The Role of the Media in the 'Battle for Hearts and Minds' in Caron Beaton-Wells and Ariel Ezrachi, eds., *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (1st edn, Hart Oxford, 2011), p. 367.

<sup>402</sup> *Ibid* p368.

<sup>403</sup> Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 Competition Law Review 123-145. There was another similar study that was carried out in Australia, which delivered similar results. See Caron Beaton-Wells, Fiona Haines and Others, 'The Cartel Project: Report on a Survey of the Australian Public Regarding Anti-Cartel Law and Enforcement' The University of Melbourne (December 2010).

[http://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0011/1676081/SurveyReportFinalDec131.pdf](http://law.unimelb.edu.au/_data/assets/pdf_file/0011/1676081/SurveyReportFinalDec131.pdf) (Accessed on 15 May 2014).

<sup>404</sup> Alison Jones and Rebecca Williams, 'The UK response to the global efforts to the global efforts against cartels: is criminalization really the solution', [2014] 2 OJAE 1 p. 9.

<sup>405</sup> Mark Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success* (1<sup>st</sup> edn, Edward Elgar Publishing Limited, 2012) p. 218.

*Stephan* has also identified four key challenges for effective criminalization of cartel laws in the UK but also in any other jurisdiction where this path is taken.<sup>406</sup> In his view, (i) legitimization is fundamental and a moral basis does exist to prosecute individuals who depart from the competitive conditions or values we expect in a liberal free market economy. (ii) An efficient relationship between criminalization and leniency must be provided where individuals have clear guidelines in which the value of cooperation beyond leniency is recognized and may lead to reduced or suspended sentences. Criminalization (iii) should exist for both corporations and individuals with settlements available and (iv) consensus in the global standards of criminalization should be achieved.<sup>407</sup>

In the end, the mixture of sanctions both administrative and criminal against corporations and individuals meant the recognition from the UK legal system of the insufficiency and ineffectiveness that a system based on fines alone would entail. Nevertheless, a set of sanctions, even if they are able to impose fines on corporations of up to ten per cent of their worldwide turnover or up to five years imprisonment for individuals, is not the only set of tools that a competition law enforcer needs in order to be effective.<sup>408</sup> Hence, focusing on the severity of sanctions will not deliver effectiveness in the enforcement of competition law.

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<sup>406</sup> Andreas Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' [2014] 2 OJAE 2, p. 333-362.

<sup>407</sup> Ibid p. 360 and 361.

<sup>408</sup> In addition, there is the possibility of being banned from acting as a director for a period of up to 15 years.

Around the world, a leniency regime is also a great anti-cartel enforcement tool serving to destabilize cartels and encourage a man-eat-man race to confess and the UK has adopted this path too. In line with this international trend,<sup>409</sup> and taking into account the corporate fines and individual criminal penalties available as enforcement tools, the OFT adopted a leniency policy contained in three main documents, the Penalty Guidance 2012,<sup>410</sup> the No-action Guidance 2003<sup>411</sup> and the ‘Leniency Guidance 2008’.<sup>412</sup>

However, due to the recent structural and legal reforms, the CMA has replaced all these documents and has only embraced the ‘Penalty Guidance 2012’, and recently added a new ‘Leniency Guidance 2013’.<sup>413</sup> In addition to the leniency guidance, the CMA also adopted two quick guides on cartels and leniency for businesses and individuals first published by the extinct OFT.<sup>414</sup>

The Leniency Guidance 2013 provides for leniency from financial penalties and immunity from criminal prosecution if five conditions are met, mainly the admission to the infringement, the information provided, continuous cooperation and termination of

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<sup>409</sup> The successful use of a leniency programme in the U.S. soon led to the Antitrust Division of the U.S. Department of Justice to push the use of leniency worldwide and to set the minimum standards for a successful immunity programme to be adopted in every jurisdiction applying antitrust rules through the OECD, Leniency Reports of 2001 and 2002 above mentioned.

<sup>410</sup> Office of Fair Trading, ‘OFT’s guidance as to the appropriate amount of penalty’, OFT 423, September 2012.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284393/oft423.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf) (Accessed on 15 October 2015).

<sup>411</sup> Office of Fair Trading, ‘The Cartel Offence: No-Action Letters of Individuals’, OFT 513, April 2003 and OFT, ‘Leniency in cartel cases: A guide to the leniency programme for cartels’, OFT 436, 2005.

<sup>412</sup> Office of Fair Trading, ‘Leniency and No-action – Guidance note on the handling of applications’, OFT 803, December 2008.

<sup>413</sup> OFT, ‘Application for leniency and no-action in cartel cases: OFT’s detailed guidance on the principles and process’, OFT 1495, July 2013.

[http://www.oft.gov.uk/shared\\_oft/reports/comp\\_policy/OFT1495.pdf](http://www.oft.gov.uk/shared_oft/reports/comp_policy/OFT1495.pdf) (Accessed on 15 October 2015).

<sup>414</sup> OFT, ‘Quick Guide to Cartels and Leniency for Businesses’, OFT 1495b, July 2013 and the OFT, ‘Quick Guide to Cartels and Leniency for Individuals’, OFT 1495i, July 2013. Both can be found in CMA website: <https://www.gov.uk/cartels-confess-and-apply-for-leniency> (Accessed on 15 October 2015).

the infringement as well as to refrain from further participation in the cartel and not have exercised coercion.<sup>415</sup>

These five conditions, together with essential commitments, apply to two out of three types of leniency available, Type A, B and C. Type A provides total immunity from financial penalties, guaranteed blanket immunity from criminal prosecution to individuals and protection from director disqualification proceedings.<sup>416</sup> Type B is available to the first applicant to provide information when the CMA is conducting a pre-existing investigation and reduction of the financial penalty of up to 100%, immunity from criminal prosecution for specific people and protection from director disqualification proceedings if a reduction is granted.<sup>417</sup>

Type C, provides reductions of up to 50% of the corporate fine, discretionary criminal immunity for specific individuals and protection from director disqualification proceedings if any reduction is granted. However, the interesting thing about Type C leniency is that it is available in circumstances where another undertaking has already reported the cartel activity and it is even available to undertakings that have coerced others in such cartel activity.<sup>418</sup>

Type A Leniency provides a blanket of criminal immunity when the leniency agreement is signed and individuals benefit from no action letters as long as they accept culpability to the cartel offence but where culpability is not appropriate, meaning that when there is

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<sup>415</sup> ‘Application for leniency and no-action in cartel cases: OFT’s detailed guidance on the principles and process’, OFT 1495, July 2013 para 2.8.

<sup>416</sup> Ibid para 2.10 to 2.14.

<sup>417</sup> Ibid para 2.15 to 2.13.

<sup>418</sup> Ibid para 2.24 to 2.32 and 2.50 to 2.55. It should be remembered that the four remaining conditions of leniency have to be met except the coercive role of the undertakings.

no evidence of culpability, the individuals are granted a comfort letter.<sup>419</sup> As to the way how the CMA will prosecute individuals for the commission of the cartel offence, the CMA published guidance on March 2014.<sup>420</sup>

It is worth mentioning that the CMA has also published the ‘Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases’ taking effect on 1 April 2014.<sup>421</sup> Such guidance is concerned exclusively with the CMA’s investigations under the Competition Act 1998 and does not deal with the criminal offence or the disqualification order proceedings.<sup>422</sup> The annex of such guidance has a list of the existing CMA guidance documents which relate to particular aspects of the investigations under the Competition Act 1998, the cartel investigations under the latter and the Criminal proceedings as well as miscellaneous guidance.<sup>423</sup>

In regards to what is provided in the guidance, it is important to highlight a new element, which is settlement.<sup>424</sup> Settlement now replaces what used to be known as early resolution in the OFT’s investigations and it is available in enforcement proceedings concerning both Chapter I and Chapter II prohibitions of the Competition Act 1998 (Articles 101(1) and 102 TFEU respectively).

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<sup>419</sup> Ibid para 8.14.

<sup>420</sup> ‘Cartel Offence Prosecution Guidance’ CMA9, March 2014.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288648/CMA9\\_Cartel\\_Offence\\_Prosecution\\_Guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9_Cartel_Offence_Prosecution_Guidance.pdf) (Accessed on 15 October 2015).

<sup>421</sup> ‘Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases’ CMA8, March 2014.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288636/CMA8\\_CA98\\_Guidance\\_on\\_the\\_CMA\\_investigation\\_procedures.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288636/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf) (Accessed on 15 October 2015).

<sup>422</sup> As was mentioned above, the guidance that should apply in this respect is contained in the ‘Cartel Offence Prosecution Guidance’ (CMA9), the ‘Director Disqualification orders in competition cases’ (OFT510) and the ‘Company directors and competition law: OFT Guidance’ (OFT1340) June 2011. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284410/oft1340.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284410/oft1340.pdf) (Accessed on 15 October 2015).

<sup>423</sup> Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases, Annex A – status of existing OFT guidance, p. 95.

<sup>424</sup> Ibid para 14.1.

Another interesting point about settlements is that they are available before and after the statement of objections has been issued by the CMA.<sup>425</sup> For the CMA to accept such settlement, the undertakings must provide admission of liability as to the nature, scope and duration of the infringement, cease and desist from committing other antitrust violations and confirm it will pay the penalty set at the maximum amount.<sup>426</sup>

The ‘Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases’ also provides for an enhanced administrative model where the CMA privileges transparency and further improves the internal procedures of the CMA and its interactions with the suspected companies subject to the proceedings and parties with legal interest.<sup>427</sup> To that end, it establishes roles for each officer or group within the CMA and provides for internal review procedure of complaints about the CMA’s investigation handling, and right to appeal and review the CMA’s processes.

The CMA’s guidance on investigation procedures provides that complaints should be made in writing in first instance to the Senior Responsible Officer and if the dispute is not resolved, the complainant can be referred to the Procedural Officer who is independent from the investigation, the case team and the Case Decision Group.<sup>428</sup> This

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<sup>425</sup> Ibid para 14.10.

<sup>426</sup> Ibid para 14.7.

<sup>427</sup> Ibid para 9.1, 15.1 and 12.12. See also the ‘Transparency and disclosure: Statement of the CMA’s policy and approach’ (CMA6), January 2014.

<https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach> (Accessed on 15 October 2015).

<sup>428</sup> Chapter 15 and Rule 8 of the Competition Act 1998 Rules, see also para 15.4 of the CMA’s guidance on investigations procedures where it is provided that the Procedural Officer is able to hear over significant procedural issues during the course of an investigation and his/her decisions are binding on the case team.

does not preclude the party's right of appeal in respect of judicial review and any appeal before the Competition Appeal Tribunal.

Nevertheless, as *Freeman* has stated, it will remain to be seen whether the CMA is able to show that it can bring cases to a successful conclusion within a shorter period of time than the OFT managed to do.<sup>429</sup> Another test for the CMA would be whether there is a real improvement in the quality and quantity of competition law enforcement cases, without sacrificing the value of fairness and due process, which will otherwise result in an increased number of appeals.<sup>430</sup>

Also interesting is the fact that the CMA adopted an 'informant reward policy' with the CMA offering a financial reward to any person of up to £100,000 for providing cartel infringement information.<sup>431</sup> For that purpose, the CMA provides a hotline and an e-mail that can be used by any person in order to provide information and the amount of the reward will depend on four factors enlisted in the guidance as well as the way this incentive will work with the leniency programme.<sup>432</sup>

This policy makes leniency proactive as it is not only meant to grant immunity but it also intends to reward whistle-blowing, something that is not standard in other jurisdiction

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<sup>429</sup> Peter Freeman, 'The Competition and Markets Authority: can the whole be greater than the sum of its parts?' [2013] 1 OJAE 1 at 21.

<sup>430</sup> *Ibid* at 22.

<sup>431</sup> CMA Guidance, 'Rewards for Information about Cartels' March, 2014.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299411/Informant\\_rewards\\_policy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf) (Accessed July 20, 2015).

<sup>432</sup> *Ibid* p. 5 where it is stated that even people involved in cartel activity can have access to the reward provided they satisfy certain requirements there enlisted.

such as the EU or the US.<sup>433</sup> On the other hand, the UK also provides for guidance for involving third parties in Competition Act 1998 investigations.<sup>434</sup>

The CMA provides a further incentive, as it has kept the guidance originally published by the now extinct Office of Fair Trading where it provides companies with the benefit of a 10% reduction in their pecuniary sanction for having effective compliance measures.<sup>435</sup> This benefit applies when the compliance measures are adopted before the infringement or when they were implemented quickly following the business first becoming aware of the potential competition law infringement.<sup>436</sup>

Although the above is expected to increase detection, actual punishment needs to be enhanced too. In this respect, the extinct OFT and now the CMA have been successful in bringing criminal prosecutions dealing with consumer protection cases under the Consumer Protection from Unfair Trading Regulations 2008.<sup>437</sup> As has been explained

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<sup>433</sup> Philippe Billiet, 'How lenient is the EC policy? A matter of certainty and predictability' [2009] 30 ECLR 1 at 19 also mentioning South Korea as another jurisdiction in which reward is been offered.

<sup>434</sup> OFT Guidance, 'Involving third parties in Competition Act investigations: Incorporating guidance on the submission of complaints' Competition Law 2006.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284401/oft451.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284401/oft451.pdf) (Accessed June 30, 2015).

<sup>435</sup> For evaluating what effective measures are with a view to prevent antitrust violations, the CMA undertakes an assessment of a four-step process that follows a clear and unambiguous commitment to competition law throughout the organization: Risk identification, risk assessment, risk mitigation and review. See CMA Guidance, 'Four-step process to competition law compliance' April 2014.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/306902/CMA19-staticwheel.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306902/CMA19-staticwheel.pdf) (Accessed June 30, 2015).

<sup>436</sup> CMA Guidance, 'How your business can achieve compliance with competition law' OFT1341, June 2011, p. 31.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284402/oft1341.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf) (Accessed June 30, 2015). See also OFT Guidance to SMEs in the UK, 'How small businesses can comply with competition law' OFT1330, April 2014. <https://www.gov.uk/government/publications/how-small-businesses-can-comply-with-competition-law> (Accessed June 30, 2015).

<sup>437</sup> See for instance, the CMA Competition, 'Three sentenced following CMA prosecution of multimillion pound pyramid promotional scheme' Press Release of 13 October 2014. Where 11 people were prosecuted and 9 convicted to imprisonment terms ranging from 3 to 6 months direct imprisonment and suspended sentences in a case that began in 2008. <https://www.gov.uk/government/news/three-sentenced-following-cma-prosecution-of-multi-million-pound-pyramid-promotional-scheme> (Accessed June 30, 2015).

above, criminal prosecutions in respect to the cartel offence remain far behind that success rate, if any. However, as of October 2014, the CMA is prosecuting two cartel cases that were initially opened by the OFT and the CMA is following such prosecution with the element of dishonesty still applicable for the CMA to prove.

On March 2013, an investigation was opened and searches were carried out into suspected cartel activity in the supply of products to the construction industry that resulted in seven individuals from three companies being arrested.<sup>438</sup> On 13 January 2014, Mr. Peter Nigel Snee was charged with the criminal cartel offence in relation to the cartel investigation in respect of the supply in the UK of galvanized steel tanks for water storage and which was adjourned to 26 January 2014.<sup>439</sup>

In conclusion, these two cases present a big opportunity for the CMA to signal effectiveness of the institutional changes provided by the ERRA 2013. However, years will make it clear whether the new cartel offence is more complex than before without the least certain element of the offence, that being dishonesty. This in turn, will show how the changes introduced will in fact make successful convictions and thus, effective criminalization and enforcement a reality.

Overall, the fact that the CMA targets both individuals and companies and even rewards any person with cartel information suggests that its deterrence policy is taking into account behavioural aspects that the economic model of optimal deterrence has failed to consider. It is also an improvement that the CMA offers a reduction in the monetary

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<sup>438</sup> Case CE/9705/12 - <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry> (Accessed June 15, 2015).

<sup>439</sup> Case CE/9623/12 - <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage> (Accessed June 15, 2015).

penalty, if the incumbent undertaking adopts an antitrust compliance programme. To this end, the CMA offers positive guidance.<sup>440</sup>

No doubt, these tools make it clear that the main policy is deterrence but we can distinguish another underlying objective, which is the promotion of compliance. While the U.S. antitrust enforcement system offers negative incentives to achieve prevention, the CMA offers positive ones.<sup>441</sup> This shall be compared to the way the EU Commission enforces EU competition law and whether such system does in fact promote compliance irrespective of whether it uses positive or negative incentives respective the principle of due process.

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<sup>440</sup> See for instance the CMA website in the United Kingdom containing information on how to comply with consumer and competition law and providing guidance on cartels such as: ‘Competition Law: dos and don’ts for trade associations’, ‘Advice for company directors on avoiding cartel infringements’, ‘Cartels and leniency: information for businesses and individuals’ and so on.

<https://www.gov.uk/government/collections/competition-and-consumer-law-compliance-guidance-for-businesses> (Accessed June 15, 2015).

<sup>441</sup> See for instance CMA, ‘CMA confirms fine as it completes eye surgeons investigation’ Press Release of 5 August 2015 <https://www.gov.uk/government/news/cma-confirms-fine-as-it-completes-eye-surgeons-investigation> (Accessed September 30, 2015) where it is stated that from a fine of £500,000 the association under investigation received reduction that ultimately led to a £382,500 fine. This was so because the incumbent association settled, offered continuous cooperation and adopted a compliance programme.

## Chapter 3

### **Rights and Principles governing the EU Competition law enforcement system**

#### **3.1 Rights.**

##### **3.1.1 Introduction.**

For an enforcement system to be effective in generating the conditions to prevent the commission of law infringements, that system needs to be driven by higher standards of justice and rule of law. Since the EU Commission is an administrative authority, it is ultimately entrusted with the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty.<sup>442</sup> Hence, for the EU Commission to deliver and execute the EU competition policy, discretionary power has been granted to it, implying a wide margin of discretion to pursue such policy interest.

In this context, the EU Commission needs to work within boundaries of what constitutes its legitimate interest to effective enforcement of the EU competition rules that allows it to pursue such broad EU competition policy. The question arises then, what are those boundaries? Those boundaries are set by general principles of EU law which, while significant in their theoretical and constitutional value towards a fair enforcement system; they have had limited effectiveness as such boundaries on which the EU Commission can exercise its discretion remain flexible or so is the perception.<sup>443</sup>

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<sup>442</sup> Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-206/02 P, C-207/02 P, C-208/02 P, C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-05425 para 170.

<sup>443</sup> J. Van Meerbeeck, ‘The principle of legal certainty in the case-law of the European Court of Justice: from certainty to trust’ [2016] 41(2) European Law Review 275.

Although the EU Courts are entrusted with the function of preventing the EU Commission from abusing its discretionary power and thus setting the boundaries of such power,<sup>444</sup> they do so while also preserving the institutional balance in accordance with the powers conferred on them by the Treaties.<sup>445</sup> Even the General Court has admitted that the inter-institutional balance principle established by the TFEU prohibits any encroachment by one institution on the powers of another, meaning that a stricter judicial scrutiny of the acts of the EU Commission would amount to an intrusion on the EU Commission's discretionary power in the area of competition policy.<sup>446</sup>

Despite the fact that the principle of inter-institutional balance has been observed since the early days of the European Coal and Steel Community,<sup>447</sup> and the dynamics between the EU Commission and the EU Courts have evolved considerably over the years; there is still debate about whether the level of judicial protection provided by the EU Courts is sufficient. Especially whether such judicial review is able to protect the observance of higher principles of EU law.<sup>448</sup>

This debate is fuelled by the perceived preference of the EU Courts in favour of the interest of having an effective EU competition policy. Indeed, when considering the

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<sup>444</sup> Article 261 TFEU grants the General Court full jurisdiction when it comes to assessing the lawfulness of the fine imposed by the EU Commission and Article 263 TFEU grants the CJEU jurisdiction to review the legality of acts of the EU Commission. This translates into a manifest error type of review when the issue relates to the economic and legal assessment of the findings made by the EU Commission as to the nature and impact of the infringement. See Case T-112/99 *Metropole Television and others v Commission* [2001] ECR II-2459 para 114.

<sup>445</sup> See Case T-65/98 *Van den Bergh v Commission* [2003] ECR II-4653 para 135

<sup>446</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 para 57.

<sup>447</sup> Case 9-56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, Judgment of the Court of 13 June 1958.

<sup>448</sup> If there is a perception that there is no respect for higher principles of law, the whole system becomes dubious and questions arise as to where should a line be drawn between the pursuit of a competition policy and the effective protection of business freedom and due process in general. See A. Andreangeli, 'Competition Law and Human Rights: Striking a Balance Between Business Freedom and regulatory Intervention' in D. Sokol and I. Lianos (eds), *Global Limits of Competition Law* (Stanford Law Books, Palo Alto CA 2012) p. 22.

political logic (preserving the interests of the Union) and the subjective logic (ensuring individuals protection of fundamental rights), when looking at case-law, it seems that the CJEU, is more keen to serve the political logic.<sup>449</sup>

But for an enforcement system to be effective, it needs to be perceived as being compatible with the paramount objective of guaranteeing a fair procedure to undertakings subject of EU Commission competition policy and rules enforcement.<sup>450</sup> Indeed, the overall outcome of the trade-off between two apparently competing values, the *effet utile* of the TFEU that aims at achieving efficiency in the interest of the Union's policy goals and the respect for basic principles in the interest of sound justice,<sup>451</sup> needs to generate the perception of a fair system.

Thus, before entering into the discussion of how general principles of EU law affect the application competition law within the European Union, it is important to keep some facts in mind. Articles 101 and 102 TFEU apply only to undertakings not natural persons and, although the Treaty does not provide a definition for the former, the EU Court of Justice has provided clarification on the matter. It stated that "the concept undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed..."<sup>452</sup> This means that the concept of undertaking has a functional approach and the legal form of the entity is irrelevant. Any

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<sup>449</sup> J. Van Meerbeeck, 'The principle of legal certainty in the case-law of the European Court of Justice: from certainty to trust' [2016] 41(2) European Law Review 282

<sup>450</sup> I. Lianos and A. Andreangeli, 'The European Union: The Competition Law System and the Union's Norms' in E. M. fox and M. J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP London 2012), p. 436.

<sup>451</sup> A. Andreangeli, *EU Competition Enforcement and Human Rights* (E. Elgar Publishing, Cheltenham 2008) p. 37.

<sup>452</sup> Case C-41/90 *Höfner and Elsner v Macrotron* [1991] ECR I-01979 para 21.

company, trade associations, co-operatives, individuals self-employed engaged in economic activity, are considered undertakings.

Hence, the three main instruments that the EU Commission may issue according to Regulation No. 1/2003,<sup>453</sup> mainly decision ordering termination of the infringement,<sup>454</sup> decisions imposing fines<sup>455</sup> and decisions making commitments binding;<sup>456</sup> are resolutions that can only be addressed to undertakings.

On the other side, and as it is well known; the European Convention on Human Rights (ECHR) is an international treaty which aims to protect human rights and fundamental freedoms in Europe. It entered into force on 03 September 1953 and established the European Court of Human Rights (ECtHR), which allows any person whose rights have been violated under the Convention by a state party, to take the case to the ECtHR. This was considered a great development since it was the first time for an international convention on human rights to give individuals an active role the international law.

However, the ECHR is also especial for another reason and differs from other international or regional arrangements in the sense that it offers a wide-ranging protection rights for business entities in addition to natural persons and not-for-profit organizations. This means that both companies and human beings are protected by the ECHR, something that can be derived from the Convention's text itself.<sup>457</sup>

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<sup>453</sup> The EU Commission can issue other kind of decisions involving pecuniary sanctions including. These include decisions imposing fines of up to 1% of total turnover in the preceding business year based on Article 23 (1) (a) and decisions imposing periodic penalty payments of up to 5% of the average daily turnover in the preceding business year per day based on Article 24 (1) (a).

<sup>454</sup> Article 7 providing for with behavioural and structural remedies.

<sup>455</sup> Article 23 (2) (a).

<sup>456</sup> Article 9.

<sup>457</sup> For instance, the right to the protection of private property applies expressly to every natural and legal person, a term naturally inclusive of undertakings. See Article 1 (1) Protocol to the Convention for the

Nonetheless, it is commonly understood that although legal persons, including undertakings, are entitled to procedural guarantees and due process protections, the moral harm arising from a violation of an individual's person right to due process is likely to be greater than a similar violation of a corporate entity's procedural entitlements.<sup>458</sup> Yet, although an undertaking, unlike a human being, has "no soul to be damned and no body to be kicked";<sup>459</sup> the notion of companies having human rights is seen as uncontroversial in principle.

However, the protection of an undertaking's interests is not straight forward; particular features of an undertaking and the interests it pursues together with the specific structure of the ECHR pose interpretative and practical challenges in terms of Convention guarantees.<sup>460</sup> Nonetheless, the nature of the state responsibility under the Convention as laid down in Article 1, informs us that the decisive criterion for enjoying ECHR protection is not a matter of nationality or territoriality. What is important is whether any action or inaction by the authorities of any ECHR member state,<sup>461</sup> has affected the applicant's interest.<sup>462</sup>

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Protection of Human Rights and Fundamental Freedoms (entered into force 18 May 1954) also known as Protocol I.

<sup>458</sup> R Dworkin, *A Matter of Principle* (Harvard University Press, Massachusetts 1985) p.80.

<sup>459</sup> Elizabeth Knowles (ed), *The Oxford Dictionary of Quotations* (6<sup>th</sup> edn OUP, Oxford 2004) p. 550 quoting Baron Thurlow.

<sup>460</sup> Marius Emberland, *The Human Rights of Companies: Exploring the structure of ECHR Protection* (1st edn OUP, Oxford 2006) p. 4.

<sup>461</sup> This refers to any responsibility from any of the Member States party to the ECHR which are the same 47 members of the Council of Europe; which on the other hand, is not the same as the Council of the European Union, which is integrated by 28 countries only.

<sup>462</sup> M. Emberland, *The Human Rights of Companies: Exploring the structure of ECHR Protection* (1st edn OUP, Oxford 2006) p. 12.

The question is then: Are undertakings covered by the ECHR against any EU Commission's action or inaction, which affects their interest? As *Wils* has noted, even before the entry into force of the Lisbon Treaty,<sup>463</sup> the General Court and the Court of Justice of the European Union were already acting in line with the ECHR as the guarantees there provided are the same as those resulting from the constitutional traditions common to the Member States of the EU.<sup>464</sup>

Hence, according to this reasoning, in order to respect the companies' guarantees in EU competition law; the judgements of the General Court and the CJEU must take into account the case-law of the ECtHR and thus develop general principles of EU law.<sup>465</sup> In this regard, it is worth noting that the Court of Justice of the European Union has already made reference to this issue observing that the General Court acts in respect of the rules provided in EU law which are not contrary to what is provided in the ECHR and the case-law of the European Court of Human Rights.<sup>466</sup>

Although, the possibility of bringing a case before the ECtHR for violation of rights by the EU Commission, the General Court or the CJEU is not yet available until the accession is completed, there is no doubt that procedural requirements and substantive guarantees apply to the EU Commission's antitrust enforcement proceedings. Such proceeding encompass all actions leading to the adoption of decisions based on Article 7,

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<sup>463</sup> Lisbon Treaty [2007] OJ C306/01 which entered into force on 1 December 2009. According to Article 6 (2) of the Treaty on European Union (TEU), as amended by the Lisbon Treaty providing for the accession of the European Union to the ECHR in respect to Article 59 (2) ECHR as amended by Protocol No. 14 which entered into force on 1 June 2010. Formal negotiations of the European Union's accession to the ECHR began on 7 July 2010.

<sup>464</sup> Article 6 (3) TEU as amended by the Lisbon Treaty confirms this.

<sup>465</sup> Wouter P.J. Wils, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' [2011] 34 World Competition 2, p. 19.

<sup>466</sup> Case C-386/10 *P Chalkor v Commission* [2011] ECR I-13085 para 50.

Article 9 or Article 23 (2) (a) of Regulation No. 1/2003 and the decisions themselves are to be adopted in harmony with the ECHR.

However, there is another legal instrument of great importance which, unlike the ECHR, it has full legal effect and is binding upon the EU Commission, the General Court and the CJEU. This instrument is the Charter of Fundamental Rights of the European Union (CFREU) and it was adopted on 7 December 2000 but became legally binding after the entry into force of the Lisbon Treaty, which gave it the same legal value as the EU Treaties.<sup>467</sup>

The CFREU enshrines certain political, social and economic rights as well as guarantees which must be observed in the application of EU law by the EU institutions and Member States.<sup>468</sup> As to the interpretation of the CFREU, the Charter provides that rights contained in it, which correspond to those rights guaranteed by the ECHR; the meaning and scope of the former shall be the same as those laid down in the ECHR.<sup>469</sup> Such interpretation is to be done not only by reference to the text of the ECHR but also *inter alia*, by reference to the case-law of the ECtHR.<sup>470</sup>

Consequently, since the main CFREU provisions applying to undertakings are also contained in the text of ECHR,<sup>471</sup> it is just logical to use the latter and the interpretation done from it by the ECtHR. The ECtHR itself supports this when it stated that the

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<sup>467</sup> Charter of Fundamental Rights of the European Union (CFREU) [2000] OJ C364/1 and Article 6 (1) of the Treaty on European Union (TEU), as amended by the Lisbon Treaty; gives the Charter full legal effects.

<sup>468</sup> The Charter, according to its Preamble; has the purpose to strengthen the protection of fundamental rights by making them more visible and hence, it does not create new rights.

<sup>469</sup> Article 52 (3) CFREU.

<sup>470</sup> Case C-279/09 *DEB v Bundesrepublik Deutschland* [2010] ECR I-13849 para 35.

<sup>471</sup> Articles 6, 7, 8, 13 and Article 4 of Protocol No. 7 to the ECHR are contained in a more or less extended way in Articles 47, 48, 49, 7 and Article 7 again and 50 of CFREU.

protection of fundamental rights by EU law could be considered to be equivalent to that of the Convention system.<sup>472</sup>

Although it is clear that the Court of Justice of the European Union has made reference to the ECHR, it is also clear that it has manifestly expressed the preference for the CFREU over the European Convention of Human Rights.<sup>473</sup> This may be explained due to the fact that the former has a legal binding character which is absent from the latter. Nevertheless, the CJEU has referred profusely to the case law of the ECtHR in order to determine the meaning and the scope of the guaranteed rights provided in the CFREU as stated in *DEB* case.<sup>474</sup>

This means that, if the ECHR and the case law from the ECtHR are applicable to antitrust proceedings, which are formally administrative. It only remains to be seen what level of protection is required by the ECHR in regards to both, the substantive guarantees and the mechanisms monitoring their observance. To establish the right level of protection required by the ECHR depends on the circumstances of a particular case and the nature of the particular proceedings.

In this regard, antitrust infringements lie in the blurry divisive line between civil and criminal wrongdoing. Not as serious and worthy of moral condemnation as abusing offences to the person sanctioned by the criminal law, yet nor are they directly analogous

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<sup>472</sup> *Bosphorus v Ireland* (App no 45036/98) ECHR 30 June 2005 para 155 and 165.

<sup>473</sup> See the case law referred in the study developed by the Directorate General for Internal Policies, Policy Department C: Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, 'Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights', requested by the European Parliament, Report PE462.446, Brussels, April 2012 p. 99. <http://www.statewatch.org/news/2012/may/ep-study-ecj-echr.pdf> (Accessed on 27 August 2014).

<sup>474</sup> Case C-279/09 *DEB v Bundesrepublik Deutschland* [2010] ECR I-13849 para 35

to private law wrongs that only generate civil liability for damages. This hybrid character make it difficult to distinguish between civil and criminal law paradigms of liability,<sup>475</sup> both of which serve to set normative standards associated with the commission of legal wrongdoing that possess both substantive and procedural dimensions.<sup>476</sup>

According to Article 23 (5) of Regulation 1/2003, decisions by the EU Commission imposing a fine shall not be considered to be of a criminal law nature. However, the ECtHR has stated that in order to establish whether a sanction is criminal or not, the formal designation made by a state authority is only indicative and informative about the purpose of the sanction but the element of most importance is whether that nature is punitive or not.<sup>477</sup>

According to *Yeung*, in legal doctrine there are four central features associated with the criminal law paradigm of liability. Firstly, the imposition of liability is primarily concerned with censuring the wrongdoer for activity considered morally blameworthy. Second, sanction entails serious consequences for the wrongdoer and carries a significant degree of moral stigma. Third, responsibility is of considerable importance and requires proof of culpability whether intentionally or recklessly. And forth, the suspected wrongdoer is entitled to a full range of procedural safeguards within the enforcement process.<sup>478</sup>

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<sup>475</sup> J. Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models and What can be done about it' (1992) 101 (8) *Yale Law Journal* 1875.

<sup>476</sup> P. Cane, *Responsibility in Law and Morality* (Hart Publishing, Oxford 2002).

<sup>477</sup> *Jussila v Finland* (App no 73055/01) ECHR 23 November 2006 para 43 and *Menarini Diagnostics v Italy* (App no 43509/08) ECHR 27 September 2011 para 41 and 42.

<sup>478</sup> See K. Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (2013) 33 (2) Legal Studies 320 where the author discusses the civil law paradigm of liability too. Civil law is primarily concerned to impose obligations of repair on the wrongdoer rather than condemnation. Secondly, financial liability is incurred towards the victim, not the state. Third, Civil liability typically lacks the moral stigma associated with criminal liability and forth, proof of culpability is not essential and procedural rights are considerably weaker for the defendant.

As to the legal statutes, there is no doubt that the procedure and fines imposed by the EU Commission for competition law breaches have a criminal character within the meaning of Article 6 of European Convention on Human Rights containing the right to a fair trial.<sup>479</sup> The same can be stated in regards to the autonomous interpretation of the notion of criminal charge that the European Court of Human Rights developed from Article 6 ECHR.<sup>480</sup>

In *Jussila* case,<sup>481</sup> the ECtHR stated that although certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it recognised that there are criminal cases that do not carry any significant degree of stigma.<sup>482</sup> Thus, there are clearly criminal charges of different weight.

In that judgement, the ECtHR made reference to *Engel* case,<sup>483</sup> where the Court developed a test to ascertain whether a person was the subject of a criminal charge within the meaning of Article 6 (1) ECHR. It stated that the national designation of the criminal character of any provisions defining the offense charged was no more than a starting point with formal and relative value.<sup>484</sup> The main elements were the nature of the offense and the nature and severity of the penalty.<sup>485</sup>

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<sup>479</sup> Article 6 ECHR provides that any person in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

<sup>480</sup> In particular *Engel and Others v The Netherlands* (App no 5100/71) ECHR 8 June 1976 para 82 and later extended in *Öztürk v Germany* (App no 8544/79) ECHR 21 February 1984 para 49.

<sup>481</sup> *Jussila v Finland* (App no 73055/01) ECHR 23 November 2006.

<sup>482</sup> *Ibid* para 43.

<sup>483</sup> *Engel and Others v The Netherlands* (App no 5100/71) ECHR 8 June 1976 para 82.

<sup>484</sup> There is no EU law definition of criminal, Article 83 (2) TFEU relies on the classification by the Member States.

<sup>485</sup> *Jussila* case para 30.

The *Engel* test was later broadened so it could consider, whether the norm is addressed to a specific group or it is of general application, this in respect to the nature of the offense. As to the severity of the sanctions, the Court will also look at whether the sanctions imposed are compensatory or are intended to be punitive and to have a deterrent effect.<sup>486</sup> The above mentioned test gave place to an autonomous interpretation of the notion of a criminal charge and underpinned a gradual broadening of the criminal character to cases not strictly belonging to the traditional categories of the criminal law, for example, competition law.<sup>487</sup>

Indeed, it is difficult to reach any conclusion other than the EU Commission's contentious procedures are criminal in nature for the purposes of the ECHR irrespective of whether the EU Commission considers not as such.<sup>488</sup> As mentioned above, the fact that Article 23(5) of Regulation 1/2003 provides that EU Commission decisions imposing fines shall not be of a criminal nature has just a relative value and is nothing but the starting point.<sup>489</sup>

It must be pointed out that although the European Court of Human Rights has emphasized that while the right to a fair trial was in itself absolute, it should be assessed in each case in light of the legal context in which it is to operate.<sup>490</sup> It further stated that for the procedures and acts of an authority to conform to what is guaranteed in the ECHR, the

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<sup>486</sup> *Öztürk v Germany* (App no 8544/79) ECHR 21 February 1984 para 49.

<sup>487</sup> *Jussila* case para 43, where the Court mentioned competition law together with administrative penalties, prison disciplinary proceedings, customs law and penalties imposed by a court with jurisdiction in financial matters. See also *Menarini Diagnostics v Italy* (App no 43509/08) ECHR 27 September 2011 para 41 and 42, mentioning that competition law is covered by Article 6 ECHR, given the severity of its sanctions.

<sup>488</sup> Alan Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?' (January 2010) CEPS, Special Report, p 12, available from (<http://www.ceps.eu>).

<sup>489</sup> *Jussila v Finland* (App no 73055/01) ECHR 23 November 2006 para 31.

<sup>490</sup> *O'Halloran and Francis v United Kingdom* (App no 15809/02 and 25624/02) ECHR of 28 June 2007 para 30.

contracting States' competent authorities need to demonstrate that the applicable rules respect the essence of this rights.<sup>491</sup>

Having this interpretation in mind, *Andreangeli* concludes that the CJEU approach, regarding the privilege against self-incrimination in EU competition proceedings, may not be entirely capable of striking a fair balance between the public interest and the need to preserve the essence of the undertaking's rights of defence.<sup>492</sup> Thus, there is a need to adhere more closely to a more rigorous enforcement system where the full respect of the principles embodying the rule of law is perceived to exist.

Even *Becker* with his economic theory of crime argues that criminal action would be defined fundamentally not by the nature of the action but by the inability of a person to compensate for the harm that he caused, thus an action would be criminal precisely because it results in uncompensated harm to others.<sup>493</sup> It may seem that cartel conduct does fall among the kind of behaviours that could be considered as crimes, we could even argue that abuse of dominance offences fall within this definition too if we take account of the costs of the consumers when the abuse goes beyond repair.

Nevertheless, criminal or not or somewhere in between, the EU competition law system is governed by legal principles of EU law which at the same time provide rights for undertakings and limitations for the EU Commission that the latter cannot simply oversee. As will be shown in the following sections, such EU legal principles are the expression

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<sup>491</sup> *Jalloh v Germany* (App no 54810/00) ECHR of 11 July 2006 para 95-97.

<sup>492</sup> See A. Andreangeli, 'Competition Law and Human Rights: Striking a Balance Between Business Freedom and regulatory Intervention' in D. Sokol and I. Lianos (eds), *Global Limits of Competition Law* (Stanford Law Books, Palo Alto CA 2012) p. 27.

<sup>493</sup> G. Becker, 'Crime and Punishment: An economic Approach', (1968) 76 Journal of Political Economy 194

of the moral values that the European society has about justice or a sense of justice that most European people have and which at the same time provide legitimization to the enforcement of EU competition law and its fining system in particular.

Thus, fines against undertakings have a criminal nature but they do not belong to the core of criminal sanctions like prison terms imposed against individuals. Yet the latter are used to enforce antitrust law in several other jurisdictions around the world and the EU Commission has decided to keep undertakings as its exclusive enforcement targets with quasi-criminal sanctions even when it is able to push for the approximation of criminal laws in order to adopt criminal sanctions against individuals as well.<sup>494</sup>

Yet, lack of political support derived from the EU social perception that antitrust law violations are not serious offenses has influenced the EU Commission to keep the EU competition law enforcement system unchanged since it first was adopted and entered into force. Yet, it is important to turn to the experience of other jurisdictions where both undertakings and individuals are regulatory targets in the enforcement of antitrust law. This will give us an idea of the standard of procedural protections that the EU Commission should afford to firms when pursuing its EU competition policy and the institutional goals in the enforcement of EU antitrust rules.

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<sup>494</sup> Article 67 (3) and Article 83 (2) TFEU, provides that if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules. In this regard, such minimum rules would cover the definition of criminal offences and sanctions in the area concerned.



### 3.1.2 The EU antitrust enforcement evolution.

As we have discussed, around the world there is an increasing number of countries opting not only for corporate sanctions against companies but also for criminal cartel regimes in order to punish individuals.<sup>495</sup> This phenomena is developing rapidly due to the fact that corporate fines do not target individuals who are the direct responsible but instead penalize innocent shareholders, creditors and employees since the corporation's finances are affected by the fine which would need to be impossibly high to achieve deterrence.<sup>496</sup> In fact, it has been argued that corporate fines alone may not be deterring, not even to prevent recidivism in the European Union.<sup>497</sup>

Yet the amount of fines imposed by the EU Commission has increased drastically since the end of 2007 when the EU Fining Guidelines 2006 were used for the first time, which has led to assume that the increase may well render the fines imposed as corporate criminal sanctions.

Nonetheless, *Wils* concludes that in the context of EU antitrust procedures, particular importance should be granted to the distinction between the hard core of criminal law and other areas of the law, which are only criminal within the broader meaning in accordance to the ECHR and to the distinction between natural persons and undertakings.<sup>498</sup> However, in respect of the latter, the ECtHR uses a teleological approach by which it

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<sup>495</sup> In the last 5 years, even countries with developing economies have opted to establish a system able to punish both companies and individuals. See Mexico, Brazil, South Korea, China and South Africa.

<sup>496</sup> John M. Connor, 'Optimal Deterrence and Private International Cartels', (Second biennial conference of the food system Research Group, University of Wisconsin-Madison, 2005)

<sup>497</sup> John M. Connor, 'Recidivism Revealed: Private International Cartels 1999-2009' [2010] 6 Competition Policy International 2 p.3.

<sup>498</sup> Wouter P.J. Wils, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' [2011] 34 World Competition 2, p. 31.

views the provisions' object and purpose with a focus on other matters than those intimately connected with the applicant so that the approach can be more inclusive of companies' interests and thus avoiding putting them at the margin or wholly beyond their coverage.<sup>499</sup>

Nevertheless, from the above we can ascertain that antitrust offences do not belong to the hard core of criminal law but to the periphery within the meaning of Article 6 ECHR, which make them criminal nonetheless.<sup>500</sup> This allows the EU Commission to set up a less stringent standard of guarantees recognized by the case law of the European Court of Human Rights that would necessarily apply to cases belonging to the traditional categories of criminal law.<sup>501</sup> Not only on the part of the EU Commission but also on the part of the EU judiciary and its standard of review, which has been a topic of major debate in the last few years, as will be discussed below.

In spite of it, when fixing the amount of the fines, when adopting commitment decisions or decisions based on Article 7 of Regulation No. 1/2003, the EU Commission must comply with general principles of law flowing from the Charter of Fundamental Rights of the European Union (CFREU).<sup>502</sup> It too must comply with the ECHR, general principles of EU Law, national law, EU Regulations,<sup>503</sup> and the EU Commission's own

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<sup>499</sup> According to M. Emberland, *The Human Rights of Companies: Exploring the structure of ECHR Protection* (1st edn OUP, Oxford 2006), p.154; the teleological approach has allowed the ECtHR to open up the rights and guarantees contained in the ECHR to undertakings, in principle at least. However, it has retained the possibility to modify the extent of protection afforded when it decides on the level of protection actually offered.

<sup>500</sup> Case T-139/07 *Schindler v Commission*, judgment of 13 July 2011 not yet reported, where the General Court held that Article 6 ECHR covered EU competition law proceedings, within the general concept of criminal deserving a less stringent standard of protection.

<sup>501</sup> *Jussila v Finland* (App no 73055/01) ECHR 23 November 2006, para 43.

<sup>502</sup> See also recital 37 of Regulation 1/2003.

<sup>503</sup> Particularly, Regulation No. 1/2003 and Commission Regulation No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18, hereafter Regulation No. 773/2004.

practice.<sup>504</sup> Principles such as those of proportionality, legal certainty, equal treatment and the protection of legitimate expectations are well established in the case law of the Court of Justice of the European Union.<sup>505</sup>

This is of utmost importance since demands for flexibility and efficiency have driven the EU Commission to acquire the functions of investigator, prosecutor and decision adjudicator which is in stark contrast for what is provided under Article 6 (1) ECHR. This has called for the EU Commission decisions and the whole procedure before it, to be subject to an internal checks-and-balances system and a subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of fair trial to review such administrative decisions.<sup>506</sup>

The combination of powers granted to the EU Commission since Regulation No. 17 entered into force, was unproblematic in the early days of its application because back then the main concern was to set up a system that could actually work in order to discover, sanction and prevent competition law infringement. This was the main objective because cartels were a widespread and highly esteemed institution throughout Europe.<sup>507</sup> Even more, after the Second World War, it was Germany the only country, which had

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<sup>504</sup> The EU Fining Guidelines 2006 form rules of practice from which the EU Commission may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment in Case C-397/03 *P Archer Daniels v Commission* [2006] ECR I-4429, para 91.

<sup>505</sup> *Ibid*, Case C-189/02 *Dansk Rorindustri and Others v Commission* [2005] ECR I -5425 para 211 and Case C-297/98 *SCA Holding v Commission* [2000] ECR I-10101 para 55. We can also mention some other higher law standards like the presumption of innocence, the parties' right of defence and the rules on burden of proof.

<sup>506</sup> Case T-351/03 *Schneider Electric v Commission* [2007] ECR II-2237 para183 et seq.

<sup>507</sup> H. G. Schöter, 'Cartelization and Decartelization in Europe, 1870-1995: Rise and Decline of an Economic Institution' [1996] 25 Journal of European Economic History 129 at 137.

introduced a comprehensive and modern set of antitrust laws when most other European countries modernized their competition laws only in the 1980s or 1990s.<sup>508</sup>

This helps to understand why the procedural guarantees put in place were of a rudimentary character when, in 1962, the main objective was to develop an effective and efficient system of antitrust law.<sup>509</sup> Over time, the EU Commission has significantly strengthened internal checks and balances, particularly in reaction to the case law of the General Court and the CJEU, which have deduced a substantial body of guarantees from the general principles of EU law and the common tradition of the Member States.<sup>510</sup>

The entry into force of the Lisbon Treaty provides, if only formally, an added set of principles of law derived from the text and interpretation of the CFREU.<sup>511</sup> However, the ECHR ought to be observed too as the CFREU contains the same guarantees in respect of the ECHR in an extended form and although the latter does not enjoy that binding character as the former, it does enjoy a substantial body of case law from the ECtHR. Overall, the rights provided in both instruments result from the constitutional traditions common to the Member States and hence, do not necessarily constitute new standards within which the EU Commission must act.<sup>512</sup>

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<sup>508</sup> Wouter P. J. Wils, *The optimal enforcement of EC antitrust law: A study in Law and Economics* (Kluwer Law International, Brussels 2002) p. 258.

<sup>509</sup> It was only Article 19 of Regulation No. 17 which contained the right to be heard as a core guarantee which was later extended by Regulation No. 99/63 of the EU Commission on the hearing provided for in article 19 (1) and (2) of Council Regulation No. 17 [1963] OJ 127/2268.

<sup>510</sup> Heike Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in Claus-Dieter Ehlermann and Mel Marquis, (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, Oxford 2011).p.86 and the citations made there.

<sup>511</sup> It should be kept in mind that the CFREU began to have full legal effect after the entry into force of the Lisbon Treaty on 1 December 2009 and its binding to all the EU institutions including the EU Commission and the Member States.

<sup>512</sup> Article 6 (3) TEU as amended by the Lisbon Treaty.

Nevertheless, one thing that should be remembered is that EU competition law is primarily a public policy tool, and as it is well known, the General Court and the Court of Justice of the European Union have been careful not to become involved in the debate relating to the economic purposes of competition rules. This has resulted in such moderation in their involvement and the development of the EU antitrust system that is evidence that the question is a political and not a legal one and hence, out of the General Court or the CJEU assessment.<sup>513</sup>

Therefore, if competition law is a policy tool and its fining system is a matter of that policy, it means that the degree of protection from substantial and procedural guarantees that the undertakings concerned must enjoy does not depend on the criminal or administrative nature of the sanctions and remedies, but on the discretion the EU Commission.

As has been noted above, the EU Commission may enforce Articles 101 and 102 TFEU through prohibition decisions and other instruments such as remedies, commitment decisions and decisions imposing fines. Due to this fact, the EU Commission applies different requirements to each of them in regards to the level of necessary protection from guarantees encompassed within the general principles of EU law. However, even in similar cases where similar decisions could be adopted, the EU Commission may depart from its own practice in previous decisions depending on the particular circumstances of

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<sup>513</sup> Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (OUP, Oxford 2012) p. 23.

the case, its context and the effect of the decision<sup>514</sup> as long as it gives sound reasoning for doing so.<sup>515</sup>

The duty to pursue a general policy designed to apply, in competition matters, the principles laid down in the Treaty and to steer the conduct of companies in the light of those principles,<sup>516</sup> is a standard application of policy, which allows the EU Commission, as a decision-maker, to have a significant leeway. This includes wide discretion when assessing the conduct under investigation and determining the kind of remedy and decision to adopt, in particular when determining fines.<sup>517</sup>

This freedom of choice, no doubt affects the protection of undertakings afforded by general principles contained in the CFREU and the ECHR and calls for equilibrium between the power to shape and implement competition policy and the full protection of the undertakings' rights and general principles of EU law within the exercise of that discretion. Whether that equilibrium is possible under the current EU antitrust system shall be discussed in the sections below concerning rights and principles beginning with the principle of proportionality.

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<sup>514</sup> A non-binding or exhaustive list of the criteria that must be applied has not been drawn up yet. See Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-04411 para 33.

<sup>515</sup> Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-206/02 P, C-207/02 P, C-208/02 P, C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-05425 para 209.

<sup>516</sup> *Ibid* para 170.

<sup>517</sup> Case T-76/08 *EI du Pont de Nemours and Others v Commission* para 124 not yet recorded but published on 02 February 2012.

### **3.2 Principle of Proportionality.**

Among the principles the EU Commission must respect, the principle of proportionality is an important one as it compels the EU Commission to impose fines that punish illegal conduct in proportion to any wrongdoing of determinate undertaking.<sup>518</sup> This means that infringements covering large volumes of trade in big markets, which cause substantial economic harm, must be sanctioned with higher fines than in smaller cases, but it does not mean that short term infringers are meant to be treated leniently.

The differentiation mentioned above is also reflected when determining the duration of the antitrust violations and in cases of collective infringements, the respective roles played by different undertakings, as well as many other relevant factors and particular features of the situation of each of the undertakings in relation to the competition law infringement. The EU Fining Guidelines 2006 also make specific provision for a one off supplement to the basic amount that applies independently of the duration, the so called “entry fee” when it concerns cartels.<sup>519</sup>

Proportionality has been a major concern and an important reason when the EU Commission published the first guidelines for the imposition of fines in cartel cases. Since such infringements involve several players and the base amounts for each undertaking may vary according to “the specific weight and, thereof, the real impact of the offending conduct of each undertaking on competition, particularly where there is a considerable

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<sup>518</sup> As stated in Article 49 (3) CFREU, that the severity of penalties must not be disproportionate to the criminal offence.

<sup>519</sup> Phillip Lowe, ‘Preventing and Sanctioning Anticompetitive conduct: Effective use of Administrative and Criminal Sanctions, Leniency Programmes and Private Action in the EU’, 33th Annual Fordham Competition Law Institute Conference on ‘International Antitrust Law & Policy’, New York City, 2006, Edit. Barry E. Hawk, Fordham Competition Law Institute, Juris Publishing, Inc. 2007 p. 91.

disparity between the sizes of the undertakings committing infringements of the same type".<sup>520</sup> Notwithstanding this, the average fine imposed by the EU Commission as a percentage of turnovers during the application of the Fining Guidelines 1998 was greater for small and medium size enterprises than for very large companies.<sup>521</sup>

This is quite regrettable since the EU Commission must take into account the fact that large undertakings have legal and economic knowledge and big enough infrastructure, which enable them more easily to recognize that their conduct constitutes an infringement of competition law.<sup>522</sup> The new set of fining guidelines adopted in 2006 would seem to duly observe the proportionality standard in respect to the assessment of the duration of the infringement as the limitation is not to be manifestly disproportionate.<sup>523</sup>

The principle of proportionality is in line with the retributive view of punishment which competes for the allegiance of the European legal system with the utilitarian conception of punishment.<sup>524</sup> Under the retributive view, punishment is not justified by its future consequence of deterring harmful conduct, but rather on the ground that it is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. It ought in no case to be more than what is necessary to bring it into conformity with any

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<sup>520</sup> Section 1 A of the EU Fining Guidelines 1998.

<sup>521</sup> Fines equivalent to an average of 6.5% of the firm's relevant turnover were imposed on small and medium sized enterprises while fines of 0.8% on average of the revenue were imposed on the very large undertakings.

<sup>522</sup> Phillip Lowe (2007) where he also states that the base amounts for each undertaking should vary according to their specific weight and, consequently, to the real impact of the offending conduct of each undertaking on competition. This is relevant particularly where there is a considerable disparity between the sizes of the undertakings committing infringements of the same type.

<sup>523</sup> Case T-25/05 *KME Germany and Others v Commission* [2010] ECR II-00091 para 116 where the General Court considered that the increase for duration which the EU Commission applied for the starting amount on the fine imposed on the applicant was not "manifestly disproportionate" following the EU Fining Guidelines 1998.

<sup>524</sup> Case C-41/69 *ACF Chemiefarma v Commission* [1970] ECR 661 para 173, where the EU Court of Justice affirmed that the fines imposed by the EU Commission for violations of Article 101 and 102 TFEU have as their object to punish illegal conduct as well as to prevent it from being repeated.

given rules.<sup>525</sup> Although the principle of proportionality must be respected, the EU Commission has stated that the main purpose of its fining system is to achieve specific and general deterrence, which is the main element within the utilitarian doctrine.<sup>526</sup>

In a strict sense, proportionality would mean that the fine is personalised and therefore proportionate to the gravity of the infringement and to the relative gravity of the participation of each undertaking in such violation, whenever the breach is a collective one; and to other circumstances of the case, both subjective and objective factors.<sup>527</sup> In a broad, objective sense, the 10% statutory cap<sup>528</sup> operates to ensure that fines are not out of proportion to the size of the undertaking on which they are imposed.<sup>529</sup>

Article 5 (4) TEU (ex Article 5 (3) EC Treaty) establishes that the content and form of union action shall not exceed what is necessary to achieve the objectives of the treaties.<sup>530</sup> Such criterion of proportionality has been recognized by settled case law as a Union principle.<sup>531</sup> As explained above, fines are the most commonly used instrument when the EU Commission deals with the most serious infringements, especially in the application of Article 101.<sup>532</sup> This situation has been similar if we refer to cases in the application of

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<sup>525</sup> Wouter P. J. Wils, *The optimal enforcement of EC antitrust law: A study in Law and Economics* (Kluwer Law International, Brussels 2002) p. 206, making reference to J. Rawls 'Two concepts of rules' [1955] 64 *Philosophical Review* 3 at 4-5.

<sup>526</sup> EU Fining Guidelines 2006, recital 4.

<sup>527</sup> Case C-51/92 *P Hercules Chemicals v Commission* [1999] ECR I-4235 para 110, and Case C-204/00P *Aalborg Portland and Others v Commission* [2004] ECR I-123 para 92.

<sup>528</sup> Article 23 (2) Reg. 1/2003 and EU Fining Guidelines 2006 para 32.

<sup>529</sup> Case C-100/80 *Musique Diffusion Française v Commission* [1983] ECR I-1825 para 119, where the CJEU stated that the 10% applies to the total turnover of each undertaking since such proxy can be an indication of its size and cannot be regarded as disproportional just because it exceeds the turnover in the relevant market.

<sup>530</sup> This of course, covers the EU Commission decisions imposing or not any fine sanctioning undertakings; it also applies to decisions imposing remedies and in fact, any kind of action of the EU Commission in general.

<sup>531</sup> C-331/88 *FEDESA and Others* [1990] ECR I-4023 para 13.

<sup>532</sup> Meaning cartels intended for price fixing, bid rigging, market allocation and output restrictions.

Article 102 TFEU.<sup>533</sup> However, fines are not the only measure the EU Commission can resort to when dealing with abuse of dominance violations or agreements restricting competition.

Behavioural<sup>534</sup> and structural remedies<sup>535</sup> as contained in Article 7 of Regulation No. 1/2003 may also be imposed by the EU Commission as long as such remedies are proportionate in respect to the infringement committed and necessary to bring the infringement effectively to an end.<sup>536</sup> However, after the entry into force of Regulation No. 1/2003, the EU Commission has been enthusiastic in making use of Article 9 commitments there provided.<sup>537</sup> The latter do not impose on the EU Commission the duty to provide for the same degree of protection to the undertakings concerned against disproportionate commitments than those remedies imposed following Article 7 and Article 23 of Regulation 1/2003.<sup>538</sup>

In this setting, the principle of proportionality has proven to be even more difficult to comply with in the application of Article 102 TFEU. Here we can find undoubtedly, an

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<sup>533</sup> *Intel* [2009] OJ C227/13, *Microsoft* [2007] OJ L32/23.

<sup>534</sup> Such remedies regulate the conduct of any undertaking in the market.

<sup>535</sup> Structural remedies are prospective in that the future competitive process is facilitated by alterations to the market structure or by removing incentives to engage in anticompetitive conduct in the future. See Erling Hjelmeng, ‘Competition Law Remedies: Striving for Coherence or Finding New Ways?’ [2013] 50 CMLRev 1014.

<sup>536</sup> Article 7 Regulation 1/2003 (ex Article 3 Regulation No. 17) provides for the use of behavioural and structural remedies by the EU Commission after infringements of Articles 101 and 102 TFEU have been found. See also recital 12 of the same regulation, which states that structural remedies would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

<sup>537</sup> Regulation No. 1/2003 introduced for the first time commitment decisions and thus making them binding upon the undertakings concerned. See recital 13 and Article. 9 of Reg. 1/2003. Not that the EU Commission did not make use of such commitment decisions before when Regulation No. 17 was still applicable however, such commitments were not binding since they were not considered in any piece of law. See for instance EU Commission, ‘The European Commission accepts an undertaking from Digital concerning its supply and pricing practices in the field of computer maintenance services’, Press Release IP/97/868 of 10.10.1997. [http://europa.eu/rapid/press-release\\_IP-97-868\\_en.htm](http://europa.eu/rapid/press-release_IP-97-868_en.htm) (Accessed on 30 June 2015).

<sup>538</sup> Consider also Article 24 of Regulation No. 1/2003 for that matter, which provides for periodic penalty payments and for which .

urgent need to observe and maintain a fair balance between the undertakings' right to receive a proportionate sanction and the EU Commission's interest in achieving prevention as the main goal in the application of antitrust law by way of deterrence.

In the Application of Article 102 TFEU, the EU Commission has the upper hand from the first request of information until a decision is reached. Since it is very rare for the EU Commission to lose Article 102 TFEU cases on the substance,<sup>539</sup> it has become easier for it to demand all kinds of commitments and remedies from the undertakings concerned, all of which are clearly disproportionate and in violation of EU legal principles.<sup>540</sup>

The divergent extent to which the principle of proportionality may apply in the enforcement of Article 102 as opposed to Article 101 TFEU, could be justified due to the different objectives the very substantive competition provisions seek to achieve. Article 101 TFEU considers illegal any kind of cooperation or coordination between undertakings without regulating market conduct, which is what Article 102 TFEU seeks to regulate directly. This difference makes it easy to understand why it is that the EU Commission, when adopting either a prohibition decision based on Article 7 or a commitment decisions based on Article 9 of Regulation No. 1/2003, requires proactive and specific conduct from the undertaking concerned in the relevant market.<sup>541</sup>

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<sup>539</sup> C. Ahlborn and D.S. Evans, 'The Microsoft Judgement and its Implications for Competition Policy Towards Dominant Firms in Europe' [2008] 75 Antitrust Law Journal 887.

<sup>540</sup> Ibid at 888. Undertakings are in fact, pushed to offer disproportionate commitments since the EU Commission has not lost a single case on the substance for over 20 years. It is undeniable that Article 9 of Regulation 1/2003 has introduced far-reaching remedies of both types, either structural or behavioural; remedies. Both go beyond termination of infringements and prevention of their repetition to the elimination of the continuing harm in order to restore the competitive process in the market to the state as it would have been in the absence of the infringement.

<sup>541</sup> Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969 para 298.

As can be seen, the EU Commission promotes the competitive process with a prospective approach. For instance, the EU Commission may require positive action from undertakings ordering some conduct to be performed when dealing with refusal to act infringements.<sup>542</sup> Nevertheless, since the entry into force of Regulation No. 1/2003, the EU Commission, whenever it takes a prohibition decision other than a commitment decision, it has ordered the termination of the infringement and prohibited any similar conduct in the future together with the imposition of a fine.<sup>543</sup> One has to take into account that the EU Commission has only issued 11 prohibition decisions against 29 commitment decisions adopted.<sup>544</sup>

Only in one case has the EU Commission ordered the sole termination of the infringement without fines.<sup>545</sup> Although prohibition decisions based on Article 7 of Regulation No. 1/2003 are down on numbers, their importance cannot be diminished. Such decisions make the finding of an infringement and order the undertaking concerned not to repeat or refrain from repeating any act or conduct having the same or equivalent object or effect.<sup>546</sup> The sole finding of an infringement, even a past infringement gives a higher level of protection for the concerned undertakings due to the wider extent to which the principle of proportionality applies.

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<sup>542</sup> *Microsoft* [2007] OJ L32/23, where the EU Commission required Microsoft to make the interoperability information available to other undertakings. *NDC Health/IMS HEALTH* [2002] OJ L59/18 concerning an interim measure requiring IMS to grant licence to undertakings on the market for German regional sales data services.

<sup>543</sup> Such decisions carrying the imposition of a fine are: *Microsoft* (Case COMP/C-3/37.792) Commission Decision of 24.03.2004, *AstraZeneca* (Case COMP/A. 37.507/F3) Commission Decision of 15.06.2005, *Intel* (Case COMP/37.990) Commission Decision of 13.05.2009, *Prokent-Tomra* (Case COMP/E-1/38.113) Commission Decision of 29.03.2006, *Wanadoo Espana v Telefónica* (Case COMP/38.784) Commission Decision of 04.07.2007 and *Telekomunikacja Polska* (Case COMP/39.525) Commission Decision of 22.06.2011.

<sup>544</sup> A. Gautier and N. Petit, ‘Optimal Enforcement of Competition Policy: The Commitments Procedure under Uncertainty’ Liège Competition and Innovation Institute, Working Paper April 24, 2015, p. 3. <http://orbi.ulg.ac.be/handle/2268/180742> (Accessed August 3, 2015).

<sup>545</sup> *Clearstream* (Case COMP/38.096) Commission Decision of 02.06.2004.

<sup>546</sup> *Telekomunikacja Polska* (Case COMP/39.525) Commission Decision of 22.06.2011.

This goes without saying that a wider protection could also be provided for third parties showing legitimate interest since the finding of an infringement would provide them with the basis to claim damages. This possibility arises as a direct right emanating from EU law; something that would be virtually impossible if the EU Commission were to issue a commitment decision since it would be up to the third parties to probe the infringement before national courts. However, due to their great importance acquired and the increasing EU Commission's reliance on them, we shall further discuss the use of commitment decisions below.

Commitment decisions have been a major tool for the EU Commission to approach cases with high degree of complexity when enforcing Article 102 TFEU. In particular, positive measures are being used to promote competition, especially in key innovative sectors like telecoms and IT<sup>547</sup> as well as cases related to the energy sector where structural remedies seem to be preferred,<sup>548</sup> but most importantly, cases that raise novel legal questions or rest upon less-established theories of harm.<sup>549</sup> Indeed, it is questionable whether remedies

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<sup>547</sup> *Microsoft* (Case COMP/C-3/39.530) Commission Decision of 16.12.2009, *RAMBUS* [2010] OJ C30/17. Consider too, the recent proposal of commitments offered by Samsung on 27.09.2013, *Samsung* (Case COMP/C-3/39.939).

[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39939/39939\\_1301\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1301_5.pdf) (Accessed on 15 April 2015).

<sup>548</sup> *E.ON Gas* (Case COMP/39.317) published on 04.05.2010.

[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39317/39317\\_1942\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39317/39317_1942_3.pdf), (Accessed on 15 April 2015).

*RWE Gas Foreclosure* (Case COMP/39.402) published on 18.03.2009.

[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39402/39402\\_576\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf) (Accessed on 15 April 2015).and

*Distrigaz* (Case COMP/B-1/37.966) published on 11.10.2007.

[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37966/37966\\_639\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37966/37966_639_1.pdf) (Accessed on 15 April 2015). See also Hubertus Von Rosenberg, 'Unbundling through the back door... the case of network divestiture as a remedy in the energy sector' [2009] 30 ECLR 237.

<sup>549</sup> Yves Botteman and Agapi Patsa, 'Towards a more sustainable use of commitment decisions in Article 102 TFEU cases' (2013) Oxford Journal of Antitrust Enforcement p.2. Here reference is made to cases *Google* (Case COMP/C-3/39.740), *Ciao/Google* (Case COMP/C-3/39.768) and *1plusV/Google* (Case COMP/C-3/39.775) as examples of an investigation raising novel legal questions related to abusive practices in the online search market.

under commitment decisions could be reasonable let alone proportionate when in many cases, the abuse is not clear and it is not supported by existing case law.

Decisions as the above mentioned are evidence that the EU Commission, based on Article 9 of Regulation 1/2003, has avoided to investigate in depth any case that might result in a lengthy investigation. In this regard, the complexity of the task serves as an excuse for it to refrain from making an extensive analysis in order to achieve an earlier termination of the alleged infringement. Accordingly, this is the main advantage, among many, for the EU Commission to reach a decision by way of commitments.<sup>550</sup> In the same line of argument, *Ibanez-Colomo* also states that in some cases it is enough to establish abuse on the basis of subjective considerations, meaning the anticompetitive intent of the dominant firm and in some other cases it is enough to prove that the contentious practice had the potential, in the abstract, to foreclose competition.<sup>551</sup>

If we consider the fact that only about 60 cases of formal decisions have been taken for Article 102 TFEU infringements, it is no surprise to find more commitment decisions based on Article 9 of Reg. 1/2003. This results from the fact that the principle of proportionality does not impose important restrictions on the choice of remedies unlike Article 7 of Reg. 1/2003.<sup>552</sup> In the *RTE and ITP* case, the Court of Justice of the European Union established that the principle of proportionality contained in Article 7 of Regulation No. 1/2003, means that the burdens imposed on undertakings must not exceed what is appropriate and necessary to attain the objective sought. Thus, proportionality has

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<sup>550</sup> Elena Wind, 'Remedies and Sanctions in Article 82 of the EC Treaty' [2005] 26 ECLR 660.

<sup>551</sup> Pablo Ibanez-Colomo, 'The Law on Abuses of Dominance and the System of Judicial Remedies', LSE Law, Society and Economy, Working Papers 13/2013, p. 6

[http://www.lse.ac.uk/collections/law/wps/WPS2013-13\\_Ibanez.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2013-13_Ibanez.pdf) (Accessed 22 July 2013).

<sup>552</sup> Joined cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-00743.

a significant weight in the assessment of the appropriateness of any measure that intends to end an infringement of competition law. Namely, reestablishment of compliance with the rules infringed.<sup>553</sup>

Such premises and boundaries of proportionality are not to be found in Article 9 of Regulation No. 1/2003 and not in the case law.<sup>554</sup> This fact makes such commitment decisions an important policy instrument due to their case to case bargaining nature which can only increase the already ample discretionary power the EU Commission enjoys since remedies under commitment decisions are far more flexible and they help restore the competitive process even if such remedies are not related to the unlawful conduct.

It has also been added that the severely limited judicial review of commitment decisions facilitated by the CJEU, may result in a vicious circle: legal uncertainty about outcomes in the infringement procedure, both administrative and in judicial review, makes commitment decisions attractive for undertakings too.<sup>555</sup>

As has been stated above, even though the EU Commission can make use of remedies by adopting decision based on either Articles 7 or Article 9 of Regulation No. 1 /2003, the EU Commission has preferred to take the negotiated approach. However, because commitment decisions based on Article 9 of Regulation No. 1/2003, are only covered by a standard of sufficiency in respect of the principle of proportionality, this makes it more likely that the remedies offered by undertakings go beyond what is necessary to end the

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<sup>553</sup> Ibid para 93 and 94.

<sup>554</sup> Case C-441/07 P, *Commission v. Alrosa* judgment of 29 June 2010, not yet reported. As opposed to what was stated by the General Court in Case T-170/06 *Alrosa v. Commission* [2007] ECR II-2601.

<sup>555</sup> Florian Wagner-Von Papp, 'Best and even better practices in commitment procedures after *Alrosa*: The dangers of abandoning the "Struggle for Competition law"' [2012] 49 CMLRev 930

antitrust violation. The EU Commission approach of deterrence when enforcing antitrust rules may support this view.

This is relevant because although dialogue as a way to tackle competition concerns is ideal, this approach cannot provide efficient results if negotiation is done between 2 parties with different bargaining powers that may facilitate the projection of the EU Commission's deterrence approach as more severe remedies can be extracted without even aiming to prevent future wrongdoing.

As has been discussed in Chapter 2, the definition of remedy has been used in a broad sense and in a strict sense. In a general sense of the definition, fines are considered as a kind of remedy. In the strict sense, fines and remedies are not the same considering their functionality, which is the view that has been taken under this thesis, and this has an impact on the degree by which the principle of proportionality applies according each measure.

However, even if we consider the broad definition of remedy, and to that end it is important to remember that according to *Hjelmeng*, a remedy in the general sense, may fulfil four functions. Mainly (i) the termination of the ongoing infringement, (ii) the compensation to victims, (iii) deterrence or prevention of future or repeat infringements and (iv) the function that a remedy should restore the *status quo ante*.<sup>556</sup>

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<sup>556</sup> Erling Hjelmeng, 'Competition Law Remedies: Striving for Coherence or Finding New Ways?' [2013] 50 CMLRev. 4 p. 1008. It should be noted that the author has the view that a fine is encompassed within the broad definition of remedy in spite of the difference in their functionality.

Hence, even if we consider this broad definition; then fines, periodic penalty payments and remedies covered under Article 7 of Regulation No. 1/2003, are all three measures that can be considered under this heading. They are the culmination of an administrative procedure based on guiding principles and in respect of rules of due and fair process amongst the lot of rights that the undertakings concerned enjoy within the legal framework.

The situation is completely different if we talk about remedies imposed in the adoption of commitment decisions in the application of Article 9 of Regulation 1/2003. Here, the full extent of the rules of due and fair process as well as rules for the establishment of liability and more importantly, the rules in regard to the principle of proportionality, do not apply unlike decisions based on Articles 7, 23 and 24 of the same regulation. This in turn, allows the EU Commission to adopt stronger remedies that can be applied for cases closed with commitments and weaker ones for cases closed with an infringement decisions. Thus, while all instruments are in some way punitive in general terms or advance the deterrence policy current being enforced in EU competition law, commitment decisions are far more lax when it comes to the respect of EU principles of law.

According to recital number 13 of Regulation No. 1/2003 it is stated that commitment decisions “should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement.” As we can see, there is no mention whatsoever of the principle of proportionality. Thus, irrespective of whether we use the broad definition of remedies or we define them in the strict sense, there is a different standard to be observed when remedies are imposed.

In the same line of argument, *Florian Wagner Von-Papp* agrees that remedies under Articles 7 of Regulation No. 1/2003 are subject to the constraints of the rule of law and as a consequence, they have various beneficial effects.<sup>557</sup> Among these, we can find first, the infringement must be proven to the requisite legal standard. (ii) The remedies imposed must be the ones mandated or at least permitted by the legal provisions on which the EU Commission relies, (iii) they must be necessary and proportionate means to end the infringement and (iv) the finding of an infringement and the proportionality of the remedies imposed are subject to judicial review.<sup>558</sup>

Despite these beneficial effects when a remedy is imposed based on Article 7 of Regulation No. 1/2003, one could argue that the main reason as to why the EU Commission would prefer the adoption of commitment decisions instead, might be the inability to fine companies since pecuniary sanctions are difficult to justify. The same applies to cases imposing fines or penalty payments, especially when sanctioning infringements of Article 102 TFEU. The latter due to the fact that the elements of the violation, mainly the concepts of dominant position and abusive conduct, are particularly difficult both to define and to establish.<sup>559</sup>

We could also argue that it is not the difficulty to justify fines or remedies based on Article 7 Regulation No. 1/2003, but the fact that the commitment procedure enables the EU Commission to obtain far-reaching remedies in a reduced period of time. In this regard,

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<sup>557</sup> Florian Wagner-Von Papp, ‘Best and even better practices in commitment procedures after *Alrosa*: The dangers of abandoning the “Struggle for Competition law” [2012] 49 CMLRev 957. Again, here the author uses a broad definition of the term remedy.

<sup>558</sup> *Ibid* at 958.

<sup>559</sup> Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases & Materials* (4th edn OUP, Oxford 2010) p. 259. Note that the author refers to fines based on Article 23 of Regulation No. 1/2003 but the very same argument could apply as to the adoption of remedies based on Article 7 of the same regulation.

the mere imposition of a fine or the imposition of remedies that should comply with the element of ‘appropriateness’ as provided in Article 7 of Regulation No. 1/2003 might not offer forward looking solutions that enable the EU Commission to address market issues.

Whatever formal or practical reasons, it seems that these have driven the EU Commission to limit itself to communicating the investigated company its concerns followings a preliminary assessment and from that point on, it is the undertaking subject to investigation the one that may offer proactive voluntary commitments in order to address such competition concerns. According to the EU Commission, such proactive commitments must contain remedies that aim to restore compliance with the rules infringed whose period of application may be limited in time and dependent on the reactivity of the markets or the investments needed for certain improvements.<sup>560</sup>

If the EU Commission, after consulting third parties who can show legitimate interest, deems the commitment offered to be adequate, it will make the commitment binding without finding whether the undertaking infringed Article 102 TFEU or 101 TFEU and without imposing a fine. It will only conclude that there are no longer grounds for action by the EU Commission as an outcome. Nonetheless, such decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding of infringement and decide upon the case.<sup>561</sup>

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<sup>560</sup> See the Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012; hereafter the *EU Commission’s Antitrust Manual of Procedures*, ch. 16, para 51.

[http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf) (Accessed on 15 May 2015).

<sup>561</sup> Article 9 (1) read together with recital 13 of Regulation No. 1/2003.

The scenario described above, where the establishment of abuse is uncertain and the imposition of a fine is not likely,<sup>562</sup> leaves the EU Commission with the choice to approach such infringements following the application of either Article 7 or Article 9 of Regulation No. 1/2003. In such context, no wonder the EU Commission has favoured the use of commitment decisions of Article 9 to the point that it has made them its primary policy tool over the application of Article 7 where the principle of proportionality imposes important restrictions on the choice of remedies.<sup>563</sup>

Hence, commitments are encouraged and this means that the EU Commission has moved from a policy focused on terminating and punishing infringements towards a consensual procedure that delivers remedies of uncertain magnitude, which, coupled with the risk aversion of the undertakings, it allows the EU Commission to extract disproportionate commitments from the companies involved.<sup>564</sup> Nevertheless, as stated above, this too is an expression of the deterrence approach in the EU antitrust enforcement system but is not strictly liable to provide the full extent of the protection of the principle of proportionality.

The preference for this less restricted deterrent approach, has been made easier and in a way, supported by the judiciary. Thanks to the *Alrosa* case, where the Court of Justice of the European Union made a distinction between Article 7 and Article 9 of Regulation No. 1/2003 in respect to their objectives. The CJEU stated that: “Those two provisions...

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<sup>562</sup> This should be considered along with the fact that undertakings are indeed willing to settle even when genuine doubts persist as to the application of Article 102 TFEU to the factual scenario and the corresponding fine. See H. First, ‘Your Money and your Life: The export of U.S. antitrust remedies’ in D. Sokol, T. K. Cheng and I. Lianos (eds) *Competition Law and Development* (Stanford University Press, California 2013), p. 136.

<sup>563</sup> Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-00743 para 93.

<sup>564</sup> See Florian Wagner-Von Papp, ‘Best and even better practices in commitment procedures after *Alrosa*: The dangers of abandoning the “Struggle for Competition law” [2012] 49 CMLRev 944.

pursue different objectives, one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission's concerns following its preliminary assessment.<sup>565</sup>

The above mentioned judgement was preceded by the following: In February 2006, after a sales agreement notification by De Beers and Alrosa, two vertically integrated companies, number one and number two respectively, in the world market for the production and supply for diamonds; the EU Commission issued two Statements of Objections. One was addressed to both companies raising collusion concerns covered under Article 101 TFEU and the second Statement of Objections was addressed to De Beers only, raising concerns about abuse of dominant position under Article 102 TFEU. In a first instance, both companies offered joint commitments but after such commitments were market-tested and third parties expressed concerns, the EU Commission asked both companies to submit revised commitments to which De Beers complied with and Alrosa did not.

Hence, the EU Commission adopted a commitment decision in *De Beers*,<sup>566</sup> which directly affected Alrosa, as the latter was deprived of a purchaser and therefore, it bought an action for annulment of such commitment decision. In July 2007, the General Court of the EU established that the principle of proportionality not only did apply to commitment procedures but also applied with almost the same degree as in infringement procedures.<sup>567</sup>

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<sup>565</sup> Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 46.

<sup>566</sup> *De Beers* (Case COMP/C-3/38.381).

<sup>567</sup> Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601 para 125, 126.

However, in June 2010 the Court of Justice of the EU, following the opinion of Advocate General *Kokott*, who emphasized the contractual and voluntary aspects of commitment decisions,<sup>568</sup> and the consequences these have in the application of the proportionality principle as its limitations broaden;<sup>569</sup> determined not to uphold the EU General Court's judgement. The latter was decided on the basis that, as pointed out above, Articles 7 and 9 of Reg. 1/2003 pursue different objectives,<sup>570</sup> due to the particular characteristics of the procedures that such Articles involved.<sup>571</sup>

This resulted in a limitation of the extent to which the principle of proportionality applies in the context of Article 9 of Reg. 1/2003. That being the confinement to which the EU Commission "subjects itself to the simple task of "examining and possibly accepting the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued."<sup>572</sup>

Thus, the EU Commission is only confined to verify that the "commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately."<sup>573</sup> As *Wagner-Von Papp* has suggested, this may lead to a situation where the undertakings under investigation resort to salami tactics by presenting the EU Commission with a

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<sup>568</sup> Opinion of Advocate General Kokott in Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 129-131 and 141.

<sup>569</sup> *Ibid*, para 52-57. If there are any limitations at all.

<sup>570</sup> Joined cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-00743 para 93.

<sup>570</sup> Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 46.

<sup>571</sup> *Ibid*, para 38.

<sup>572</sup> *Ibid*, para 40.

<sup>573</sup> *Ibid*, para 41.

selection of alternative incremental commitments, requiring the latter to choose the least restrictive of them.<sup>574</sup>

Irrespective of whether those salami tactics become a common practice or not, the EU Commission's Antitrust Manual of Procedures calls for the full respect for the principle on proportionality, in the adoption of commitment decision.<sup>575</sup> However, such a means to guarantee the application of the principle of proportionality fully is just an internal guidance with no enforceability and it is regrettable that the Court of Justice of the European Union has let pass a great opportunity to expand and clarify and thus limit the EU Commission's discretion.

The principle of proportionality concerning third parties was another issue dealt in the *Alrosa* case.<sup>576</sup> The plaintiff claimed that the EU Commission failed to comply with the principle of proportionality as established in Article 5 (4) TEU.<sup>577</sup> Thus, *Alrosa* contested the criterion of necessity only.<sup>578</sup> Whilst the General Court of the EU stated that the review of the proportionality of any measure was an objective review,<sup>579</sup> it also stated that, for a limited review to apply on its part, it would require to be in a position to determine that the EU Commission had carried out its own specialized assessment. This meant that the EU Commission was able to adopt a decision on the basis of complex

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<sup>574</sup> Florian Wagner-Von Papp (2012) p. 937. He further states that salami tactics would force the EU Commission to engage in a proportionality analysis that is equivalent to that demanded by the EU General Court judgement, see para 938. However, he also mentions that there may be four reasons why the salami tactics may not work, two of which are legal and two practical.

<sup>575</sup> EU Commission's Antitrust Manual of Procedures, ch. 16, para 46.

<sup>576</sup> Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601, para 90.

<sup>577</sup> Action by the Union must not go beyond what its necessary to achieve its objectives.

<sup>578</sup> Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601 para 95.

<sup>579</sup> *Ibid*, para 99.

economic analysis which allowed it to conclude that the commitments proposed satisfy the criterion of necessity.<sup>580</sup>

In this regard, the General Court considered that the EU Commission did not make that extensive reasoning required since other solutions existed that were proportionate to the objective it sought to achieve.<sup>581</sup> Hence, the General Court of the EU decided to annul the EU Commission commitment decision on the ground that it infringed the principle of proportionality.<sup>582</sup>

The judgement above described, opened the door for the principle of proportionality to apply in benefit of third parties by making the remedies chosen by the EU Commission to be appropriate, adequate and necessary as well as the less onerous in respect of them. However, Advocate General *Kokott* argued that: “Whilst necessity may be presumed as a matter of course in relation to the interests of the undertaking which has offered the commitments... such a presumption cannot be made where the interests of third parties are affected. The commitments do not originate from them, which means that the voluntary nature of the commitments offered cannot be any guarantee that their interest will be safeguarded.”<sup>583</sup>

Although the Court of Justice of the European Union agreed with the Opinion of Advocate General in respect to the contractual characteristics of the commitment

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<sup>580</sup> *Ibid*, para 123.

<sup>581</sup> *Ibid*, para 156.

<sup>582</sup> *Ibid*, para 157.

<sup>583</sup> Opinion of Advocate General Kokott in Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 55.

decisions,<sup>584</sup> it nonetheless emphasised that the EU Commission is still obliged to take into account the interests of third parties.<sup>585</sup>

In addition, one must remember that without the finding of an infringement by the commitment decision, a third party must be the one proving their claim before National courts as a direct right of EU law,<sup>586</sup> as long as there is causal relationship between the harm alleged and the infringement of EU competition law.<sup>587</sup> This of course, is *de facto* almost impossible since commitment decision are based on a preliminary assessment which is not as detailed as the factual findings in an infringement procedure and plaintiffs claiming damages will have to find other sources to prove the infringement in the first place before proving the harm done and the direct causation.<sup>588</sup>

Wils further questions whether the EU Commission should be legally obliged to make a full inquiry into the facts or at least up to a certain minimum standard during the preliminary assessment on which the commitment decision is based.<sup>589</sup> The non-establishment of facts which leads to the non-admission of liability makes the commitment decision a sort of settlement towards which we can all have doubts as to whether such decision was fair, reasonable, adequate and in the public interest.

Overall, the above mentioned *Alrosa* judgement has had serious repercussions sending a message not of efficiency or efficacy but a message of convenience and conformity that

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<sup>584</sup> Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 38-40.

<sup>585</sup> *Ibid*, para 41.

<sup>586</sup> Article 102 as Article 101 TFEU is directly effective, allowing third parties with legitimate interest to claim damages. See Case C-127/73 *BRT v SABAM* [1974] ECR 51 para 16, Case C-282/95 P *Guérin Automobiles v Commission* [1997] ECR I-1503 para 39.

<sup>587</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 para 24.

<sup>588</sup> Wouter P.J. Wils, ‘The use of settlements in public antitrust enforcement: Objectives and Principles’ [2008] 31 World Competition 346.

<sup>589</sup> *Ibid* p. 347.

involves the choosing of the less burdensome instruments to limit the effects of potentially abusive conducts over remedies involving a heavier evidentiary and methodological burden.<sup>590</sup> This has helped the EU Commission to turn its back to stricter proportionality tests because ever since *Alrosa*, the EU Commission has stressed the voluntary nature of the commitment decisions as a factor in assessing the proportionality of remedies adopted.<sup>591</sup>

Even the EU Court of Justice has held that “undertakings which offer commitments on the basis of Article 9 of Regulation No. 1/2003 consciously accept that the concessions they make may go beyond what the EU Commission could itself imposed on them in a decision adopted under Article 7.”<sup>592</sup> This makes it certainly regrettable that the CJEU leaves the setting of the standard to apply in respect of the protection afforded by the principle of proportionality in the enforcement of EU competition law to the EU Commission entirely.

It should be remembered that complying with the principle of proportionality takes place whenever sanctions and remedies are proportionate in their severity to the gravity of the offences it seeks to punish or stop. Such compliance appears to be a requirement of justice since doing justice is understood as a matter of imposing on offenders, punishments that are proportionate and thus retributively appropriate to their wrongdoing. According to

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<sup>590</sup> Yves Botteman and Agapi Patsa, ‘Towards a more sustainable use of commitment decisions in Article 102 TFEU cases’ (2013) Oxford Journal of Antitrust Enforcement p.8.

<sup>591</sup> See *RAMBUS* [2010] OJ C30/17 para 70, *E.ON Gas* (Case COMP/39.317) published on 04.05.2010 para 62.

<sup>592</sup> Case C-441/07 *P Commission v Alrosa* [2010] ECR I-5949 para 48.

*Von Hirsch*, people have a sense that punishments, which comport with the gravity of offences are more equitable than punishments that do not.<sup>593</sup>

Hence, effectiveness in delivering just and purposeful punishment rather than efficiency<sup>594</sup> should govern whether fines or commitment decisions or any other kind of remedies, either behavioural or structural; are the best tool to address the antitrust concerns that the EU Commission may direct its enforcement efforts to. This at the same time, should be done while protecting the rights of those undertakings subject to such decisions.

The imposition of corporate criminal fines<sup>595</sup> as an instrument to achieve deterrence or the preference to adopt commitment decisions as opposed to remedies based on Article 7 of Regulation No. 1/2003 in order to achieve efficiency, cannot outweigh the respect of the rights of the undertakings being punished or result in the overriding of the principle of proportionality. Punishment or the adoption of a commitment decision, if justified, must be inflicted or imposed while respecting the rights of the person to be punished or against whom the commitment decision is imposed.<sup>596</sup> That includes the right to receive a proportionate remedy or sanction according to the gravity of the violation.

In conclusion, treating the non-consideration of the principle of proportionality as a mere means to some competition policy good, results in failure to comply with an indispensable

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<sup>593</sup> See Andrew Von Hirsch, 'Censure and Proportionality' in R. A. Duff and D. Garland (eds), *A Reader on Punishment* (OUP, Oxford 1995) p. 113.

<sup>594</sup> Efficiency understood as the main driver to achieve the ultimate goal of prevention by way of deterrence.

<sup>595</sup> Criminal in the general sense as contained in the ECHR and the case law built from its interpretation by the ECtHR.

<sup>596</sup> J. G. Murphy, 'Marxism and Retribution' in R. A. Duff and D. Garland (eds), *A Reader on Punishment* (OUP, Oxford 1995) p. 49.

requirement of justice. Said in other words, the non-observance of the principle of proportionality would mean that the undertakings subject to the EU Commission's proceedings are being fined or subject to commitment decisions because of the instrumental value, those decisions will have in the future. This is in stark contrast as to the immediate value of serving justice in a particular case since the principle of proportionality, though an important requirement is one of many conditions the aggregate of which, results in justice.

This though, does not mean that efficiency or deterrence and justice are mutually exclusive. However, they stand in a complex relationship in which the realization of these values need not always be a competitive trade off and can in fact be taken in a coordinated manner largely. In this context, we have to remember that the fining system as well as other tools available to the EU Commission that serve to enforce competition law, are just part of a wide competition policy, which cannot pursue one unique goal, as it is part of the TFEU. The latter includes diverse 'values' thus, diverse goals are contained in it. Hence, the EU Commission must take account of such different values because they reflect the wishes and perceptions of consumers and the society as a whole, who are the main beneficiaries of competition policy.

Nevertheless, such equilibrium will depend on the establishment of a proper methodology in which value conflicts can be resolved, where the competition policy's balance sheet accounts for all costs and benefits of seemingly conflicting values and principles in the short and long term. The Court of Justice of the EU has recognized the applicability of general principles of EU law applicable to all administrative proceedings whose outcomes could affect the legal position of private parties in the interest of sound justice and as an

expression of good administration.<sup>597</sup> Thus, a fairer balance is required for the EU Commission to operate within boundaries that do not lead to excesses.

Since deterrence and efficiency are the values that the EU Commission has adopted to guide the competition policy and thus the competition law enforcement, it is important to remember that the value of fairness and the general principles of law it comprises are of great significance too. People are more likely to comply with the law if they agree with the substance, and regard the way it is applied and enforced, as legitimate and just.<sup>598</sup>

The value given to justice cannot be denied and it is for the EU Commission to decide, if not by a cost-benefit analysis; the methodology to follow on whether justice can be excluded in favour of another value and when those situations will be encountered, or whether there can be compromise and equilibrium between two competing values. However, more than competing values, it must be acknowledged that a system that is being perceived as just, ultimately leads to efficacy as law compliance is promoted.

Overall, while we can see different objectives for each of the enforcement instruments used by the EU Commission in regards to their function, the fact that there are different levels of protection afforded to undertakings for each of them make remedies and sanctions all work to strengthen the deterrence approach system. This is more evident in respect to remedies adopted by commitment decisions where the flexible standard of protection make remedies adopted become instruments that reinforce the utilitarian approach of the EU Commission.

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<sup>597</sup> Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885 para 39.

<sup>598</sup> Caron Beaton-Wells and Christine Parker, 'Justifying criminal sanctions for cartel conduct: a hard case' [2013] 1 OJAE 1 p. 210.

Yet, a utilitarian system that does not achieve prevention and does not promote compliance is bound to fail. Thus, the negotiated enforcement should be encouraged as long as it does seek to promote compliance by taking into account the insights of the antitrust concerns so actions directed for risk assessment and risk mitigation can be adopted, rather than instruments that only focus on damage control.

### 3.3 Principle of Legal Certainty.

Another fundamental guarantee of great importance is the respect of the principle of legal certainty, which protects the undertakings subject to the procedures and fines imposed by the EU Commission against the arbitrary use of its powers. This is done by requiring clear, ascertainable and non-retrospective legal basis, restricting its power to impose sanctions unless there is an infringement and a corresponding punishment for it provided by legal statute.

According to Article 49 (1) CFREU, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor, shall a heavier penalty be imposed, than the one that was applicable at the time the criminal offense was committed.<sup>599</sup> In the EU legal system, it is the General Court and the CJEU the judicial bodies which have the task of interpreting the Treaty provisions and the duty to define their legal scope. However, for practical purposes, it may seem that this function has been delegated to the EU Commission as can be observed by the degree of deference shown on appeals.

In any civilized society it is a basic rule of law that the violation of any legal provision may only be sanctioned if the rule of law is written in clear and unambiguous way so that it is possible for people to foresee the consequences of their actions. The legal phrase *nullum crimen, nulla poena sine lege* embodies the principle that only the law can define a crime and prescribe a penalty.<sup>600</sup> However, Article 23(3) of Regulation 1/2003 merely

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<sup>599</sup> The corresponding provision that contains this right in a less extended form is Article 7 (1) ECHR.

<sup>600</sup> The principle of legality provided for under Article 263 TFEU.

states that regard is to be given to the gravity and duration if the infringement, which allows the EU Commission to have room for the exercise of its discretion when it comes to determine the size of the sanction. Indeed, the General Court has repeatedly held that the EU Commission has a margin of discretion when fixing the fines.<sup>601</sup> This includes a particularly wide discretion as regards the choice of factors to be taken into account for the purpose of determining the amount of the fines,<sup>602</sup> and a discretion to raise the general level of fines so as to reinforce their deterrent effect.<sup>603</sup>

Nonetheless, if we consider that commitment decisions are, together with the EU competition fining system, the preferred tools for the EU Commission to enforce EU antitrust law, then the *Alrosa* judgement has had a bad impact on the building of legal certainty too. The fact that EU Commission' decisions finding and terminating an infringement together with the General Court rulings and the judgements of the Court of Justice of the European Union on appeal, are pronouncements of what the law is, as they are subject to the constraints of the rule of law. Such decisions and judgements provide clarification and refinement to the scope of the legal provisions in question and they further provide legal certainty for future cases. Hence, absent the above mentioned, the principle of legal certainty is reduced or lost through commitment decisions which do not contribute to the clarification of the legal boundaries.<sup>604</sup>

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<sup>601</sup> Case T-230/00 *ABB Daesang and Sewon Europe v Commission* [2003] ECR II-2733 para 38.

<sup>602</sup> Case C-289/04 *Showa Denko v Commission* [2006] ECR I-5859 para 36 and Case C-3/06 *Danone v Commission* [2007] ECR I-1331 para 37.

<sup>603</sup> Wouter P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' [2010] 33 World Competition 1. See also Case T-76/08 *EI du Pont de Nemours and Others v Commission* para 124 not yet recorded but published on 02 February 2012.

<sup>604</sup> Florian Wagner-Von Papp, 'Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the "Struggle for Competition law"' [2012] 49 CMLRev 958.

The criticism towards this wide discretion, when it comes to the imposition of fines particularly, was the reason why the EU Commission had itself set limits by way of guidelines in which it laid down the method for determining the amount of the fine in 1998 and later in 2006. The EU Court of Justice had also established that in adopting and announcing by publishing the guidelines that these will henceforth apply to the cases to which they relate. the EU Commission cannot depart from those rules under the pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment and the protection of legitimate expectations.<sup>605</sup> Still, Soltesz states that the guidelines cannot compensate for the lack of certainty of the legal basis, since the rule of law, in fact requires that the essential provisions be made by the legislature and not an administrative authority.<sup>606</sup>

Despite this argument, the CJEU has stated, in many occasions, that although the fining Guidelines may not be regarded as rules of law, which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart.<sup>607</sup> Furthermore, the guidelines determine, generally and abstractly, the method that the EU Commission has bound itself to use in setting fines in order to ensure legal certainty.<sup>608</sup> Despite such interpretation, the General Court has limited such review of legality to a coherent and objective justification assessment.<sup>609</sup> This means that the limit is not to manifestly go beyond such margin of assessment, whatever that limit may be.

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<sup>605</sup> C-189/02 *Dansk Rorindustri and Others v Commission* [2005] ECR I -5425 para 211.

<sup>606</sup> Ulrich Soltesz, 'Due process and judicial review – mixed signals from Luxemburg in cartel cases' [2012] 33 (5) ECLR 243.

<sup>607</sup> C-189/02 *Dansk Rorindustri and Others v Commission* [2005] ECR I -5425 para 213.

<sup>608</sup> *Ibid* para 212.

<sup>609</sup> Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913 para 416.

Apart from the wide discretion enjoyed by the EU Commission when it comes to the setting of fines, complaints about prosecutorial bias in the antitrust proceedings before the EU administrative authority have also spurred debate about the provision and effectiveness of fundamental rights for the proper defence of the undertakings concerned. The CJEU stated that the right to a fair hearing as a general principle of EU law is inspired in Article 6 (1) ECHR as well as the right to a legal process within a reasonable period of time, both of which are applicable to competition law proceedings before the EU Commission.<sup>610</sup>

Again, it was the Court of Justice of the European Union judgements, which made the EU Commission react to external concerns about internal checks and balances. This led to create the function of the Hearing Officer for the purpose of having an independent official from the case team and yet, member of the EU Commission attached to the office of the Competition Commissioner, who shall ensure fair and impartial hearings with full respect of the parties' right to be heard.<sup>611</sup>

Before the *Revised Hearing Officer Mandate 2011* was adopted, the hearing Officer was entrusted with the mission of guaranteeing that the parties could exercise their right to be heard during the stages of the procedure following the sending of the Statement of Objections (SO). Today, the Hearing Officer is empowered to exercise functions in the investigation phase of antitrust cases and regarding investigatory measures in cases under

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<sup>610</sup> Case C-403/04 P *Sumitomo Metal Industries v Commission* [2007] ECR I-00729 para115. See also the case law there referred.

<sup>611</sup> Recital 4 Decision of the President of the European Commission 2011/695/EU of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, 2011 OJ L 275/29 hereafter *Revised Hearing Officer Mandate 2011*.

*Merger Regulation*<sup>612</sup> that can result in the imposition of fines,<sup>613</sup> as well as commitment and settlements procedures.<sup>614</sup> Further procedural rights and guarantees are set out in Regulation No. 1/2003 and Regulation No. 773/2004.

The exercise of the EU Commission's discretion has been further limited with the assurance that the Court of Justice of the European Union have unlimited powers to review appeals as stated by the Court of Justice of the EU in *Evonik Degussa*.<sup>615</sup> This judgement may be in line with the case-law of the ECtHR in respect of the broad autonomous interpretation of a criminal charge contained in Article 6 (2) ECHR.<sup>616</sup>

However, this judicial control has been criticised by the fact that the General Court and the CJEU confine their scrutiny to whether the EU Commission has respected the self-imposed limits of its discretion. That review is based on whether it respected the procedural rules and did not commit any manifest error of law or of fact or misused its powers,<sup>617</sup> leaving a great margin of appreciation in the assessment of complex economic particulars.<sup>618</sup>

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<sup>612</sup> Council Regulation No. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, [2004] OJ L24/1.

<sup>613</sup> Revised Hearing Officer Mandate Article 4.

<sup>614</sup> *Ibid* Article 15.

<sup>615</sup> Case C-266/06 *Evonik Degussa v Commission* [2008] ECR I-81 para 36 in reference to Article 261 TFEU and Article 31 of Regulation 1/2003.

<sup>616</sup> Where the condition that courts of appeal must offer a review of full jurisdiction including, the power to quash in all respects, on question on fact and law, the challenged decision, is met by the current system. See *Janosevic v Sweden* (App no 34619/97) ECHR 21 May 2003 at 81 and *Menarini Diagnostics S.R.L. v Italy* (App no 43509/08) ECHR 27 September 2011 at 59.

<sup>617</sup> Case T-28/03 *Holcim (Deutschland) v Commission* [2005] ECR II-1357 para 95 and cases referred there.

<sup>618</sup> *Ibid*, see also Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-03601 para 87. See also A. Andreangeli et al. 'Report of Working Group III: Enforcement by the Commission – The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System', Global Competition Law Centre's Annual Conference "Towards an Optimal Enforcement of Competition Rules in Europe – Time for a Review of Regulation 1/2003", Bruges, 11 and 12 June 2009, p 16.

On the other hand, since both the Court of Justice of the European Union and the General Court have stated that fines are an instrument of competition policy and the EU Commission “must be allowed a margin of discretion when fixing their amount, in order that it may channel the conduct of undertakings towards observance of the competition rules.”<sup>619</sup> This too, raises a problem for the fact that EU competition law and the competition policy are interpreted, applied, and shaped mainly by the EU Commission that may be influenced by a prosecutorial bias.

Although interpretation of EU competition law is a task entrusted to the EU Court of Justice alone in order to provide for uniform and authoritative interpretations of primary and secondary EU law, according to Article 267 TFEU, the fact is that the EU Commission is the main driver of antitrust law. Nevertheless, a more intense and broad degree of protection for the undertakings subject to antitrust proceedings, may be required. This is important because complementary to efficiency and justice, another important principle of law is legal certainty. Moreover, in the long term, legal certainty is conducive to efficiency.<sup>620</sup> Legal certainty is thus, the basis for an effective internal market and thus, economic efficiency.

This means that calls for an effective regime of judicial control should also be made, a regime with full jurisdiction to review the EU Commission decisions in order to comply with the provisions calling for an independent and impartial tribunal.<sup>621</sup> However, the

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<sup>619</sup> See Case T-150/89 *Martinelli v Commission* [1995] ECR II-1165 para 59 and Case C-298/98 P *Metsä-Serla Sales v Commission* [2000] ECR I-10157 para 57.

<sup>620</sup> Klaus Mathis, *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law* (1<sup>st</sup> edn Springer, Lucerne 2009) p. 204.

<sup>621</sup> As provided in Article 47 (2) CFREU and Article 6 (1) ECHR, although this requirement is only applying on appeal for competition cases as justified in *Le Compte et al v Belgium* (App no 7299/75) 28 January 1983 at 25 and *Öztiirk v Germany* (App no 8544/79) ECHR 21 February 1984 at 50.

General Court but especially the Court of Justice of the European Union both seem reluctant to make sure that the administrative authority's decisions remain within the limits that are drawn from the case law.

Although, to say "limits" may be misstated since the General Court has resolved that "the Union institutions enjoy a broad discretion regarding definition of objectives to be pursued and choice of the appropriate means of action. In that regard, review by the Community judicature of the substance of the relevant act must be confined to examining whether the exercise of such discretion is vitiated by a manifest error or a misuse of powers or whether the Community institutions clearly exceeded the bounds of their discretion..."<sup>622</sup>

The more or less complaisant standard of review applied by the CJEU is probably due to the implied belief that the evaluation of evidence is better carried out by the first instance decision-maker rather than by a court of review.<sup>623</sup> This may also be explained by the principle of institutional balance; according to which, clearly defined exclusive executive powers as provided in the EU Treaties and in secondary legislation such as the development of competition policy and interest, the evaluation of evidence and its complex economic assessment fit into the EU Commission's main tasks. This doctrine of limited judicial review allows the General Court and the CJEU to fine-tune their relationship with other organs of the European Union, balancing the need to protect rights

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<sup>622</sup> Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II- 3305 para 406.

<sup>623</sup> Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-00987 para 39.

of individuals with the constitutional structure of the Union and the prerogatives and functions of other bodies.<sup>624</sup>

The doctrine of limited judicial review also allows the Court of Justice of the European Justice to exercise and modulate levels of intervention to different and diverging degrees in order to protect rights and to keep the institutional balance between the EU and member states as well as the different organs of the EU.<sup>625</sup> In turn, this means that the question would rather be how to reconcile this institutional balance approach with the principle of effective judicial protection as part of the undertakings' procedural guarantees.<sup>626</sup>

This makes it doubtful whether the external judicial review performed by the General court and the CJEU fulfils the need to ensure a full, fair, impartial, effective and timely protection of the individual rights of the undertakings at stake as the jurisprudence of the ECtHR indicates.<sup>627</sup> However, what makes the matter a cause for concern is not the deference *per se* but the fact that the EU Commission, as an administrative authority, is naturally inclined to stretch and explore the outer boundaries of competition law provisions with the result that decisions may deviate from the substantive standards set out in the relevant precedents.<sup>628</sup>

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<sup>624</sup> Thomas Cottier, 'The judge in International Economic Relations' in Mario Monti, Nikolaus Von Und Zu Liechtenstein and Bo Versterdorf (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (Nomos Verlagsgesellschaft, Bilingual edition, 2007) p. 115.

<sup>625</sup> *Ibid* p. 116.

<sup>626</sup> Renato Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functional Perspective' [2012] 49 CMLRev 997.

<sup>627</sup> Heike Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in Claus-Dieter Ehlermann and Mel Marquis, (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, Oxford 2011), p. 88.

<sup>628</sup> Pablo Ibanez Colomo, 'The Law on Abuses of Dominance and the System of Judicial Remedies', LSE Law, Society and Economy Working Papers 13/2013 p. 5 (accessed 22 July 2013).

The General Court (GC) and the CJEU distinguish between the review of the law, the review of the facts and the review of the application of the law to the facts that may involve complex economic assessments.<sup>629</sup> Only the EU Commission's decisions imposing a fine or a periodic penalty payment are subject to the unlimited jurisdiction of the CJEU.<sup>630</sup> Although such unlimited jurisdiction is confined to the element of legality, which is reduced to a coherent and objectively justified assessment and does not extend to all aspects of fact and law relevant to the infringement. It can nonetheless, cancel, reduce or increase the amount of the fine initially imposed based on the court's analysis of the facts, the gravity of the infringement or the appropriateness of the fine.<sup>631</sup>

The above means that on the one hand, the CJEU has unlimited jurisdiction with regard to the penalties; on the other, it acknowledges the discretion the EU Commission has in respect of fines as an instrument to shape the EU competition policy. However, the Court of Justice of the European Union has confirmed that the penalty under revision, the one imposed by the EU Commission, would not be modified as long as the departure from the EU Fining Guidelines 2006 does not entail a violation of the criteria laid down in Regulation No. 1/2003.<sup>632</sup> Thus, any modification of the EU Commission's fining decision would entail that the General Court and the CJEU would apply the manifest error approach rather than a full judicial review approach.

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<sup>629</sup> Heike Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in Claus-Dieter Ehlermann and Mel Marquis, (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, Oxford 2011), p. 89.

<sup>630</sup> Article 261 TFEU together with Recital 33 and Article 31 Regulation No. 1/2003.

<sup>631</sup> Case C-298/98 P *Metsä-Serla Sales v Commission* [2000] ECR I-10157 para 57.

<sup>632</sup> Case C-189/02 *Dansk Rorindustri and Others v Commission* [2005] ECR I -5425 para 278.

In *Remia* judgement, where the decision based on Article 101 (1) TFEU was subject of appeal; the Court of Justice of the European Union acknowledged the EU Commission's appraisal of complex economic matters and stated that the court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with.<sup>633</sup> To analyse, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.<sup>634</sup>

The above mentioned assessment made by the CJEU of the decisions imposing a fine, also applies to aspects of expediency. In *Baustahlgewebe*, the Court of Justice of the EU reduced the fine imposed by the EU Commission by €50,000 because the General Court exceeded a reasonable time to rule on the appeal in contravention with Article 6 (1) ECHR.<sup>635</sup> On a later occasion, the General Court confirmed the above stating that its review of the lawfulness of the exercise of the EU Commission's discretion must be confined to checking that the thresholds set are coherent and objectively justified and that the GC must not immediately substitute their own assessment for that of the EU Commission.<sup>636</sup>

It seems that the GC and the CJEU have preferred a more efficiency oriented approach in the interpretation of EU competition law and in setting its enforcement system based around the discretion of the administrative body than a full judicial review approach. However, the latter is now called for in view of the developments in the case-law of the ECtHR so the rule of law can be guaranteed. Indeed, a long lasting debate has taken place

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<sup>633</sup> Case C-42/84 *Remia v Commission* [1985] ECR 02545 para 34.

<sup>634</sup> *Ibid* para 36.

<sup>635</sup> Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I – 8417 para 26-49.

<sup>636</sup> Case T-76/08 *EI du Pont de Nemours and Others v Commission* not yet reported para 127.

about the full judicial review standard that the Court of Justice of the European Union states it applies as in *KME*, where the CJEU agreed with the General Court stating that the later does make a full review of the factual evidence.<sup>637</sup>

For one view, *Nazzini* concludes that the current system of deferential judicial review is incompatible with the principle of effective judicial protection. Even though the *KME* case can be interpreted as signalling the demise of deferential review of EU Commission decisions on Article 101 or 102 TFEU or at least a significant change in the way the EU will exercise deferential review of fining decisions.<sup>638</sup> In his view, the EU Court of Justice failed to articulate a test of whether the General Court or the CJEU review of complex economic assessments is limited to verifying if the evidence is capable of substantiating the conclusions drawn from it. This is different to a review of whether such conclusions are right in the opinion of the Court and thus, falls short of the correctness standard.<sup>639</sup>

He further argues that a correctness standard is not the only solution but a functional separation between prosecutor and the decision maker may be needed.<sup>640</sup> The correctness standard is explained as the standard of judicial review with limited scope to examining possible errors of appraisal on questions of fact, discretion or policy.<sup>641</sup> Along with this, the suggested functional separation means that the Commissioner should not become excessively involved on the merits of the case during the course of the investigation. Following this proposition, if functional separation of prosecution and decision were to

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<sup>637</sup> Case C-272/09 *P – KME Germany and Others v Commission* judgement of 8 December 2011 para 103, 106 and 109 not yet published.

<sup>638</sup> Renato Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective' [2012] 49 CMLRev 994

<sup>639</sup> *Ibid* at 995.

<sup>640</sup> *Ibid* at 996.

<sup>641</sup> *Ibid* at 998.

be introduced at the administrative level, the deferential standard of review at the Court level could be in line with what is provided in the ECtHR case law.<sup>642</sup>

On closer inspection of the case-law, we can observe that this deference has been the common characteristic of the intensity of judicial review exercised by both the General Court and the Court of Justice of the European Union and it has made a common practice in the EU not to make policy determinations susceptible of judicial analysis. It has been called “the margin of appreciation” doctrine<sup>643</sup> and, although the CJEU considers it to be a standard of effective judicial protection, it actually limits the intensity of review.

The margin of appreciation doctrine has been expressed in *Microsoft* judgement, where the General Court laid down the standards or better said, the limits imposed on itself, to checking whether the complex economic and technical data on which the EU Commission bases its decisions, meet the specified criterion.<sup>644</sup> This test is limited “to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers”.<sup>645</sup>

This leaves the EU Commission with the development of competition policy and the application EU competition law through the application of fines as its primary tasks favoured by the General Court and the CJEU deference.<sup>646</sup> This reinforces the theory of institutional balance as provided in the Treaty on the Functioning of the European Union

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<sup>642</sup> *Ibid* at 999.

<sup>643</sup> B. Bailey, ‘Scope of review under Article 81 EC’ (2004) 41 CMLRev 1327 and Fritzsche, ‘Discretion, scope of judicial review and institutional balance in European law’ (2010) 47 CMLRev 361.

<sup>644</sup> Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

<sup>645</sup> *Ibid* para 1363 – 1365.

<sup>646</sup> Article 103 TFEU, Case C-119/97P *Ufex and Others v Commission* [1999] ECR I-1341 para 88.

and Regulation No. 1/2003. Moreover, as has been suggested here, this institutional balance might be the root of the perceived unfairness in the basic structure of EU antitrust enforcement, with the EU Commission both investigating and deciding in the driving seat, and a European judiciary that allegedly restricts itself to some sort of light review, in the back seat.<sup>647</sup>

For more than half century, the EU competition law enforcement system has been premised on an area of discretion being reserved to the EU Commission. Although the General Court has stated in many instances that it undertakes “an exhaustive review of both the Commission’s substantive findings of facts and its legal appraisal of those facts”<sup>648</sup>; such discretion coupled with a *de facto* deferential judicial review, makes it incompatible with the principle of effective judicial protection.<sup>649</sup>

However, such intensity of judicial review, meaning the deferential standard of judicial review, may be understandable if we consider that such deference is linked to the peculiar characteristics of the EU courts, to the effects of their judgements and to their functioning in a system in the course of progressive consolidation.<sup>650</sup> In addition, such deference may

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<sup>647</sup> Editorial comments, ‘Towards a more judicial approach? EU antitrust fines under scrutiny of fundamental rights’ [2011] 48 CMLRev 1406.

<sup>648</sup> See Case T-25/95 *Cimenteries CBR v Commission* [2000] ECR II-491 para 719 and Case C-204/00P *Aalborg Portland and Others v Commission* [2004] ECR I-123 para 49 and more recently Case C-272/09 *P – KME Germany and Others v Commission* judgement of 8 December 2011 para 103 and 106, not yet published.

<sup>649</sup> Renato Nazzini Renato Nazzini, ‘Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective’ [2012] 49 CMLRev (2012) at 998.

<sup>650</sup> See Paolo Mengozzi, ‘The European Union balance of powers and the case law related to EC external relations’ in Mario Monti, Nikolaus Von Und Zu Liechtenstein and Bo Versterdorf (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (Nomos Verlagsgesellschaft, Bilingual edition, 2007) p. 222.

also be sufficient<sup>651</sup> as long as the first instance decision maker satisfies the requirement of independence and impartiality as provided in Article 6 (1) ECHR.<sup>652</sup>

This has prompted some commentators to conclude that the current EU competition law enforcement regime, despite of its administrative nature; needs the decision adjudicator to be sufficiently detached from the prosecutor. If the decision maker were to be under no bias before any the case, then no legitimate doubt who arise as to his impartiality. However, lack of independence and impartiality together with the judicial deferential review, render the whole system “unconstitutional”.<sup>653</sup>

Yet, such particular concern of “constitutionality” could be met without any structural separation or amendment to the TFEU or the applicable regulation. A functional separation can be implemented within the EU Commission as long as the investigative and decisional functions are clearly separated. To this end, the Commissioner for competition would retain the ultimate power to adopt, reject or amend the draft decision as the basis for his own recommendation to the College of Commissioners, which would remain the ultimate decision maker.<sup>654</sup>

Whether the prosecutorial bias and the impartiality issue it originates could be remedied without any amendment to the TFEU or the implementing regulation, and without any structural reform to the EU Commission, is uncertain. Yet, the fact remains that the ultimate decision is taken by the College of Commissioners who do not know and have

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<sup>651</sup> *Sigma Radio Television Ltd v Cyprus* (App no 32181/04) ECHR 21 July 2011 para 154.

<sup>652</sup> *Dubus SA v France* (App no 5242/04) ECHR 11 June 2009 para 60.

<sup>653</sup> The General Court has also acknowledged that the legitimacy of the system depends on the existence of effective judicial review Case T-54/03 *Lafarge v Commission* [2008] ECR II-120 para 42.

<sup>654</sup> Renato Nazzini, ‘Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective’ [2012] 49 CMLRev 1005.

not heard of the case until the competition Commissioner, the only member explicitly entrusted with the responsibility for the protection of competition in the EU, presents the draft decision. Nevertheless, such draft decision is based, at the same time, on the interpretation of law and facts produced during the investigation that the personnel of Directorate General for Competition has done.

Therefore, even if we consider the body of Commissioners as an independent and impartial decision maker, the concern about a possible violation of the right to be heard is left unsolved since undertakings do not present their case nor do they present any evidence to the College of Commissioners. One could argue that the undertaking's right to be heard and right to a fair trial are well protected as part of the main functions of the Hearing Officer. However, the latter is attached to the Competition Commissioner who plays the prosecutor in the institutional make-up of competition law enforcement in the EU, leaving to the body of 28 Commissioners the adoption of final decision of competition law enforcement without hearing directly the views of the addressed companies.

In other words, this means that such decision is left dependant on the conclusions reached by the Competition Commissioner who does participate in the decision-making within the EU Commission but most importantly, he has the main role in the decision-shaping and such discretion is at the same time biased.<sup>655</sup> Indeed, a host of underlying factors including, political ideology as well as his own background, outlook and mentality shapes

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<sup>655</sup> Basil Markesinis, 'Judicial Mentality: Mental Disposition and Outlook as a Factor Impeding recourse to Foreign Law' [2006] 80 No. 4 Tulane Law Review 1375.

his decision-making.<sup>656</sup> This in turn, reinforces the theory of prosecutorial bias and thus, the inadequate protection of the infringers' guarantees.

On the other hand, one has to remember that the Court of Justice of the European Union is expected to be governed by the principle of consistency and should adjudicate cases with an eye to keep stable readings of the law.<sup>657</sup> Yet, this in no way means that it should hold itself whenever it is presented with an opportunity to clarify, expand or refine concepts and principles of law for the benefit of transparency and confidence in the rule of law which are essential for the competitive process to thrive as a goal of EU competition law.

This is particularly important for the CJEU since the General Court has shown willingness to clarify and refine the law as shown in *Alrosa*.<sup>658</sup> However, the CJEU decided not to take a more prominent role in the interpretation of EU competition law and reversed the judgment adopted by the GC, which ultimately meant that the CJEU effectively left the EU Commission in the driver's seat in that respect.<sup>659</sup>

Legal certainty has been undermined on another front too. As it was mentioned before, the EU Commission has shifted its enforcement policy of Article 101 and Article 102 TFEU to a policy based on settlements and commitments. Although the main argument here has been the possible disregard of the principle of proportionality in commitment

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<sup>656</sup> *Ibid* at 1378.

<sup>657</sup> Christian NK Franklin, 'The Burgeoning Principle of Consistency in EU Law' (2011) 30 *Yearbook of European Law* 01 at 42. See also E. Herlin-Karnell and Theodore Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' in *Cambridge Yearbook of European legal Studies (2012-2013)*, January 2013, p. 139.

<sup>658</sup> Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601 para 125, 126

<sup>659</sup> See Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 46.

decisions, the absence of supervision as to the adequacy of such commitments is also disappointing.

No matter how much the EU Commission wants to highlight the efficiency gains in the use of settlements and commitments to the point that even the Competition Commissioner states that fast moving markets would benefit from a quick resolution and restoring competition at an early stage is always preferable to lengthy proceedings.<sup>660</sup> The fact that commitment decisions are most probably, not going to be challenged by the offering undertakings, means that the number of appeals is reduced and hence the body of case law is not enhanced, resulting in a reduced body of cases that define the boundaries of competition law and assert the legal principles at stake.<sup>661</sup>

Although *Padilla* and *Edwards* have pointed to the positive externalities of adjudication, they also state that such externalities are lost where the parties, considering only their private interest, settle the case.<sup>662</sup> Furthermore, it has been pointed out that any welfare loss that society may suffer is likely to be outweighed by the more swift correction of market failures through commitment decisions.<sup>663</sup>

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<sup>660</sup> Joaquin Almunia, ‘Statement of VP Almunia on the Google Antitrust Investigation’ Speech delivered on 21 May 2012, Brussels. [http://europa.eu/rapid/press-release\\_SPEECH-12-372\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm?locale=en) (Accessed on 15 February 2014).

<sup>661</sup> Ian S. Forrester, ‘Creating new rules or closing easy cases? Policy consequences for public enforcement of settlements under Article 9 of Regulation 1/2003’, in *Claus-Dieter Ehlermann and Mel Marquis, eds., European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2010), p. 637.

<sup>662</sup> Jorge Padilla and Kirsten Edwards, ‘Antitrust Settlements in the EU: Private incentives and Enforcement Policy’ in *Claus-Dieter Ehlermann and Mel Marquis, eds., European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing, Oxford 2009).

<sup>663</sup> Wouter P.J. Wils, ‘The use of settlements in public antitrust enforcement: Objectives and Principles’ [2008] 31 World Competition 352.

Overall, whether it is the EU Commission decisions imposing fines or any other remedy or whether it adopts a commitment decision, it seems that precedents are not reliable predictors of the outcome of future rulings. Indeed, minimal differences in the facts among cases seem to justify the divergent methodological approaches and outcomes, which makes anyone wonder if there really is a principle of legal certainty applying within EU competition law enforcement.

The enforcement of the EU antitrust law system can only be considered to be effective when its ultimate goal is achieved, that is prevention.<sup>664</sup> The effectiveness of the antitrust law enforcement system consist of two components; negative general prevention aimed to discourage unlawful competition law conduct on the basis of deterrence and *ex post* sanctions, and positive general prevention pursued through instruments that foster the development of competition culture in which anticompetitive conducts are considered socially reprehensible.<sup>665</sup>

It is clear from the current system that the EU Commission has focused on negative prevention by escalating the amount of fines aimed to deter. Effective deterrence requires not only the imposition of fines, but public condemnation against anticompetitive conducts, since the latter affect the whole society. However, this condemnation is normally a precondition for deterrence to work effectively but the EU Commission did the opposite and it is building such condemnation by way of punishment.<sup>666</sup> This is

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<sup>664</sup> EU Commission, 'Fines for breaking EU Competition law' (Factsheet) November 2011. [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf) (Accessed on 20 February 2015).

<sup>665</sup> Alberto Pera and Giulia Codacci Pisanelli, 'Prevention of antitrust violations: which role for compliance programs?' [2013] 34 ECLR 5 p. 267.

<sup>666</sup> In this regard, see Caron Beaton-Wells and Christine Parker, 'Justifying Criminal sanctions for cartel conduct: a hard case' [2013] 1 OJAE 1 at 211. Although the authors discuss the condemnation as justification for criminalization but the latter works for the benefit of deterrence and thus, similarities can be drawn.

something worth considering and shall be discussed later as it could affect the effectiveness of the deterrent effect when imposing fines.

The focus on negative prevention has also resulted in the neglect of the use of other instruments in order to promote compliance with the EU competition rules such as compliance programs, which are among the tools that can increase the awareness of competition law.<sup>667</sup> Even more worryingly is the fact that the General Court and the Court of Justice of the EU have expressed that although the level of the fine set by the EU Commission does not represent a change in its policy that warrant specific explanation, it nonetheless represents a standard application of that policy.<sup>668</sup>

This means that if deterrence is the main weapon the EU Commission has in order to achieve prevention and the fining system is the main component of such deterrence policy, we can conclude that any sign of lack of legal certainty in the fining system renders the whole enforcement of EU competition law ineffective. Thus, legal certainty is an important principle since its observance can be considered as a mean to the social good of antitrust infringement prevention.

As has been mentioned earlier, legal certainty leads to efficiency as the former is the element that sustains the whole EU competition law enforcement system.<sup>669</sup> It would be hard to sustain a legal system where undertakings are in fear that the rights they are entitled to are not respected at any moment for short-term reasons of efficiency or

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<sup>667</sup> Damien Geradin, ‘Antitrust compliance programmes an optimal antitrust enforcement: a reply to Wouter Wils’ [2013] 1 OJAE 2 p. 325 – 346.

<sup>668</sup> Case T-155/06 *Tomra Systems and Others v Commission* [2010] ECR II-4361 para 315 and Case C-549/10 P *Tomra Systems and Others v Commission* not yet published para. 108.

<sup>669</sup> Klaus Mathis, *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law* (1<sup>st</sup> edn Springer, Lucerne 2009) p. 204.

efficacy. Legal certainty is thus, the basis for an effective internal market and thus, economic efficiency.

Yet the degree of discretion enjoyed by the EU Commission coupled with the deferential standard of review exercised by the General Court and the Court of Justice of the European Union, pose a significant threat to the respect of the principle of legal certainty. This is so because there is no clarification as to the limits of the decisions made by the enforcer and clarification of the law is in jeopardy if there is no active judicial review.

Legal certainty could be increased if the EU Commission redirects its enforcement policy to advance a compliance approach. Positive general prevention rather than deterrence could provide for greater transparency and improve companies' trust in the enforcement system. A responsive regulatory approach that follows the positive general prevention instruments would be perceived as fairer while also generating greater effectiveness.

In conclusion, we can hold that legal certainty is the main element of enforcement of EU competition law and any set of laws for that matter. Legal certainty provides the support for the promotion of compliance with the EU antitrust provisions, even more than the principle of proportionality does. The benefits derived from legal certainty make competition in the internal market even more effective, which in turn results in economic efficiency, the main purpose of competition policy.<sup>670</sup>

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<sup>670</sup> Commission Notice (EU) of 27 April 2004, 'Guidelines on the application of Article 101 (3) TFEU (Ex Article 81 (3) EC) [2004] OJ C101/97 hereafter, 'Guidelines on the application of Article 101 (3) TFEU' para 33. See also Case T-198/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-02969 para 118, 273.

Nevertheless, legal certainty does not operate alone and it is not a means neither an end itself, but is an element whose function is intertwined with the principle of proportionality and principles like equal treatment and legitimate expectations that work together to provide a fair and effective system as will be discussed below.



### 3.4 Principle of Equal Treatment.

Along with the principles of proportionality and legal certainty, the EU Commission is also not entitled to disregard is the principle of equal treatment.<sup>671</sup> This principle may be infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference is objectively justified,<sup>672</sup> or as AG *Tizzano* has put it, the fines must be equal for all undertakings which are in the same situation and that different conduct cannot be punished by the same penalty.<sup>673</sup> This principle also strengthens the effects of punishment since sanctions are perceived as reasonable, just and non-discriminatory if equality is protected.

Although the EU Fining Guidelines 2006 do not constitute the legal basis of the decisions by which the EU Commission establishes an infringement and imposes a fine, they do determine, generally and abstractly, the method that the EU Commission has bound itself to use. Particularly when establishing the amount of the fines to be imposed and, consequently, ensure legal certainty on the part of the undertakings.<sup>674</sup> This means that it would be discriminatory to apply different methods of calculating the fine to be imposed on undertakings that have participated in a cartel infringement.<sup>675</sup>

Nevertheless, when setting the amount of the fines, discrimination has been argued on appeal by the undertakings concerned. This has happened in cases involving small and

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<sup>671</sup> Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627 para 315, Case C-110/03 *Belgium v Commission* [2005] ECR I-2801 para 71.

<sup>672</sup> Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai Speciali Terni v Commission* [2001] ECR II-3765 para 237 and Case C-174/89 *Hoche v Commission* [1990] ECR I-2681 para 25 and Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129 para 309.

<sup>673</sup> Opinion of AG Tizzano of 8 July 2004 in Case C-189/02 P *Dansk Rorindistri v Commission* [2005] ECR I-5425 para 109.

<sup>674</sup> Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals v Commission* not yet published para 108.

<sup>675</sup> Case C280/98 P *Weig v Commission* [2000] ECR I-9757 para 63-68.

medium-sized undertakings complaining about the higher percentage their fines represent in respect of their turnover for any antitrust violation as compared with lower percentages applied on large and diversified undertakings. However, it should be recognized that such situation was recurrent when the 1998 EU Fining Guidelines applied according to the seriousness of the infringement without really taking into account neither the size of the undertaking nor the affected sales.<sup>676</sup>

Despite the discrimination claims, it cannot be denied that differentiation is allowed and it has been confirmed by several decisions where the EU Commission has been supported by the case-law from the General Court. In *ThyssenKrupp*, the GC established that ‘the EU Commission, in exercising its discretion, is required to fit the penalty to the individual conduct and specific characteristics of the undertakings concerned in order to ensure that, in each case, the EU competition rules are fully effective’.<sup>677</sup>

Hence, supported by the case law, the EU Commission has certainly applied differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition. In *Sorbates* for instance, the EU Commission deemed it necessary to apply differential treatment due to the considerable disparity in the market size of the undertaking participating in the infringement as it was possible within the scale of fines in the category of very serious infringements.<sup>678</sup>

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<sup>676</sup> See factsheet, ‘Fines for breaking EU Competition law’, 2011, p.2 on Europa website. [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf) (Accessed on 15 September 2014).

<sup>677</sup> Case T-144/07 *ThyssenKrupp Liften Ascenseurs v Commission* [2011] ECR II-5129 para 247.

<sup>678</sup> *Sorbates Cartel* [2005] OJ L182/20 para18. See also *Graphite electrodes* [2002] OJ L100/1 para.146-149.

According to the General Court, the principle of proportionality and equal treatment do not dictate that the starting amount of the fine should represent the same percentage of individual turnover for all the various members of a cartel.<sup>679</sup> The above mentioned gives support to the EU Commission's positive view when it justifies differential treatment since it is intended precisely to take into account the differences among the infringing undertakings.

This is particularly important and the General Court has pronounced itself repeatedly about the importance of differential treatment when companies are not in a comparable position. For instance, the GC has acknowledged that the method used to assess the duration of the infringement by progressive thresholds might have the effect of ignoring the differences of the companies that participated in the infringements.<sup>680</sup> However, in *EI du Pont de Nemours* the General Court did not censure the fact that differences were ignored since the setting of such thresholds complied with the principle of equal treatment and the principle of proportionality.<sup>681</sup>

Overall, the principle of equal treatment does not mean that all undertakings are going to be treated in the same way; it only guarantees that undertakings that share the same conditions will be treated equally and those, which do not share similarities will be treated differently. In this respect, the General Court has been active and has made pronouncements on the applicability and scope of the principle of equal treatment and it has even amended the EU Commission's decisions.

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<sup>679</sup> Case T-15/02 *BASF v Commission* [2006] ECR II-497 para 149.

<sup>680</sup> Case T-76/08 *EI du Pont de Nemours and Others v Commission* not yet reported para 118.

<sup>681</sup> *Ibid* para 119 and 120.

For instance, the GC has reduced the amount of the fine when the EU Commission punished in like manner the undertakings that were found to have committed two infringements and those which only committed one of them.<sup>682</sup> In this case, the General Court made reference to the principles of proportionality and equity establishing that the EU Commission cannot punish with the same degree of severity companies which do not share similar conditions and specifically those which do not share the same liability in respect to the commission of an antitrust violation.

In a later case, the General Court also reduced the starting amount of the fine but this time it reduced it because of the difference in the gravity of the infringement an undertaking committed as opposed to the rest of the co-infringers. In *Chalkor*,<sup>683</sup> the GC reduced the starting amount in order to take account of the fact that the EU Commission held that the undertaking was liable for participation only in one of the three branches of the cartel;<sup>684</sup> thus making it less serious as regards the gravity.<sup>685</sup>

In *BASF*,<sup>686</sup> the GC partially annulled the EU Commission's decision and carried out a new calculation of the fine to reflect the precise duration of the company's participation in the violation.<sup>687</sup> This was a more elaborated decision based on *Musique Diffusion*. In the latter case, the GC stated that to the extent to which reliance is to be placed on the turnover of undertakings involved in the same infringement, the period to be taken into

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<sup>682</sup> Case T-59/99 *Ventouris v Commission* [2003] ECR II-5257 para 219.

<sup>683</sup> Case T-21/05 *Chalkor v Commission* [2010] ECR II-1895.

<sup>684</sup> *Ibid* para 105.

<sup>685</sup> *Ibid* para 112 and para 184, mentioning the lesser gravity of the infringement by comparison with other undertakings. This judgement was later confirmed in Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085 para 99.

<sup>686</sup> T-101/05 *BASF and UCB v Commission* [2007] ECR II-4949.

<sup>687</sup> *Ibid* para 213 – 223.

consideration must be ascertained in such a way that the resulting turnovers are as comparable as possible.<sup>688</sup>

The above judgements not only reflect that, on occasion, the General Court is willing to exercise its unlimited jurisdiction when examining the question of the amount of the fine imposed.<sup>689</sup> They also show that the principles of equal treatment and proportionality are intertwined. Indeed, respecting the principle of equal treatment takes into account the differences between undertakings in respect to the exact duration of the infringement and its gravity leading to a reduction or even an increase of the fine; resulting in the imposition of a more proportional and fair punishment.

On the other hand, discrimination has also been argued in cases where the EU Leniency Notice 2002 and 2006 had been applied, when each company seeking to benefit from leniency is object of different treatment during the investigation and adjudication process.<sup>690</sup> The EU Commission can grant immunity or a reduction in fines in exchange for providing information and evidence in order to bring down secret cartels.<sup>691</sup>

According to settled case law, the EU Commission is not entitled, in its appraisal of the cooperation provided by members of a cartel, to disregard the principle of equal

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<sup>688</sup> Joined Cases C-100/80 to C-103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825 para 122. This consideration needs to be done for the purpose of determining the proportions between the fines to be imposed.

<sup>689</sup> T-101/05 *BASF and UCB v Commission* [2007] ECR II-4949 para 213 and 214. Note also that unlike the CJEU, the General Court is willing to interpret and expand the law and provide more guidance in EU competition law matters without leaving the interpretative function to the EU Commission.

<sup>690</sup> Since EU Fining Guidelines 2006 entered into force, 25 out of 30 cartels were brought to the EU Commission's attention by way of immunity applications, 16 cases were brought under the 2002 EU Leniency Notice and 9 cases under the 2006 EU Leniency Notice.

<sup>691</sup> As mentioned above, 25 out of 30 cartel cases benefited from immunity and 4 of the 5 remaining cases benefited from reductions only, the later available under 2002 EU Leniency Notice. It was *E.ON/GDF* (Case COMP/39.401) Commission Decision 2009/C 248/05 the only case without the benefit of leniency or reduction there available.

treatment.<sup>692</sup> Furthermore, the General Court and the CJEU have also stated that the principle of equality is not in conflict with such reduction or exemption from the fine as a result of cooperation during the administrative procedure, if such cooperation allowed the EU Commission to identify and probe the infringement more easily.<sup>693</sup>

If anything, such differentiation, according to the promptness and quality of the evidence by which companies are ranked; reinforces the deterrence factor because the uncertainty about the ultimate size of the penalty is increased. This is because, by taking advantage of the uncertainty that involves the use of the Prisoner's Dilemma, the EU Commission can expect the incumbent undertakings to rush to its door at the first whiff of competition law liability. This prompts any company to provide information relative to the antitrust infringement and thus reduce the risk of paying a hefty fine.

We must remember that fines are an instrument of competition policy and as such, the EU Commission is allowed a margin of discretion when fixing their amount, "in order that it may channel the conduct of undertakings towards observance of the competition rules."<sup>694</sup> In such context, leniency is also applied as a way to channel companies' conduct and it too results as "a matter of the Commission's discretion".<sup>695</sup>

Therefore, uncertainty will play an important role when it comes to the discovery of the cartel and the setting of the amount of fines for such infringements, both of which are a

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<sup>692</sup> Case C-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881 para240.

<sup>693</sup> Case C-297/98 *SCA Holding v Commission* [2000] ECR I-10101 para 36, Case T-21/99 *Dansk Rorindustrie and Others v Commission* [2002] ECR II -1681 para 245.

<sup>694</sup> Case T-322/01 *Roquette Frères v Commission* [2006] ECR II-3137 para 223.

<sup>695</sup> Commission decision of 01 October 2003, *Sorbates*, not published in Official Journal but on Europa website, Case COMP/E-1/37.370 para 421.

[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37370/37370\\_44\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37370/37370_44_1.pdf) (Accessed on 20 June 2015).

matter of policy only to be exercised by the EU Commission itself. That importance has been highlighted by the GC as it stated that, “given that the climate of uncertainty that is created within the cartel members by encouraging denunciation to the EU Commission. That uncertainty results precisely from the fact that the cartel participants know that only one of them can benefit from immunity from being fined by denouncing the other participants in the infringement.”<sup>696</sup>

Yet again, even as instruments of competition policy, the leniency notice and the fining guidelines are not exempted from observance of general law principles,<sup>697</sup> especially equal treatment.<sup>698</sup> This is difficult to reconcile since leniency inevitably raises a sense of unfairness because recipients of immunity or reductions are equally guilty of the same serious infringement or are, in principle, in the same situation.

Nevertheless, The General Court has stated that the discovery and punishment of cartels outweigh the interest in sanctioning those undertakings that enabled the EU Commission to detect and punish such cartels.<sup>699</sup> There is no doubt that, as a matter of policy, the EU Leniency Notice 2006 has remained proactive as its predecessors but it is also important that such policy takes into account the limits imposed by higher law. In this regard, it is important for undertaking affected by this policy, the belief survives that despite the difference in treatment and the significant fine reductions that are granted to one undertaking and that are denied to others, everyone is equal before the law.<sup>700</sup>

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<sup>696</sup> Case T-127/04 *KME v Commission* [2009] ECR II-1167 para 130.

<sup>697</sup> Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627 para 409.

<sup>698</sup> Case T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni v Commission* [2001] ECR II-3757 para 106.

<sup>699</sup> Case T-138/07 *Schindler Holding and Others v Commission* [2011] ECR II-04819 para 168.

<sup>700</sup> Dirk Arts, ‘Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken.’, [2012] 1 *Tijdschrift voor Belgische Mededinging* 18.

In spite of it, for the principle of equal treatment to be respected, the undertakings participants in the competition law infringement should be in a position, which puts them in a similar situation, one another. In this regard, the General Court also considered that in view of similar situations of the infringers, it is not appropriate to apply any differential treatment to them for the purpose of calculating the fine.<sup>701</sup>

Nonetheless, in this context one should keep in mind that the cooperation provided by the undertakings participant in the cartel can be of three kinds. In first place, we have the cooperation provided in the application of the Leniency Notice second, we find the cooperation provided outside the EU Leniency Notice 2006 and third, cooperation that could be considered both within and outside the Leniency Notice. This is particularly important since such differentiation is enough to justify difference of treatment.<sup>702</sup>

Once this condition has been established, the EU Commission must take into account the facts, in order to decide whether the applicants were in a comparable position or not within the kind of cooperation provided.<sup>703</sup> However, discrimination can only be indicated by assessing the quality and usefulness of the cooperation provided by an undertaking by reference to the contributions made by other undertakings.<sup>704</sup> In this regard, the EU Commission has justification to attribute limited value to cooperation, which merely corroborates evidence obtained at an early stage of an inquiry.<sup>705</sup>

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<sup>701</sup> Case T-144/07 *ThyssenKrupp Liften Ascenseurs v Commission* [2011] ECR II-5129 para 262.

<sup>702</sup> Case T-132/07 *Fuji Electric v Commission* [2011] ECR II-04091 para 146.

<sup>703</sup> The facts to be considered could be the precedence in supplying information, its quality and usefulness. See Case T-25/05 *KME Germany and Others v Commission* [2010] ECR II-0091 para 139 and 140.

<sup>704</sup> Case C-328/05 P - *SGL Carbon v Commission* [2007] ECR I-3921 para 81.

<sup>705</sup> Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223 para 301, Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407 para 455.

The principle of equal treatment, as explained above; is breached when comparable situations are treated differently or when different situations are treated in the same way unless such treatment is objectively justified;<sup>706</sup> both in the application of the EU Fining Guidelines 2006 and, in case of cartel infringements, in the application of the EU Leniency Notice 2006. Nevertheless, differential treatment is allowed in order to take account of the differences of the undertakings concerned.

However, even when comparable positions can be found, the EU Commission enjoys discretion to assess the evidence provided and the General Court and the CJEU can only offer limited review as to the lawfulness of such exercise of discretion. For instance, in case of leniency; the review carried out by the General Court is limited and only an error of assessment can be censured.<sup>707</sup> The same situation applies when the issue under review is the cooperation provided outside leniency.<sup>708</sup>

In respect to the amount of the fines imposed, the General Court has also stated that the EU Commission can treat differently two or more undertakings found to have participated in the same infringement, as long as it gives a coherent and objective justification. In the particular case of *Hoechst*, the General Court considered as void the justification for a steep increase in the fine of an undertaking as the EU Commission subjected it to unequal treatment since the applicant did not enjoy a comparable position as the other

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<sup>706</sup> Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai specialiTerni v Commission* [2001] ECR II-3757 para 237

<sup>707</sup> Case T-77/08 *Dow Chemical v Commission* not yet published para 164, Case T-410/03 *Hoechst v Commission* [2008] ECR II-0881 para 555 and 556.

<sup>708</sup> Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921 para 81, referring to the quality and usefulness of the cooperation to allow unequal treatment.

undertakings involved and yet, it was treated in the same way.<sup>709</sup> It is important to note that the justification was not objective or coherent, otherwise the GC would have agreed with the EU Commission.

It is true that on a number of occasions, the General Court and the CJEU have used its unlimited jurisdiction to amend the amount of the fines imposed by the EU Commission either to reduce it or to increase it. However, that unlimited jurisdiction was exercised when the EU Commission failed to objectively justify the elements and criteria taken into account that resulted in such fine. This means that the unlimited jurisdiction enjoyed by General Court or the Court of Justice of the European Union is present only due to the EU Commission's sloppiness and the minor or significant differentiation, if properly motivated, does not limit the exercise of the wide discretion enjoyed by the EU Commission.

The above may be true if we consider the *Gas Insulated Switchgear* cartel case where the GC annulled the fines imposed on Mitsubishi and Toshiba because in setting these fines, the EU Commission used sales figures for a different reference year than for other cartelists.<sup>710</sup> Here, the GC stated that, although the EU Commission was allowed to differentiate, it should be seen whether there was an objective justification for that difference in treatment.<sup>711</sup> Despite the fact that the GC deemed as legitimate the aim of different treatment,<sup>712</sup> it considered that the use of different reference years violated the

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<sup>709</sup> Case T-410/03 *Hoechst v Commission* [2008] ECR II-0881 para 311.

<sup>710</sup> Case T-113/07 *Toshiba v Commission* [2011] ECR II-3989.

<sup>711</sup> *Ibid* para 287.

<sup>712</sup> *Ibid* para 290.

principle of equal treatment and it even gave an example of another method by which the EU Commission could have achieved its objective.<sup>713</sup>

In line to what has been described and explained so far, we can conclude that the principles of equal treatment and that of proportionality are closely related to one another whether their respect relates to the application of the EU Fining Guidelines 2006 or whether it relates to the EU Leniency Notice 2006.<sup>714</sup> Now, what rest to be seen is how the principle of equal treatment is reconciled with the principle of legality.

In this regard, it is important to refer to *SCA Holding*.<sup>715</sup> In this particular case, the EU Commission awarded reductions in the fines to be imposed on undertakings, which did not contest the essential factual allegations upon which it relied against them. On appeal, the General Court regarded those reductions to be lawful in so far as the undertakings concerned have expressly stated that they are not contesting those allegations.<sup>716</sup>

However, the GC further stated that even if the EU Commission applied an unlawful criterion by reducing the fines imposed on undertakings which had not expressly stated that they were not contesting the factual allegations, it is necessary that respect for the principle of equal treatment by reconciled with the principle of legality. According to the latter, a person may not rely, in support of his claim, on an unlawful act in favour of a third party.<sup>717</sup>

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<sup>713</sup> *Ibid* para 291.

<sup>714</sup> Case T-120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II-4441, see below in n. 602.

<sup>715</sup> Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373.

<sup>716</sup> *Ibid* para 159.

<sup>717</sup> *Ibid* para 160 also referencing Case C-134/84 *Williams v Court of Auditors* [1985] ECR 2225 para 14.

This case is important since the plaintiff was trying to establish its right not to be discriminated to an unlawful reduction in the fine and it was established that the principle of legality has precedence and outweighs the principle of equal treatment. We can also argue that it was the relation between the principle of equal treatment, legality and that of legal certainty that drove the EU Commission to finally adopt the EU Settlement Notice 2008 and thus, avoid appeals based on discrimination. On the other hand, it is unacceptable that it took it more than ten years to do so.<sup>718</sup>

The principle of equal treatment and the principle of legal certainty are also related in the same way. Although the GC has already stated that the fining guidelines do not constitute a legal basis, they do however; ensure legal certainty on the part of the undertakings.<sup>719</sup> As has been mentioned above, the GC has also stated that the principle of equal treatment must be reconciled with the respect of the principle of legality,<sup>720</sup> even stating that the principle of equal treatment cannot be invoked where there is illegality.<sup>721</sup>

However, the GC has further elaborated on these points and it has made clear that, as regards to the EU Commission's practice in taking decisions; that practice does not in itself serve as a legal framework for fines in competition matters.<sup>722</sup> That legal framework referred is solely defined in Regulation No. 1/2003 and in the EU Fining Guidelines 2006.<sup>723</sup> Furthermore, operators cannot place a legitimate expectation in the maintenance

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<sup>718</sup> The judgment against *SCA Holding* was delivered on 14 May 1998 and the EU Settlement Notice was announced in June 2008.

<sup>719</sup> Case C-213/02 P *Dansk Rorindustri and Others v Commission* [2005] ECR I -5425 para 213 and Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals v Commission* not yet published para 108.

<sup>720</sup> Case T-16/99 *Løgstør Rør v Commission* [2002] ECR II-1633 para 350.

<sup>721</sup> Case T-86/95 *Compagnie Générale Maritime and Others v Commission* [2002] ECR II-1011 para 242.

<sup>722</sup> Case T-203/01 *Michelin v Commission* [2003] ECR II-4071 para 292.

<sup>723</sup> *Ibid* para 294.

of an existing situation that might be altered by the EU Commission in the exercise of its discretion.<sup>724</sup>

As can be observed, the General Court makes a distinction in the scope of application of the principle of equal treatment between two kinds of practices that can be identified in the EU Commission's decision-making. On the one hand the GC differentiates the practices encompassed within the legal framework, meaning the ones contained in Regulation No.1/2003 or in the EU Fining Guidelines 2006 even when the former is a hard-law instrument and the latter a soft-law instrument. That differentiation is made against those practices that are outside such legal framework. This is the main distinction in which the respect of the principle of legal certainty is based. Whether this is the very same criterion that is also used as the basis for the principle of legitimate expectations will be discussed in Section 3.5 below.

On the other hand, the GC makes another distinction within the practices outside the legal framework. First, the General Court considers as unlawful the practices that are not to be found within those practices that might be altered by the EU Commission discretion. Hence, there are two types of practices, those considered as unlawful practices which are contrary to the principle of legality,<sup>725</sup> and the practices that might be subject to discretion from the EU Commission.<sup>726</sup> Both practices are to be taken into account as the main base element in which the principle of equal treatment is applied. This is also the main

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<sup>724</sup> Case T-410/03 *Hoechst v Commission* [2008] ECR II-0881 para 372.

<sup>725</sup> Case T-120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II-4441 para 77. From this, it can also be understood that the Leniency Notice 2006 and the Settlement Notice 2008 do provide legal certainty as well.

<sup>726</sup> Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739 para 239.

distinction by which another principle can be expected to be applied, that is the principle of legitimate expectations.

Nevertheless, even when it has been assured that the EU Fining Guidelines 2006 provide legal certainty,<sup>727</sup> the EU Commission is empowered to raise the level of fines at any point if it finds that the previous level is not sufficient to ensure a deterrent effect of fines.<sup>728</sup> In this regard, the EU Commission also retains certain discretion when making a global assessment of the size of any reduction in the fines to reflect attenuating circumstances when there is no mandatory indication in the fining guidelines of the attenuating circumstances that may be taken into account.<sup>729</sup> Thus, the EU Commission is not bound by its previous decisions, in regard to mitigating factors, to follow any criterion applied in the exercise of its discretion and even when it has erred when a benefit was granted to a third party on the base of an unlawful act.<sup>730</sup>

Some authors point to limited situations where the principle of equal treatment is actually respected,<sup>731</sup> particularly in situations involving undertakings to the same infringement, as it was the case in *Toshiba*.<sup>732</sup> Nonetheless, because the EU Commission has the ability to significantly vary the amount of the fines according to the individual infringement and the particularities of any given case,<sup>733</sup> in pursuit of its goal to achieve specific and general

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<sup>727</sup> Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals v Commission* not yet published para 108.

<sup>728</sup> Joined Cases C-100 to 103/80 *Musique Diffusion française v Commission* [1983] ECR 1825 para 108-09.

<sup>729</sup> Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223 para 275.

<sup>730</sup> Case T-461/07 *Visa Europe and Visa International Service v Commission* [2011] ECR-II 1729 para 217-219.

<sup>731</sup> Katharina Voss, ‘The Principle of Equality: A Limit to the Commission’s Discretion in EU Competition Law Enforcement’ (2013) 6 Global Antitrust Review at 165 where she argues that the applicability of the principle of equal treatment is limited to cases where parties to the same case should be treated equally.

<sup>732</sup> Case T-113/07 *Toshiba v Commission* [2011] ECR II-3989 para 287.

<sup>733</sup> Recitals 27 and 37 of the EU Fining Guidelines 2006.

deterrence,<sup>734</sup> it has a significant leeway for action. It is the exercise of this discretion justified to protect the effectiveness of competition law,<sup>735</sup> which ultimately leaves undertakings with the sole option to argue that the EU Commission violates the principle of equal treatment.<sup>736</sup>

In conclusion, there is limited if not worthless observance of the principle of equal treatment from the EU Commission on the one hand, and limited protection from the GC and CJEU on the other. A system as such cannot be relied on, and this has serious consequences to the application of the EU Leniency Notice 2006 but also about the unfairness of the EU competition law fining system if discrimination is perceived while using the objective justification argument.

Equal treatment must also be respected in the application of the Settlement Notice 2008, the imposition of remedies and adoption of commitment decisions. The EU Commission is again left, with a significant margin action to overcome the difficulty that might suppose the respect of such fundamental principle in the application of those instruments of guidance that should provide legitimate expectations, to say the least.

Predictability is provided too, by equal treatment and the Hearing Officer should have more involvement in its observance within the EU Commission own investigation and decision making process. This way, it can build a reputation based on a clear practice that

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<sup>734</sup> Ibid recital 4 and the case law there referred.

<sup>735</sup> Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739 para 239.

<sup>736</sup> Case T-24/05 *Alliance One International and Others v Commission* [2010] ECR II-5329 para 113-119 and 159. Especially when the EU Commission does not consistently apply its rules in respect of the principle of equal treatment.

seeks to protect the undertakings rights and provide certainty for future investigations even if it is by way of legitimate expectations as shall be explained in Section 3.5 below.

### 3.5 Principle of Legitimate Expectations.

The principle of legitimate expectations is another principle of general observance and just like the principle of equal treatment, it also seems dependent on whether the EU Commission is in exercise of its discretion and hence, it does affect the efficacy of the fining system and the effectiveness of the EU antitrust law enforcement.

According to the Court of Justice of the European Union, the principle of the protection of legitimate expectations is one of the fundamental principles of the EU. However, there cannot be a legitimate expectation that an existing situation, which is capable of being altered by the EU institutions in the exercise of their discretionary power, will be maintained.<sup>737</sup> This is something that is particularly true in an area such as the common organization of the markets whose purpose involves constant adjustments to meet changes in the economic situation.<sup>738</sup>

On the other hand, this principle is a standard that imposes an obligation on the EU Commission not to depart from the rules of law, which it is obliged to comply with at all time, but also not to depart from the rules it had imposed on itself.<sup>739</sup> Indeed, such rules of practice, through their publication, impose a limit to its discretion and it may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment.<sup>740</sup> Hence, we can initially presume that the respect of the principle of legitimate expectations is applied in order to provide a balance between the discretion

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<sup>737</sup> Case T-410/03 *Hoechst v Commission* [2008] ECR II-0881 para 372.

<sup>738</sup> Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-0395 para 33.

<sup>739</sup> In regards to its soft-law in which we can find the EU Cartel Settlement Notice, the 2006 Leniency Notice, the EU Fining Guidelines 2006 and the more recently published Commission Notice on Best Practices in proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6 on 20 October 2011.

<sup>740</sup> Case T-73/04 *Carbone-Lorraine v Commission* [2008] ECR II-2661 para 71.

enjoyed by the EU Commission and the way the limitation of that discretion is exercised in order to provide certainty to the undertakings subject to the EU competition law proceedings.

Nevertheless, it should be recognized that although full foreseeability may lead to under deterrence in some cases and disproportionately high fines in others,<sup>741</sup> it is often argued by undertakings that more predictable fines would work better in order to have a fairer system with a proper legal basis for an effective antitrust system.<sup>742</sup>

Even so, full foreseeability only goes so far, since it is the undertakings' conduct, the one that ultimately leads to the commission of an antitrust offence. In this regard, based on the fundamental idea in law and economics of the rational agent, it is assumed that people always, or at least in general, act rationally. According to this economic approach, the rational agent is able to rationally assess the options that are presented to him and rationally balance different outcomes in order to find the optimal one.

Therefore, considering that companies or the individuals taking decision inside them are risk averters, *Coffee* argues that a less determinate structure for setting fines generates more deterrence due to the increase in marginal costs.<sup>743</sup> In his view, excessive precision as to the amount of the sanctions is likely to weaken the moral effects of the imposition of the fine *per se*.<sup>744</sup>

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<sup>741</sup> G. Des Rosiers, 'Hear No Evil, See No Evil, Speak No Evil? The Effects of Guidelines Sentencing on the Behaviour on Corporations and their Insiders' [1997] 18 *Research in Law and Economics* 65 at 75.

<sup>742</sup> Case T-279/02 *Degussa v Commission* [2006] ECR II-00897 para 34 and Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-03255 para 49.

<sup>743</sup> John Coffee, 'Corporate Crime and Punishment: A Non Chicago View of the Economics of Criminal Sanctions' [1980] 17 *ACLR* 419.

<sup>744</sup> *Ibid* at 430.

If a fine is not high enough to deter, precision may lead some undertakings that would otherwise have abided with the law, to conclude that they have an interest in committing competition law infringements.<sup>745</sup> On the other hand, it may be wrongly assumed that people act rationally. This criticism comes from a number of psychological observations and due to the fact that neoclassical economics fails to take account of cognitive biases such as the hindsight bias and the overconfidence bias which are now incorporated in the research of Behavioural Economics.<sup>746</sup>

Nevertheless, for the effectiveness of EU competition law, transparency is an indispensable element and in order to increase transparency, the EU Fining Guidelines 2006 have imposed limits to its discretion and bound itself to a standard method to be used in assessing the fines imposed by that decision and thus providing legal certainty.<sup>747</sup> However, the EU Court of Justice has also held that previous practice is not binding for the EU Commission since it is not part of the actual legal framework.<sup>748</sup> Hence, it can be more accurate to consider that the fining system generates legitimate expectations rather than legal certainty.

It has also been argued that, the principle of legitimate expectations must also comprise the criteria that the EU Commission intends to apply in all areas where the EU Commission exercises its discretion when enforcing EU competition law. This means not only the criteria involved in the application of the EU Fining Guidelines 2006 but also in

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<sup>745</sup> Ibid at 431. Law abiding companies would comply without making any calculations in respect to the costs and benefits.

<sup>746</sup> Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioural Economics' [2003] 93 The American Economic Review 05 p. 1449 – 1475.

<sup>747</sup> Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals v Commission* not yet published para 108.

<sup>748</sup> Case C-549/10 P *Tomra and Others v Commission* not yet published para 104.

the application of the EU Leniency Notice 2006, and the 2008 EU Cartel Settlement Notice, the consequence of which is a self-limitation of the wide discretion.<sup>749</sup>

However, one should keep in mind that the EU Commission has wide discretion in many areas throughout the enforcement of EU competition law and the above mentioned areas are covered but not limited to the use of such discretion. Nevertheless, at least the EU Commission, in its EU Leniency Notice 2006 point 38, has acknowledged the creation and reliability of legitimate expectations that such notice would entail.

Despite the calls for the self-limitation of discretion afforded to the EU Commission, so that the principle of legitimate expectations can be enhanced, the EU Commission has recognized some instances where effective cooperation is recognised. In the particular case, effective cooperation provided during the investigation by an undertakings participant to the infringement, could still be considered a mitigating circumstance outside the scope of the EU Leniency Notice 2006.<sup>750</sup> Nonetheless, this may also mean taking the opposite path and increasing its power of discretion.

The Court of Justice of the EU has also stated, just to make clear that it does not intend to limit the EU Commission's discretion; that the principle of equal treatment does not require the EU Commission to recognize such cooperation during the administrative procedure. In its view, cooperation cannot be regarded as a mitigating circumstance merely because the EU Commission recognized a similar situation as a mitigating one in

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<sup>749</sup> Case T-59/02 *Archer Daniels Midland v Commission* [2006] ECR II-3627 para 409.

<sup>750</sup> Case T-13/03 *Nintendo and Nintendo of Europe v Commission* [2009] ECR II-00975 para 160-163. Although this case dealt with an infringement of a vertical nature and thus, the Leniency Notice did not apply.

another case.<sup>751</sup> Although it may be obvious that the principle of equal treatment has been compromised, it has a strong effect in detriment to the principle of legitimate expectations too.

Furthermore, the EU Commission does not seem to be bound by the EU Leniency Notice 2006 requirements and has assessed the cooperation differently on an ad hoc basis. Under the argument that cooperation provided by any undertaking, and the evidence derived from it; cannot be qualified as being of “substantial” added value, the EU Commission stretches the broad concept of “substantial” to either grant or decline immunity or reduction applications, depending on the particular circumstances of each case.<sup>752</sup>

This is true if we consider that the meaning of ‘substantial added value’ of the cooperation has not been clearly interpreted by the Court of Justice of the European Union. The General Court has limited itself to state that the EU Commission has wide discretion in assessing the quality and usefulness of the cooperation provided and, only a manifest error of assessment can be censured.<sup>753</sup>

In both cases, the assessment of evidence within the scope of leniency and outside its scope; it appears that the principle of equal treatment and that of legitimate expectations had been outweighed by the desire to maintain the EU Commission’s discretion when it decides not to grant immunity or reductions on the amount of the fines. This is done so, under the argument that the evidence must be ‘decisive’ and of ‘substantial added value.’

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<sup>751</sup> Case C-511/06 P *Archer Daniels Midland v Commission* [2009] ECR I-05843 para 104,105.

<sup>752</sup> See *Marine Hoses* (Case COMP/39406) Commission Decision of 28.01.2009 para 496.

[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39406/39406\\_1902\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39406/39406_1902_1.pdf) (Accessed on 23 January 2015).

<sup>753</sup> Case T-13/03 *Nintendo and Nintendo of Europe v Commission* [2009] ECR II-00975 para 161.

As a result, the lack of transparency has undermined the principle of legal certainty as undertakings cooperating within or outside the EU Leniency Notice 2006 can keep providing information about the existence and functioning of the cartel without having the certainty that their cooperation will be awarded. Most importantly, such lack of compromise between competing values also undermines the values of justice and fairness.

Leniency and reduction grants depend on timing and content and therefore, the EU Commission directs its attention to the latter as timing, although an element of utmost importance; is a straightforward way to differentiate treatment. In *Solvay* for instance, the General Court considered that the time of the filing for leniency, was the element of utmost importance in the balance for assessing and granting either leniency or reductions<sup>754</sup>

Hence, focusing on content means that the assessment of whether the evidence provided complies with the quality requirements is not conducted in isolation but is carried out in comparison with the evidence that the EU Commission has at the time of the leniency filing. Nevertheless, in *ThyssenKrupp* the General Court declared that one person cannot rely on the protection of legitimate expectations unless he has been given precise assurances by the authorities.<sup>755</sup> What may constitute an assurance is information that is precise, unconditional and consistent which comes from an authorised and reliable source.<sup>756</sup> This in turn, makes it easy for the EU Commission to justify different treatment within its discretionary power, which makes it almost impossible to draw legitimate expectations from those decisions.

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<sup>754</sup> Case T-186/06 *Solvay v Commission* [2011] ECR II-02836 para 365.

<sup>755</sup> Case T-144/07 *ThyssenKrupp Liften Ascenseurs v Commission* [2011] ECR II-5129 para 421

<sup>756</sup> *Ibid* para 422.

On the other hand, the General Court has stated that the discovery and termination of cartels outweighs the need to punish the undertakings whose information allowed the uncovering of those infringements.<sup>757</sup> Following the law and economics logic of this system, only one cartel member can have the benefit of immunity given that the effect being sought is to create an environment of uncertainty within cartels by encouraging companies to come forward with information.<sup>758</sup>

In addition to the above mentioned, the General Court and the Court of Justice of the EU have indicated that the voluntary nature of leniency applications, is a legitimate criterion to make a distinction whether or not to grant immunity or reductions. According to the judicial bodies, there is no unequal treatment between an undertaking which “chooses freely to cooperate and one which refuses to do so, since the conduct of the first one is different from that of the second, thus justifying different treatment and different punishment.”<sup>759</sup>

In *KME*, the CJEU claimed that only an undertaking, which is the first to adduce decisive evidence of the cartel’s existence, would benefit from non-imposition of a fine or a very substantial reduction in its amount.<sup>760</sup> What is it that constitutes ‘decisive’ evidence is something that needs further clarification as it widens the area in which the EU

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<sup>757</sup> Case T-138/07 *Schindler Holding and Others v Commission* [2011] ECR II-04819 para 168.

<sup>758</sup> Case T-25/05 *KME Germany and Others v Commission* [2010] ECR II-0091 para 137.

<sup>759</sup> Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré v Commission* [2007] ECR II-00947 para 677. See also Case C-272/09 P.

<sup>760</sup> Case C-272/09 P *KME Germany and Others v Commission* [2011] ECR I-12789 *KME Germany and Others v Commission* judgement of 8 December 2011 para 78 not yet published.

Commission can exercise its discretion. Thus, it is for each undertaking in a cartel to decide whether and at what point it wishes to avail itself of the 2006 EU Leniency Notice.<sup>761</sup>

Furthermore, the General Court later pointed out that in the context of a leniency policy, “it is permissible for the Commission to grant larger fine reductions to undertakings which cooperate with it spontaneously than to undertakings which do not.”<sup>762</sup> Hence, not only do the decisive character of the evidence or the substantial added value derived from it, but also the spontaneous nature of the cooperation increases the discretion already enjoyed by the EU Commission.

It must be pointed out that the argument here is that the discretion enjoyed by the EU Commission concerns the violation of the principle of equal treatment between undertakings cooperating with the former, either within the scope of the 2006 EU Leniency Notice or outside its scope. Even in situations where both companies are providing cooperation within and outside leniency at the same time. Such comparison cannot be made between two undertakings when one cooperates through leniency and the other one does not.

However, it seems that even if a pattern could be established as to what the EU Commission could consider a safe harbour in order for cooperation and evidence to be characterised as decisive, substantial and spontaneous and thus be granted immunity or reductions based on previous decisions, such situation would not hold. The EU Commission can still shield itself behind the case law according to which, the EU

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<sup>761</sup> Case T-18/05 *IMI and Others v Commission* [2010] ECR II-1769 para 129 and 130.

<sup>762</sup> Case T-127/04 *KME v Commission* [2009] ECR II-1167 para 143.

Commission's previous practice is not binding since it is not part of the legal framework.<sup>763</sup>

Yet, even if the previous practice lacks the formal legal character to be binding on the EU Commission, the departure from that practice requires the EU Commission to state the reasons for which it considers that the information provided by each undertaking does not justify a reduction of the fine.<sup>764</sup> On the other hand, the General Court also added that it is for the undertakings to show that in the absence of such information provided voluntarily by the undertakings, the EU Commission would not have been in a position to prove the essential elements of the infringement and therefore, adopt a decision imposing fines.<sup>765</sup>

This only means that it is ultimately up to the undertakings concerned, to establish, on appeal at least, the objective justification as to the value of the information provided by them. This is the alternative to having the EU Commission objectively justifying the differential treatment, which at the same time translates in the application of the principle of legitimate expectations being respected on an *ad hoc* basis.

There is also a different matter as to whether the EU Fining Guidelines 2006 should be considered as a practice that is subject to the discretionary powers of the EU Commission within the legal framework or out of it. On the one hand, the General Court has expressed that the EU Commission's practice in taking decisions, which could encompass the EU Fining Guidelines 2006, the EU Leniency Notice 2006 and the EU Settlement Notice

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<sup>763</sup> Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935 para 205.

<sup>764</sup> Case T-214/06 *Imperial Chemical Industries v Commission* not yet published para 184.

<sup>765</sup> *Ibid* para 185.

2008, does not serve in itself as a legal framework for fines in competition matters. Nonetheless, the GC has also stated that the EU Commission's practice ensures legal certainty on the part of the undertakings.<sup>766</sup> In another case, it too stated that the legal framework is defined by Regulation No. 1/2003<sup>767</sup> and by the EU Fining Guidelines 2006.<sup>768</sup>

Hence, even when the case law is clear that the fining guidelines should provide legal certainty, it is also clear that the character of such guidelines is that of rules of conduct of general application and thus recognizing their soft-law dimension.<sup>769</sup> This sets them on a different level from the legal framework enjoyed by the Regulation No. 1/2003, and undertakings cannot place legitimate expectations in the maintenance of an existing situation that might be altered by the EU Commission in the exercise of its discretion.<sup>770</sup>

In the particular case of *Denki Kagaku*, the General Court stated that as to the level of fines or the method of calculating those fines, the undertakings concerned cannot place legitimate expectations.<sup>771</sup> It further stated that applicants should take into account the possibility that, after the infringement is committed, the EU Commission can decide to adopt and apply new guidelines on the method on setting fines.<sup>772</sup>

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<sup>766</sup> Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425 para 213.

<sup>767</sup> Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705 para 234.

<sup>768</sup> Case T-203/01 *Michelin v Commission* [2003] ECR II-4071 para 292.

<sup>769</sup> Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals v Commission* para 115, not yet reported.

<sup>770</sup> Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-0395 para 33 and Case T-410/03 *Hoechst v Commission* [2008] ECR II-0881 para 372.

<sup>771</sup> Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals v Commission* not yet reported.

<sup>772</sup> *Ibid* para 116. The General Court that this should be expected in light of the case law. It is not clear what the latter would mean.

In conclusion, once again the effectiveness of the EU antitrust law enforcement system is at odds as the main tools the EU Commission has at its disposal consist of soft law instruments containing the previous practices that would normally mean a source of legitimate expectations to say the least. However, a wide exercise of discretion is provided in those instruments for the EU Commission to *effectively* apply EU competition law and policy and both the General Court and the CJEU have kept a marginal standard of review that makes previous decisions and the practices leading to such decisions, unreliable.

So far we have discussed important principles of law that if respected, give the idea of a fair EU competition law enforcement system that is focused on deterrence but with a clear determination to highlight the importance of the robustness of due process. To this end, the respect and protection of such principles will be reflected on the effective exercise of the rights and obligations that the EU citizens derive from the direct application of EU antitrust rules, especially from Articles 101 and 102 TFEU. To that end, the EU Commission, the GC, the CJEU, the NCAs and judicial bodies from the Member States should secure the observance of the principle of effectiveness, which will be discussed below.



### 3.6 Principles of Equivalence and Effectiveness.

In regard to the principles related to the efficiency and effectiveness of the EU antitrust law enforcement, the principles of equivalence and effectiveness are general principles of EU law that must also apply and which compel Member States (MS) to provide for effective sanctions that do not fall short of sanctions imposable for breaches of equivalent provisions of national law.<sup>773</sup> Indeed, the principle of equivalence entails a prohibition against discrimination of rights, in the sense that EU law rights are entitled to the same level of protection and corresponding rights under national law.<sup>774</sup>

Articles 101 and 102 TFEU have a direct effect, which means that these provisions create rights and obligations for individuals.<sup>775</sup> These can be enforced by the national courts of the Member States.<sup>776</sup> Due to the direct effect of the prohibitions laid down in Article 101 and 102 TFEU, any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an infringement of the EU competition rules.<sup>777</sup>

In this regard, the Court of Justice of the EU has confirmed that the full effectiveness of EU rules would be impaired and the protection of the rights, which they grant, would be weakened if individuals were unable to obtain redress.<sup>778</sup> This is especially important

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<sup>773</sup> Case C-68/88 *Commission v Greece* [1989] ECR 2965 para 23.

<sup>774</sup> Erling Hjelmeng, ‘Competition Law Remedies: Striving for Coherence or Finding New Ways?’ [2013] 50 CMLRev 1010, referencing Case C-295/04 *Manfredi* [2006] ECR I-06619 para 93.

<sup>775</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-05357 para 41.

<sup>776</sup> Article 6 of Regulation No. 1/2003.

<sup>777</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161 and Case C-199/11 *European Community v. Otis NV and others* [2012] ECR I-0000.

<sup>778</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-05357 para 33.

when their rights are infringed by a breach of EU law for which a Member State can be held responsible.<sup>779</sup>

Hence, national rules governing the exercise of the right to compensation for harm resulting from a violation of Articles 101 and 102 TFEU must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the Treaty, and they should not be formulated or applied less favourably than those applicable to similar domestic actions.

According to *Hjelmeng*, in regard to the principle of effectiveness, EU law sets a minimum effectiveness standard in two different respects: The procedural requirement that it must not be impossible or excessively difficult to enforce an EU law right and the requirement of an adequate remedy.<sup>780</sup> In this regard, as we have already seen, a remedy fulfils the functions of termination of the infringement; the compensation to victims, it serves as a deterrent instrument and it restores the *status quo ante*.

Hence, enforcement and compliance of EU competition rules is ensured through public enforcement by the EU Commission and the National Competition Authorities (NCA) and through private enforcement within the domain of civil law and procedure before national courts of the MS. This means that the application of EU law is decentralised and in light of the principle of national procedural autonomy, national courts are expected to

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<sup>779</sup> *Ibid* para 34.

<sup>780</sup> Erling Hjelmeng, ‘Competition Law Remedies: Striving for Coherence or Finding New Ways?’ [2013] 50 *CMLRev* 1010.

apply national procedural rules when applying substantive EU rules in order to provide for remedies.

According to *Lenaerts*, an individual may rely on the right to effective judicial protection with a view to protecting the substantive rights, which EU law confers on him or her.<sup>781</sup> This right to effective judicial protection is enshrined in Article 47 of the CFREU, which is more extensive than that offered by Article 13 of the ECHR since it guarantees the right to an effective remedy before a court. Hence, where an EU right is violated, national court must be empowered to grant injunctive and monetary relief. The principle of effective judicial protection is an aspect of effectiveness that focuses on access to the court, effective judicial review and the need for judicial supervision.<sup>782</sup>

In this regard, *Safjan* also states that the above mentioned principle of effective judicial protection serves the principle of effectiveness of the EU law. However, he too identifies situations where the two principles can fall in conflict and a balancing would be needed where the principle of effectiveness would only go as far as the principle of effective judicial protection is respected.<sup>783</sup> Nevertheless, according to this author, where EU law requires enforcement but does not lay down the procedural conditions, MS authority is nevertheless limited by the *Rewe* case principles of equivalence and effectiveness<sup>784</sup> and by the right to effective judicial protection.<sup>785</sup>

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<sup>781</sup> Koen Lenaerts, 'Effective Judicial Protection in the EU', Court of Justice of the European Union, Interventions, 2013, p 1. <http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf> (Accessed 02 September 2014).

<sup>782</sup> Ibid p. 12.

<sup>783</sup> Marek Safjan, 'A Union of Effective Judicial Protection: Addressing a multilevel challenge through the lens of Article 47 CFREU', King's College London, February 2014, p. 4.

<http://www.kcl.ac.uk/law/research/centres/european/Speech-KINGS-COLLEGE.pdf> (Accessed 23 September 2014).

<sup>784</sup> Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR I-1989 para 5.

<sup>785</sup> Marek Safjan, 'A Union of Effective Judicial Protection: Addressing a multilevel challenge through the lens of Article 47 CFREU', King's College London, February 2014, p. 5.

This translates in an obligation imposed on the Member States to provide individuals, actual access to a court and to judicial proceedings since the Court of Justice of the EU cannot develop such remedies since it is not allowed to adjudicate on complaints by individuals whose rights under EU law have been violated. Thus, the principle of effectiveness is applicable to procedural provisions while the principle of equivalence applies to substantive provisions and such effectiveness is ensured by making any Member State responsible for the failure to protect the rights that EU law grants.

In this regard, the Court of Justice of the European Union further stated that “it is a principle of EU law that the Member States are obliged to make good loss and damage caused to individuals by breaches of EU law for which they can be held responsible.”<sup>786</sup> In *DEB*, a case dealing with the principle of effective judicial protection, the CJEU ruled that Article 47 of the CFREU applies to judicial proceedings in which a legal person brings an action for damages against a Member State on the grounds that the latter’s failure to implement a directive on time had allegedly caused that person economic harm.<sup>787</sup>

The CJEU surprisingly took a step further in order to secure the full observance of the principle of effectiveness by establishing the principle of State liability on which the former rests. Nevertheless, it will depend on whether there were measures of harmonization or not and whether there were conditions and time limits that made it

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<sup>786</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991 ECR I-05357 para 37.

<sup>787</sup> Case C-279/09 *DEB* [2010] ECR I-13849.

impossible in practice to exercise the rights, which the national courts were obliged to protect.<sup>788</sup>

According to the Court of Justice of the European Union, the principle of State liability “is a principle inherent in the system of the Treaty.”<sup>789</sup> State liability is understood to comprise any organ or institution of the State as well as European Union authorities. Not only did the Court of Justice of the EU establish the principle of State liability but it also refined it when it had the opportunity to do so.

In *Brasserie du pêcheur* and *Factortame* cases,<sup>790</sup> the court’s judgement established three conditions under which the requirement of direct causation for an effective right of reparation was recognized.<sup>791</sup> According to the CJEU, the right of reparation constitutes the necessary corollary of the direct effect of the EU provision whose breach caused the damage sustained.<sup>792</sup>

Despite the fact that EU law has not provided for specific remedies to be available in national courts, the CJEU has set minimum standards for remedies to be provided at the national level which, have been developed through the requests by national courts for preliminary rulings under Article 297 TFEU.<sup>793</sup> This must be highlighted as the Court of Justice of the European Union cannot develop such remedies since it is not allowed to adjudicate on complaints by individuals whose rights under EU law have been violated.

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<sup>788</sup> Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR I-1989 para 5.

<sup>789</sup> Case C-279/09 *DEB* [2010] ECR I-13849 para 35.

<sup>790</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* [1996] ECR I-1029.

<sup>791</sup> *Ibid*, para 51 declaring that first, the rule of law infringed must be intended to confer rights on individuals, second that the breach must be sufficiently serious and third that there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained.

<sup>792</sup> *Ibid*, para 22.

<sup>793</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297 para 29.

Hence, where there are no remedies to ensure the respect for individual EU rights, Member States are obliged to create them. Within the scope of application of EU law, it is CJEU, which ultimately decides what the EU standard of protection is and to what extent Member States may, without infringing the primacy, unity or effectiveness of EU law, guarantee a higher standard of protection.<sup>794</sup> In this regard, according to the case law, injured parties must be able to seek compensation not only for actual loss suffered but also for the gain of which they have been deprived plus interest.<sup>795</sup>

However, another problem to overcome for effective compensation to be a reality has been the method for quantifying the harm of the victims of competition law infringements. In this respect, the EU Commission has published some guidance for national judges<sup>796</sup> and in particular, on the quantification of damages,<sup>797</sup> something that should be welcomed in order to encourage harmonization across the Member States as the Model Leniency Programme has done within the European Competition Network.<sup>798</sup>

Nevertheless, the EU Commission has gone further and on 11 June 2013 it adopted a proposal for a directive on antitrust damages.<sup>799</sup> On 17 April 2014, the European

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<sup>794</sup> Marek Safjan, ‘A Union of Effective Judicial Protection: Addressing a multilevel challenge through the lens of Article 47 CFREU’, King’s College London, February 2014, p. 14.

<sup>795</sup> Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619 para 95.

<sup>796</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* [1996] ECR I-1029 para 55, where the EU Court of Justice also held that it is the national courts which have the “sole jurisdiction to find the facts... and characterise the breaches of EU law at issue.”

<sup>797</sup> EU Commission Communication of 13 June 2013 on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013] OJ C167/19. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF> (Accessed on 20 June 2015)

<sup>798</sup> ECN Model Leniency Programme as revised in November 2012.

[http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf) (Accessed on 20 June 2015).

<sup>799</sup> EU Commission Communication of 11 June 2013, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law provisions of the Member States and of the European Union, COM(2013) 404 final <http://eur->

Parliament adopted a text of the Directive on antitrust damages actions, which has been sent to the EU Council of Ministers for final approval and once the directive is adopted, the Member States will have two years to implement the provisions of the directive in their national legal systems.<sup>800</sup>

This is important since the Treaty on the Functioning of the European Union provides that legal acts of the Union such as regulations, have a general application and they are directly applicable on all Member States.<sup>801</sup> Concerning directives, the Treaty establishes that they are binding as to the result to be achieved but it is up for the national authorities the choice of form and methods.<sup>802</sup> Hence, even if the result to be achieved alone is binding on Member States, the Directive on antitrust damages actions will definitely serve the purpose of the principle of effectiveness of the EU competition rules since it seeks to remove the obstacles to make the right to full compensation for antitrust violations a reality in the European Union.

The Court of Justice of the EU further held that in the case of directives adopted at the EU level, the Member States are left with freedom to “choose the ways and means of ensuring that the directive is implemented. That freedom does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues.”<sup>803</sup> Although *Von Colson and*

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[lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF](http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF) (Accessed on 06 December 2013).

<sup>800</sup> EU Commission, ‘Antitrust: Commission welcomes Parliament vote to facilitate damages claims by victims of antitrust violations’, Press Release IP/14/455, Brussels 17.04.2014.

[http://europaeuropa.eu/rapid/press-release\\_IP-14-455\\_en.htm](http://europaeuropa.eu/rapid/press-release_IP-14-455_en.htm) (Accessed on 20 June 2015).

<sup>801</sup> Article 288 (2) TFEU.

<sup>802</sup> *Ibid*, para 3.

<sup>803</sup> Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 para 15.

*Kamann* case relates to issues of equal treatment and access to employment, the same principles apply as long as a directive is considered no matter what objective it pursues. This means that the Directive on antitrust damages actions will impose obligations on the Member States to make it fully effective no matter what means or ways each MS chooses for that purpose.

Thus, the EU competition rules, in particular Articles 101 and 102 TFEU, produce direct effects and create rights and obligations, which national courts must enforce. In order to provide a measure for harmonization, the Directive on antitrust damages actions reaffirms this right of EU law and makes it binding on the MS to provide effective judicial remedies in the exercise of such rights, and makes them liable if they fail to do so.

In respect of the principle of State liability and the right of reparation,<sup>804</sup> the CJEU stated in *Robins* that, for the national courts to determine whether there is a serious breach, each national court must take account of all the factors characterising the situation placed before it.<sup>805</sup> Those factors may include “the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or EU authorities, whether the infringement and the damage caused was intentional or involuntary. Whether any error of law was excusable or inexcusable, the fact that the position taken by a Union institution may have contributed towards the omission and the adoption and retention of national measures or practices contrary to EU law.”<sup>806</sup>

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<sup>804</sup> As has been explained before, the choice of remedy is left to national law but EU law requires this choice to be scrutinised closely.

<sup>805</sup> Case C-278/05 *Robins and Others* [2007] ECR I-1053 para 76.

<sup>806</sup> *Ibid*, para 77.

The CJEU further made emphasis on the importance of the degree of discretion as a criterion in establishing the existence of a serious breach of EU law. In this regard, the CJEU held that “where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach.”<sup>807</sup>

In the particular case of *Robins*, the Court of Justice of the EU dealt with national systems of judicial protection rights by establishing some general principles on the adequacy and necessity of national laws on remedies. This should not be an impediment to consider that such direction could apply to areas of discretion enjoyed by the EU Commission.

The principles of effectiveness and equivalence are a great example of how the Court of Justice of the European Union can establish and develop to either expand or limit the application of EU principles without effectiveness outweighing legal certainty and due process.<sup>808</sup> This judicial activism should be encouraged whenever it seeks to clarify and restrict the grey areas of EU competition law, which can only strengthen the EU Commission’s discretion. On the other hand, despite the importance of having an effective EU law system and in this particular case, an effective exercise of the rights derived from the application of Articles 101 and 102 TFEU, it is important to emphasize that the effectiveness of EU law must never be an end in itself.

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<sup>807</sup> *Ibid*, para 71.

<sup>808</sup> For further reading on the principle of effectiveness, State liability and the right of reparation, see EU Commission Communication of 15 July 2009 on Case Law of the Court of Justice of the European Union connected with claims for damages relating to breaches of EU law by Member States. [http://ec.europa.eu/eu\\_law/infringements/pdf/jur\\_09\\_30385\\_en.pdf](http://ec.europa.eu/eu_law/infringements/pdf/jur_09_30385_en.pdf) (Accessed on 06 December 2013).

To conclude this section, it can be stated that the principles of equivalence and effectiveness ensure the effective application of EU law in the strict sense as they act a means to uphold the primacy of EU law with regard to conflicting national procedural law. As has been explained above, the principle of effectiveness also gives expression to the right to effective judicial protection, which means that the rights that EU law confers on individuals must be accompanied by effective judicial remedies.

However, in any given case, national courts and both the GC and the CJEU must be able to weigh in the balance, an effective enforcement of EU law and in this particular case, the effective enforcement of EU competition law and the right to effective judicial protection. To this end, we should remember that the effectiveness of EU law is a means to be used only where the law to be enforced complies itself with general principles of EU law and fundamental rights.

The above mentioned does set a limitation on the EU Commission, the GC, the CJEU and Member States, to protect and provide or facilitate effective redress to direct and indirect victims of EU competition law violations. It also sets a limitation to impose a fair penalty or remedy on the infringing undertakings that is appropriate and proportionate to the harm caused. This should be done without it being of such a punitive nature that goes beyond what is necessary to end the infringement and in violation of fundamental rights and the general principles of EU law in order to restore competition.

Overall, Chapter 4 provides an analysis of the current situation as to the respect and observance of fundamental rights and general principles of EU law in the enforcement of the EU competition rules, particularly Articles 101 and 102 TFEU. However, this analysis

should also be understood with a view on the legal punitive character of EU competition law as a background.

Although the current EU competition law enforcement system can be said to belong to the broad sense of what a criminal is due to the punitive and deterrent effect of fines and, it should also be kept in mind that the enforcement of EU competition law could easily be described as a prosecutorial adjudication system. Here, the EU Commission not only enjoys discretion as to the kind of cases it will investigate according to its enforcements priorities, but it also enjoys a prosecutorial discretion that determines the interpretation and development of legal precepts. This prevents the General Court and the Court of Justice of the European Union to provide for greater transparency, predictability and due process for a legal system focused on justice.

Nonetheless, the question should not be focused on how to limit the prosecutorial discretion of the EU Commission but on how to devise an effective and efficient enforcement system in which the GC and the CJEU are the ones able to provide legal certainty. This is needed for the development and application of the EU competition rules and effective protection of fundamental rights derived from the application of general principles of EU law, which seem to depend on the application of the former.

It is important not to leave the applicability of fundamental law principles and guarantees they provide on a mere theoretical and constitutional value with no effectiveness attached to them. Although it is true that the Court of Justice of the EU has at times, built ad hoc limits into the otherwise pervasive investigative powers enjoyed by the EU

Commission,<sup>809</sup> this building of boundaries needs to be greater so that the discretionary powers of the EU Commission are perceived as being under solid checks by the EU Courts.<sup>810</sup>

The EU Commission's discretion may be necessary however; the enforcement system it has developed from it, in the application of EU competition law, has been inefficient and recidivism is evidence of that.<sup>811</sup> The fundamental problem of the system is the fact that the EU Commission only punishes undertakings, which is technically and morally questionable, since it is the employees that decide to commit an antitrust infringement.

The questionable handling of recidivism and the current policy of the EU Commission to resolve cases by way of fines and negotiated outcomes that reinforce the deterrence approach, highlight the importance of targeting both undertakings and individuals for an effective enforcement system. A compliance approach, meaning the adoption of instruments that actively promote compliance, would assign responsibility to prevent wrongdoing between the undertakings, people with managerial responsibility and employees. Such instruments would either be intrusive or not; in order to create a monitoring network, internal or external so that the policing function of antitrust law is spread across a number of agents that are able to prevent antitrust violations.

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<sup>809</sup> I. Lianos and A. Andreangeli, 'The European Union: The Competition Law System and the Union's Norms' in E. M. fox and M. J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP London 2012), p. 421.

<sup>810</sup> See for instance Case C-27/88 *Orkem v Commission* [1989] ECR I-3355 para 35 where the CJEU imposed limits on the EU Commission but could not offer a more extensive interpretation of the appellant right as that would impose an unjustified obstacle to the EU Commission's performance of its functions.

<sup>811</sup> Again, there is divergence as to the degree of recidivism in EU antitrust enforcement. However, in Chapter I of the present work, a description has been provided of cases where recidivism has been dealt with and it is questionable whether its handling was appropriate in respect to the effectiveness of EU antitrust enforcement in preventing future infringements.

This focus on the subjects that can prevent antitrust wrongdoing is part of a positive general prevention policy that is able to create a culture of compliance by initially creating an active monitoring network. Within this system, the standard of protection afforded by EU principles of law is increased as there is positive guidance and legitimization is built. As will be discussed below, the deterrence approach does not take into account the insights that a compliance approach considers but instead, it is based on assumptions much like an invisible hand enforcement approach, which make it bound to be ineffective in preventing violations.

On the other hand, according to *Andreangeli* and *Lianos*, although the EU Courts have managed to hold the EU Commission to rather strict standards of proof and sound reasoning, it is still questionable whether the EU Commission enforcement instruments are sufficiently exacting. Full protection is needed to ensure that fundamental principles are not hindered beyond what is necessary to achieve the objectives of competition policy in individual cases.<sup>812</sup>

A system that actively promotes compliance could provide the ground for the EU Courts to develop a more active role in setting boundaries to the EU Commission discretionary power as the measures to be under review would have a fixed purpose and directly seem to tackle the issue of whether prevention is at the core of EU antitrust enforcement. They could enhance their role as effective supervisory bodies that allow a growing perception of a just system.

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<sup>812</sup> I. Lianos and A. Andreangeli, 'The European Union: The Competition Law System and the Union's Norms' in E. M. fox and M. J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP London 2012), p. 426.



## Chapter 4

### Shortcomings of the EU competition law deterrent system

#### 4.1 Serious antitrust violations define the whole enforcement approach.

In order to provide a well-based proposal for the adoption a compliance approach system in the enforcement of EU competition law, it is important to understand the foundations of the deterrence approach. So are the issues that led to the endorsement of the optimal deterrence framework as the main scheme of the EU Commission to pursue the EU competition policy and enforcement system.

For over 40 years, Regulation No. 17 governed the enforcement of Article 101 and 102 TFEU, from 1962 until its replacement in May 1<sup>st</sup> 2004 by Regulation No. 1/2003, the EU Commission had the exclusive monopoly in the application of those 2 provisions, especially when it concerned the application of Article 101 (3) TFEU. This allowed the EU Commission to design and implement competition law and policy in consideration of relevant public policy objectives covered within the Union Treaties. As competition policy is not an end in itself but rather one of the means for achieving the Treaty's fundamental goals, antitrust provisions cannot be explained or enforced without reference to this social, political, legal and economic context.

Although it has been held that the main objective of EU competition policy and the application the EU competition rules is "to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."<sup>813</sup>

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<sup>813</sup> Commission Guidelines (EC) of 27 April 2004 on the application of Article 81 (3) of the Treaty[2004] OJ C101/97, hereafter *Article 81 (3) Guidelines* para 13 and 33.

There is no doubt that the EU Commission has pursued many public policy goals through the enforcement of Article 101 and 102 TFEU. According to *Townley*, EU competition law has been used to pursue market integration and to serve public policies such as employment, environment, culture, industrial policy, consumer policy and economic efficiency among others.<sup>814</sup>

This helps to explain the high level of discretion afforded to the EU Commission within the EU Treaties' provisions and regulations concerning the enforcement of EU competition rules, especially in collecting and assessing the evidence,<sup>815</sup> in the imposition of remedies<sup>816</sup> and in deciding on the size of the fines and periodic penalty payments.<sup>817</sup> The GC and the CJEU have also validated this discretion.<sup>818</sup>

Regulation No. 1/2003 modernized the rules, which govern the enforcement of Articles 101 and 102 TFEU and meant a fundamental change in their decentralisation. Empowering the competition authorities from the Member States and national courts to apply such rules in full, replacing the *ex-ante* system envisaged in Regulation No. 17 for an *ex post* enforcement system towards a culture of detection and investigation of serious hidden violations.<sup>819</sup>

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<sup>814</sup> Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford and Portland, Oregon 2009) p. 5 and 314.

<sup>815</sup> Articles 18 to 21 of Regulation No. 1/2003.

<sup>816</sup> *Ibid.*, Articles 7 and 9.

<sup>817</sup> *Ibid.*, Articles 23 and 24.

<sup>818</sup> Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-0395 para 33, see also case C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I-5949 and Case T-446/05 *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission* [2010] ECR II-01255 para 174-175.

<sup>819</sup> White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty of 28 April 1999, OJ 1999/C 132/1.

Regulation No. 1/2003 could be seen as a response to the OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels pushed by the United States back in 1998.<sup>820</sup> At that time, the U.S. Department of Justice (DoJ), Antitrust Division was the most prominent antitrust enforcer taking action against international cartels and acknowledged that the most effective cartel enforcement required other countries or jurisdictions to have appropriate anti cartel laws to enforce them against both local and international cartels.<sup>821</sup>

In this regard, the decentralisation process in Europe brought about by Regulation No. 1/2003 served the interests of the U.S. DoJ Antitrust Division as it meant that the EU Commission became more efficient devoting its resources to detect and prosecute the most serious violations of competition law, mainly international cartels. The latter are the most harmful violations, leaving other cases of pure national or minor union interest to national competition authorities of the Member States. After more than 10 years since that process began, the EU Commission has now become the harshest enforcer against international cartels in the world.<sup>822</sup>

Nevertheless, the fact that 28 national competition authorities<sup>823</sup> together with the EU Commission have the task to enforce EU competition law within the European Union meant a significant risk of fragmentation and lack of effectiveness. However, national

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<sup>820</sup> Hereafter *OECD Cartel Recommendation 1998* at 2, where the consensus reached set hard-core cartels, whether in the form of price fixing, output restrictions, bid rigging, or market division, as the most egregious of violations of antitrust law. <http://www.oecd.org/competition/cartels/2350130.pdf> (Accessed on 20 June 2015).

<sup>821</sup> Communication from the United States, ‘Modalities for Voluntary cooperation’, Working Group on the Interaction between Trade and Competition Policy, World Trade Organization, August 15 2002 at 4.

<sup>822</sup> Ian S. Forrester, ‘Due process in EC competition cases: a distinguished institution with flawed procedures’ [2009] 34 ELR 825. See also Z. A. Cronin, ‘The Competitor’s Dilemma: Tailoring Antitrust Sanctions to White-Collar Priorities in the Fight against cartels’ [2013] 36 Fordham International Law Journal 1699.

<sup>823</sup> Croatia became the 28<sup>th</sup> member of the European Union on 01 July 2013.

competition authorities have initiated 1,376 administrative cases under EU competition law since 2004, this represents an 86% of total cases applying EU antitrust law. Hence, only 14% of all cases were initiated by the EU Commission, which confirms its focus on the most harmful cases.<sup>824</sup>

The above has been possible because Regulation No. 1/2003 envisaged mechanisms for cooperation and exchange of confidential information between national competition authorities and the EU Commission, which has been mainly channelled through the European Competition Network (ECN).<sup>825</sup> On the other hand, although Regulation No. 1/2003 aimed at ensuring substantive convergence in the application of EU and national competition laws, some divergence has existed among national laws providing for different standards for assessing dominance in the application of Article 102 TFEU and not on cartel cases. Nevertheless, this minimal divergence consists in stricter national provisions governing the conduct of dominant undertakings, which is a concern for businesses, especially because their strategies are typically formulated on a European or global level.<sup>826</sup>

In spite of this, we can say that there is no divergence on substantive competition rules in the EU and if any, it is restricted to the issue of dominance. Leaving aside substantial law and the institutional framework issues, procedural competition rules have remained a matter of domestic national policy despite of the fact that a single and uniform doctrine

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<sup>824</sup> Available at <http://ec.europa.eu/competition/ecn/statistics.html> (Last accessed on 02 April, 2013). These priorities can be confirmed with many EU Commission statements such as recital 1 of the *EU Leniency Notice 2006* in respect to cartels or the Guidance on the Commission's Enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 in respect of violations of Article 102 TFEU.

<sup>825</sup> Articles 11 and 12 of Regulation No. 1/2003.

<sup>826</sup> Ailsa Sinclair, Vita Jukneviciute and Ingrid Breit, 'Regulation 1/2003: How has this landmark reform worked in practice?' (2009) 2 Competition Policy Newsletter at 22.

of supremacy of EU law has emerged over domestic law.<sup>827</sup> This is regrettable and contributes to the systematic lack of uniformity and consistency in the application of EU law, which prevents its effectiveness,<sup>828</sup> but most importantly, prevents undertakings from having legal certainty and thus, convergence on procedural rules that needs to be fostered.

The principle of procedural autonomy is respected in the sense that Member States are able to design their own procedural rules when applying EU competition law but they are not allowed to deviate from a uniform standard of protection that is granted under EU law.<sup>829</sup> Despite the apparent coherent application of EU competition rules, within the ECN, it was highlighted that there remained divergences on important procedural issues that may influence the outcome of individual cases.<sup>830</sup> However, the EU Commission ensures uniformity and coherent application through Article 16 of Regulation No. 1/2003.<sup>831</sup>

Uniformity is also ensured by the principle of equivalence, which maintains equilibrium between the autonomy of national systems to enforce EU law and the imperative to have effective and uniform enforcement of EU law across all Member States.<sup>832</sup> This is

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<sup>827</sup> Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025 para 27. See also above in Section 4.6 where the principles of equivalence and effectiveness can also be held responsible for this supremacy of EU law.

<sup>828</sup> Paolo Mengozzi, 'The European Union balance of powers and the case law related to EC external relations' in Mario Monti, Nikolaus Von Und Zu Liechtenstein and Bo Versterdorf (eds), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (Nomos Verlagsgesellschaft, Bilingual edition, 2007) p. 211.

<sup>829</sup> Case C-2/92 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* [1994] ECR I-00955 para 16.

<sup>830</sup> COMMISSION STAFF WORKING PAPER accompanying the COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND COUNCIL Report on the functioning of Regulation 1/2003 COM (2009) 206 final of 29 April 2009. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0574&from=EN> (Accessed on 20 June 2015).

<sup>831</sup> Preventing national authorities and courts from taking decisions running counter to the decision contemplated or adopted by the EU Commission. See also Case C-344/98 *Masterfoods Ltd v HB Ice cream Ltd* [2000] ECR I-11369 para 51-57.

<sup>832</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-05357 para 43.

important to consider as the adequacy, effectiveness and efficacy of the ever-increasing amount of fines. As well as the and the fine itself, can only be backed by a body of case law and coherent and consistent enforcement of competition law across the European Union without raising concerns about its unpredictability.

In this regard, let us return to the facts previously mentioned as to the severity of fines imposed by the EU Commission. In the period from 1962 to 1997, just before the first guidelines on fines were published, the EU Commission levied fines reaching the amount of €817 million in total imposed as sanctions in 57 decisions issued against hard-core cartels.<sup>833</sup> We can firmly state that the size of such fines had grown incredibly keeping in mind that the first cartel fines imposed in the EU took place in 1969 in the *Quinine* case where the EU Commission imposed a fine of 210,000 units of account<sup>834</sup> which was later reduced to 190,000 by the Court of Justice of the EU.<sup>835</sup>

In a second period, from 1998 to 2006, while the EC Fining Guidelines 1998 were applicable, the total amount of fines increased to € 6.9 billion including leniency reductions through the 1996 and 2002 Leniency Notices.<sup>836</sup> That amount was subsequently reduced to €5.9 billion in consideration to the judgements of the General Court and the Court of Justice of the EU after appeal, which represents 67% of the amount of all fines imposed by the EU Commission.<sup>837</sup>

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<sup>833</sup> P. Lowe, 'Preventing and Sanctioning Anticompetitive conduct: Effective use of Administrative and Criminal Sanctions, Leniency Programmes and Private Action in the EU', 33th Annual Fordham Competition Law Institute Conference on 'International Antitrust Law & Policy', New York City, 2007, Edit. Barry E. Hawk, Fordham Competition Law Institute, Juris Publishing, Inc. 2007 p. 88.

<sup>834</sup> *Quinine* [1969] OJ L192/5.

<sup>835</sup> Case C-41/69 *Chamieferma v Commission* [1970] ECR-0661 para 189.

<sup>836</sup> One must take into account that €8.8 billion Euro in fines were imposed by the EU Commission after leniency reductions were applied.

<sup>837</sup> Cento Veljanovski, 'European Commission Cartel Prosecutions and Fines, 1998-2006 - An updated Statistical Analysis of fines under the 1998 Penalty Guidelines' (2010) Case Associates Working Papers Series 7 at 4.

Under the EU Fining Guidelines 2006, the EU Commission has sanctioned 43 cartels so far with final fines amounting €12.8 billion.<sup>838</sup> It must be remembered that during the application of the EU Fining Guidelines 1998 there were 63 cartels sanctioned using the procedure there established and the current guidelines have so far been applied to just 43 cartel decisions. If one compares the 43 cartel fines under the EU Fining Guidelines 2006 with the earlier 1998-2006 period fines, the former are more than three times as severe as comparable fines imposed under the EC Fining Guidelines 1998.<sup>839</sup>

For instance, in 2012 alone, the EU Commission imposed €1.87 billion in fines on undertakings found to have infringed EU competition rules. In 2013, the amount was €1.88 billion and for the year 2014, the amount of fines imposed reached €1.69 billion.<sup>840</sup> This large increase in EU fines is due in part to the linking of the fine to the relevant sales of the infringing company and in part to the tougher provisions of the new EU fining guidelines.<sup>841</sup>

Thus, if we consider the fact that the focus of the EU Commission is on the most serious infringements and it applies a clear policy basis where deterrence is privileged, then of course the fines have increased.<sup>842</sup> In addition, if we refer to the case law where it is stated

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<sup>838</sup> See the statistics, available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (last accessed on 07 March, 2015) covering fines sanctioning Article 101 infringements were a Statement of Objections was sent after 1 September 2006.

<sup>839</sup> John M. Connor, 'Cartel fine severity and the European Commission: 2007-2011' [2013] 34 ECLR 58.

<sup>840</sup> See EU Commission Cartel Statistics 2015.

<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (Accessed on 16 March 2015).

<sup>841</sup> John M. Connor and D. J. Miller, 'Determinants of EC Antitrust Fines for Members of Global Cartels', paper presented at the 11<sup>th</sup> annual meeting of the American Antitrust Institute (Washington DC, June 2010).

<sup>842</sup> Neelie Kroes, 'The Lessons Learned' (Speech at 36<sup>th</sup> Annual Conference on International Antitrust Law and Policy, Fordham University, New York, Speech/09/408 Europa website 2009)

[http://europa.eu/rapid/press-release\\_SPEECH-09-408\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-09-408_en.htm) (Accessed on 16 March 2015).

that the object of fines is to suppress illegal activities and to prevent any reference, then higher fines are justifiable too.<sup>843</sup> However, high fines have also been imposed on cases where the conduct punished cannot be considered to be illegal *per se*, in particular conduct under Article 102 TFEU. Nevertheless, even if we consider fines imposed in the application of Article 101 TFEU alone, these seem to be disproportionate, non-dissuasive and over-all ineffective, which cannot justify their high amount.

However, as *Lowe* has stated, sanctions for the infringement of EU competition law cannot be looked at in isolation; they do not exist in the vacuum.<sup>844</sup> Rather, each competition enforcement system is a complex whole in which the nature and severity of the available sanctions are interlinked with the standard of proof to be met in the different types of procedures. Be it administrative or criminal, the investigative powers of the enforcers, the procedural safeguards and guarantees available to the defendants, the leniency programmes available and the structure of the enforcement agencies.<sup>845</sup>

In this regard, it must be taken into account that the EU Commission has adopted a policy where it is allowed to focus on the most serious antitrust offenses. This has left the EU Commission with the task to prioritize its enforcement that in turn, has led it to target cartels, most of them international.<sup>846</sup> Prioritization is just another area were the EU

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<sup>843</sup> Case C-41/69 *Chamiearma v Commission* [1970] ECR-0661 para 173.

<sup>844</sup> P. Lowe, 'Preventing and Sanctioning Anticompetitive conduct: Effective use of Administrative and Criminal Sanctions, Leniency Programmes and Private Action in the EU', 33th Annual Fordham Competition Law Institute Conference on 'International Antitrust Law & Policy', New York City, 2007, Edit. Barry E. Hawk, Fordham Competition Law Institute, Juris Publishing, Inc. 2007, p. 94.

<sup>845</sup> *Ibid.* p. 96.

<sup>846</sup> Mario Monti, 'Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour' (Speech at 3<sup>rd</sup> Nordic Competition Policy Conference, Stockholm, Speech/00/295 Europa website 2000) [http://europa.eu/rapid/press-release\\_SPEECH-00-295\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm) (Accessed on 16 March 2015). (Cartels, as the cancer of open market economy, are logically at the forefront of the agenda).

Commission is allowed to make choices;<sup>847</sup> it can prioritize actions and cases according to its enforcement policy which, at the same time, the EU Commission has the ability to define and pursue.<sup>848</sup> This means that the EU Commission may reject a complaint when it considers that the case does not have a sufficient “Union interest” to justify further investigation.<sup>849</sup>

Although such discretion is subject to judicial review, as has been seen in *Automec* case,<sup>850</sup> the Court of Justice of the European Union has invariably and unsurprisingly adopted a deferential review towards EU Commission’ decision in this regard. Nevertheless, in *CEAHR* case,<sup>851</sup> the General Court limited the discretion so far enjoyed by the EU Commission to reject complaints and noted that the EU Commission’s reasoning was insufficient.

The Court examined the ground which related to national authorities and courts being well placed to deal with the complaint and it stated that “even if the national authorities and courts are well placed to address the possible infringement (...) that consideration alone is insufficient to support the Commission’s final conclusion that there is no sufficient Community interest”.<sup>852</sup>

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<sup>847</sup> Case T-432/10 *Vivendi v Commission* [2013] ECR-II 0538 para 22 where the General Court confirmed that since the EU Commission is responsible for defining and implementing the competition policy of the European Union, for that purpose it has a discretion as to how it deals with complaints.

<sup>848</sup> Nicolas Petit and Norman Neyrinck, ‘A Review of the Competition Law Implications of the Treaty of the Functioning of the European Union’, CPI Antitrust Journal, February 2010 at 6

<sup>849</sup> Case C-119/97 *Ufex and others v Commission* [1999] ECR I-01341 para 88.

<sup>850</sup> Case T-24/90 *Automec v Commission* [1992] ECR II-02223 para 77 and 85.

<sup>851</sup> Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs v Commission* [2010] ECR II-05865.

<sup>852</sup> *Ibid* para 157-178.

Yet, the General Court and the CJEU cannot substitute their assessment of the European Union interest for that of the EU Commission, but must focus on whether the contested decision is based on materially incorrect facts or is vitiated by an error of law, manifest error of appraisal or misuse of powers.<sup>853</sup> As long as the EU Commission considers attentively all the matters of fact and of law that the complainant bring to its attention,<sup>854</sup> and it provides reasons as to why it declines to continue the examination of a complaint on priority grounds.<sup>855</sup>

Non-cartel enforcement priorities for the EU Commission seem to involve particularly abuses of dominance infringements that appear to occur mainly in network industries or in information, communication and technology markets characterised by network effects.<sup>856</sup> Although it is essential to focus on cartels and abuse of dominance violations, it is also important to take on smaller cases, which could give rise to useful precedents and provide guidance to undertaking on the way they can conduct their business in compliance with competition law.

Outside cartels and network industries, there appears to be a widespread perception that the EU Commission has chosen to provide general guidance on the application of competition rules. The fact that the EU Commission has on many occasions gone beyond the principles laid down by the Court of Justice of the European Union. This was acknowledged by Commissioner *Almunia*: “I believe we have the responsibility to lead

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<sup>853</sup> *Ibid* para 65.

<sup>854</sup> Case C-450/98 P *IECC v Commission* [2001] ECR-I 3947 para 57.

<sup>855</sup> Case C-367/10 P *EMC Development v Commission* [2011] ECR-I 0046 para 75.

<sup>856</sup> Luis Ortiz Blanco and Alfonso Lamadrid de Pablo, ‘EU Competition Law Enforcement: Elements for a Discussion on Effectiveness and Uniformity’, 38th Annual Fordham Competition Law Institute Conference on ‘International Antitrust Law & Policy’, New York City, 2012, Edit. Barry E. Hawk, Fordham Competition Law Institute, Juris 2012 p. 67.

this sort of development, a responsibility which it would be very difficult for a Court of Justice to fulfil.”<sup>857</sup> However, legal innovation contained in soft law instruments may end up affecting the case law of the General Court and the Court of Justice of the European Union, perhaps even without the courts being fully aware of it.<sup>858</sup>

As has been confirmed many times, the EU Commission has wide discretion when it concerns the enforcement of EU competition law as it is part of the wide EU competition policy.<sup>859</sup> This broad discretion allows it to deviate from previous practice at any time, which may be in contrast with basic principles of law, and procedural and substantive transparency that characterises any legal system.

The fining system that serves to enforce EU completion law is part of the EU competition policy too and it is subject to the EU Commission’s discretion. This means that such discretion, can be adjusted or altered in any case depending on the objectives that policy seeks to achieve.<sup>860</sup> Judicial deference would be granted as long as the EU Commission clearly and unequivocally states the reasons setting out the factual and legal

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<sup>857</sup> Ibid at 72 referencing Joaquin Almunia, ‘Due Process and Competition Enforcement’ (Speech at 14<sup>th</sup> Annual Competition Conference - IBA, Florence, Speech/10/449 Europa website 2010) [http://europa.eu/rapid/press-release\\_SPEECH-10-449\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-10-449_en.htm) (Accessed on 16 March 2015).

<sup>858</sup> As an example see Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, hereafter *Guidance on Abuse of Dominance Position*. Although we can point to all guidance adopted by the EU Commission in respect to EU antitrust law policy and enforcement.

<sup>859</sup> Article 105 (1) TFEU, recitals 11 to 14 of Regulation No. 1/2003 and case law cited in Case T-432/10 *Vivendi v Commission* [2013] ECR-II 0538.

<sup>860</sup> Case T-355/13 *EasyJet Airline v Commission* para 17, (not yet reported) judgement delivered on January 21, 2015. <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130de7aa04c88a6254d08b0a991f2ff867e87.e34KaxiLc3eQc40LaxqMbN4ObhmNe0?text=&docid=161547&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=56054> (Accessed on 16 March 2015).

considerations as to the manner it decided a case, and how it decided the amount of the sanction based on its deterrence policy, which is a matter of discretion.<sup>861</sup>

This means that the deterrence policy that guides EU antitrust enforcement system is an expression of the EU competition policy objectives. As has been stated before, the objectives of EU competition law are economic efficiency<sup>862</sup> and more recently as stated by the EU Commission, consumer welfare.<sup>863</sup> Hence, the sanctions and remedies imposed by the EU Commission in order to deter are result of the efficiency-oriented policy that prevails in the EU.

This is very important to consider since fines are used as the main policy tool and the efficiency policy has liberated the EU competition law fining system from the traditional onerous procedural rules that are intended to protect the suspected companies in the otherwise uneven contest against the EU Commission. Hence, in order to understand the sanctions system and provide workable alternatives, it will be necessary to take a look at how efficiency took over EU competition policy.

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<sup>861</sup> Ibid para 73 stating that the Courts of the EU are only required to examine whether the EU Commission sufficiently reasoned its decision when making use of its discretion.

<sup>862</sup> Mario Monti, ‘A proactive Competition Policy and the role of the Consumer’ COM (2004) 293 Dublin Castle, Dublin, 29th April 2004 para 1. [http://europa.eu/rapid/press-release\\_SPEECH-04-212\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-04-212_en.htm?locale=en) (Accessed on February 24, 2015).

<sup>863</sup> Article 81 (3) Guidelines para 13 and 33, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7 para 19. See also EU Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5.

#### 4.2 Economics-oriented enforcement to achieve prevention.

We should remember that EU competition law is a public policy tool as it serves to advance in the achievement of EU competition policy goals. Nevertheless, both EU competition policy and antitrust rules are only another integral part of the Treaty on the Functioning of the European Union, which contains many objectives.<sup>864</sup> Thus, the emphasis placed on one or other objective may fluctuate over time and be influenced by external factors such as changes in the overall economic situation, political background, etc.<sup>865</sup>

Despite this fact, the goals of economic efficiency and consumer welfare seem to be more prevalent and publicly favoured in latest application of EU antitrust rules.<sup>866</sup> This economic efficiency and efficacy orientation seem to have begun early in the decade that started in 2000 when the EU Commission adopted a new regulatory competition framework in which one of the major characteristics was a stronger emphasis of economic analysis.<sup>867</sup>

According to *Roth*, this strategic choice would correspond to developments that are said to have taken place in the United States twenty years before.<sup>868</sup> Although there are

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<sup>864</sup> Case C-32/65 *Italy v Council of the ECC and Commission of the ECC* [1966] ECR-0563 para 405, where the CJEU held that Article 101 TFEU should be read in the context of the provisions of the preamble to the Treaty which clarify it and reference should particularly be made to those necessary for bringing about a single market.

<sup>865</sup> Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford and Portland, Oregon 2009) p. 5 and 314. See also D. Geradin, A. Layne-Farrar and N. Petit, *EU Competition Law and Economics* (1<sup>st</sup> edition OUP Oxford 2012) p. 23.

<sup>866</sup> D Geradin, 'Efficiency claims on EC Competition Law' in H. Ullrich (ed), *The Evolution of European Competition Law-Whose Regulation, Which Competition?* (Cheltenham, Edward Elgar 2006).

<sup>867</sup> Wulf-Henning Roth, 'Strategic competition policy: A comment on EU Competition policy' in H. Ullrich (ed), *The Evolution of European Competition Law-Whose Regulation, Which Competition?* (Cheltenham, Edward Elgar 2006) p. 38 referring to several notices and guidance published by the EU Commission.

<sup>868</sup> *Ibid* p. 39.

commentators that point to political motivations in the adoption of the economic efficiency approach and the economics-oriented EU competition policy.<sup>869</sup> In their opinion, the current economic efficiency and consumer welfare objectives of EU competition law and policy, as well as its economic oriented approach, are result of the influence of the Chicago School that first surged and expanded in the United States antitrust law policy and enforcement,<sup>870</sup> and was then adopted across the Atlantic a couple of decades later.<sup>871</sup>

Concerning antitrust laws, the Chicago School manifests preferences for economic models over facts, the tendency to assume that the free market mechanisms will cure all market imperfections and the belief that only efficiency matters.<sup>872</sup> This efficiency orientation that the economic study of law has provided is perfectly recognised in antitrust enforcement around the world. Although a Post-Chicago School has been recognized, it is seen as an attempt to build on the insights of the Chicago School by adding different analytical tools that question some of the conclusions reached by the latter.<sup>873</sup>

However, in a broader sense, despite the differences that might be observed between the Chicago and the Post-Chicago Schools, the common ground they share is that both agree

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<sup>869</sup> R.B. Bouterse, *Competition and Integration: What Goals Count?* (1<sup>st</sup> ed. Springer, Boston 1995) p. 40 and references made there.

<sup>870</sup> The Chicago School first saw light with the article published by R. H. Bork, 'Legislative Intent and the Policy of the Sherman Act' [1966] 9 Journal of Law & Economics 7 arguing that antitrust laws' only permissive objective is to enhance economic efficiency, p. 44. However, it was until 1980 during the Reagan administration that Chicago School acquired institutional traction. See also R. A. Posner, 'The Chicago School of Antitrust Analysis', [1979] 127 University of Pennsylvania Law Review 925.

<sup>871</sup> G. Monti, *EC Competition Law* (Cambridge University Press, Cambridge 2007), M. Motta, *Competition Policy: Theory and Practice* (CUP, Cambridge 2004).

<sup>872</sup> R. Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP, Oxford 2008) p. 5.

<sup>873</sup> G. Monti, *EC Competition Law* (Cambridge University Press, Cambridge 2007) p. 69.

that wealth maximization should be the exclusive goal of antitrust policy; and antitrust enforcement should strive to achieve the highest practicable level of consumer welfare.<sup>874</sup>

It is important to distinguish that, although Bork, one of the most recognizable and influential authors of the Chicago School; referred to consumer welfare as the only consideration that should guide antitrust policy.<sup>875</sup> In reality, he used the term to refer to the aggregate economic welfare standard, which takes the possible effects on consumers, producers and competitors into account.<sup>876</sup> This is different from the pure consumer welfare standard, which condemns conduct that reduces consumer's welfare without consideration of the impact on competitors and producers.

This is particularly important since according to *Wils*, the appropriate sanctions system in the enforcement of competition law will depend on the primary goal of the antitrust provisions as will be explained further below in the next section.<sup>877</sup> Thus, while the Chicago School advocates for a total welfare standard, the EU Commission has made clear that when it refers to the efficiency standard it actually refers to the pure consumer welfare standard.<sup>878</sup> This wealth maximization for consumers as the primary goal for EU competition law and policy is in contrast or seems to be inconsistent with enforcement of

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<sup>874</sup> M. S. Jacobs, 'An Essay on the Normative Foundations of Antitrust Economics', [1995] 74 North Carolina Law Review 219 p. 242.

<sup>875</sup> R. Bork, *The Antitrust Paradox* (Basic Books, New York 1978) p. 50.

<sup>876</sup> S. C. Salop, 'Question: What is the real and proper antitrust welfare standard? Answer: The true consumer welfare standard' [2010] 22 Loyola Consumer Law Review 336. According to Bork and Chicago School, an activity should be allowed when the total welfare gain outweighs the total loss, regardless of the effects on consumers. In this sense, aggregate economic welfare is also referred to as an efficiency of total surplus standard.

<sup>877</sup> W. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing, Oxford 2008) p. 57.

<sup>878</sup> 'Guidelines on the application of Article 81 (3) of the Treaty' [2004] OJ C101/ 08 para 85 and Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' C/2009 864 para 19.

EU competition law as the latter has adopted a cost and time effective system only focusing on the level of punishment.

This is not surprising since Chicago School is a broad school of thought that has influenced and developed in other areas of law and other areas of knowledge such as economics, industrial organization, political economy, sociology and criminology. Nonetheless, despite its long reach, the Chicago School exerted its greatest influence in antitrust and such influence was never replicated with the same importance and to the same extent in other areas.<sup>879</sup>

The influence this school has exerted in many areas and in antitrust can explain the many ways it has affected EU antitrust enforcement too.<sup>880</sup> Indeed, in the 1990s and early 2000, many of the views of the Chicago School found their way to the other side of the Atlantic and have materialized in the 'more economic approach' that attempts to modernize EU competition law.<sup>881</sup> However, we need to make the distinction that while the Chicago School influenced areas of enforcement of EU competition law, the aim of EU antitrust law and policy seems to be more in line with the Post-Chicago School.

Advocates of the Post-Chicago School have argued that antitrust analysis should explicitly factor in political considerations arguing that it is 'bad history, bad policy, and

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<sup>879</sup> D. A. Crane, 'Chicago, Post-Chicago, and Neo-Chicago' [2009] 76 University of Chicago Law Review 1911.

<sup>880</sup> According to D. Bartalevich, the EU Commission does to a considerable extent, follow the Chicago School theory, observing that elements of this school hold strongest in vertical practices but they are somewhat weaker in horizontal practices and in unilateral exclusionary conduct. See D. Bartalevich, 'The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy' [2016] 54 Journal of Common Market Studies 267.

<sup>881</sup> *Ibid.* See also The Competition Law Working Group: The Chicago School of Antitrust Analysis, seminar held at the European University Institute on 6 November 2015.

bad law to exclude certain political values in interpreting antitrust laws.<sup>882</sup> Certainly, the EU Commission has moved to pursue different policy aims among which, consumer welfare is central.

Nonetheless, elements of Chicago School have remained in EU antitrust enforcement and in this regard, the EU Commission needs to take account of the empirical evidence that questions the theoretical economic models based on rationality. For instance, behavioural economics has provided new insights that contradict economic assumptions and thus, provide appropriate foundations for a more correct approach in criminology.

In this regard, the Chicago School in the broad sense is an approach to regulation that focuses on regulators other than the law. Under this approach, regulation is understood as an intentional action by some policy maker, which has a constraining effect based assuming that the regulatory target is a rational actor.<sup>883</sup> According to *Lessig*, four types of constraint regulate behaviour and law is just one of those constraints.<sup>884</sup>

Law is the first constraint as law directs behaviour in certain ways, it threatens sanctions ex post if those orders are not obeyed.<sup>885</sup> Social norms regulate as well and so too do markets.<sup>886</sup> Markets regulate through the device of price.<sup>887</sup> The fourth constraint is the one *Lessig* calls architecture, which is the world as we find it, understanding that much of the world has been made.<sup>888</sup> These four constraints of behaviour or modalities of

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<sup>882</sup> R. Pitofsky, 'The Political Content of Antitrust', [1979] 127 University of Pennsylvania Law Review 1051 and J. B. Baker, 'Competition Policy as Political Bargain' [2006] 73 Antitrust Law Journal 484.

<sup>883</sup> L. Lessig, 'The New Chicago School' [1998] 27 Journal of Legal Studies 661.

<sup>884</sup> *Ibid* at 662.

<sup>885</sup> *Ibid.*

<sup>886</sup> D. Lange, 'A Multidimensional Conceptualization of Organizational Corruption Control' [2008] 33 Academy of Management Review 712-22.

<sup>887</sup> J. L. Coleman, *Market, Morals, and the Law* (2<sup>nd</sup> edition, OUP, New York 2002) Chapters 3 and 4.

<sup>888</sup> L. Lessig, 'The New Chicago School' [1998] 27 Journal of Legal Studies 663.

regulation operate together and they constitute the sum of forces that guide an individual to behave or act in a given way.<sup>889</sup>

Taking into account the above mentioned, the Chicago School emphasizes this multiplicity of constraints however, it argues that law is the less effective of all constraints and understands it from a perspective of rationale choice which means that law is relegated as regulation is more effective through the three other behaviour constraints. Overall, it can be stated that the Chicago School argues against the dominance or centrality of law in favour of other regulatory alternatives.<sup>890</sup>

In addition, the law and economics influence of the Chicago School has provided a framework to identify the factors that should govern the choice between rules and standards and between *ex ante* and *ex post* responses. *Ehrlich* and *Posner* provided this general framework in order to cost-effectively choose among the four modalities of behaviour constraint based on minimising four categories of costs.<sup>891</sup> They advocate for considering the fixed costs of designing and implementing legal standards, the costs of enforcing the standards, compliance costs and the social costs imposed by regulatory offenses and then decide for the modality that offers the lowest cost.<sup>892</sup>

*Veljanovski* adds to this framework a fifth kind of cost that he calls error cost. Since regulators are not error proof, they can find an infringement where there is none (Type I

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<sup>889</sup> *Ibid*, see also R. C. Ellickson, 'A critique of Economic and Sociological Theories of Social Control', [1987] 17 *Journal of Legal Studies* 67 p. 76.

<sup>890</sup> L. Lessig, 'The New Chicago School' [1998] 27 *Journal of Legal Studies* 666.

<sup>891</sup> I. Ehrlich and R. A. Posner, 'An Economics Analysis of the Legal Rule Making' [1974] 3 *Journal of Legal Studies* 257.

<sup>892</sup> *Ibid* p. 285.

error) or they can fail to find a violation when in fact there is one (Type II error).<sup>893</sup> Hence, an efficient mix or set of rules or modalities of behaviour constraints should minimise the sum of these expected costs.

There have been further variants of regulatory design that seek to put together the right mix for optimal regulatory response. *Shavell* proposed a model in which the choice of the optimal response mix depends on weighing four factors among injurers and victims. These factors are the asymmetric information concerning risks, capacity of the injurer to pay, probability of private enforcement and relative magnitude of legal and regulatory costs.<sup>894</sup>

Overall, this rational choice of instrument selection for the best regulatory framework possible based on cost-effectiveness analysis of regulation is perfectly recognised in the public enforcement of EU competition rules. Yet, it has also been translated into the field of criminology and criminal justice policies overall. Although criminology is concerned with the study of crime control and prevention of criminal behaviour, it is not totally unrelated to the study on antitrust law since, as I have argued in Chapter 3, sanctions imposed by the EU Commission in the enforcement of EU competition law have a punitive nature and are thus, criminal in the broad sense.<sup>895</sup>

EU competition law enforcement can benefit from the study of punishment theories and philosophies and it is important to analyse whether the EU Commission needs to choose

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<sup>893</sup> C. Veljanovski, 'Economic Approaches to Regulation' in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, New York 2010) p. 28.

<sup>894</sup> S. Shavell, 'Liability of Harm versus Regulation of Safety' [1984] 13 Journal of Legal Studies 357 – 374.

<sup>895</sup> See Chapter 4 and the case law of the ECtHR there referred in this respect.

a different approach other than a theoretical based model that assumes rationality when punishing undertakings. By taking account of the empirical evidence, for instance following the studies on this matter in criminology and how it has been affected by economics and behavioural economics, the EU Commission can move towards convergence between its enforcement framework and its policy objective.

#### 4.3 Utilitarian vs Retributive approach.

Following the modern western criminal justice system, the EU antitrust enforcement has rested on utilitarian foundations first laid on the ideas of *Cesare Beccaria* that were published back in 1764.<sup>896</sup> Indeed *Beccaria's* innovative thinking is the origin of most theories of deterrence that are predicated on the idea that if state-imposed sanctions costs are sufficiently severe, criminal activity will be discouraged, at least for some. He was concerned with the constructive purpose of punishment as he conceived it to be preventing crime; in fact, he observed that it was better to prevent crimes than punish them.<sup>897</sup>

He also argued that the elements of this deterrence process were severity, certainty and celerity of punishment and even identified that one of the greatest curbs on crime is not the cruelty of punishments, but their infallibility; meaning the certainty of punishment will always make a stronger impression.<sup>898</sup> Largely, he argued for punishment to be scaled to the seriousness of the crime and should be used to deter others and to prevent the criminal from repeating the crime.<sup>899</sup>

Later in 1789, *Jeremy Bentham* further developed Beccaria's work which was considered to have more normative considerations.<sup>900</sup> Indeed, *Bentham's* scheme was more oriented towards deterrence effectiveness but posed formidable practical difficulties as he believed

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<sup>896</sup> Cesare Beccaria, *Dei delitti e delle pene (On Crimes and Punishments)*. Translated by Henry Paolucci (Macmillan, New York 1986) (Originally published 1764).

<sup>897</sup> Ibid p. 93.

<sup>898</sup> Ibid p. 58.

<sup>899</sup> Ibid p. 36.

<sup>900</sup> Jeremy Bentham, 'An Introduction to Principles of Morals and Legislation' in J.H. Burn, H.L.A. Hart and F. Rosen (eds), *The Collected Works of Jeremy Bentham* (Clarendon Press, Oxford, 1996) p. 38.

that penalties are meant to be harsher for more serious crimes compared with less serious.

In addition, sanctions are to be increased to take account of the probability that any punishment will be imposed for a particular kind of crime and of delays in imposition, and are further to be adjusted to take account of the offender's unique sensibilities.<sup>901</sup>

According to *Tonry*, Bentham's primary means of crime prevention were based mostly on deterrent ideas he shared with *Beccaria*, combined with a model of human rationality engaged in calculations of costs and benefits and taking into account how punishment would affect a particular individual offender.<sup>902</sup> This led him to be considered the inventor of utilitarian analyses of public policy that are based on the belief that the greatest good of the greatest number is the best justification of state policies and actions.<sup>903</sup>

As *Nagin* observes, since Beccaria and Bentham works, there has been a large theoretical research on deterrence within and outside economics, in which scholars have speculated on the deterrent effect of state-imposed sanctions. Nevertheless, sustained efforts to empirically verify their effects did not begin until 1960s.<sup>904</sup>

However, considering the fact that it was in the 1960s that the Chicago School became known and economic analysis of law and its enforcement was gaining more and more adepts. It is no surprise that it was an economist *Gary Becker*, who in 1968 provided the modern formalization of the deterrence process formulated by *Beccaria and Bentham*.<sup>905</sup>

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<sup>901</sup> Michael Tonry, *Why Punish? How much? A reader on Punishment* (1<sup>st</sup> Edition, Oxford University Press, 2011) p. 3.

<sup>902</sup> *Ibid.*

<sup>903</sup> Michael Tonry, *The Oxford Handbook of Crime and Public Policy* (OUP, Oxford 2009) p. 9.

<sup>904</sup> D. S. Nagin, 'Deterrence: A Review of Evidence by a Criminologist for Economists' [2013] 5 Annual Review of Economics 83 – 105.

<sup>905</sup> G. Becker, 'Crime and Punishment: An Economic Approach' [1968] 79 Journal of Political Economy 2 p. 169 – 217.

Indeed, it was *Becker* who laid the foundations of contemporary theoretical and empirical research in economics on deterrence process and which is still developing.<sup>906</sup>

In the particular case of antitrust law and its enforcement, it was *W. Landes* who in 1983 further developed what is now considered the optimal deterrence theory in order to determine the appropriate antitrust sanction levels.<sup>907</sup> Under this theory, the optimal sanction level for deterring anticompetitive behaviour is found by multiplying the expected harm from the behaviour multiplied by the inverse of the probability of a fine being effectively imposed.<sup>908</sup>

Under Landes' economic model of optimal deterrence, the fine must equal the net harm to persons other than the offender and the amount of gain a prospective violator will garner from a violation is irrelevant insofar as it does not convey information on net harm.<sup>909</sup> Becker stated the same, when he argued that if the goal is to minimize the social loss in income from competition law infringements, then fines should depend on the total harm done by the offenders and not directly on their gains.<sup>910</sup>

*Wils* has called this model the 'internalisation approach' that requires knowledge of marginal gains and harm and of marginal discovery and conviction costs.<sup>911</sup> Following

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<sup>906</sup> Note that Becker developed his work from previous research done by other Chicago scholars such as G. J. Stigler, 'The Kinky Oligopoly Demand and Rigid Prices' (1947) 55 (5) *Journal of Political Economy* 432 and R. H. Coase, 'The Problem of Social Cost' [1960] 3 *Journal of Law & Economics* 1.

<sup>907</sup> W. Landes, 'Optimal Sanctions for Antitrust Violations' [1983] 50 *University of Chicago Law Review* 652, David A. Dana, 'Rethinking the Puzzle of Escalating Penalties for Repeat Offenders' [2001] 110 *Y LJ* 733.

<sup>908</sup> *Ibid.*

<sup>909</sup> *Ibid.* p. 656.

<sup>910</sup> G. Becker, 'Crime and Punishment: An economic Approach', (1968) 76 *Journal of Political Economy* 194.

<sup>911</sup> W. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing, Oxford 2008) p. 57.

this reasoning, fines under the internalisation approach seek to provide compensation to victims and optimal fines at the margin, fully compensate victims and restore the status quo ante, so that they are no worse off than if offenses were not committed.<sup>912</sup>

This conception of optimal fines at the margin is the idea of restorative justice applied to competition law. According to the theory of punishment, restorative justice was a new different paradigm of justice, which proposes that crimes should be reconceptualised as conflicts and that the aim of punishment should be to build relationships among offenders and victims.<sup>913</sup>

The idea of restorative justice sat comfortably under the retributive view, according to which, punishment is not justified by its future consequence of deterring harmful conduct, but rather on the ground that it is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing.<sup>914</sup> This ought in no case to be more than what is necessary to bring it into conformity with any given rules.<sup>915</sup> Nevertheless, since undertakings are the only ones susceptible of fines imposed by the EU Commission, they have “no soul to be damned and no body to be kicked”,<sup>916</sup> and thus, it would seem that moral considerations are absent.

Those retributivists’ frameworks were mostly developed in the area of criminal policy and criminal law, and considered that people who have chosen to commit criminal

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<sup>912</sup> W. Wils, ‘Optimal Antitrust Fines: Theory and Practice’ (2006) 29 *World Competition* 2 at 198.

<sup>913</sup> Michael Tonry, *Why Punish? How much? A reader on Punishment* (1<sup>st</sup> Edition, Oxford University Press, 2011) at 22.

<sup>914</sup> Wouter P. J. Wils, *The optimal enforcement of EC antitrust law: A study in Law and Economics* (Kluwer Law International, Brussels 2002) p. 206, making reference to J. Rawls ‘Two concepts of rules’ [1955] 64 *Philosophical Review* 3 at 3-4.

<sup>915</sup> *Ibid* p. 5.

<sup>916</sup> Elizabeth Knowles (ed), *The Oxford Dictionary of Quotations* (6<sup>th</sup> edn OUP, Oxford 2004) p. 550 quoting Baron Thurlow.

offenses deserve to be punished and punishments should be proportional to the seriousness of crimes. The above mentioned for the purpose that relative punishments can be said in a meaningful way, to be equivalent to the crimes for which they are imposed.<sup>917</sup>

According to *Kant*, deserved punishment must be inflicted and can never be used merely as a means to promote some other good for the criminal himself or for the society in general. Punishment is an end in itself and not an instrument.<sup>918</sup> *Hegel* later developed on this theory basically providing an explanation to this for the end goal of punishment by stating that crime negates moral law and only punishment can restore the negated moral right.<sup>919</sup>

The above explained retributive view of punishment, in which proportionality is a central element, competes for the allegiance of the EU competition law system with the utilitarian conception. This has been shown by the Court of Justice of the EU where it affirmed that the fines imposed by the EU Commission for violations of Article 101 and 102 TFEU have as their object to punish illegal conduct as well as to prevent it being repeated.<sup>920</sup>

However, this retributive approach based on harm considerations appears difficult to apply in practice since, in order to determine the optimal fine in a concrete case; one has to quantify the harm to parties other than the offender, which means that it must include

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<sup>917</sup> Michael Tonry, *Why Punish? How much? A reader on Punishment* (1<sup>st</sup> Edition, Oxford University Press, 2011) p. 10.

<sup>918</sup> Immanuel Kant, *The Metaphysical Elements of Justice* (Translated by John Ladd Bobbs-Merrill Indianapolis 1798 (1965) p. 100.

<sup>919</sup> Georg W. F. Hegel, *Elements of the Philosophy of Right* (Edited by Allen W. Wood Cambridge University Press 1991) p. 71 and 218.

<sup>920</sup> Case C-41/69 *ACF Chemiefarma v Commission* [1970] ECR 661 para 173.

not only the monopoly transfer but also the portion of the deadweight loss borne by consumers.<sup>921</sup> This model has also been criticised under the argument that it merely seeks to price antitrust violations.<sup>922</sup>

On the other hand, the utilitarian view of the deterrence framework developed by *Landes* is an approach that sets the optimal fine to exceed the expected gain from the violation multiplied by the inverse of the probability of a fine being effectively imposed.<sup>923</sup> According to *Wils*, if prevention of future antitrust violations, as a means to prevent future wealth transfers from consumers to producers, is the primary goal, then fines should aim to achieve deterrence. In this regard, the minimum fine for deterrence to work must be based on the expected gain the antitrust violator intended to obtain, irrespective of whether the offender's gain exceeds the harm caused to consumers.<sup>924</sup>

This is important because it is neither the actual harm, nor the actual gain the relevant measure, but the subjectively expected harm or gain, discounted by the subjectively expected probability that a fine would be imposed.<sup>925</sup> As has been explained before, it was Jeremy Bentham, anticipating modern economists writing on deterrence, who argued that punishments should be increased in severity in inverse relation to the likelihood that the offender would be caught and punished.<sup>926</sup>

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<sup>921</sup> W. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing, Oxford 2008) p. 58.

<sup>922</sup> Robert Cooter, 'Prices and Sanctions', [1984] 84 CLR 1523 and John Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It', [1992] 101 YLJ 1875.

<sup>923</sup> W. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing, Oxford 2008), p. 56.

<sup>924</sup> *Ibid*, p. 57.

<sup>925</sup> Richard Posner, *Economic Analysis of Law* (7<sup>th</sup> edition Aspen, New York, 2007) at 226.

<sup>926</sup> Herbert L.A. Hart, 'Bentham and Beccaria' in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (OUP, Oxford, 1982).

This utilitarian perception of optimal deterrence has almost been accepted universally around the world by national and regional competition authorities including the EU Commission in antitrust enforcement.<sup>927</sup> Overall, antitrust law and policy were just another victory for this utilitarian view of punishment that ultimately won the battle for the hearts and minds of law practitioners and policy makers around the world over retributivist views of punishment founded by *Kant*<sup>928</sup> and *Hegel*.<sup>929</sup> This was done despite the fact that the utilitarian approach has also resulted in the perception that it merely seeks to price antitrust violations.

Hence, the debate of deterrence has so far focused on whether optimal deterrence in antitrust should put emphasis on the expected harm or expected profit.<sup>930</sup> As has been explained before, the EU Commission links the fine to be imposed to the value of the affected sales during the infringement, which it considers to be a good indicator of the damage to the economy caused by the violation over time.<sup>931</sup>

Even though this link between the value of affected sales and the fine to be imposed provided in the EU Fining Guidelines 2006 means a huge improvement from the tariff-based methodology that delivered too high or too low fines and thus, disproportionate fines under the EU Fining Guidelines 1998.<sup>932</sup> According to *Ridyard*, such a turnover-

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<sup>927</sup> EU Fining Guidelines 2006 recital 4 and factsheet ‘Fines for breaking EU Competition law’, (Competition policy website, November 2011)

[http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf)

<sup>928</sup> Immanuel Kant, *The Penal Law and the Law of Pardon in the Metaphysical Elements of Justice* (Translated by John Ladd Bobbs-Merrill Indianapolis 1798 (1965) p. 26.

<sup>929</sup> Georg W. F. Hegel, *Elements of the Philosophy of Right* (Edited by Allen W. Wood Cambridge University Press 1991) p. 166.

<sup>930</sup> W. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing, Oxford 2008) p. 57 referring to R. H. Lande, ‘Chicago’s false foundation: Wealth transfers should guide antitrust’ [1989] 58 Antitrust Law Journal 631 p. 638.

<sup>931</sup> Factsheet ‘Fines for breaking EU Competition law’, (Competition policy website, November 2011).

<sup>932</sup> Ivo van Bael, *Due Process in EU Competition Proceedings* (1<sup>st</sup> edn, Kluwer Law International, 2011) p. 253.

based formulae is nothing more than a mechanistic and unsatisfactory approach due to the fact that there is a too wide class of conduct that is deemed to fit the category of very serious competition law infringements.<sup>933</sup> In this regard, even for horizontal cartel conduct, differences between industries provide a very poor link between turnover and anticipated cartel profits.<sup>934</sup>

*Riley* also argues that companies' turnover is such an inadequate proxy not only for assessing the damage done by antitrust law infringers but also the gain acquired by such undertakings.<sup>935</sup> He further states that it may no longer be appropriate for fines to be based on turnover calculations rather than the levels of overcharges imposed by cartels or effects in case of abusive conduct.<sup>936</sup>

Despite these arguments, fines remain disconnected from substantive effects and as such, they will never derive results that are truly fit for the stated purpose of providing appropriate levels of deterrence without compromising the principle of proportionality.<sup>937</sup> Although there seems to be a broad consensus among legal and economic writers that the question of the optimality of price-fixing penalties turns mightily on the actual degree of harm caused by cartel conduct, the fact is that we do not know enough about this issue.<sup>938</sup>

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<sup>933</sup> Derek Ridyard, 'Another fine mess: OFT proposals pave the way to effects-based analysis of competition law penalties' [2013] 34 ECLR 128

<sup>934</sup> *Ibid* at 132.

<sup>935</sup> Alan Riley, 'Modernising cartel sanctions: effective sanctions for price fixing in the European Union', [2011] 32 ECLR 551.

<sup>936</sup> Alan Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?' (January 2010) CEPS, Special Report, p 19, available from (<http://www.ceps.eu>).

[http://aei.pitt.edu/14570/1/Modernisation\\_Final\\_e-version.pdf](http://aei.pitt.edu/14570/1/Modernisation_Final_e-version.pdf) (Accessed on 15 October 2015).

<sup>937</sup> Derek Ridyard, 'Another fine mess: OFT proposals pave the way to effects-based analysis of competition law penalties' [2013] 34 ECLR 153.

<sup>938</sup> J. M. Connor and R. H. Lande, 'How high do cartels raise prices? Implications for optimal cartel fines' [2005] 80 Tulane Law Review 513.

Perhaps this is the reason why focusing on expected profits from the violations makes a better reference for deterrence purposes as undertakings are supposed to make rational choices and engage in prohibited antitrust conduct only if expected profits exceed expected costs. Hence, if we focus on expected profits, enforcement can concentrate to elevate the costs and deter companies from committing the violation in the first place.

Another practical reason of the link of the fines to the sales of the relevant products of the concerned undertaking against a system, in which the amount of the fine is based upon the quantification of the gain obtained by the offender or the harm caused by the antitrust infringement, is the burden of proof. The EU Commission is not obliged to prove any actual impact on the market in order to be able to impose the necessary fines for antitrust violations such as cartels, which are illegal, by object, but if it chooses to refer to such effects in setting the amount of the fine, it must prove what it claims.<sup>939</sup>

Nor is the EU Commission required, in order to determine the fine, to establish that the antitrust violation brought an unlawful advantage for the undertakings concerned but if it chooses to refer to such gain, it again must prove what it claims.<sup>940</sup> However, not only practical reasons influence this choosing. As has been stated above, based on the objective of antitrust in the EU, which is consumer welfare, the focus on expected profits is consistent with the general EU competition policy objective to prevent the transfer of wealth from consumers to producers.<sup>941</sup>

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<sup>939</sup> Case T-25/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-1570 para 4862 and 4863, Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913 para 280 and Case T-224/00 *Archer Daniels Midland v Commission* [2003] ECR II-2597 para 148-171.

<sup>940</sup> Case T-25/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-1570 para 4881 and 4882 and Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913 para 340 - 343.

<sup>941</sup> W. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing, Oxford 2008) p. 57.

In either case, whether harm-based or profit-based optimal deterrence frameworks adopted, for advantageous purposes the EU Commission and other competition agencies around the world have focused on the value of sales as a proxy for expected profit and a measure of harm. The latter focuses on the supra competitive price, therefore, the basis is not affected as a way to achieve efficiency in EU antitrust enforcement. This in essence means that the premises of the Chicago School have been unchanged for the last three decades and remain valid.<sup>942</sup>

Hence, the EU Commission's approach concerning competition law infringements is based on the utilitarian punishment theory based on expected profit without complete disregard of the harm. According to the EU Commission's communication '*Fines for breaking EU competition law*', the EU Commission has a policy of prevention, and fines imposed for the violation of EU competition law are levied with that goal in mind, and must hence fulfil two objectives, to punish and to deter.<sup>943</sup> This is done under a clear commitment by the EU Commission to provide theories of harm in principle although the applicable legal standard in antitrust cases is not always clear.<sup>944</sup>

As the historic analysis above has shown, this policy choice can easily be explained, and tracked back to *Beccaria* and *Bentham*'s punishment theories. Going even further up to the optimal deterrence framework developed by *Becker* and *Landes* during the

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<sup>942</sup> Affected sales are the basis in the setting of fines in both the EU and the U.S. See para. 12 and 13 of the EU Fining Guidelines 2006 in respect to the EU and the 2011 U. S. Federal Sentencing Guidelines Manual §2R1.1 (2011) in respect to the U.S.

<sup>943</sup> Factsheet 'Fines for breaking EU Competition law', (Competition policy website, November 2011). [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf) (Accessed February 27, 2015.)

<sup>944</sup> H Zenger and M. Walker, 'Theories of Harm in European Competition Law: A Progress Report' (February 22, 2012). TEN YEARS OF EFFECTS-BASED APPROACH IN EU COMPETITION LAW, Jacques Bourgeois and Denis Waelbroeck, eds., pp. 185-209, Bruylant, 2012. Available at SSRN: <http://ssrn.com/abstract=2009296> (Accessed on 01 April 2015).

enlightenment-era of law and economics of the Chicago School. However, the high levels of recidivism, the increasing number of cartels discovered and the ever-increasing amount of fines imposed for violations of Articles 101 and 102 TFEU may suggest that the optimal deterrence approach is ineffective in its operation.



#### 4.4 The utilitarian approach in antitrust enforcement: Does it work?

In the last decade, there have been several empirical studies suggesting that the enforcement of antitrust law based on the optimal deterrence framework, is actually deterrent suboptimal. This is true particularly against cartels in the U.S. and the EU. In this respect, *Connor* and *Landes* suggest that because the antitrust deterrence framework in the U.S. puts emphasis on the cartel overcharge as the basic point for harm quantification; other less obvious factors are not taken into consideration. Such factors are deadweight loss, the umbrella effect prices, managerial slack, less innovation, non-price harm to quality, variety and present value adjustments, which overall produce lower fines.<sup>945</sup>

Even setting aside the limited harm quantification, they further argued that the base fine level of 20% of the volume of affected commerce provided in the 2011 U. S. Federal Sentencing Guidelines,<sup>946</sup> offers an inaccurate estimation considering that such percentage is based on a presumption that the average gain from price-fixing is 10% of the selling price.<sup>947</sup> This all seems at odds considering that even the 2002 OECD report on hard-core cartels concluded that the median average cartel overcharge between 1995 and 2001 was between 15 and 20%.<sup>948</sup>

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<sup>945</sup> J. M. Connor and R. H. Landes, 'How high do cartels raise prices? Implications for optimal cartel fines' [2005] 80 Tulane Law Review 513 and 562.

<sup>946</sup> 2011 U. S. Federal Sentencing Guidelines Manual §2R1.1 (2011) §2R1.1(d)(1) .

<http://www.ussc.gov/guidelines-manual/2011/2011-2r11> (Accessed on 12 December 2014).

<sup>947</sup> Ibid §2R1.1, Application note 3.

<sup>948</sup> OECD, Report on the nature and impact of hard-core cartels and sanctions against cartels under national competition laws, DAFFE/COMP (2002)7.<http://www.oecd.org/competition/cartels/2081831.pdf> (Accessed on 15 January 2015).

Their study, based on scholarly social science studies and the examination of every final verdict of collusion cases in the U. S., found that the median cartel overcharge for all types of cartels for all periods of time has been between 17% and 19% for domestic cartels and 30 to 33% for international cartels.<sup>949</sup> This means that cartels are undeterred and an increase in the presumption of cartel overcharge to 15% for domestic cartels and 25% for international cartels would be desirable in order to be consistent with optimal deterrence framework.<sup>950</sup>

Further empirical studies on cartel overcharges concerning the U.S. and international markets including Europe, have developed ever since. All these provide an average of cartel surcharge between 12% and 25%.<sup>951</sup> One of the most important was published in 2008 using a sample of sanctioned modern international cartels, mainly those sanctioned in the U.S. and the EU; and found that the average median gain from price-fixing was 27% of affected commerce and the average government fine was only 2.1% of affected commerce.<sup>952</sup>

In addition, the study found that the average median cartel sanction that includes both government fines and compensation recovered by private parties is only 4.9% of affected sales.<sup>953</sup> Hence, antitrust fines around the world fail to perform even a compensatory

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<sup>949</sup> J. M. Connor and R. H. Lande, 'How high do cartels raise prices? Implications for optimal cartel fines' [2005] 80 Tulane Law Review 563

<sup>950</sup> *Ibid* at 565.

<sup>951</sup> See J. M. Connor and Y. V. Bolotova 'Cartel Overcharges: Survey and Meta-Analysis' [2006] 24 International Journal of Industrial Organization 1109. Y. V. Bolotova, J. M. Connor and D. J. Miller, 'Factors Influencing the Magnitude of Cartel Overcharges: An Empirical Analysis of Food Industry' [2005] 23 Antitrust International Journal 17. Y. V. Bolotova, J. M. Connor and D. J. Miller, 'Factors Influencing the Magnitude of Cartel Overcharges: An Empirical Analysis for the U.S. Market' [2008] 5 Journal of Competition Law and Economics 361. See also John M. Connor, *Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008*, at 55, American Antitrust Institute, Working Paper No. 09-06, 2009.

<sup>952</sup> Y. V. Bolotova, and J. M. Connor, 'Cartel Sanctions: An Empirical Analysis' (April 2008). Available at SSRN: <http://ssrn.com/abstract=1116421> (Accessed January 3, 2015).

<sup>953</sup> *Ibid* p. 19.

function and are far from being deterrent, even when adding private measures to access compensation.

One explanation for the above could be that the cartel fine is not a function of the cartel overcharge, which is the cartel's obvious damage in essence, but is more likely to be a function of affected sales.<sup>954</sup> In this regard, it should be remembered that the EU Commission has as its reference, the value of sales for the calculations of fines and is thus, not a function of the cartel damage.<sup>955</sup> Therefore, cartels imposing higher overcharges tend to pay smaller fines and larger in sales cartels, even when the overcharge is very low, tend to pay larger fines which means that the affected market has a positive impact on the fines to be imposed.<sup>956</sup>

In 2006, Connor and Lande published one study that particularly addressed the situation in Europe.<sup>957</sup> In it, it was concluded that on average, European wide cartels show overcharges in the range of 28% to 54%. If for example, one third of European cartels are detected, if they last for 5 years on average, and if the surcharges above stated are in fact those that are actually applied; the optimal fine would be between 420% and 810% of the annual sales of the infringing firm. However, fines in the EU for antitrust violations are capped and cannot exceed 10% of the total turnover in the preceding business year.<sup>958</sup>

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<sup>954</sup> *Ibid.*

<sup>955</sup> See para 13 of 2006 EU Fining Guidelines. In the U.S., it is 20% of the affected commerce according to the 2011 U. S. Federal Sentencing Guidelines Manual.

<sup>956</sup> Y. V. Bolotova, and J. M. Connor, 'Cartel Sanctions: An Empirical Analysis' (April 2008) p. 19.

<sup>957</sup> J. M. Connor and R. H. Lande, 'The size of cartel overcharges: Implications for U.S. and EU fining policies' (2006) 51 (4) *The Antitrust Bulletin* 983.

<sup>958</sup> See also Article 23(2) of Regulation No. 1/2003.

The most recent study focusing solely on the European market has been developed by *Smuda*, and was published in March 2014. It reached similar conclusions as the one carried by *Connor* and *Lande*. Based on a data set with 191 overcharge estimates solely for the European market, the author found that the mean cartel overcharge in Europe is 20.7% and the median is 18.4% of the selling price. As to cartel durability, the average cartel duration is 8.35 years and the median is 5 years.<sup>959</sup>

One important conclusion delivered was the fact that although the EU Fining Guidelines 2006 are in line with the more economics oriented approach of enforcement adopted in late 1990s; the study showed that potential fines under these setting have not influenced the economic decision of undertaking to take part in cartel agreements. In fact, in the last decade, the average cartel duration was 5.7 years and the mean overcharge was 21.9%. These numbers are higher than the overall period starting in 1969 up to 2009.<sup>960</sup>

With this data, a hypothetical case was given. Although there are empirical studies that validate the assumption that the probability of cartel detection in Europe is in the range between 12.9% and 13.3%,<sup>961</sup> or in the range of between 10 and 20%;<sup>962</sup> the highest upper bound of detection from the international overcharge study published by *Connor* and *Lande* in 2006,<sup>963</sup> which was 33%, was used instead.

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<sup>959</sup> Florian Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law', (2014) 10 (1) Journal of Competition Law and Economics 63 – 89, p. 69. He further discovered that at least in Europe, bid-rigging cartel overcharges are 4.71% higher than those of non-bid-rigging cartels.

<sup>960</sup> *Ibid* p. 81 and 82.

<sup>961</sup> E. Combe, C. Monnier and Renaud Legal 'Cartels: The probability of being caught in the European Union' (2008) Available at SSRN: <http://ssrn.com/abstract=1015061> It must be noted that these percentages represent the upper bound and thus, the detection could be significantly lower.

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1015061](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015061) (Accessed on 04 March 2015)

<sup>962</sup> P. L. Ormosi, 'A Tip of the Iceberg? The probability of Catching Cartels' (November 30, 2012). Available at SSRN: <http://ssrn.com/abstract=1851309> (Accessed on 04 March 2015).

<sup>963</sup> J. M. Connor and R. H. Lande, 'The size of cartel overcharges: Implications for U.S. and EU fineing policies' (2006) 51 (4) The Antitrust Bulletin 983.

Hence, taking into account the 33% detection rate, it was found that as of 2014 the optimal fine for an average cartel should amount to 374.49% of affected sales and that the EU Fining Guidelines 2006 do not achieve effective deterrence since fines derived from it are too low and do not prevent undertakings from cartel participation.<sup>964</sup> Even more, the study showed that in 67% of the cases from the collected data, the amount of cartel overcharges exceeded the maximum possible fine levels.<sup>965</sup> Despite these results, it must be kept in mind that the 33% detection rate is not consistent with research developed earlier that suggested that even in the U.S. which is considered to be more effective uncovering cartels, the cartel detection rate was between 13 and 17%.<sup>966</sup>

This means that in Europe, for 2 out of 3 cartels it has been a lucrative business to participate in cartels. Furthermore, 37% of cartel cases obtained more than double in cartel profits than the sanction imposed and in 13% of the cases, the cartel profits were 3 times bigger than the current maximum possible fine level.<sup>967</sup> Hence, EU Fining Guidelines 2006 do not achieve optimal deterrence and may not even achieve compensation for the harm caused by antitrust violations.

However, as *Motta* has noted, no matter how much evidence a study collects on actual cartels discovered and fined by the EU Commission, if we do not know how many cartels exists in the European economy, then the evidence is incomplete and the results are

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<sup>964</sup> Florian Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law', (2014) 10 (1) Journal of Competition Law and Economics 63 – 89, p. 84.

<sup>965</sup> Ibid p. 85-86. It must be remembered that cartel fines in the EU are capped to 10% of the total turnover in the preceding business year and the actual fines imposed are far below from that limit.

<sup>966</sup> P. G. Bryant and E. W. Eckard, 'Price Fixing: The Probability of Getting Caught', [1991] 73 Rev. Econ. & Stat. 531 p. 535 although the period that was taken into account was between 1961 and 1988.

<sup>967</sup> Florian Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law', (2014) 10 (1) Journal of Competition Law and Economics 63 – 89, p. 84 – 86.

incomplete as to the effects of the fight against antitrust violations.<sup>968</sup> Nevertheless, even assuming that the EU Commission is more effective at setting detection rate at 33%; empirical research confirms the reality that the EU fining system for antitrust violations is far from effective as fines are too low and it should be considered whether other elements of deterrence other than severity of fines could be drastically altered.

However, the EU Commission has directed its deterrence policy by focusing on one element only, by making fines for cartel offenders higher than in the past in order to discourage prospective offenders. This situation has led the EU Commission to become the harshest fining authority in public enforcement of antitrust law around the world.<sup>969</sup> According to *Lasserre*, from 1999 to 2004 the EU Commission imposed €3.46 billion in corporate fines and from 2004 to 2009, it further increased that amount to €9.76 billion. This amount is much bigger if compared against the USD \$4 billion in corporate sanctions imposed by the DoJ Antitrust Division in the United States for the same period;<sup>970</sup> although in the fiscal year of 2014 it collected USD \$1.86 billion.<sup>971</sup>

Nevertheless, it is important to remember that the U.S. antitrust regime allows for criminal sanctions to be imposed on individuals and thus, executives are susceptible of paying fines of up to USD \$1 million and serve prison sentences for up to 10 years.<sup>972</sup> In this regard, according to *Howell*, from 1999 to 2009 the number of individuals convicted

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<sup>968</sup> M. Motta, 'On cartel deterrence and fines in the European Union' [2008] 29 ECLR 4 p. 209.

<sup>969</sup> Z. A. Cronin, 'The Competitor's Dilemma: Tailoring Antitrust Sanctions to White-collar priorities in the fight against Cartels' [2013] 36 Fordham International Law Journal 1683, p. 1699.

<sup>970</sup> B. Lasserre, Antitrust: A Good Deal for all in Times of Globalization and Recession' Competition Policy International, Vol. 7, no. 1, Spring 2011, p. 258.

[http://www.autoritedelaconcurrence.fr/doc/cpi\\_lasserre\\_printemps2011.pdf](http://www.autoritedelaconcurrence.fr/doc/cpi_lasserre_printemps2011.pdf) (Accessed on 06 March 2015).

<sup>971</sup> Antitrust Division of the U.S. Department of Justice, 'Antitrust Division Announces Fiscal Year Total in Criminal Fines Collected' Press Release of January 22, 2015. <http://www.justice.gov/opa/pr/antitrust-division-announces-fiscal-year-total-criminal-fines-collected> (Accessed September 30, 2015).

<sup>972</sup> 15 U.S.C. §§ 1, 2, 3.

for violations of the Sherman Act was 246 with a median prison term of 6 months ranging from a low of 2 weeks to a high of 4 years.<sup>973</sup> For the fiscal year of 2014, 21 individuals served prison sentences of 26 months on average.<sup>974</sup>

Treble damages are available in the U.S. as well, which would mean that the total amount of monetary sanctions and remedies from public and private enforcement combined against corporations in the U.S. could, in reality be higher than the fines imposed by the EU Commission. According to *Shaffer* and *Nesbitt*, from 1990 to 2008 the total global penalties imposed against international cartels amounted to an estimated of USD \$63.3 billion.<sup>975</sup> From this amount, an estimated USD \$29 billion stemmed from civil suits and private settlements that took place mainly in the U.S.<sup>976</sup>

While the combination of fines and treble damages may suggest that the total amount in financial penalties imposed in the U.S. against companies participating in cartel infringements may be greater than those imposed in Europe by the EU Commission; a new study published in 2014 proves this assumption wrong.

Treble damages are a remedy available in the U.S. that allows for compensation and deterrence as well. However, since most of the cases do not reach judgement, and are settled, the data available about damages is limited. Nevertheless, *Connor* and *Lande*

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<sup>973</sup> B. A. Howell, 'Sentencing of Antitrust Offenders: What does the data show?' United States Sentencing Commission, p. 5 and 8.

[http://www.ussc.gov/sites/default/files/pdf/about/commissioners/selected-articles/Howell\\_Review\\_of\\_Antitrust\\_Sentencing\\_Data.pdf](http://www.ussc.gov/sites/default/files/pdf/about/commissioners/selected-articles/Howell_Review_of_Antitrust_Sentencing_Data.pdf) (Accessed on 05 March 2015).

<sup>974</sup> Antitrust Division of the U.S. Department of Justice, 'Antitrust Division Announces Fiscal Year Total in Criminal Fines Collected' Press Release of January 22, 2015. <http://www.justice.gov/opa/pr/antitrust-division-announces-fiscal-year-total-criminal-fines-collected> (Accessed on 06 March 2015).

<sup>975</sup> G.C. Shaffer and N. H. Nesbitt, 'Criminalizing Cartels: A Global Trend?' (2011) 12 Sedona Conference Journal 313.

<sup>976</sup> *Ibid* p. 324.

assembled a sample of every completed private U.S. cartel case discovered from 1990 to mid-2014 reaching 71 cartels. Twenty per cent of these cases received a bit more than initial damages and 10% of cases received more than double initial damages.<sup>977</sup> However, 70% of the cases received less than their initial damages, meaning less than 100% of compensation.<sup>978</sup>

Overall, the median average settlement was 37% of single damages and they particularly observed that recovery ratios were higher in cases that followed adverse legal enforcement by the DoJ Antitrust Division or the OFT than non-follow on settlements. No explanation was provided for this but a suggestion maybe that the ratios could be different for direct consumers than indirect.<sup>979</sup>

Thus, even if fines were imposed to compensate deadweight loss or loss from allocative inefficiency and damages were granted for compensatory grounds to consumers only against cartel offenders; the current situation is that in the U.S., antitrust damages should be significantly greater to compensate at least if not to deter. Overall, the U.S. sanctioning and remedial system does not prevent competition law infringements.<sup>980</sup> The system implemented by the EU Commission, that of fines against undertakings, does not do better and its penalties could even be considered as business prices.

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<sup>977</sup> J. M. Connor and R. H. Lande, 'Cartel Settlements Seldom Surpass Actual Damages' (December 29, 2014). Iowa Law Review, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2548712> (Accessed on 01 October 2015).

<sup>978</sup> *Ibid* p. 21.

<sup>979</sup> *Ibid* p. 25

<sup>980</sup> For more information about the highest fines ever imposed in the U.S. see Department of Justice ANTITRUST DIVISION, 'Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More. April 22, 2015. <http://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more> (Accessed on 01 October 2015).

Whether it is only financial sanctions against corporations or criminal charges against individuals, or both, and whether sanctions and remedies are imposed through public enforcement or private enforcement or in combination. Today, more than 120 jurisdictions around the world have followed the example of U.S. and the EU in order to enforce antitrust rules based on a policy of deterrence, and fines are just piling up.<sup>981</sup>

As to the particular approach of individual cases, deterring anti-competitive conduct is more effective when the illegal nature of the conduct is clear in advance and when some kinds of conduct are more likely than not to be harmful. However due to the nature of competition law, the EU Commission cannot always expect to achieve deterrence in every decision it adopts when sanctioning undertakings.

Infringements decisions in individual cases should be individualized to account for the offender's recidivism prospects or need for either structural or behavioural remedies by way of commitments and occasionally to address deterrent concerns.<sup>982</sup> As long as these elements are not taken into account in the EU competition law fining system, such punishment scheme will not produce any practical benefits and hence it cannot be justified at all.

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<sup>981</sup> Bill Baer, 'Reflections on Elements of Effective Antitrust Enforcement', Global Competition Review, 4<sup>th</sup> Annual Antitrust Leaders Forum, Miami, Florida, February 6, 2015.  
<http://www.justice.gov/atr/public/speeches/311710.pdf> (Accessed on 12 July 2015).

See also, Z. A. Cronin, 'The Competitor's Dilemma: Tailoring Antitrust Sanctions to White-collar priorities in the fight against Cartels' [2013] 36 Fordham International Law Journal 1683 at 1700 and the references there provided. There it is mentioned that jurisdictions such as Brazil, Chile, Britain, South Korea and India imposed in the last 5 years more than USD \$4 billion in fines. It must be kept in mind that most national systems also have statutory limitations as to the amount of fines so, although the amount may seem big enough, they may not be effective in deterring future violations.

<sup>982</sup> David J. Rothman, *Conscience and Convenience* (Little Brown, Boston 1980) p. 146.

However, a broad standardization has served as justification for the criminalisation of cartels around the world including Europe, as fines imposed by the EU Commission, although formally administrative, they have a punitive nature and are sanctions within the broad criminal definition. This in turn means that other remedies should be considered when it is not clear whether a conduct is anticompetitive *ex ante*.

In such cases perhaps, disgorgement is a more preferable remedy for abuse of dominance violations. Even in cartel cases, Article 101 TFEU is a broad offense type that includes many types of anticompetitive acts, firm and industry variables can operate differently and thus, cannot be addressed in the same way.<sup>983</sup>

Nevertheless, the EU Commission has followed a deterrence policy in order to prevent future EU competition law infringements, punishing cartels and abuses of dominance in the same way. But then again, deterrence is not the only goal of regulation and it must be taken into account that the relevant actors do not always respond in the rational manner described by the optimal deterrence framework and the law and economics principles in general.<sup>984</sup>

This is particularly important since the EU Commission's deterrence policy is based on the understanding that the undertakings are rational actors and do not take account of the agency problem. Prevention of future anticompetitive conduct should be guiding the enforcement of EU competition policy and alternatives to deterrence should be

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<sup>983</sup> S. Simpson, 'The Decomposition of Antitrust: Testing a Multi-Level, Longitudinal Model of Profit-Squeeze' [1986] 51 American Sociological Review 859 – 875.

<sup>984</sup> B. Sweeney, 'The Role of Damages in Regulating Horizontal Price-Fixing: Comparing the Situation in the United States, Europe and Australia' [2006] 30 Melbourne University Law Review 837.

considered as it has been demonstrated that the EU Commission efforts are largely ineffective.

It is true that agreements restricting competition which are not considered to be serious antitrust violations of Article 101 TFEU are often solved by commitment decisions and, in respect of Article 102 TFEU violations, 29 commitment decisions have been taken against 11 infringement decisions based on Article 7 of regulation No. 1/2003.<sup>985</sup> Indeed a consensual enforcement approach has gained more importance than fines but the way such consensual approach is taken, actually reinforces the deterrent approach making prevention unlikely.

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<sup>985</sup> A. Gautier and N. Petit, 'Optimal Enforcement of Competition Policy: The Commitments Procedure under Uncertainty' Liège Competition and Innovation Institute, Working Paper April 24, 2015. <http://orbi.ulg.ac.be/handle/2268/180742> (Accessed on 03 August 2015).



#### 4.5 No deterrence then how to achieve prevention, or is it control?

*William Paley* stated more than two hundred years ago, that “the proper end of legal punishment is not the satisfaction of justice, but the prevention of crimes”.<sup>986</sup> This is certainly the formal policy that the EU Commission has adopted, when enforcing EU competition law. Yet, the latter is not the same as applied in practice. In reality, the EU Commission has opted for a utilitarian approach when fining undertakings, meaning the use of deterrence as a vehicle to achieve prevention thus, focusing on general deterrence.

However, many philosophers and writers in criminal law and criminology have tried in many ways to move from the retributive/utilitarian standoff and modern and mixed theories about punishment have emerged and do not comprise sole objectives. Thus, whether punishment should be imposed as a means or as an end is no longer a black or white policy decision and antitrust enforcement may benefit from alternatives being offered in other disciplines.

According to *Hart*, punishment has multiple purposes like treatment, incapacitation, deterrence, retribution, and they must all be taken into account.<sup>987</sup> For him, the prevention of crime was the aim of punishment but retributive issues of moral responsibility and desert were pertinent to the questions of who may be punished and how much.<sup>988</sup> In the same line of thinking, *John Rawls* attempted to resolve the retributive/utilitarian standoff

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<sup>986</sup> William Paley, *The Principles of Moral and Political Philosophy* (6<sup>th</sup> edition, printed by J. Davis and for R. Faulder, London, 1788), p. 273.

<sup>987</sup> Henry M. Hart, ‘The Aims of the Criminal Law’, 23 Law and Contemporary Problems 401 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2758&context=lcp> (Accessed on 05 June 2013).

<sup>988</sup> *Ibid* p. 403.

by arguing that legislators should be governed by utilitarian aims of aggregate public good and that judges should base their decision on ideas about deserved punishment.<sup>989</sup>

However, in the particular case of EU competition law and policy, the EU Commission has adopted a competition law system where rules, procedures and enforcement are determined by efficiency. This has made the EU Commission a policy maker, enforcer and adjudicator and such deterrence policy has been translated into the whole EU competition law system down to its system of sanctions. Thus, once the EU Commission considers that punishment is needed, the discussion now focuses on what kind of punishment and to what degree should it be imposed.

In this regard, the EU Commission imposes fines in order to punish and for the fine calculation, it uses as a starting point a percentage of the company's annual sales of the product concerned by the infringement. That percentage can be up to 30% of the relevant sales during the last full year of such infringement and then multiplied by the number of years and months the violation lasted.<sup>990</sup>

This fine setting procedure answers the question as to the degree of punishment based on a rational economic model. However, as has been explained in the section above, this degree of punishment does not deter and it does not even compensate despite the numerous proclamations by the EU Commission to state otherwise.<sup>991</sup> Hence, a further

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<sup>989</sup> Tonry (2011) at 18 also mentioning John Rawls 'Two concepts of rules' [1955] 44 The Philosophical Review 3 at 4-5.

<sup>990</sup> EU Communication, 'Fines for breaking EU competition law' November 2011, p. 3.

[http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf) (Accessed on 05 June 2014).

<sup>991</sup> Margrethe Vestager, 'Antitrust: Commission fines five envelope producers over €19.4 million in cartel settlement', Press release IP/14/2583, Brussels December 11, 2014. (Europa website 2014) Stating that 'the EU Commission's fight against cartels penalises such behaviour and also acts as a deterrent'.

[http://europa.eu/rapid/press-release\\_IP-14-2583\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2583_en.htm) (Accessed on 05 June 2015).

question to be answered is: Why has the EU Commission not adopted other types of sanctions or remedies, or considered another approach to prevent antitrust violations?<sup>992</sup>

In this regard, as it has been established before, the law and economics movement brought about by the Chicago School not only has influenced considerably antitrust rules around the world but also entire systems as well. For this movement in general, the fine appears as the most efficient sanction for criminal justice.<sup>993</sup> As mentioned earlier, according to *Becker*, fines are to be preferred because they can fully compensate victims so they are no worse off than if offenses were not committed.<sup>994</sup> In his view, imprisonment is not enough because even if the period of time has been served, his debt to society is not resolved.<sup>995</sup>

The fact that money attracts lesser stigma has resulted in the fine been considered as a mere price. As has been discussed in Chapter 1 above, according to *Ulen*, economics has provided a scientific theory to predict the effects of legal sanctions upon behaviour. To economists, legal sanctions look like prices, and presumably people respond to these sanctions much as they respond to prices. Thus, heavier sanctions are like higher prices and because people respond to higher prices by consuming less, they argue that people respond to heavier legal sanction by doing less of the sanctioned activity.<sup>996</sup>

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<sup>992</sup> It should be remembered that Article 103 TFEU has considered fines and periodic penalty payments as the only mechanisms in order to ensure compliance with competition rules since 1951. This has been confirmed by Regulation No. 1/2003 as well, back in 2004.

<sup>993</sup> Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 56. Who considers that if neoliberal rationalities of government become predominant, then a focus on money as a means of rendering the problems of law intelligible in monetized ways is only to be expected.

<sup>994</sup> G. Becker, 'Crime and Punishment: An Economic Approach' in G. Becker and W. Landes (eds) *Essays in the Economics of Crime and Punishment* (Columbia University Press, New York, 1974) p. 29.

<sup>995</sup> *Ibid* p. 30.

<sup>996</sup> T. Ullen, 'The Economics case for corporate criminal sanctioning' in W. Lofquist, M. Cohen and G. Rabe (eds) *Debating Corporate Crime* (Anderson Publishing, Cincinnati 1997) p. 122.

Indeed, the whole point of rendering punishment optimally efficient through use of fines is to increase social welfare in a process of individual responsibilisation, whereby the externalities created by wrongdoers are returned to them in the form of a fine that is equivalent to a tax on privilege.<sup>997</sup> However, O’Malley questions the fact that the movement of law and economics does not take into account the different meanings of money and especially the idea that it cannot compensate for certain harms. In his view, this is done so because the aim of the fine is not punishment per se but harm minimisation and for this reason, prevention also becomes an issue.<sup>998</sup>

Nevertheless, the Chicago School principles appear to be ideal still today and since corporations are rational choice actors, they are the most suited to monetary forms of punishment and deterrence par excellence. In addition, the fact that the corporation has no soul to be damned and no body to be kicked,<sup>999</sup> it seems obvious that the fine is the ideal sanction against businesses and their impact is taken for granted on the basis of economic theory assumptions and ultimately, on grounds of efficiency.<sup>1000</sup>

With this reasoning, law and economics scholars have always assumed that fines are the optimally efficient sanction but empirical research has shown that they do not deter corporate offending as has been stated in previous sections.<sup>1001</sup> However, a different view of the nature of fines has to do with taking into account the objectives of punishment,

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<sup>997</sup> S. Levitt, ‘Incentive compatibility constraints as an explanation for the use of prison sentences instead of fines’ [1997] 17 International Review of Law and Economics 188.

<sup>998</sup> Pat O’Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 76.

<sup>999</sup> Elizabeth Knowles (ed), *The Oxford Dictionary of Quotations* (6<sup>th</sup> edn OUP, Oxford 2004) p. 550 quoting Baron Thurlow.

<sup>1000</sup> K. Elzinger and W. Breit, *The antitrust penalties: A study in law and economics* (Yale University Press, New Haven 1976).

<sup>1001</sup> See section 1.1

which are retribution, deterrence and denunciation. In this regard, fines are intended to be loaded with social meaning in political and governmental discourses.<sup>1002</sup>

If we consider the above, then the fine is not a moral free instrument. It is part of a complex and highly variable assemblage of procedures and legal responses to problems of bio power. Thus, fines are supposed to inflict pain in the sphere of freedom, a freedom that differs from liberty, the freedom of market and freedom of choice.<sup>1003</sup> Since we live in a consumer society, this very fact has made fines easy to enforce and are politically acceptable.

Hence, the functional meaning of fines and in particular, money's underlying critical meaning is that it delivers pain, promises or denies pleasure and it impacts the concept of freedom. Indeed, the fine delivers its sanction in terms of the freedom of the market. The fine against corporations, impacts upon profits, and even a fine against an individual has an impact on his consumption.<sup>1004</sup>

However, this approach does not consider the fact that, at least formally, fines have increasingly been disarticulated from the criminal justice system. Indeed, due to this detachment, fines are considered to be punitively marginal and thus, not real

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<sup>1002</sup> Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 68. Although the evidence provided in the previous section might show that undertakings might consider fines in the enforcement of EU competition law as prices of doing business.

<sup>1003</sup> A. Hunt, 'Police and the regulation of traffic: Policing as a civilizing process' in M. Dubber and M. Valverde (eds), *The New Police Science: The Police \Power in Domestic and International Governance* (Yale University Press, New York 2006) p. 180. See also Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 110. Here he quotes Colin Campbell (1987) stating that freedom of choice emerges as a prominent category of consumer society as freedom of choice is a choice among commodities and most specially, the commodities associated with surplus income. Thus, the modern fine is a function of the surplus income of the consuming classes.

<sup>1004</sup> Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 73.

punishment.<sup>1005</sup> Being punitively marginal means that they have been disarticulated from their link with the concept of liberty, and instead; they have become what is now known as the administrative fine or modern fine.<sup>1006</sup> In this context, the idea of the fine as a price becomes stronger and more consistent with the thesis that when society wants not to proscribe the activity, but only to reduce its level, it should use prices.<sup>1007</sup>

Hence, even though fines can be seen as a form of punishment if we focus on how they affect our freedom in a consumer society, the fact that they lack basic elements to be considered as a sanction of the criminal sphere; has turned them into a price instrument. This is the result of the reliance on legal economic theory, which considers regulatory targets, as rational actors. However, it fails to take into account evidence that leads to a different conclusion.

Thus according to *Rusche and Kirchheimer*, fines do not penetrate into the offender's life and the State's sole interest in such offenses is to compel obedience by levying sufficiently large fines.<sup>1008</sup> In their opinion, the State levies fines because it dislikes the activity but is not seriously enough to be prepared to put a stop to it.<sup>1009</sup> Even more, the cost effective nature of the fines has made them an attractive instrument that has led to their application to more numerous and more serious offenses.<sup>1010</sup> This is in line with theoretical cost-effective models of the efficiency standard.

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<sup>1005</sup> *Ibid* p. 74.

<sup>1006</sup> See G. Rusche and O. Kirchheimer, *Punishment and Social Structure* (Columbia University Press, New York 1939) and A. Bottoms, 'Some neglected features of contemporary penal systems' in D. Garland and P. Young (eds) *The Power to Punish* (Heinemann, London 1983).

<sup>1007</sup> J. Coffee, 'Paradigms lost: The blurring of the criminal and civil models and what can be done about it' [1992] 101 *Yale Law Journal* 1886.

<sup>1008</sup> G. Rusche and O. Kirchheimer, *Punishment and Social Structure* (Columbia University Press, New York 1939) p. 176.

<sup>1009</sup> *Ibid* p. 177.

<sup>1010</sup> R. Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology, Canberra 1996).

*Bottoms* calls this type of fine, a regulatory fine which appears to be driven not so much by the desire to punish or correct, but is driven by pragmatic concerns with rates and distributions of behavioural regulation.<sup>1011</sup> It is directed at a rational choice actor in the form of general deterrence and is thus, not disciplinary per se.<sup>1012</sup> Even though punishment is present in rationalities of the regulatory fine, the imperative to identify and punish every violation becomes less significant than do the pragmatics of efficiency.<sup>1013</sup>

Adding to this argument, *Foucault* states that regulatory fines are imposed without being tailored to the specific needs of specific individuals and it is not concerned to correct past problems or punish moral wrongs but to ensure as far as possible that future infringements will not occur again.<sup>1014</sup> He further argues that because the regulatory fine is not interested in understanding and changing the soul of the unique individual offender, they are designed to be imposed on offenses of strict liability where behaviour is more important than consent.<sup>1015</sup>

Overall, the system seems to be one of preventative social control backed up by regulatory fines and disciplinary or corrective punishment is not necessary in order to achieve control.<sup>1016</sup> These forms of control focus on behavioural order and on whole groups and categories, not on individuals and thus, are not concerned with discipline but with

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<sup>1011</sup> A. Bottoms, 'Some neglected features of contemporary penal systems' in D. Garland and P. Young (eds) *The Power to Punish* (Heinemann, London 1983) p. 190.

<sup>1012</sup> *Ibid* p. 191.

<sup>1013</sup> P. Duff, 'The Prosecutor fine and social control' [1993] 33 British Journal of Criminology 481 – 503.

<sup>1014</sup> M. Foucault, *Security, Territory, Population* (Macmillan, London 2007) p. 19.

<sup>1015</sup> *Ibid* p. 20.

<sup>1016</sup> A. Bottoms, 'Some neglected features of contemporary penal systems' in D. Garland and P. Young (eds) *The Power to Punish* (Heinemann, London 1983) p. 187.

regulation.<sup>1017</sup> This system has made fines proportional to risk rather than offense seriousness.<sup>1018</sup>

Under this approach, the categorization and differentiation of morally reprehensible crimes from those that could be considered to be merely administrative, was possible because it created a qualitative distinction that set aside the moral conditions under which the bureaucratization of justice could proceed. <sup>1019</sup>

This seems to be the case for the EU fining guidelines. According to the above, an argument could be raised that the EU Commission's main deterrent tool designed to achieve prevention is rather a measure of control than an instrument of discipline.<sup>1020</sup> Indeed, the economic model on which the fining system is based, specifically the optimal deterrence framework, is focused on risk, trying to elevate the cost of violation of the law as the main factor to prevent the commission of such infringement.

This seems to be the approach, which the ECtHR adopted when it considered the punitive nature of fines. Even though fines imposed in the enforcement of EU antitrust law are sanctions of criminal nature and thus, merit full protection from guarantees originating from the EU principles of law;<sup>1021</sup> they are marginally punitive and thus, the intensity of protection is less stringent than the core of criminal sanctions. This differentiation means

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<sup>1017</sup> Ibid.

<sup>1018</sup> M. Feeley and J. Simos, 'Actuarial Justice: The Emerging New Criminal Law' in D. Nelken (ed.) *The Futures of Criminology* (Sage, New York 1994).

<sup>1019</sup> M. Foucault, *The History of Sexuality* (Peregrine Books, London 1984).

<sup>1020</sup> For a different view see W. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 (2) World Competition 8.

<sup>1021</sup> *Jussila v Finland* (App no 73055/01) ECHR 23 November 2006 para 30.

that the moral charge of an antitrust fine is lesser than that on sanctions imposed through the traditional criminal justice system.

Hence, based on the above reasoning and despite the fact that the EU Commission has stated that it intends to punish undertaking in order to achieve general deterrence; it can be argued that signs of recidivism<sup>1022</sup> can only mean that fines are failing to achieve the stated aim. Instead, the result has been an increased perception that the EU Commission is more concerned in regulating or controlling the occurrence of anticompetitive behaviour rather than prevent it.<sup>1023</sup>

If the control of anticompetitive behaviour is what has resulted from the EU Commission's enforcement efforts, then it contradicts its own prevention policy. It is clear that the EU Fining guidelines 2006 have been designed to take account of the particular situation of the undertakings suspected of having committed antitrust violations and are intended to serve as a specific and general deterrent purpose. Nevertheless, as to the actual impact that those fines generate, it may cast doubt about the true objective of the EU Commission. Not only is specific deterrence compromised but more importantly, the most important message of general deterrence is lost.

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<sup>1022</sup> See section 1.2 referring to cases against Akzo Nobel, Bayer, Solvay. See also W. Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 1 and C. Harding and A. Gibbs, 'Why go to court in Europe? An analysis of cartel appeals 1995-2004' (2005) 30 (3) *European Law Review* 368.

<sup>1023</sup> Even when the EU Commission has stated that it focuses its efforts to create a credible threat of punishment for those who would be willing to commit violations on the basis of a profit calculation. Cases such as *Synthetic Rubber* involving companies like ENI, Shell and Bayer who had been found to have infringed competition rules three prior times and yet, the level of punishment was low that in 2008 there was another infringement involving Bayer. See EU Commission Decision IP/06/1647 of 29 November 2006. See also Case COMP/38629 - Chloroprene Rubber of 05 December 2007.

However, the fining system is simply another tool available to the EU Commission and it is pertinent to study its function within the whole enforcement apparatus so that a conclusion can be reached. Such conclusion should give answer to the question on whether it is control of antitrust behaviour or the reduction or even elimination of future EU competition law infringements is the actual objective of EU competition policy. To this end, signs of recidivism can inform us on whether the deterrent approach is bound to fail.

#### **4.6 Choice vs Control.**

In the context of EU competition law and EU competition policy in general, the EU Fining Guidelines 2006 are indeed part of a system that seeks to prevent the occurrence of future infringements of competition law in the European market. Unlike the regulatory fines described above, the EU Commission's intent, when it imposes fines, is to punish undertakings responsible of committing antitrust violations and influence other companies in their decision to refrain from committing anticompetitive behaviour.

However, as to the kind of punishment and the degree it should be imposed, it seems that the EU Commission's efforts have resulted in mere attempts to regulate behaviour or keep it under control rather than prevent it due to the fact that it keeps imposing fines that do not achieve the goal of the general and specific deterrence. Nevertheless, fines are charged with the function of discipline by punishment into the design of the machinery available to the EU Commission to effectively enforce EU antitrust rules. However, it has long been recognized that the inefficiency of regulation is often the result of a mismatch between regulatory objective and regulatory instruments.<sup>1024</sup>

The above would mean that fines are not the right instrument to achieve deterrence. On the other hand, within the EU competition law enforcement system operating under the hegemony of efficiency, fines are only one technique among many that provide help to effectively enforce such rules, which would prompt the question as to whether all enforcement instruments, as a whole are in fact, the right instruments.

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<sup>1024</sup> S. G. Breyer, *Regulation and its Reform* (Harvard University Press, Cambridge 1982).

In this regard and despite the fact that some national competition authorities around the world refuse to consider their efforts and actions, meaning those efforts of actions directed to keep markets without competition restrictions, as regulatory.<sup>1025</sup> It can be said that the instruments used by the EU Commission and the U.S. DoJ Antitrust Division to that end, individually of as a whole, resemble those instruments that are seen in regulation of behaviour in order to exercise control. Control of an activity rather than its deterrence.

This is relevant because this regulatory approach, can be tracked back and identified, as a result from the influence of the Chicago School. Indeed, economics has been used to design and draft efficient or cost effective legal rules and standards. To this end, ex ante and ex post regulation is adopted to the use of cost benefit analysis to ensure cost effective regulation and to cut red tape.<sup>1026</sup> In other words, it has been used to propose and design market alternatives to the traditional command and control approach of law enforcement.<sup>1027</sup>

In this context, smart regulation as identified by law and economics movement, seeks to achieve an effective or efficient form of response for law enforcement. To this end, careful consideration needs to be given to selecting the optimal mix of various regulatory instruments. According to *Gunningham* and *Grabosky*, recognizing the limits of single instrument approaches is the first lesson for smart regulators since single instrument approaches are misguided as all instruments have strengths and weaknesses and because

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<sup>1025</sup> Bill Baer, 'Reflections on Elements of Effective Antitrust Enforcement', Global Competition Review, 4<sup>th</sup> Annual Antitrust Leaders Forum, Miami, Florida, February 6, 2015, p. 1. Where Bill Baer recoils at the suggestion that antitrust equates to regulation.

<http://www.justice.gov/atr/public/speeches/311710.pdf> (Accessed on 25 July 2015).

<sup>1026</sup> R. W. Hahn, 'Designing Smarter Regulation with Improved Benefit Cost Analysis', American Enterprise Institute, Working Paper 08 – 20 (2008) and P. C. Tetlock, 'Has Economic Analysis Improved Regulatory Decisions?' [2008] 22 Journal of Economic Perspectives 67.

<sup>1027</sup> C. Veljanovski, 'Economic Approaches to Regulation' in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, New York 2010) p. 27.

none are sufficiently flexible and resilient to be able to successfully address all problems in all contexts.<sup>1028</sup>

Indeed, in regards to law as a modality of constraint, its ineffectiveness can be attributed to the excessive use of what have been termed command and control approaches, that is, prescriptive rules were used to regulate inputs and impose obligations backed by administrative enforcement and penal sanctions without complete disregard of other regulatory modalities.<sup>1029</sup>

It is further argued that a better strategy would be to seek to harness the strengths of individual mechanisms while compensating for their weaknesses by the use of additional and complementary instruments, such a mix will work effectively if a broader range of participants is involved in their implementation.<sup>1030</sup> As to the latter, *Levy and Spiller* see a regulatory design consisting of two components, regulatory governance and regulatory incentives.<sup>1031</sup> Regulatory governance requires credible commitments from the regulator and mechanisms to constrain its regulatory discretion,<sup>1032</sup> this in turn creates strong incentives for other agents, either those subject to regulation or the society in general, to facilitate regulation and bring about its effectiveness.<sup>1033</sup>

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<sup>1028</sup> N. Gunningham and P. Grobosky, *Smart Regulation* (Clarendon Press, Oxford 1998) p. 14.

<sup>1029</sup> C. Veljanovski, 'Economic Approaches to Regulation' in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, New York 2010) p. 27.

<sup>1030</sup> N. Gunningham and P. Grobosky, *Smart Regulation* (Clarendon Press, Oxford 1998) p. 15. See also C. Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' in J. Jordana and D. Levi Faur (eds), *The politics of Regulation* (Edward Elgar, Cheltenham 2004) p. 145.

<sup>1031</sup> B. Levy and P. T. Spiller, 'The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation [1994] 10 Journal of Law Economics and Organization 201.

<sup>1032</sup> Ibid p. 202. In this regard, regulatory governance becomes fundamental because if regulators do not declare their regulatory positions or their objectives, the invisible hand of regulation can escape from accountability.

<sup>1033</sup> Ibid p. 204.

Therefore, it may seem efficient and overall good that the regulator seeks to strive for a more instrumentally rational approach, based on efficient, effective and economic regulatory response. At first sight, the EU Commission seems to have taken this approach when enforcing Article 101 TFEU at least. To that end, the EU Commission has adopted the EU Leniency Notice 2006 and the EU Settlement Notice 2008 as instruments that help it to effectively enforce EU competition law apart from fines provided in Article 23 Regulation No. 1/2003 and the EU Fining Guidelines 2006.

However, it would remain to be determined whether in the functioning of these instruments, they actually signal direct or indirect intervention from different regulatory modalities other than law and whether they provide incentives for a multiparty enforcement that results in effective governance where the instrument cover needs that other tools cannot.

As stated in Section 4.2 above, *Lessig* has differentiated four modalities that constraint behaviour. Although he identifies the Chicago School with the kind of regulation that displaces law by favouring norms, market and architecture, which is the approach that the EU Commission has taken as described above; he also identifies another kind of regulation that he calls the New Chicago School.<sup>1034</sup>

Under the New Chicago School, law not only regulates behaviour directly but law also regulates behaviour indirectly as norms, architecture and market might constraint on their own but law can affect each of them. Under this school, law functions as a regulator and

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<sup>1034</sup> L. Lessig, 'The New Chicago School', [1998] 27 Journal of Legal Studies 661.

meta-regulator as law might direct itself or might also use or regulate these other alternative modalities of regulation so that they each regulate to law's own end.<sup>1035</sup>

In *Lessig*'s view, law functions in two different ways. In one, its operation is direct as it tells individuals how they ought to behave and it threatens a punishment if they deviate from that directed behaviour. However, when regulating indirectly, law changes the constraints of one of these other structures of constraint and it can even do so simultaneously.<sup>1036</sup>

Thus, the techniques of direct and indirect regulation are the tools of any regulatory regime and the New Chicago School aims to understand how they function together, about how they interact and about how law might affect their influence and select among these alternatives.<sup>1037</sup>

Hence, the purpose is to look beyond the simple direct regulation of law towards a more sophisticated mix of indirect intervention that law might yield.<sup>1038</sup> However, to achieve this optimal mix, it is important to understand that constraints can be subjective, objective or both. The objective constraint is the one that, whether subjectively recognised or not, it actually operates as a constraint, and a constraint is subjective when a subject consciously or not, acknowledges it as a constraint.<sup>1039</sup>

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<sup>1035</sup> *Ibid* p. 672.

<sup>1036</sup> *Ibid* p. 671 also referencing R. Craswell, 'Offer, Acceptance, and Efficient Reliance' (1996) 48 (3) *Stanford Law Review* 481 – 553.

<sup>1037</sup> C. R. Sunstein, 'Lochner's Legacy' [1987] 87 *Columbia Law Review* 873.

<sup>1038</sup> Eugene Volokh, 'Freedom of Speech, Shielding Children and Transcending Balancing' (1997) *Supreme Court Review* 141.

<sup>1039</sup> L. Lessig, 'The New Chicago School', [1998] 27 *Journal of Legal Studies* 677.

This is so because between a norm and the behaviour sought, there is a human being, who ultimately decides whether to conform or not to the behaviour that is requested from him.<sup>1040</sup> Such decision is influenced by many factors, some have to do with problems of rationality,<sup>1041</sup> but others have to do with issues of internalization.<sup>1042</sup> This internalization is relevant in context beyond norms because in principle one can internalize law just as one internalises norms however, internalisation should not be assumed.<sup>1043</sup>

Considering the above, in order to determine the effectiveness of a particular constraint it should be determined, in the first place, the extent to which an objective constraint is subjectively effective. Secondly, it should be determined the extent to which an objective constraint can be made subjectively effective and thirdly, the extent to which what is not an objective constraint is, or could be made, subjectively effective.<sup>1044</sup>

Overall, when law is able to optimally influence other modalities of constraint, whether directly or indirectly, such a model or mix evolves, and modalities of constraint might change from a situation where one imagines a self-conscious action directed to a certain change, to a situation where one can point to no similar action that results in such change.<sup>1045</sup> This is the base for what *Lessig* has called code. In his view, code is an efficient means of regulation and its perfection is based on the fact that one obeys these

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<sup>1040</sup> L. Lessig, 'The Zones of Cyberspace' [1996] 48 Stanford Law Review 1403.

<sup>1041</sup> A. Tversky and D. Kahneman, 'Judgement under Uncertainty: Heuristics and Biases,' *Science*, New Series, Vol. 185, No. 4157 (1974) p. 1124-1131.

<sup>1042</sup> R. Cooter, 'Normative Failure Theory of Law' [1997] 82 Cornell Law Review 947.

<sup>1043</sup> C. R. Sunstein, 'Selective Fatalism' [1998] 27 Journal of Legal Studies 799.

<sup>1044</sup> Lessig, further argues that perhaps other dimensions enter into consideration such as immediacy which is the level of directness of a particular constraint, and plasticity which refers to the ease with which a particular constraint can be changed. See L. Lessig, 'The New Chicago School', [1998] 27 Journal of Legal Studies 679.

<sup>1045</sup> L. Lessig, 'The Zones of Cyberspace' [1996] 48 Stanford Law Review 1408.

laws as code, not because one should; one obeys these laws as code because one can do nothing else, there is no choice.<sup>1046</sup>

This is the main element of criticism about this theory of control proposed by *Lessig*, in that regulation based on the premises of the New Chicago School are totalizing, every space is subject to a wide range of control and the potential to control every space is the aim of this school.<sup>1047</sup> It must be added that another advantage of political nature is that the regulator does not suffer political costs since the structure of regulation was designed to achieve the regulator's end without that end being attributed to the regulator as part of the evolution of such model.<sup>1048</sup>

Due to this controlling nature, it is necessary to understand the consequences of substituting one constraint for another. This is of utmost importance since much of regulation's study evaluates substitutions along the dimension of efficiency. This means that in the current regulatory context, a full account must ask whether substituting one constraint for another, on the balance, is more efficient in achieving an objective. However, this choice in substituting might sacrifice another value that could also be important and the prime concern would then be, to evaluate which value should control or be the criterion in selecting regulatory instruments.

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<sup>1046</sup> *Ibid* p. 1410.

<sup>1047</sup> L. Lessig, 'The New Chicago School', [1998] 27 *Journal of Legal Studies* 691.

<sup>1048</sup> This has been criticised since it is implied that there is a reduction in transparency and accountability and thus, it deviates from the canons of good governance. See V. Mayer-Schonberger, 'Demystifying Lessig' (2008) *Wisconsin Law Review* 711.

In this regard, *Posner* criticizes norm regulation for its failure to properly value human freedom.<sup>1049</sup> He argues that norms are internalized and one obeys them without giving thought into it. Something different happens with external constraints like law since these are weighed before obeyed and thus, this is an expression of choice and freedom.<sup>1050</sup> Hence we can observe that the effect that law has directly or indirectly on other modalities of constraint can be internalised and no concern arises as to the weighing of obedience or disobedience.

*Brownsword* further developed this criticism as he distinguished two different regulatory strategies based on their dual theoretical importance, that being conceptual and moral.<sup>1051</sup> He separates those strategies that rely on an engagement with the practical reason of regulatory targets, and those that simply seek to achieve a desired pattern of behaviour such as control suggested by *Lessig*.<sup>1052</sup>

In his view, there are two broad approaches of the regulatory complex. One is what he identifies as West Coast and the other is identified as East Coast. Understanding the regulatory complex as whatever controlling or channelling strategy a regulator employs, he argues that the West Coast model prioritises control over choice since coding a desired pattern of behaviour.<sup>1053</sup> However desirable that behaviour is, regulators deprive those subject to regulation of making self-conscious choice to act in a particular way.<sup>1054</sup>

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<sup>1049</sup> R. A. Posner, 'Social Norms and the Law: An Economic Approach' [1997] 87 American Economic Review 365.

<sup>1050</sup> *Ibid* p. 366.

<sup>1051</sup> R. Brownsword, 'Code, control and choice: why East is East and West is West' (2005) 25 (1) Legal Studies p. 3

<sup>1052</sup> *Ibid* p. 4.

<sup>1053</sup> *Ibid* p. 5. He uses a narrow concept of regulator describing it as an agent authorized by the government to control and channel conduct in a specified field. On the other hand, he adopts a broad concept of regulation as encompassing whatever measures regulators take to control and to channel conduct in the desired way.

<sup>1054</sup> *Ibid* p. 6.

On the other hand, East Coast regulation makes sure that choice is preserved even if it diminishes the degree of control that regulators have over those under regulation.<sup>1055</sup> This is done because human beings are empowered through the ability to choose and it represents a higher value.<sup>1056</sup> In order to highlight the different approaches that these two strategies represent, he also engages in the discussion of what smart regulation should be. In this regard, he acknowledges that smart regulation is a complex of tailored responses that uses the optimal mix of modalities that constraint behaviour, a definition already provided by *Gunningham and Grobosky*.<sup>1057</sup>

However, the primary objective of such regulatory structure is to spread responsibility for control onto regulators, organizations, regulatory targets and individuals in general that operate outside the regulatory state and to persuade them to act appropriately.<sup>1058</sup> *Brownsword* too accepts the four modalities of regulation identified by Lessig, namely law, social norms, market and architecture.<sup>1059</sup> However, he takes the view of *Murray* and *Scott*, that each such modality of constraint has three functional dimensions.<sup>1060</sup>

The first dimension is to adopt and declare a regulatory position, meaning having some goal or standard. The second dimension is to monitor responses to that position or goal and to exert pressure for compliance. The third dimension of a modality that constraints behaviour is to take enforcement steps against regulatory targets who do not comply,

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<sup>1055</sup> *Ibid* p. 7.

<sup>1056</sup> V. Mayer-Schonberger, 'Demystifying Lessig' (2008) *Wisconsin Law Review* 713.

<sup>1057</sup> N. Gunningham and P. Grobosky, *Smart Regulation* (Clarendon Press, Oxford 1998).

<sup>1058</sup> D. Garland, *The Culture of Control* (OUP, Oxford 2001) p. 115.

<sup>1059</sup> L. Lessig, 'The law of the Horse: What Cyber law Might Teach' [1999] 113 *Harvard Law Review* 504.

<sup>1060</sup> A. Murray and C. Scott, 'Controlling the New Media: Hybrid Responses to New Forms of Power' (2002) 65 (2) *Modern Law Review* 491.

which is a mechanism for realigning the system when its operation deviates from its intended goal.<sup>1061</sup>

In respect of the first dimension, the first difference emerges between the East Coast and the West Coast. As the declaration of the regulatory goal can provide for legalism and further structures and procedures based on the rule of law,<sup>1062</sup> this is identified with the East Coast because it lets regulatory targets know where they stand. A different situation emerges where those who are subject to regulation only stand where their regulated environment allows them, which is associated with the West Coast or the theory of control advocated by *Lessig*.<sup>1063</sup>

Nevertheless, *Brownsword* provides a further element that he calls the regulatory pitch.<sup>1064</sup> In his opinion, regulatory pitch refers to the way in which a regulator seeks to engage with their targets and there are essentially three pitches available. The first one is the moral pitch that could be substantive, meaning that the emphasis is on the moral merits of the regulatory position itself or the moral merits of respect for that position.<sup>1065</sup> The moral pitch could be procedural, which means that it appeals to the fairness or reasonableness of the process that has generated the outcome.<sup>1066</sup> Hence, when the moral pitch successfully engages with the regulatory targets, it is accepted either that the

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<sup>1061</sup> R. Brownsword, 'Code, control and choice: why East is East and West is West' (2005) 25 (1) Legal Studies p. 7.

<sup>1062</sup> L. L. Fuller, *The Morality of Law* (Yale University Press, New Haven 1969).

<sup>1063</sup> R. Brownsword, 'Code, Control and Choice: Why East is East and West is West' (2005) 25 (1) Legal Studies p. 8.

<sup>1064</sup> *Ibid* p. 9

<sup>1065</sup> *Ibid* p. 10.

<sup>1066</sup> D. Beyleveld and R. Brownsword, *Consent in the Law* (Hart Publishing, Oxford, 2007) p. 45.

regulatory position is morally legitimate, or that it merits respect or that compliance is morally obligatory.<sup>1067</sup>

The second regulatory pitch is a practical one and it relates to the more diffuse claim that there is good reason for compliance. In practice the practical pitch will often appeal to the economic interest of regulatory targets.<sup>1068</sup> The third regulatory pitch is identified as the behavioural pitch, which concerns whatever instrument used to engage with the targets in such a way as to achieve the desired pattern of behaviour.<sup>1069</sup>

According to the above, East Coast is concerned with the engagement of practical reason and the West Coast is not. This is so because regulatory targets not only have a choice concerning the question of compliance but also as to the kind of enforcement regime that they invite.<sup>1070</sup> Hence, the East Coast approach to regulation leaves targets with the option of non-compliance, on paper and in practice, and the West Coast regulation is focused on designing the environment in which regulatory targets act.

As to the last part, *Garland* states that the proper target of crime prevention would be the processes bearing upon the formation of criminal character and that of situational crime prevention, which targets the situational dynamics that produce particular criminal events.<sup>1071</sup> Different situations are redesigned so as to give rise to fewer opportunities for

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<sup>1067</sup> Although law requires norm-conformative behaviour, law must also meet the expectation of legitimacy so that it is at least open to people to respect law. See J. Habermas, 'Introduction' [1999] 12 *Ratio Juris* 330.

<sup>1068</sup> D. Beyleveld and R. Brownsword, *Consent in the Law* (Hart Publishing, Oxford, 2007) p. 56.

<sup>1069</sup> R. Brownsword, 'Code, control and choice: why East is East and West is West' (2005) 25 (1) *Legal Studies* p. 10.

<sup>1070</sup> J. T. Scholz, 'Cooperation, Deterrence and the Ecology of Regulatory Enforcement' [1984] 18 *Law and Society Review* 179.

<sup>1071</sup> See D. Garland, 'Ideas, Institutions and Situation Crime Prevention' in A. von Hirsch, D. Garland and A. Wakefield (eds) *Ethical and Social Perspectives on Situational Crime Prevention* (Hart Publishing, Oxford 2000) p. 5.

crime and interacting systems might be made to converge in ways that create fewer criminological hot spots.<sup>1072</sup>

Hence, the above described approaches that focus on design, code or control, deal with problems of social order in a way that does not rely on building a normative consensus and hence, it is amoral because it bypasses the realm of values and it does not rely on discipline or obedience.<sup>1073</sup> In other words, when either the regulator has identified a desired pattern of behaviour, moral or not, it will secure that pattern of behaviour by designing out any option of non-conforming behaviour and when this is achieved, there is no need for correction or enforcement, let alone punishment.<sup>1074</sup>

In sum, since choice is not presented to regulatory targets, they might not even be aware of the difference between right and wrong. Hence, moral action cannot be understood as it requires the involvement of an agent doing the right thing as a matter of act morality for the right reasons as a matter of agent morality, resulting in a society that is no longer an operative moral community.<sup>1075</sup>

Ultimately, we are presented with two alternatives to approach regulation. On the one hand or better say extreme, we find the amoral regulation that aims to eliminate any possibility for non-compliance and hence, no correction or punishment is needed, not even enforcement is required or at least administrative enforcement. On the other hand, there is the not-so-smart regulation that aims to incentivize regulatory targets to comply

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<sup>1072</sup> D. Garland, *The Culture of Control* (OUP, Oxford 2001) p. 183.

<sup>1073</sup> R. Brownsword, 'Code, control and choice: why East is East and West is West' (2005) 25 (1) Legal Studies p. 13.

<sup>1074</sup> Ibid.

<sup>1075</sup> Ibid p. 19.

with legal directions and seeks to normalize non-compliance behaviour as it offers them a choice whether to comply or not.

Even though the EU Commission's policy in the enforcement of EU competition rules is one of prevention, which would suggest that the instruments adopted in pursuit of that policy should resemble those tools that aim to eliminate the possibility of non-compliance; the instruments currently in place do not actually achieve that objective. Since EU competition law can only be enforced against undertakings, the morality concerns are not present and thus, it would seem that the ineffectiveness of the system is due to the mismatch between the deterrence policy and the enforcement instruments.<sup>1076</sup>

As to the above, it is permissible to describe the following case: On December 2013, the EU Commission fined eight financial institutions with €1.7 billion euros for operating in two cartels that effectively fixed the interest rate derivatives denominated in euro currency (EIRD) and in Japanese yen (YIRD).<sup>1077</sup> This decision was related to the LIBOR and EURIBOR scandals, and financial regulators around the world imposed further fines.

As to antitrust concerns, six companies were involved in the YIRD and four undertakings were involved in the EIRD. As to the latter, the undertakings were fined with €1.04 billion. However, because the investigation initiated thanks to a leniency application, one of those banks escaped a fine amounting to €690 million, almost 70% of the entire amount of fines imposed. In addition, the colluding companies received also 50%, 30% and 5%

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<sup>1076</sup> S. G. Breyer, *Regulation and its Reform* (Harvard University Press, Cambridge 1982).

<sup>1077</sup> EU Commission, 'Antitrust: Commission fines banks €1.7 billion for participating in cartels in the interest rates derivative instruments.' Press Release IP/13/1208, Brussels 04.12.2013.

[http://europa.eu/rapid/press-release\\_IP-13-1208\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1208_en.htm) (Accessed on 26 March 2015).

discounts respectively, as they cooperated with the EU Commission under the EU Leniency Notice 2006.

The companies settled their cases with the EU Commission and they further received a 10% discount each as provided in the EU Settlement Notice 2008. Thus, after an investigation that lasted 14 months, the EU Commission, making use of all instruments available to it to enforce Article 101 TFEU, imposed a shorter fine instead of the €2.09 billion that would have otherwise been imposed. The same instruments were applied in the YIRD cartel case where the total amount of the fines imposed was €68 million and where UBS, a single undertaking, escaped a fine of €2.5 billion for its involvement in the YIRD cartel.

Overall, because of the instruments that enhance detection rates and those that advance in the interest of pragmatism and expediency,<sup>1078</sup> the EU Commission chose to forego the possibility of imposing a fine of almost €5.5 billion and it is debatable whether the actual fine imposed prevents the companies involved or third undertakings from committing future violations. Thus, even though the EU Commission aims to prevent future antitrust violations, the instruments it uses may seem directed towards the normalization of illegal behaviour.

This is so because in competition law, deterrence is used not as a policy but as an instrument, which has turned to be an end in itself. When seen as an instrument, it can be appreciated that deterrence favours choice and provides incentives to comply with law. This predisposition towards deterrence as an instrument can be explained in view of the

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<sup>1078</sup> K. Mack and S. Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, Carlton South 1995).

natural connection between East Coast and its aim to incentivise compliance by giving preference to choice, and competition policy in general which highlights the importance of choice as a regulating tool of the market.<sup>1079</sup>

However, this view may be limited because fines do not operate alone even within the ambit of punishment and deterrence let alone the whole regulatory system. As *O'Malley* has argued before, fines are not moral free as they affect a fundamental value, which is freedom of choice in a consumer society.<sup>1080</sup> On the other hand, it is important to consider that fines carry a strong blaming power too and this delivers moral condemnation.<sup>1081</sup>

In this regard, the harm to self-conception that punishment, as the expression of moral condemnation can wreak, is even more disabling than external condemnation.<sup>1082</sup> Although undertakings do not experience this effect as individuals do, since the function of punishment as blaming is to generate and reinforce feelings of moral condemnation and only individuals have feelings, it nevertheless communicates such condemnation to the wrongdoer and transmits it the relevant community.<sup>1083</sup>

The fining system that assists in the enforcement of EU competition law, like sanctions imposed by any state, carry a blaming power that affects corporations and the way how

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<sup>1079</sup> Since competition law and competition policy are concerned with keeping markets free and competitive, a competitive marketplace offers a mechanism of exclusion based on choice which in turn offers market control. See T. Prosser, *The Limits of Competition Law: markets and Public Services* (OUP, New York 2005) p. 18.

<sup>1080</sup> Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (1<sup>st</sup> ed. Routledge Cavendish, 2009) p. 110.

<sup>1081</sup> M. C. Materni, 'Criminal Punishment and the Pursuit of Justice' [2013] 2 British Journal of American Legal Studies 263. <http://www.law.harvard.edu/academics/degrees/gradprogram/sjd/sjd-current-students/sjd-candidate-uploads/michele-materni--criminal-punishment.pdf> (Accessed on 09 April 2015).

<sup>1082</sup> C. S. Steiker, 'Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide' [1997] 85 Georgetown Law Journal 775.

<sup>1083</sup> Ibid p. 808.

they are perceived in the community. For that reason such imposition of punishment needs to be circumscribed by special guaranties and procedural protections because the expression of attitudes of resentment and judgements of disapproval by the state present potent political threats to liberty.<sup>1084</sup>

Hence, the purpose of this protection is twofold as punishment needs to be restricted because of the special dangers from the authority and it limits the harms that it poses or imposes to either juridical or individual persons. As an effect, such special guaranties and procedural protections preserve blaming as a social practice and makes punishment more rather than less powerful since it controls the ability from the state to harness the force of blaming.<sup>1085</sup>

If we highlight the fact that companies are not affected by moral considerations then antitrust fines can only be regarded to be of administrative nature without corrective or punitive characteristics or any other blaming considerations that could affect corporate entities. As a consequence, the optimal enforcement framework in antitrust should be the one that aims to design out any possibility of non-compliance. By eliminating choice since there is no need to engage with regulatory targets to incentive them to comply with law because undertakings do not suffer from the loss of choice and hence, the amorality problem will not be an issue. However, individuals and undertakings subunits working within individuals, should act within a regulatory scheme that favours incentives. Hence, the proposal here is to use two diverging approaches at two different levels.

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<sup>1084</sup> B. E. Harcourt, 'Joel Feinberg on Crime and Punishment: Exploring the Relationship between the Moral Limits of the Criminal Law and the Expressive function of Punishment' (2001) 5 (1) Buffalo Criminal Law Review 145.

<sup>1085</sup> D. A. Dripps, 'The Exclusivity of the Criminal Law: Toward a 'Regulatory Model' of, or 'Pathological Perspective' on, the Civil-Criminal Distinction' [1996] 7 Journal of Contemporary Legal Issues 199.

However, the seemingly absence of morality in EU antitrust enforcement would also be limited as corporate liability, even without the actual imposition of penalties but through the ability of the EU Commission to harness the power of blame, imposes sanction on shareholders. As has been shown by *Langus* and *Motta*, a successful prosecution of an undertaking might decrease its market value by up to six per cent and even subjecting a company to antitrust investigation may result in loss of market value of 2%.<sup>1086</sup>

A subsequent study updated these figures and although the EU Commission has the potential to indirectly sanction shareholders, and cause them a pecuniary damage between 5.5% and 8.4% in their company's market value,<sup>1087</sup> it must be remembered that stock markets react to any and every kind of news. According to the new study, the fine actually imposed to punish proved infringements in Europe represents an average value of around 1.9% of the capitalisation of a firm.<sup>1088</sup>

In spite of the very low value that the antitrust fine represents when compared to the undertaking's market value, we can conclude without doubt that the fines imposed by the EU Commission in the enforcement of EU competition law have a moral message. Whether that does reach individuals behind the corporation should be analysed. Fines

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<sup>1086</sup> G. Langus and M. Motta, 'The effect of EU antitrust investigations and fines on a firm's valuation' London: CEPR\Discussion Paper No.6176, March 2007. Mentioning that stock markets react to news of a dawn raid, an infringement decision by the EU Commission and a court judgement upholding the EU Commission decision, by reducing the firm's market value by 2%, 3.3% and 1.3% respectively, which means that the combined loss of value in the stock market amounts to roughly 6.6%. Nevertheless, this loss of value is because the market expects the firm's profits to drop after it will have to discontinue the illegal practice.

<sup>1087</sup> This amount should be compared to the 13% of the total loss of stock market value caused by the company's antitrust indictment in the United States. See J. C. Bosch and W. Eckard, 'The profitability of Price Fixing: Evidence from Stock Market Reaction to Federal Indictments' (1991) 73 (2) The Review of Economics and Statistics 309.

<sup>1088</sup> G. Langus, M. Motta and L. Aguzzoni, 'The effect of EU antitrust investigation and fines on a firm's valuation' Barcelona GSE, July 2009, p. 20. [http://www.barcelonagse.eu/tmp/pdf/motta\\_fines\\_july09.pdf](http://www.barcelonagse.eu/tmp/pdf/motta_fines_july09.pdf) (Accessed on 10 April 2015).

should affect their liberty and freedom of choice in the consumer society that we live in. Thus, the adoption of an optimal enforcement system that seeks to pose great threat to a fundamental value such as that of freedom of choice, would be consistent with what EU competition law policy seeks to achieve, which is the empowerment of the consumer in the market place through the power of choice.

On the other hand, the stated objective of the EU Commission in regards to antitrust violations is not that of keeping infringements under a manageable given number but to prevent all infringements. Thus, taking into account he above explained, deterrence as an instrument is in line with the objectives that EU antitrust law and policy seek to achieve but it is also limited, if used alone. As *Fingleton* has stated, antitrust enforcers should aim to change business behaviour rather than simply punish as many transgressors it can, they must complement targeting and hard-hitting enforcement and deterrence with help and advice to businesses willing to comply with the law.<sup>1089</sup> This is the two level, two approaches of enforcement, one that aims at eliminating noncompliance and the other offering choice to whether comply or not.

The following sections will address the different instruments that may be used in combination with deterrence in order to achieve prevention without compromising the core value of choice, which is of utmost importance in human civilization and constitutes a corner stone in different fields of economic law including antitrust law. Nevertheless, it is important to engage in the study of the components of deterrence before evaluating other instruments.

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<sup>1089</sup> John Fingleton, 'The future of the competition regime: increasing consumer welfare and economic growth' (Speech at the Law Society Competition Section Annual Conference 25 May 2011) at 9. [http://oft.gov.uk/shared\\_oft/speeches/2011/1011.pdf](http://oft.gov.uk/shared_oft/speeches/2011/1011.pdf) (Accessed on 01 April 2014)

#### 4.7 Deterrence perceptions.

This study has shown that the fine eventually imposed by the EU Commission no longer matches the gravity or damage caused by the antitrust violation and does not serve as a proper deterrent to prevent future antitrust violations. This is done intentionally with the aim to stimulate the level of detection, which means that the EU Commission, like many other antitrust authorities around the world, is operating a trade-off between reducing the potential deterrent effect of financial sanctions at the benefit of an increased level of detection.

As has been mentioned in Section 3 of this chapter, more than two centuries ago *Beccaria* and *Bentham* laid down the foundations of the theory of deterrence by identifying three key concepts, which were certainty, severity and immediacy of punishment.<sup>1090</sup> Nonetheless, since the 1960s the study has focussed on the deterrent effect of official sanctions or severity, and the theoretical and empirical research in this field has been done following the seminal publication of *Becker* on ‘Crime and Punishment: An Economic Approach’ back in 1968.<sup>1091</sup>

According to *Nagin*, most economic models of crime that have followed, have only focussed on certainty and severity and do not include celerity of punishment as a theoretical component.<sup>1092</sup> The reason for this could be that even in theory, the swiftness

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<sup>1090</sup> Cesare Beccaria, *Dei delitti e delle pene* (*On Crimes and Punishments*). Translated by Henry Paolucci (Macmillan, New York 1986) (Originally published 1764) and Jeremy Bentham, ‘An Introduction to Principles of Morals and Legislation’ in J.H. Burn, H.L.A. Hart and F. Rosen (eds), *The Collected Works of Jeremy Bentham* (Clarendon Press, Oxford, 1996).

<sup>1091</sup> G. Becker, ‘Crime and Punishment: An Economic Approach’ [1968] 79 *Journal of Political Economy* 2 p. 169 – 217.

<sup>1092</sup> D. S. Nagin, ‘Deterrence: A Review of Evidence by a Criminologist for Economists’ [2013] 5 *Annual Review of Economics* 83 – 105.

of punishment, except for the payment of a monetary fine, has an ambiguous incentive effect.<sup>1093</sup> Even *Beccaria* was unsure about the impact of the element of celerity as he stated that “the more promptly and the more closely punishment follows upon the commission of the crime, the more just and useful. It is more just because the criminal is spared the cruel torments of uncertainty which increase with the vigour of imagination and with the sense of personal weakness.”<sup>1094</sup>

On the other hand, from the research available, there is more empirical support for the deterrent effect of changes in the certainty of punishment than changes in the severity of punishment. *Nagin* explains that this situation, what he calls the certainty effect, comes from criminology which places at least as much emphasis on the deterrent effect of informal sanction costs as formal sanction costs.<sup>1095</sup>

This is something that economists tend to overlook, as they would normally focus on the level of the formal sanction costs in order to make punishment effective. As has been explained before, the efficiency standard was adopted by the EU Commission in its enforcement framework as it incorporated an economic model based on the assumption that higher costs would stop potential infringers from committing the violation. However, theoretical models have been questioned over their preference for economic frameworks

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<sup>1093</sup> Ibid p. 85. According to Nagin, while it is always advantageous to delay payment of a monetary fine, there is nothing illogical about the desire to get non-monetary punishment over with. In addition, there is no evidence that the rapidity of the response to crime or even the thoroughness of the post crime investigation has a material influence on crime rates. See D. S. Nagin, ‘Deterrence in the Twenty-first Century: A Review of the Evidence’ (2013) 42 (1) *Crime & Justice* 240.

<sup>1094</sup> Cesare Beccaria, *Dei delitti e delle pene* (*On Crimes and Punishments*). Translated by Henry Paolucci (Macmillan, New York 1986) (Originally published 1764) p. 36.

<sup>1095</sup> D. S. Nagin, ‘Deterrence in the Twenty-first Century: A Review of the Evidence’ (2013) 42 (1) *Crime & Justice* 240. See also K. R. Williams and R. Hawkins, ‘Perpetual Research on General Deterrence: A Critical Overview’ [1896] 20 *Law and Society Review* 545 – 572 and F. E. Zimring, G. Hawkins and J. Vorenberg, *Deterrence: The legal Threat in Crime Control* (The University of Chicago Press, Chicago and London 1973).

over facts,<sup>1096</sup> and the EU Commission should question how this is affecting its deterrence enforcement system.

Thus, it is pertinent to turn to evidence upon which an appropriate enforcement framework can be built in order to achieve prevention. For instance, in criminology informal sanction costs are measured too even though they are separate from the costs that attend the imposition of formal sanctions like loss of liberty and fine costs. Informal costs include censure and loss of social and economic standing.<sup>1097</sup> To consider and measure these costs is very important as their magnitude may be largely independent from the severity of legal consequences since the mere fact to be subject to an investigation by an authority may trigger the imposition of informal sanctions.<sup>1098</sup>

The above is a reminder that certainty of punishment is a product of a series of conditional probabilities associated with various stages of the criminal legal procedure, mainly the probability of apprehension, probability of conviction given apprehension and probability of sanction execution and so on.<sup>1099</sup> In the particular case of antitrust enforcement in Europe, the probabilities at the various stages of the procedure could be enumerated as following: In first place, we have the probability of discovery of the infringement. Second, the probability that the EU Commission sends a statement of objection third, the probability of the adoption of an infringement decision imposing a fine and the probability

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<sup>1096</sup> D. A. Crane, 'Chicago, Post-Chicago, and Neo-Chicago' [2009] 76 University of Chicago Law Review 1916. See also B. Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP, Oxford 2008) p. 5

<sup>1097</sup> S. Klepper and D. Nagin, 'The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited' [1989] 27 (4) Criminology 721 – 746.

<sup>1098</sup> K. R. Williams and R. Hawkins, 'Perpetual Research on General Deterrence: A Critical Overview' [1896] 20 Law and Society Review 545 – 572 where they use the term fear of arrest to label the deterrent effect of informal sanction cost.

<sup>1099</sup> D. S. Nagin, 'Deterrence: A Review of Evidence by a Criminologist for Economists' [2013] 5 Annual Review of Economics 86.

of the General Court and the Court of Justice of the EU in confirming the EU Commission decisions, sanctions and remedies.

Each of these conditional probabilities has costs associated with them and their measurement is of great importance, as they constitute the most accurate representation of informal sanction costs that ought to be taken into account when evaluating the impact of certainty of punishment. Thus, it is important to take into account empirical evidence from criminology on certainty and how it could work with the current framework being enforced by the EU Commission in which the purpose of the fine is to offset the gains that would result from the commission of a violation.<sup>1100</sup>

In criminal law, an antitrust violation is an economic offense known as a type of white-collar crime which can be defined as an infringement committed through the use of some combination of fraud, deception or collusion;<sup>1101</sup> empirical studies have shown that there are expanding boundaries to define white-collar crimes.<sup>1102</sup> Although it is clear that they belong to a different category to street crime,<sup>1103</sup> it has been found that much of what has

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<sup>1100</sup> K. N. Hylton, 'Antitrust Enforcement Regimes: Fundamental Differences' in R. D. Blair and D. Sokol, *The Oxford Handbook of International Antitrust Economics, Volume I* (OUP, Oxford 2014) p. 22-25.

<sup>1101</sup> D. Weisburd, S. Wheeler, E. Waring and N. Bode, *Crimes of the middle classes* (Yale University Press, New Haven 1991). According to the authors, white-collar crimes are among others: antitrust offenses, security fraud, mail and wire fraud, false claims and statements, credit and lending institution fraud, bank embezzlement, income tax fraud and bribery.

<sup>1102</sup> Although we can find many definitions of what white-collar crime is, there are many issues to define the category of crimes and criminals in order to provide a clear contrast to the common crimes and street criminals. Yet, in some basic sense, there seems to be an agreement that people of higher social status are those most likely to have the opportunity to commit crimes that involve nonphysical means. See H. Croall, 'Who Is the White Collar Criminal?' (1989) 29 (2) *British Journal of Criminology* 157-174 and D. Weisburd, E. Waring and E. F. Chayet, *White-collar crime and criminal careers* (Cambridge University Press, Cambridge 2001) p. 10.

<sup>1103</sup> Ibid p. 11 stating that there is a sharp difference between white-collar criminals and lower-class criminals that are generally thought of when scholars discuss the crime problem.

been assumed to be white-collar crime is committed by people in the middle rather than upper classes of our society.<sup>1104</sup>

This means that white-collar criminals share a number of similarities in their social and economic circumstances with other types of criminals. Hence, any general evidence that proves the value of certainty can be of use for EU antitrust enforcement. In this regard, *Weisburd, Einat and Kowalski* have engaged in the empirical study for alternative strategies to incentivize the payment of fines.<sup>1105</sup> They found that the threat of imprisonment provides a powerful incentive to pay fines even when the prison term is for a short period, which they call ‘the miracle of the cells’.<sup>1106</sup>

This means that highly certain punishment can be an effective deterrent alone and this provides a base for the conclusion that certainty of punishment rather than the severity of punishment is a more powerful and more effective deterrent.<sup>1107</sup> The possibility of being imprisoned has proved to be effective in antitrust enforcement. According to *Sokol’s* empirical study, the rigorous enforcement of U.S. antitrust rules with the possibility of prison terms has had the effect on international cartel agreements of operating on a global scale except for the United States.<sup>1108</sup>

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<sup>1104</sup> D. Weisburd, S Wheeler, E. Waring and N. Bode, *Crimes of the middle classes* (Yale University Press, New Haven 1991) M. Levi, Michel, Regulating Fraud: White Collar Crime and the Criminal Process (Tavistock New York 1987).

<sup>1105</sup> D. Weisburd *et al*, ‘The Miracle of the Cells: An Experimental Study of Interventions to Increase Payment of Court Ordered Financial Obligations’ [2008] 7 Criminology and Public Policy 9

<sup>1106</sup> *Ibid.* at 10.

<sup>1107</sup> D. S. Nagin, ‘Deterrence in the Twenty-first Century: A Review of the Evidence’ (2013) 42 (1) *Crime & Justice* 199.

<sup>1108</sup> D. D. Sokol, ‘Cartels, Corporate Compliance, and what Practitioners really think about Enforcement’ [2012] 78 *Antitrust Law Journal* 201. See also G. J. Werden, S. D. Hammond and B. A. Barnett, ‘RECIDIVISM ELIMINATED: CARTEL ENFORCEMENT IN THE UNITED STATES SINCE 1999’ at Georgetown Global Antitrust Enforcement Symposium, September 22, 2011, Washington D.C. <https://www.justice.gov/atr/file/518331/download> (Accessed on 27 June 2015).

Thus, although prison terms would involve an increase in the severity of punishment, the fact that the U.S. DoJ Antitrust Division has been successful in discovering international cartel arrangements makes the level of certainty of being in jail, fairly high.<sup>1109</sup> Nevertheless, the focus on certainty of punishment originally relates to *Bentham's* 'Panopticon' where he suggested a prison to be construed so that inmates could constantly be under surveillance, but would not know whether they are watched or not and this would constrain their behaviour, even in the absence of actual enforcement.<sup>1110</sup>

Hence, the proposal to base enforcement on certainty is not innovative but does highlight its importance. Indeed, some other studies offer illustration of the potential for combining elements of both severity and certainty to create an effective deterrent effect. Aside from this, another important issue to consider is the fact that research assumes that individuals perceive sanction risks as subjective probabilities of arrest, conviction and execution and since data is not available, researchers presume that they are somehow based on the observable frequencies of arrest, conviction and execution. This in turn, leads to the erroneous assumption that individuals have accurate perceptions of these risks and consequences, which is something not credible.<sup>1111</sup>

In spite of the obvious difficulties to obtain evidence to inform risks perceptions, there have been studies that show that there is considerable instability in sanction risks perceptions and that; for instance, non-offenders or youth offenders have higher sanction

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<sup>1109</sup> Certainty is increased and deterrence achieved as imprisonment is unlikely to be a common experience in the lives of friends and family of white-collar offenders, the stigmatization associated with prison may be greater for white-collar criminals than for other types of criminals.

<sup>1110</sup> J. Bentham, 'Panopticon' in M. Bozovic (ed) *The Panopticon Writings* (Verso 2011).

<sup>1111</sup> D. S. Nagin, 'Deterrence: A Review of Evidence by a Criminologist for Economists' [2013] 5 Annual Review of Economics 91 mentioning that it does seem unlikely that criminals have well-formed perceptions of the sanctions regimes for specific crimes.

risks perceptions than experienced offenders. This all means that there is an experiential effect, whereby inexperienced delinquents learned that sanction risks were lower than initially anticipated.<sup>1112</sup>

In this regard, *Stafford* and *Warr* argue that there are two sources of information of sanction risks: experience of peers and own experience. In respect to the latter, many studies find that increases in perceived apprehension risks are associated with the failure in avoiding being discovered.<sup>1113</sup> Further studies found that being arrested increased subjective probabilities but that individuals with more experience in offending were making smaller adjustments in their risk perceptions in subsequent apprehension experiences and placed more weight on their prior subjective probabilities.<sup>1114</sup> In contrasts, inexperienced offenders adjusted upwards their risk perceptions and placed more weight on their first arrest and less weight on prior perceptions.<sup>1115</sup>

These observations have delivered staggering conclusions between specific deterrence and general deterrence. The former considered as the response to experience of punishment and the latter as the response to the threat of punishment and yet, there is no logical contradiction since the results from empirical research show that the experience

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<sup>1112</sup> R. Paternoster et al, 'Perceived Risk and Deterrence: Methodological Artefacts in Perceptual Deterrence Research' [1982] 73 *Journal of Criminal Law and Criminology* 1238.

<sup>1113</sup> M. Stafford and M. Warr, 'A Reconceptualization of General and Specific Deterrence' [1993] 30 *Journal of Research in Crime and Delinquency* 123.

<sup>1114</sup> L. Lochner, 'Individual Perceptions of the Criminal Justice System' [2007] 97 *American Economic Review* 444, R. Hjalmarsson, 'Crime and Expected Punishment: Changes in Perceptions at the age of Criminal Majority' [2009] 7 *American Law and Economics Review* 209.

<sup>1115</sup> S. Anwar and T. A. Loughran, 'Testing as Bayesian Learning Theory of Deterrence among Serious Juvenile Offenders' (2011) 49 (3) *Criminology* 667.

[http://www.heinz.cmu.edu/ShamenaAnwar/index\\_files/Anwar\\_deterrence.pdf](http://www.heinz.cmu.edu/ShamenaAnwar/index_files/Anwar_deterrence.pdf) (Accessed on April 2, 2015).

of punishment actually increases the propensity for offending while the threat of punishment deters it.<sup>1116</sup>

As mentioned earlier, since white-collar criminals share a number of similarities in their social and economic circumstances with other types of criminals, these findings are useful to competition law enforcement. In fact, According to *Waring et al*, although experience of punishment is expected to reinforce the costs of criminality for the white-collar offender, what really happens is that the stigma of having served a prison sentence may also serve to weaken the deterrent threat of punishment.

Once occupational prestige and social status are lost, the white-collar criminal may not have much to lose through future criminality.<sup>1117</sup> This of course, is a theoretical assumption that is informative. However, as will be argued below, in the particular case of antitrust enforcement, different results have been obtained. Yet, according to *Connor* and *Lande*, 18 out of 35 people that were sentenced to prison for cartel infringements in the United States, were still working at the same companies or in the same industry.<sup>1118</sup> Thus, this raises questions because it is clear that once the possibility of imprisonment is to be taken into account, cartels would stop their collusive activity and yet, it seems that undertakings see value in keeping such individuals in managerial positions.

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<sup>1116</sup> D. S. Nagin, 'Deterrence: A Review of Evidence by a Criminologist for Economists' [2013] 5 Annual Review of Economics 99. See also D. Nagin et al, 'Imprisonment and Reoffending in M. Tonry, *Crime and Justice: A Review of Research* (Chicago University Press, Chicago 2009) p. 115 where the conclusion offered on the effect of experience of imprisonment on recidivism is that most of the studies point to a criminogenic effect of the incarceration experience.

<sup>1117</sup> E. Waring, D. Weisburd and E. Chayet. 1995 'White Collar Crime and Anomie' [1995] 6 Advances in Criminological Theory 207–225. See also M. Benson and F. T. Cullen, 'The Special Sensitivity of White-Collar Offenders to Prison: A Critique and a Research Agenda' (1988) 16 (3) Journal of Criminal Justice 207.

<sup>1118</sup> J. M. Connor and R. H. Lande, 'Cartels as Rational Business Strategy: Crime Pays' [2010] 34 Cardozo Law Review at 442, providing statistics.

Thus, empirical evidence in criminology has shed some light into the white-collar crime category and seems to make sense of the difficulties to optimally enforce antitrust rules. These views are essential, as it is important to get a more accurate account of the sanction risk perceptions. In *Nagin's* view, the first step is to define the relevant population of potential law infringers, both active criminals and the people on the margin of criminality, to evaluate the way they perceive the sanction system so as to measure risk perceptions before we even try to design an optimal sanction regime.<sup>1119</sup>

In this regard, according to empirical research developed in the United States on the type of people that would engage in white-collar criminal activities, the results for antitrust violations and securities fraud offenses were revealing. According to the authors, people who had engaged in in the above mentioned crimes in the U.S. from 1970s to 1990s were generally middle-aged white males with stable employment in white-collar jobs and, more often than not, owners or officers in their companies. The antitrust offenders tend to be richer within the middle class range and are more likely to be college graduates.<sup>1120</sup>

So, empirical evidence allows us to identify the relevant population and although the above mentioned study was done in the United States, we can assume that the observation would be similar to the case in Europe. However, even when the population of potential offenders could be defined, subjective perceptions and informal costs are almost impossible to measure.

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<sup>1119</sup> D. Nagin et al, 'Imprisonment and Reoffending in M. Tonry, *Crime and Justice: A Review of Research* (Chicago University Press, Chicago 2009) p. 102.

<sup>1120</sup> D. Weisburd, E. Waring and E. F. Chayet, *White-collar crime and criminal careers* (Cambridge University Press, Cambridge 2001) p. 24.

It is because of this that the focus centred on formal sanction costs and hence, under the *Bentham's* choice framework as developed by economists, it is assumed that the offense will be committed if the expected benefits from a successful completion exceed the expected costs of an unsuccessful attempt, that is expected formal sanction costs. However, for most people sanction costs are not relevant to the decision to refrain from committing an offense.<sup>1121</sup>

In light of this shortcoming, *Nagin's* analysis of the choice model delivers an alternative approach to that of the deterrence model as developed by economists. In his view, the choice model results in four possible outcomes, each having benefits and costs with their corresponding probabilities whenever an individual chooses to act on a criminal opportunity. Taking into account the five factors mentioned above, these are the four possible scenarios:<sup>1122</sup>

i) The offender successfully commits the offense in which case, the net benefit is reward less commission costs; ii) the offender is not successful in committing an offense but is not apprehended. In this case, commission costs are incurred but there is no reward; iii) the offender is not successful in committing the offense, is apprehended but not convicted and formally sanctioned in which case, the total costs are the sum of commission costs and apprehension costs.<sup>1123</sup>

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<sup>1121</sup> R. Bachman et al, 'The Rationality of Sexual Offending: testing a Deterrence/Rational Choice Conception of Sexual Assault' (1992) 26 (2) *Law and Society Review* 343 – 372.

<sup>1122</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) *Crime & Justice* 210 and 211.

<sup>1123</sup> *Ibid* p. 211

In a forth scenario, the individual committing an offense is successful in its commission, but is apprehended, convicted and formally sanctioned. In this last case, the total costs to the offender result from the sum of the commission cost plus apprehension cost plus formal and informal sanction costs. In view of these possible scenarios and the probabilities they convey, it is clear that unless the benefit of crime commission is positive, the crime will not be committed regardless of the formal and informal sanction costs.<sup>1124</sup>

Thus, increases in perceived commission costs will have a greater deterrent effect than equal increases in either perceived apprehension or perceived formal and informal sanction costs. This is so because commission costs always contribute to the total costs while increases in apprehension costs will only have a greater deterrent effect than equal increases in either formal or informal sanctions costs or both.<sup>1125</sup>

In respect to antitrust enforcement, there are some characteristics of the population that can be highlighted and can help us make an inference of the sanction risk perception of such population. For instance, we can agree that competition law in Europe has developed drastically and EU competition law enforcement went from almost non-existent in 1960's to the EU Commission being considered the world's top antitrust cop.<sup>1126</sup>

This evolution has affected many areas of society including education. We can make the case for the argument that graduate business students in Europe are more familiar and

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<sup>1124</sup> Ibid p. 212.

<sup>1125</sup> Ibid p. 213.

<sup>1126</sup> Tom Fairless, 'EU Displaces U.S. as Top Antitrust Cop: Activism has put the EU in a prime position to shape the Internet' *The Wall Street Journal* (New York City, 03 September 2015). <http://www.wsj.com/articles/eu-displaces-u-s-as-top-antitrust-cop-1441314254?mod=e2tw> (Accessed on 04 September 2015).

have a better understanding of competition law than graduate students back in the 60s or even back in the 1990s. Thus, the fact that most people who have been found to have infringed competition law are mid-class company officers with a college education, make it possible to exploit such characteristics and infer the risk perception and informal costs.

According to *Paternoster and Simpson*, the majority of MBA students hold personal moral codes, which would carry informal sanction costs and these, are more important than rational calculations of sanction risks in predicting compliance.<sup>1127</sup> This means that for present and future business people, moral considerations and other non-formal costs outweigh formal costs.<sup>1128</sup> Thus, the stigmatization risk perception associated with prison may be greater for business people. It is important to point that it is not actual stigmatization but the risk of being stigmatized what makes for most of the cost of commission.

The above stated is consistent with theories of perceptual deterrence that highlight the importance to consider what is known about salience and conditional probabilities.<sup>1129</sup> People focus on the most salient link in the chain of conditional probabilities that influence the likelihood of being caught, rather than the overall probability. The salience of the higher probabilities leads people to overcompensate in determining the joint effect on risk, a heuristic that has been called the conjunctive effect. Given this effect,

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<sup>1127</sup> R. Paternoster and S. Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' [1996] *Law and Society Review* 549 - 583.

<sup>1128</sup> Empirical studies offer conclusions in the same line stating that firms and senior executives are vulnerable to activities that have a negative impact on their reputation and self-esteem. See D. Kahan and E. Posner, 'Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines' [1999] 42 *Journal of Law & Economics* 365 and D. Skeel, 'Shaming in Corporate Law 149 [2001] *University of Pennsylvania Law Review* 1811.

<sup>1129</sup> R. Paternoster and R. Bachman, 'Perceptual Deterrence Theory' in F. T. Cullen and P. Wilcox (eds), *The Oxford Handbook of Criminological Theory* (OUP, Oxford 2012), p. 33.

compliance levels increase when the salience of high probability links is increased, even when the underlying risk is unchanged.<sup>1130</sup>

Further studies confirm the pre-eminence of certainty over severity of punishment, which leads to conclude that the deterrent effect of increasing the severity of a penalty might be null.<sup>1131</sup> Thus, certainty of punishment offers a more deterrent effect than the severity of the legal consequences statutorily provided, although the most accurate expression would be that it is certainty of apprehension the one that increases the costs for an offender, irrespective of whether the apprehension results in a conviction or not.<sup>1132</sup>

Although apprehension carries greater costs for offenders than formal and informal costs alone, it must be kept in mind that commission costs affect apprehension costs and formal and informal costs as well. This means that if the commission costs are increased enough to outweigh the benefits from committing a crime, then crime is actually prevented and no enforcement is needed in the first place.

Yet again, deterrence based on certainty of punishment is a matter of perception and unless the deterrence policy can affect people's perceptions, it will not deliver the

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<sup>1130</sup> John T. Scholz, 'Trust, Taxes and Compliance' in V. Braithwaite and M. Levi (eds), *Trust and Governance* (Russell Sage Foundation, New York 1998) p. 143. Here an example is given concerning tax payers who focus on the most salient link in the chain of conditional probabilities. Thus, a 10% chance of getting caught and punished is treated as a lower risk than a combined 50% chance of being caught and a 20% chance of being punished after being caught, even though the actual risk in both situation is the same.

<sup>1131</sup> See R. Hjalmarsson, 'Crime and Expected Punishment: Changes in Perceptions at the Age of Criminal Majority' [2009] 7 American Law and Economics Review 209, where it was found that greater penalties that attend moving to the adult justice system from the juvenile one, does not deter. E. Helland and A. Tabarrok, 'Does Three Strikes Deter? A Nonparametric Estimation' (2007) 42 (2) Journal of Human Resources 309, where it was found that longer sentences on individuals were unlikely to have a material deterrent effect.

<sup>1132</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) Crime & Justice 210 and 213.

behavioural response sought by the authority.<sup>1133</sup> According to *Sherman's* study on police crackdowns, the deterrent effect of apprehension declines as potential offenders learn through trial and error that they had overestimated the certainty of getting discovered at the beginning of the crackdown.<sup>1134</sup>

Although this may be true for white-collar criminals in general as this category tends to have many criminal opportunities based on the fact that most people committing these crimes belong to mid-class of society thus, not limiting the crime opportunities to business situations.<sup>1135</sup> Nonetheless, this does not apply to antitrust enforcement as antitrust offenders show much less evidence of repeat criminality.<sup>1136</sup>

Again, it must be kept in mind that undertakings seem to keep competition law infringers in decision-making positions within the organization and yet, they cannot be considered repeat criminals, not formally.<sup>1137</sup> Nevertheless, offending corporations cannot be believed to make laudable efforts to put in place effective compliance and ethics programs if they keep culpable senior executives and employ indicted fugitives in positions of substantial authority where they can be able to repeat the antitrust offence.<sup>1138</sup>

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<sup>1133</sup> L. W. Sherman, 'Police Crackdowns: Initial and Residual Deterrence' in M. Tonry and N. Morris (eds), *Crime and Justice: A Review of Research* (12<sup>th</sup> vol. University of Chicago Press, Chicago 1990).

<sup>1134</sup> *Ibid.* p 10.

<sup>1135</sup> M. Benson and F. T. Cullen, 'The Special Sensitivity of White-Collar Offenders to Prison: A Critique and a Research Agenda' (1988) 16 (3) *Journal of Criminal Justice* 207

<sup>1136</sup> According to the empirical study, only 10% of these offenders are repeat criminals. See D. Weisburd, E. Waring and E. F. Chayet, *White-collar crime and criminal careers* (Cambridge University Press, Cambridge 2001) p. 30.

<sup>1137</sup> J. M. Connor and R. H. Lande, 'Cartels as Rational Business Strategy: Crime Pays' [2010] 34 *Cardozo Law Review* at 442 providing evidence that at least 18 out of 35 people convicted for antitrust violations were in the same company or within the same industry.

<sup>1138</sup> See Bill Baer, 'Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes' in remarks as prepared for the Georgetown Law 7<sup>th</sup> Annual Global Antitrust Enforcement Symposium, Washington, 25 September 2013, p. 8. <http://www.justice.gov/atr/public/speeches/300930.pdf> (Accessed on 10 October 2015).

On the other hand, there is a residual deterrence effect, which is an offense suppression consequence that extends beyond authority intervention until offenders learn by experience or by peers experience that it is once again safe to commit an offense.<sup>1139</sup> This all means that shame as a perceptual deterrent, which is a key component of commission and apprehension costs; plays a more decisive role in the deterrence process than sanction cost.<sup>1140</sup> This susceptibility is greater on white-collar criminals because they have more to lose in terms of status, financial situation, and other factors than common crime offenders who are often unemployed, poorly educated, and without great personal or social resources.<sup>1141</sup>

However, even if deterrence can be said to be a matter of increasing the perception of certainty of punishment rather than affecting the perception of severity of punishment, this does not mean that the former works independently and unrelatedly from the latter, in fact; both interact and they complement each other.<sup>1142</sup> As has been mentioned earlier, certainty must result in a distasteful consequence for the prospective offender in order for it to be an effective deterrent.<sup>1143</sup> On the other hand, as has been argued earlier, the

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<sup>1139</sup> Ibid. See also D. S. Nagin, 'Criminal Deterrence Research in the Outset of the Twenty-First Century' in M. Tonry, *Crime and Justice: A Review of Research* (23<sup>th</sup> vol. University of Chicago Press, Chicago 1998). Here, he explains that the initial deterrence decay is the response to what behavioural economists call ambiguity aversion in the sense that people prefer gambles in which the risks are clearly comprehensible compared to other gambles where the risks are less transparent.

<sup>1140</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) *Crime & Justice* 210 and 214.

<sup>1141</sup> D. Weisburd, E. Waring and E. F. Chayet, *White-collar crime and criminal careers* (Cambridge University Press, Cambridge 2001) p. 92.

<sup>1142</sup> M. Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' in M. Tonry (ed), *Crime and Justice: A Review of Research* (38<sup>th</sup> vol., University of Chicago Press, Chicago 2009).

<sup>1143</sup> M. Kleiman, *When brute force fails, how to have less crime and less punishment* (Princeton University Press, New Jersey 2009) where positive results in regular, random drug testing carrying short periods of incarceration, provided a more effective deterrent effect than previous strategies.

effectiveness of the severity of punishment is dependent upon the effectiveness of certainty of punishment.<sup>1144</sup>

Even more, this dependency on one another is highlighted due to the fact that, since there is no prior reliable data in the sanctioning process that serves to calculate the present and future risk of offense commission, then there can be no reasoned basis for an accurate estimate of the deterrent effect of sanctions.<sup>1145</sup> This too calls for severity and certainty of punishment to be considered together rather than independent from each other.

*Nagin* further argues that the lack of data concerning subjective perceptions on deterrence is ultimately more important than the lack of a measure on actual risk of offense commission.<sup>1146</sup> In order to predict how changes in certainty and severity might affect crime rate, knowledge of the relationship of the crime rate to certainty and severity as separate entities is required. In regards to the latter, for instance, it needs to be specified how offenders respond to multiplicity of sanction options for the punishment of crimes and deterrence theories also need to account for the possibility that offenders' perceptions of the severity of sanction options may differ.<sup>1147</sup>

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<sup>1144</sup> H. L. Ross, *Deterring the Drinking Driver: Legal Policy and Social Control* (Lexington Books, Mass. 1982), where it was established that the severity enhancing policies were ineffective due to the reduced certainty of punishment. On the other hand, it appears that knowledge of official sanctions is strongly affected by the need to know principle and knowledge of maximum penalties for various offenses is better for incarcerated individuals than not incarcerated ones.

<sup>1145</sup> See P. Cook, 'The Clearance Rate as a Measure of Criminal Justice System Effectiveness' [1979] 11 Journal of Public Economics 135, arguing that measures of apprehension risk based only on enforcement action and crimes that actually occur are not valid measures of the apprehension risk represented by criminal opportunities not acted upon because the risk was deemed too high.

<sup>1146</sup> See D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) Crime & Justice 232.

<sup>1147</sup> Ibid, referring to P. B. Wood and D. C. May, 'Racial Differences in Perceptions of Severity of Sanctions: A Comparison of Prison with Alternatives' (2003) 20 (3) Justice Quarterly 605. Concluding that some people may view the possibility of life sentence as worse than execution and others might view community supervision more onerous than a short period of incarceration.

These two factors, the multiplicity of sanctions and the diverse response to them, make it difficult to specify a general theory of deterrence that can be applied broadly and yet, both factors are essential to the deterrence phenomenon.<sup>1148</sup> Nevertheless, this major difficulty is more burdensome in regards to severity than certainty and studies focused on the relationship between crime rate and certainty of punishment, have provided more consistent results in the assessment on deterrence effectiveness.

For instance, *Klick and Tabarrok*'s study is one of many empirical research works that have provided consistent and meaningful findings on deterrence effectiveness by focusing on the relationship between certainty and crime rate. Their study found that U. S. police presence on the streets has had a substantial deterrent effect on serious crimes, their estimates revealed that 10% increase in police presence results in a reduction of about 3% in total crime.<sup>1149</sup>

On the other hand, *Shi* produced another study that showed that decline in police productivity, which in the particular case resulted from an unofficial incentive for police officers to curtail their use of arrest due to a three-day riot incident in Cincinnati; resulted in a substantial increase in criminal activity.<sup>1150</sup> These findings are conclusive to the fact that increases in police numbers or the perceived increases due to the way police officers are deployed, as well as actual or perceived changes in the way police officers exercise their functions; have a direct relationship and effect on crime rate. Indeed, commitment

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<sup>1148</sup> Ibid p. 233.

<sup>1149</sup> J. Klick and A. Tabarrok, 'Using Terror Alert Levels to Estimate the Effect of Police on Crime' [2005] 46 Journal of Law and Economics 267 – 279 mentioning that the police presence could be enhanced by hiring new officers or by reallocating them on the street in larger numbers or for longer periods of time.

<sup>1150</sup> L. Shi, 'The Limits of Oversight in Policing: Evidence from the 2001 Cincinnati Blot' [2009] 93 Journal of Public Economics 99 – 113.

to policing is associated with lower crime rates, something that has been confirmed by many other studies on certainty and deterrence.<sup>1151</sup>

According to *Nagin*, another dimension of deterrence from police action involves averting crime in the first place. In his view, the fact that there is no apprehension because there is no offense to pursue, is the primary source of deterrence from the presence of police.<sup>1152</sup> As has been stated above, this dimension is the source of doubts as to the validity of measures on apprehension risk as the latter is based on enforcement actions on registered offenses only and do not offer an accurate measure due to its non-consideration of the overall crime propensity.<sup>1153</sup>

Nevertheless, this second dimension increases the commission costs, which means that the sentinel policing activity as described by *Nagin*, influences the four possible scenarios within the choice model, when an individual is presented with a crime opportunity. These commission costs may be high enough to achieve prevention unlike the first deterrence dimension described above, where the apprehension agent role of police that can only increase the probability of three remaining scenarios and after the violation is committed.<sup>1154</sup>

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<sup>1151</sup> P. Heaton, 'Understanding the Effects of Anti-Profiling Policies' (2010) 53 (1) *Journal of Law and Economics* 29 – 64. See also G. DeAngelo and B. Hansen, 'Life and Death in the fast Lane: Police Enforcement and Roadway Safety' University of California, Santa Barbara, Department of Economics, unpublished. [http://media.oregonlive.com/commuting/other/Life\\_And\\_Death\\_5\\_29.pdf](http://media.oregonlive.com/commuting/other/Life_And_Death_5_29.pdf) (Accessed on 06 May 2015).

<sup>1152</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) *Crime & Justice* 237. According to this author, the sentinel role of policing is more effective in deterring crime than their apprehension agent role.

<sup>1153</sup> *Ibid* p. 238. As has been stated before, measures of apprehensions risks do not accurately represent the missed opportunities to commit an offense. Nor acted upon due to the high risk of apprehension.

<sup>1154</sup> *Ibid* p. 242. This is how Nagin reaches his conclusion that innovations that make police sentinels that are more effective will tend to be more influential in the decision process characterized by the choice model than innovations in apprehension effectiveness.

It is clear that increasing the offense commission costs is more effective than the impact that apprehension can have in the probabilities of being convicted and sanctioned all together. However, as mentioned earlier, since deterrence is a matter of perception, it is appropriate to refer to perceptual deterrence literature in this respect. In *Nagin*'s view, perception studies consistently find that actual or perceptual offending is not related to perceptions of sanction certainty and although the importance of certainty is confirmed, the observation is that certainty has a negative consequence and not necessarily a draconian one.<sup>1155</sup>

On another end, perception studies have focused on the links between formal and informal sources of social control. According to *Zimring* and *Hawkins*, societal actions can set off societal reactions that may provide potential offenders with more reason to avoid conviction than the officially imposed unpleasantness of punishment.<sup>1156</sup> Further studies have delivered conclusions that individuals, who have high regard of conventionality, are more deterred by perceived risks of public exposure for violating law.<sup>1157</sup>

This has been confirmed by *Klepper* and *Nagin*'s study that showed that if taxpayers perceived no risks of criminal prosecution, a great percentage of people reported that they would take advantage of the non-compliance opportunities.<sup>1158</sup> Whereas most people

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<sup>1155</sup> *Ibid* p. 244.

<sup>1156</sup> F. Zimring and G. Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, Chicago 1973) p. 174.

<sup>1157</sup> J. P. Gibbs, *Crime, Punishment, and Deterrence* (Elsevier, New York 1975), K. R. Williams and R. Hawkins, 'Perceptual Research on General Deterrence: A Critical Overview' [1986] 20 Law and Society Review 545.

<sup>1158</sup> S. Klepper and D. Nagin, 'The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited' (1989) 27 (4) Criminology 721.

reported that if there was even a slight risk of criminal consequences, they would abstain themselves from taking advantage of the offense opportunity.<sup>1159</sup>

This fear of arrest is consistent with what has been explained above about the greater deterrent effect of apprehension than that of formal sanctions cost.<sup>1160</sup> Further studies have confirmed the above stated and have exposed that people with greatest stakes in conformity were the most deterred by informal sanction costs.<sup>1161</sup> Furthermore, for individuals without a criminal record, informal sanction costs make a large contribution to the total costs although that impact diminishes once people has been involved with the criminal justice system.<sup>1162</sup>

These conclusions have provided the grounds for make the proposition that if fear of stigma is the key component of deterrence then punishment must be a relatively rare event.<sup>1163</sup> In this regard, research should focus on whether and how the experience of punishment affects the response to the threat of punishment.<sup>1164</sup> In doing this, it is important to take into account that people update their perceptions with new information.

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<sup>1159</sup> S. Klepper and D. Nagin, 'Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecution' [1989] 23 Law and Society Review 209.

<sup>1160</sup> K. R. Williams and R. Hawkins, 'Perceptual Research on General Deterrence: A Critical Overview' [1986] 20 Law and Society Review 545. If taking into account the choice model and the 4 possible scenarios and probabilities there presented before a crime opportunity, it is clear that apprehension increases the probability of conviction and sanction costs whereas sanction costs only follow after conviction has been secured.

<sup>1161</sup> D. Nagin and G. Pogarsky, 'An Experimental Investigation of Deterrence: Cheating, Self-Serving Bias, and Impulsivity' [2003] 41 Criminology 167.

<sup>1162</sup> D. Nagin et al, 'Imprisonment and Reoffending in M. Tonry, *Crime and Justice: A Review of Research* (Chicago University Press, Chicago 2009) p. 115 referring to the criminogenic effect of the incarceration experience. See also R. Paternoster, 'Estimating Perceptual Stability and Deterrent Effects: The Role of Perceived Legal Punishment in the Inhibition of Criminal Involvement' [1983] 74 Journal of Criminal Law and Criminology 210, mentioning that non-offenders have higher sanctions risk perceptions than recidivists.

<sup>1163</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) Crime & Justice 246.

<sup>1164</sup> Ibid, in his view, the experience of punishment may affect general deterrence by affecting perceptions of sanction risks and it may affect the basic proclivity for offending as well.

Hence, people would update their perceptions of sanction risk with new information in regards to failure or success of themselves or their peers in eluding apprehension. Interestingly though, individuals do not entirely abandon prior beliefs based on new information and only incrementally adjust them.<sup>1165</sup>

Based on these perception studies as well as the choice model above described, *Pogarsky* distinguishes three groups of individuals.<sup>1166</sup> In first place, he identifies the acute conformists who are the group of people that have no need to gain knowledge of sanction risk because for them there is no profit in committing the offense even in the absence of sanction costs. The second group of people is identified as the deterribles who are attentive to sanction costs and the issue is whether the net benefits of successful commission exceeds the potential costs attending failure.<sup>1167</sup>

The third group of individuals is called the incorrigibles for whom crime is profitable but who for whatever reason are not attentive to sanctions threats.<sup>1168</sup> This classification is useful as it is possible to determine what empirical research should further focus on, mainly sanction risk perception studies need to target the second and third groups mentioned above in order to gain better knowledge of their awareness of the legally authorized sanctions and the intensity of their application.<sup>1169</sup>

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<sup>1165</sup> M. Stafford and M. Warr, 'A Reconceptualization of General and Specific Deterrence' [1993] 30 Journal of Research in Crime and Delinquency 123.

<sup>1166</sup> G. Pogarsky, 'Deterrence and Individual Differences among Convicted Offenders' (2007) 23 (1) Quantitative Criminology 59.

<sup>1167</sup> *Ibid* p. 66.

<sup>1168</sup> *Ibid* p. 68.

<sup>1169</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) Crime & Justice 252.

Overall, these studies show that the optimal deterrence framework used by the EU Commission to deter and prevent EU competition law violations is actually short-sighted as it is being applied. Research from non-economists into corporate and individual wrongdoing suggest that enforcers, in this particular case the EU Commission and NCAs, should seek to influence incentives of firms and behaviour of individuals within the firm.

This is needed in order to deter anticompetitive behaviour. The EU Commission has put more weight on making sanctions harsher for antitrust law infringers by making it possible for it to impose fines close to the maximum level allowed statutorily,<sup>1170</sup> that it has forgotten about elements such as certainty and celerity of punishment.

No doubt, a new approach needs to be adopted in order to take account of the research and developments above described. In particular, a new design of enforcement should enhance detection and sanction risk perceptions as these could increase perceptual deterrence. This is ultimately more important than actual deterrence itself. In doing so, it may create a more effective enforcement system of EU antitrust law that is effective in deterring but also in promoting compliance mechanisms that can lower cartel harm and reduce enforcement costs.

In particular, it is important to take into account the fact that antitrust infringers are people who do not belong to the elite class of society and instead, have a common social background. This allows us to take into account the evidence collected from empirical studies that seek to shed light into the factors of general criminality that might enhance enforcement of competition rules. We have learned from the above that more and more

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<sup>1170</sup> Article 23 (2) (c) of Regulation No. 1/2003 sets a limit in the amount of a fine of no more than 10% of the undertaking's total turnover in the preceding business year.

people who are more likely to have the opportunity to commit an antitrust violation are people who have received higher education and are highly sensitive to social costs.

It has been argued that people in the middle, rather than upper classes of our society commit white-collar crimes. In the particular case of antitrust violations, they seem to be committed by educated people in the upper segment of the middle class and thus, have more to lose in terms of status and financial situation than the poorly educated and without great social resources.<sup>1171</sup> This situation make them sensitive regulatory targets for whom policing tactics might have a greater residual deterrence effect.

As has been explained before, residual deterrence effect extends beyond authority intervention and constrains behaviour towards compliance even when there is not actual authority enforcement.<sup>1172</sup> Thus, what is necessary to achieve is to increase the perception that an active policing activity is taking place to inhibit criminal conduct. As to antitrust enforcement, the goal should be to create the perception that certainty of punishment is high because there is active policing activity that increases the chances of being caught in proscribed activities.

Hence, the question to answer would be what kind of instruments must be adopted to increase the perception of decision-making people within the undertaking, that discovery likely so that they decide to abstain from even attempting to infringe competition law.

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<sup>1171</sup> As stated above, the assumption was that white-collar criminals were likely to fall into repeat criminality once they had suffered punishment, as they had nothing to lose anymore. However, empirical research has shown that only 10% of antitrust offenders are recidivists. See D. Weisburd, E. Waring and E. F. Chayet, *White-collar crime and criminal careers* (Cambridge University Press, Cambridge 2001) p. 30. This might be true at a personal level however, undertakings seems to keep competition law infringers within the organization which that alone, does not make them recidivists per se but needs to be taken into account as evidence towards the creation of a culture of compliance.

<sup>1172</sup> This seems to confirm what Bentham argued about the Panopticon. See J. Bentham, 'Panopticon' in M. Bozovic (ed) *The Panopticon Writings* (Verso 2011).



## Chapter 5

### Responsive Regulation

#### 5.1 Increased perception of certainty of punishment through compliance.

The focus on severity of sanctions, meaning the focus on one element of deterrence alone; has been in place since the first decision fining an undertaking for violation of EU competition law was taken back in 1969.<sup>1173</sup> However, as has been explained earlier, it is fair to say that there are serious limitations to the optimal deterrence framework adopted by the EU Commission, as it is cast in terms of expected profits and does not have substantial impact in generating the desired incentives and behaviour of companies subject to antitrust law.<sup>1174</sup>

It is undeniable that in the last twenty-five years, competition law enforcers around the world have acknowledged these limitations and perhaps the most impressive innovation in antitrust enforcement during this period has been the leniency programme.<sup>1175</sup> The latter was designed to address such short-sighted approach by creating a race among cartelists to report on each other making use of the classic prisoner's dilemma.<sup>1176</sup>

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<sup>1173</sup> Decisions *Quinine* [1969] OJ L192/5 and one week later *Dyestuffs* [1969] OJ L195/11.

<sup>1174</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 201. The author shares the view of many other academics that, although it is not clear, what the optimal level of cartel deterrence should be, or whether any given cartel has been deterred considering the costs of such deterrence; there is a common belief that competition law enforcement has not reached the optimal level.

<sup>1175</sup> A. O'Brien, 'Cartels Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions' Antitrust Division, Department of Justice, 13<sup>th</sup> Annual EU Competition Law and Policy Workshop, Florence, Italy, June 6, 2008, p. 10. <http://www.justice.gov/atr/public/speeches/235598.pdf> (Accessed on May 25, 2015).

<sup>1176</sup> A. Rapoport and A. Chammah, *Prisoner's Dilemma: A Study in Conflict and Cooperation* (University of Michigan Press, Ann Arbor, MI 1965). The nickname Prisoner's Dilemma, attributed to A.W. Tucker, derives from the original anecdote used to illustrate the game. Two prisoners, held uncommunicated, are charged with the same crime. They can be convicted only if either confesses. Further, if only one confesses, he is set free for having turned state's evidence and is given a reward to boot. The prisoner who has held out is convicted on the strength of the other's testimony and is given a more severe sentence

Indeed, since the U.S. DoJ Antitrust Division first published and made use of its leniency programme, the latter has become the Division's most effective investigative tool and it has served as a model for similar corporate leniency programmes that have been adopted by many antitrust authorities around the world.<sup>1177</sup> This development increases the costs of offense commission and contributes to a greater certainty of punishment, which helps to create a greater deterrent effect. The EU Commission enhances its apprehension agent function by providing incentives to co-infringers in order to discover competition law infringements.

Indeed, leniency programmes have helped U.S. and EU antitrust enforcement agencies among many others, to discover more than 90% of cartel cases sanctioned on both sides of the Atlantic.<sup>1178</sup> However, despite their great value as an investigative tool, the fact remains that the certainty deterrent effect stems primarily from police functioning in its official guardian role rather than in their apprehension agent role.<sup>1179</sup>

This means that the EU Leniency Notice 2006 does increase a risk of discovery and apprehension but does not prevent the occurrence of antitrust infringement in the first place.<sup>1180</sup> As has been stated in sections 4.6 and 4.7 of this work, many criminology

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than if he had also confessed. It is in the interest of each to confess whatever the other does. But it is in their collective interest to hold out.

<sup>1177</sup> S. D. Hammond, 'Recent Developments, Trends and Milestones in the Antitrust Division's Criminal Enforcement Program' 56<sup>th</sup> Annual Spring Meeting ABA Section of Antitrust Law, Washington, March 26, 2008, p. 13. <http://www.justice.gov/atr/public/speeches/232716.pdf> (Accessed on April 1, 2015)

<sup>1178</sup> G. J. Werden *et al*, 'Detection and Deterrence of Cartels: Using All the Tools and Sanctions' [2011] 56 Antitrust Bulletin 207 and M. Reynolds *et al*, 'EU Competition Policy in the Financial Crisis: Extraordinary Measures' [2010] 33 Fordham International Law Journal 1724.

<sup>1179</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) Crime & Justice 253.

<sup>1180</sup> There is no doubt that leniency programmes are successful in limiting both the formation of cartels and their duration. However, because cartels are secret violations and most empirical research only takes account of those cases that have been discovered and those studies that contain self-reported behaviour, they should be considered with caution, as their parameters are very limited.

studies provide evidence that crime control effectiveness would be improved by shifting resources from corrections to policing methods that enhance the effectiveness of police in their official guardian role.<sup>1181</sup>

Hence, the EU Commission must adopt an enforcement design and tools that could enhance its role of police or provide incentives for external and internal policing of the undertaking in order to inhibit anticompetitive behaviour.<sup>1182</sup> Although empirical studies about the effects of leniency on the policing function have shown some levels of deterrence and prevention; it must be remembered that in virtually all models, the effects of leniency hinge on specific parameters, the values of which are unknowable theoretically and difficult to estimate empirically.<sup>1183</sup>

Thus, it is important to refer to what the perceptions are about the leniency programme, sanction system, etc., and build on those aspects that help to deter and prevent antitrust law violations and change those sides of the enforcement framework that could be improved towards an effective antitrust system. In addition to the above, it is also necessary that such enforcement design does not become too onerous but instead, produces a more efficient process that could increase social welfare further.<sup>1184</sup>

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<sup>1181</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) *Crime & Justice* 254.

<sup>1182</sup> The value of the EU Leniency Notice 2006 must not be understated in regards to the EU Commission's police and prevention functions. According to N. H. Miller, 'Strategic Leniency and Cartel Enforcement' [2009] 99 *American Economic Review* 750, an empirical analysis that considers data from the U.S. suggests that the leniency programme there may have reduced cartel formation by 42% and increased cartel detection by 62%. It is fair to assume that same percentages could apply to Europe however, because the parameters are limited, the value of such study should be considered with due caution.

<sup>1183</sup> *Ibid* p. 751. On a similar view, see M. E. Stucke, 'Morality and Antitrust' [2006] 443 *Columbia Business Law Review*

<sup>1184</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 *Antitrust Law Journal* 201, see footnote no. 10.

Since deterrence is a matter of perception and the perception is subjective then, it is important to consider the New Chicago School approach discussed in section 4.6 above as it involves the intertwined working of direct and indirect regulation techniques that can target both firms and individuals as tools for an optimal regulatory regime. This is important as the New Chicago School aims to understand how those techniques function together, about how they interact and about how law might affect their influence and make selections among these.<sup>1185</sup>

Since the optimal deterrence framework of EU competition law enforcement has been designed based on the Chicago School premises, this has resulted in an antitrust system that considers companies as black boxes in which it assumes away the internal workings of the firm and focuses instead at the firm level.<sup>1186</sup> However, in a world of associates, representatives and agents acting on their own behalf in the enterprise society that produces a massification of the welfare system; it is incoherent that antitrust agencies assume aligned interests between firms and individuals acting as agents of those firms.

According to *Jensen* and *Meckling*, if both parties of the agency relationship are utility maximizers, there is a good basis to believe that the agent will not always act in the best interests of the principal, meaning the firms.<sup>1187</sup> This is the source of the problem of diffuse shareholders being unable to coordinate their monitoring efforts effectively to

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<sup>1185</sup> C. R. Sunstein, 'Lochner's Legacy' [1987] 87 Columbia Law Review 873.

<sup>1186</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 220. Under the Chicago School, it is cost effective to only target the company as this would incentivise the latter to monitor its agents and adjust their interest to its own.

<sup>1187</sup> M. C. Jensen and W. H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' [1976] 2 Journal of Financial Economics 305 – 360.

<http://www.sfu.ca/~wainwrig/Econ400/jensen-meckling.pdf> (Accessed May 25, 2015).

prevent managers from running the business in their own interests rather than in the interests of the shareholders, owners or principals.<sup>1188</sup>

Antitrust enforcers assume that agency costs will be incurred by undertakings in order to monitor their agents and limit their activities to those that are convergent to their own interest.<sup>1189</sup> However, as described in section 4.7, there are two groups of people, which the enforcement system needs to address. Mainly the deterribles and the incorrigibles.<sup>1190</sup> Since, an undertaking has various components, organizational subunits and individuals; it must be considered that each of them has its own incentives that shape behaviour, and they need to be addressed.<sup>1191</sup>

It is the organization environment, structure and the amount of individual discretion the factors that affect decision making for the entire organization and at the same time, constrains the decision making of individuals working within them.<sup>1192</sup> This is the main reason why an optimal enforcement system must take account of the organizational structure and incentives at the firm and individual levels in order to adopt the most optimal approach to police antitrust behaviour and achieve prevention.

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<sup>1188</sup> See G. Reed and P. Yeager, 'Organizational Offending and Neoclassical Criminology: Challenging the Reach of the General Theory of Crime' [1996] 34 Criminology 357 stating that shareholders' interests are not only rendered an abstraction to managers making key decisions but they are abstracted out of the moral calculus of decision making altogether.

<sup>1189</sup> Ibid p. 308. It is said that the generality of the agency problem is mainly the problem of inducing an agent to behave as if it were maximizing the principal's welfare.

<sup>1190</sup> See L. Kaplow, 'An Economic Approach to Price Fixing, [2011] 77 Antitrust Law Journal 343 at 427 who considers that even if top executives within a company want to comply with competition law, its agents may not. See also J. Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' [1994] 23 Journal of Legal Studies 833 who states that corporations do not commit crimes but their agents do.

<sup>1191</sup> M. C. Suchman and L. B. Edelman, 'Legal Rational Myths: The New Institutionalism and the Law and Society Tradition' [1996] 21 Law and Society Inquiry 903 at 918.

<http://scholarship.law.berkeley.edu/facpubs/475/> (Accessed May 30, 2015).

<sup>1192</sup> S. Finkelstein and D. C. Hambrick, 'Top-Management-Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion' [1990] 35 Administrative Science Quarterly 484.

Adopting regulatory techniques that target both companies and individuals would amount to shift resources to the policing function and methods that enhance the effectiveness of the EU Commission in its official guardian of the open and free internal EU market role rather than its discovery and investigative function. Still though, the latter would also be benefited as in both cases the costs and risks for offenders are increased, either for offense commission or discovery and apprehension when the offense has been committed.

According to *Sokol* recent work in the U.S., although the leniency programme can be considered as the most important innovation and investigative tool in the enforcement of antitrust law, his research has shed some light on the limitations of its operation.<sup>1193</sup> This study involved quantitative and qualitative surveys to investigate the perceptions of antitrust practitioners involved in cartel work. This was the first attempt to focus on the subjective perception in the operation of leniency rather than focusing on rational and economic assumptions.<sup>1194</sup>

One of the significant findings was the fact that 56% of respondents from the quantitative survey considered that the present antitrust enforcement was significantly or moderately more effective since the 1990s due to the adoption of immunity programmes.<sup>1195</sup> On the other hand, only 19% of respondents considered that the availability of harsher penalties since the 2004 revisions in the U.S. made antitrust enforcement more effective while 44%

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<sup>1193</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 220.

<sup>1194</sup> Ibid p. 222. It must be noted that the focus on the perceptions of legal counsel, rather than the perceptions of business people, is what should be reference in the application of leniency. Since the former would be the ones that will actually influence the decision to contact competition authorities on behalf of the undertakings in order to extract benefits from their cooperation in the cartel investigation.

<sup>1195</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 211.

was of the opinion that more severe sanctions did not have an important effect.<sup>1196</sup> The latter confirms what has been discussed in the previous section about the limited effect of severity of sanctions.

Although it can be concluded, from the evidence above provided that leniency has brought cartel enforcement closer to the optimal deterrence level; law and economics literature suggest that a generous leniency programme can incentivise undertakings to behave strategically.<sup>1197</sup> This has been confirmed by *Sokol*'s qualitative study in which it was found that nearly all practitioners considered that it is a reality that undertakings were using leniency to punish rivals and in some cases, to help enforce collusion.<sup>1198</sup>

Hence, although the perception about the adoption of a leniency programme is that it has increased the certainty of punishment, it in fact did not as it has failed to increase the informal costs, which can make deterrence effective.<sup>1199</sup> In addition, the qualitative study supports the theoretical assumption that the use of leniency as an investigative tool, may lead to under detection of cartel infringements.<sup>1200</sup> The above may be true as it has been

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<sup>1196</sup> Ibid. See also N. H. Miller, 'Strategic Leniency and Cartel Enforcement' (2009) 99 (3) *The American Economic Review* 750, where it was argued that the increase in the severity of sanctions did not have a significant impact on cartel detection.

<sup>1197</sup> Z. Chen and P. Rey, 'On the Design of Leniency Programs' CCP Working Paper 08-18, University of East Anglia, April 2007.

<http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-18.pdf> (Accessed on May 25, 2015).

<sup>1198</sup> Over half of respondents manifested that strategic use of leniency was significant and the only issue was the frequency and severity of the strategic gaming. See also C. J. Ellis and W. W. Wilson, 'What doesn't kill us Makes us Stronger: An Analysis of Corporate Leniency Policy' Department of Economics, University of Oregon, United States, May 2001.

[http://www.researchgate.net/publication/2498536\\_What\\_Doesn%27t\\_Kill\\_us\\_Makes\\_us\\_Stronger\\_Analysis\\_of\\_Corporate\\_Leniency\\_Policy](http://www.researchgate.net/publication/2498536_What_Doesn%27t_Kill_us_Makes_us_Stronger_Analysis_of_Corporate_Leniency_Policy) (Accessed on June 1, 2015).

<sup>1199</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) *Crime & Justice* 240.

<sup>1200</sup> J. E. Harrington Jr. and Myong-Hun Chang, 'Modelling the Birth and Death of Cartels with an Application to Evaluating Competition Policy' (2009) 7 (6) *Journal of the European Economic Association* 1400, arguing that a leniency programme may contribute to under detection by prosecuting too few cartels outside the cartels detected by leniency.

previously noted that more than 85% of cartel investigation result from leniency applications which can result in fewer total cartels uncovered since the EU Commission would rather advance these cases than those that require more investigation and resources in order to successfully sanction them.

The above can be described as an external effect in the operation of leniency programme. However, there is another more important internal aspect of its operation. It has been established that only a small share of all cartel cases is pursued outside leniency procedure which means that whatever shortcoming as to the internal operation of the EU Leniency Notice 2006, it will have a broader impact on the overall enforcement effort of the EU Commission that will result in a suboptimal application of EU competition law.

The internal effect in the operation of leniency due to the prisoner's dilemma mechanism there embedded, is the risk - reward calculation that undertakings make due to the lack of procedural transparency.<sup>1201</sup> According to practitioners' perceptions, there is a risk involved when applying for leniency as a corporation may not even know the extent of its own cartel involvement. This means that the greater the risk involved in cooperating with antitrust agencies, the greater the likelihood that undertakings may choose to take their chances and continue with the cartel.<sup>1202</sup>

Since leniency has the function of facilitating the detection of cartels, the benefits that may be extracted by leniency applicants cannot exceed the level that is strictly necessary

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<sup>1201</sup> A. Rapoport and A. Chammah, *Prisoner's Dilemma: A Study in Conflict and Cooperation* (University of Michigan Press, Ann Arbor, Michigan 1965).

<sup>1202</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 214.

to guarantee the efficiency of the program.<sup>1203</sup> The case law has confirmed this rationale and it seems that the mere fact of informing the EU Commission about the cartel may allow the company to benefit from a reduction in the fine at least.<sup>1204</sup>

However, it is the lack of transparency of such leniency application procedure together with the EU Commission's discretion on the consideration and valuation of evidence that is provided under EU Leniency Notice 2006;<sup>1205</sup> the factors that feed the mistrust on the EU Commission's procedural transparency and influences the internal calculus of cooperation within a given undertaking. We might add as another factor, the high level of deference of the EU Courts in favour of EU Commission's discretion but there are different views in this regard as will be explained further below.

Nevertheless, the possibility of having a firm doing an internal balancing whether to cooperate with the EU Commission or continue with the cartel infringement has been increased since *Alstom Grid*.<sup>1206</sup> The latter is a company that was granted conditional immunity for its involvement in the infringement of Article 101 TFEU. However, the EU Commission decided to focus the proceedings on a different violation concerning the same product but for which Alstom Grid did not file an application for leniency.

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<sup>1203</sup> Case T-543/08 *RWE and RWE Dea v Commission* judgement of July 11, 2014 not yet published, para 143 and 164, Case T-558/08 *Eni v Commission* judgement of December 12, 2014 not yet published, para 225.

<sup>1204</sup> Case T-384/09 *SKW Stahl-Metallurgie Holding and SKW Stahl-Metallurgie v Commission* judgement of January 23, 204 not yet published, para 244. Here the General Court held that it is irrelevant that a firm's failure to cooperate is due to objective reasons beyond that firm's control. Adding that a company that is willing to cooperate but cannot submit the relevant evidence, can file an application for leniency and inform the EU Commission of its existence and the reason why it cannot submit it.

<sup>1205</sup> As discussed in Chapter 3 above in respect of legal certainty and legitimate expectations.

<sup>1206</sup> Case T-521/09 *Alstom Grid v Commission* judgement of November 27, 2014 not yet published.

Although it is clear that *Alstom Grid*'s application led to dawn raids as part of the investigation into other related infringements and the subsequent leniency applications by Siemens and Fuji, the General Court did not reach a similar view and decided that Alstom Grid's application was of no value.<sup>1207</sup> This judgement may be seen to be in contrast with the fundamental aim of leniency that seeks to provide assurance to undertakings that immunity applicants are not worse off when they decide to cooperate.<sup>1208</sup>

Indeed, this perception is confirmed in *Sokol*'s study mentioned above where antitrust practitioners considered that EU competition law enforcement is tougher and fines are much larger than in the U.S. but they also nearly universally noted that the EU system was not transparent enough.<sup>1209</sup> This means that the EU Commission's discretion and the great degree of deference from the General Court and the CJEU have resulted in a negative impact on the internal calculus of cooperation from an undertaking.<sup>1210</sup>

Nevertheless, this negative impact goes beyond the firm level, and has contributed to generate mistrust among individuals working within those companies. According to law practitioners, this uncertainty as to the resulting benefit of cooperation with the authority, makes individuals seem less likely to come forward to the legal counsel unit with information.<sup>1211</sup> Adding to this fact, *Reagan* argues that lawyers specifically, are more

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<sup>1207</sup> *Ibid* para 90 – 93 and 114 where the General Court consider that the snowball effect that follows a leniency application is an inherent feature of the EU Leniency Notice 2006 and corporations should not cooperate in a selective manner and they should reveal all cartel activity they are aware of.

<sup>1208</sup> E. Barbier de La Serre and E. Lagathu, 'The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings' *Journal of European Competition Law & Practice*, April 1, 2015.

<sup>1209</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 *Antitrust Law Journal* 215.

<sup>1210</sup> However, some authors have a different view in this regard and argue that the General Court undertakes a close review of the EU Commission's assessment of the value of evidence while marginally referring to the manifest error standard. See E. Barbier de La Serre and E. Lagathu, 'The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings' *Journal of European Competition Law & Practice*, April 1, 2015 p. 13.

<sup>1211</sup> C. E. Parker et al, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation' [2009] 22 *Georgetown Journal of Legal Ethics* 205 where it is noted that to the extent

likely to be object of mistrust as they are regarded as protectors of the client's long-term interest and at the same time, the interests of the society in general.<sup>1212</sup>

This dual role perception, irrespective of whether a lawyer is acting as in-house or external counsel; together with the uncertainty generated by the EU Commission's discretion, means that individuals within a company will not always tell the truth to legal counsel about their involvement in the cartel infringement or all the facts about it.<sup>1213</sup> Overall, this means that in order to police antitrust behaviour and keep the EU internal market unrestricted, the EU Commission needs to take account of the incentives of different units within the undertakings.

Hence, individuals should become regulatory targets together with firms as targeting both would mean that the EU Commission's policing function is enhanced and according to criminologists, the latter is the most important source of effectiveness in preventing law violations. On the other hand, a policy that only targets firms even when employees behave badly, will always be subject of criticism.

Indeed, when an individual working within a company is one of those subjects belonging to the group of incorrigibles as described in previous section;<sup>1214</sup> the question of how

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lawyers influence clients, it is towards game playing, not commitment to compliance or resistance to compliance.

<sup>1212</sup> M. C. Regan, Jr., 'Professional Responsibility and the Corporate Lawyer' [2000] 13 Georgetown Journal of Legal Ethics 203. It must be noted that in the United States, individuals working for a company would be more likely not to trust corporate legal counsel as the latter would only look after the undertaking's interests and they are under no obligation to look after the employees' interest in case legal issues arise.

<sup>1213</sup> See M. DeStefano Beardslee, 'Taking the Business out of Work Product' (2011) 79 (5) Fordham Law Review 1869, for a broader view on the role of corporate lawyers and the limitations they encounter to develop their work.

<sup>1214</sup> See G. Pogarsky, 'Deterrence and Individual Differences among Convicted Offenders' (2007) 23 (1) Quantitative Criminology 59 cited in the previous section where he states that incorrigibles are the group of people for whom for whatever reason, they are not attentive to sanction threats and see the commission of an offense as something profitable.

should responsibility be assigned, its fairness or lack of it; will arise.<sup>1215</sup> Whether liability should lay on the individual wrongdoer, the company that employs him or people in charge to emphasize managerial responsibility is something that must be included in this new approach as going after the company alone is both technically and morally suspect.<sup>1216</sup>

Economically speaking, targeting merely undertakings give the latter, an incentive to continue with the infringement because there is a very limited or no benefit at all in proactively spending on serious compliance programmes when the company benefits from no detection.<sup>1217</sup> Thus, the EU Commission needs to consider all levels of the undertaking in order to influence its behaviour and direct it towards compliance with EU competition law.

To this end, the EU Commission must get the right combination of regulatory tools by making use of law, norms, market and architecture as has been explained in Section 4.2 above of the last chapter.<sup>1218</sup> In this regard, it has been established that law can influence social norms, market and architecture, either directly or indirectly in order to constrain behaviour. Considering this, the EU Commission can make use of soft law instruments

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<sup>1215</sup> This is particularly true in antitrust cases as empiric studies have established that “at whatever the legal regime sets fines and jail time, there will always be some groups of people for whom no amount of penalties will matter because such people convince themselves that they will never get caught.” See D. Sokol, ‘Cartels, Corporate Compliance, and what Practitioners really think about Enforcement’ [2012] 78 Antitrust Law Journal 230 and D. Sokol, ‘Policing the Firm’ [2013] 89 Notre Dame Law Review 785 at 848.

<sup>1216</sup> John Kay, ‘Crime, Responsibility and Punishment’ *Financial Times* (London 05 August 2014) in interview with Judge Jed Rakoff of the Southern District of New York where he argues that the deterrent effects of successfully prosecuting individuals far outweigh the prophylactic benefit of imposing internal compliance remedies and sanctioning companies that ultimately negotiate their fines.

<sup>1217</sup> D. D. Sokol, ‘Cartels, Corporate Compliance, and what Practitioners really think about Enforcement’ [2012] 78 Antitrust Law Journal 226.

<sup>1218</sup> L. Lessig, ‘The New Chicago School’ [1998] 27 Journal of Legal Studies 663, mentioning that these four constraints of behaviour or modalities of regulation operate together and they constitute the sum of forces that guide an individual to behave or act in a given way.

that allows it to influence norms that help shape undertakings' behaviour that is in compliance either *ex ante* or *ex post*. But in order to do this, incentives must be taken into account at all levels of the undertaking to produce the behaviour desired.

As to *ex ante* enforcement, the EU Commission could provide specific compliance guidelines that can help companies and individuals to identify the particular types of behaviour and methods to mitigate risks that have been identified as best practices which is something that has been done in other jurisdictions.<sup>1219</sup> The incentive for companies to adopt such compliance guidance is that those undertakings would receive lower monetary sanctions than those companies that do not integrate those internal programmes.

In regards to the *ex post* enforcement, the EU Commission could also impose remedies to ensure that an infringing company puts in place the training and internal compliance controls needed to prevent recidivism. To that end, such remedy can specifically require major improvements to the company's antitrust compliance program including the designation of an external compliance monitor who will oversee the adoption and implementation of an effective compliance programme, just like the U.S. DoJ Antitrust Division sought in court in its case against Apple.<sup>1220</sup>

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<sup>1219</sup> See for instance the CMA website in the United Kingdom containing information on how to comply with consumer and competition law and providing guidance on cartels such as: 'Competition Law: dos and don'ts for trade associations', 'Advice for company directors on avoiding cartel infringements', 'Cartels and leniency: information for businesses and individuals' and so on.

<https://www.gov.uk/government/collections/competition-and-consumer-law-compliance-guidance-for-businesses> (Accessed June 15, 2015).

<sup>1220</sup> This intrusive remedy has been imposed in the United States and the most illustrative case on this regard is Apple Company as described above in Chapter 4 section 1 subsection 2. See Final Judgment, United States v. Apple, Inc. et al., (S.D.N.Y 2012) (No. 12-cv-2826) (Sept. 5, 2013).

<http://www.justice.gov/atr/cases/f300500/300510.pdf> (Accessed on 15 June 2015).

The external monitor could be designated for a period of two years or more, and the company on which the remedy is imposed could pay expenses and the monitor's salary. The monitor's main task would be to keep the undertaking within the limits of antitrust laws by evaluating the undertaking's antitrust compliance policies and training programs and recommending changes to ensure their effectiveness.

This could be the most intrusive remedy imposed by any competition authority in order to prevent recidivism in antitrust cases but it also sends a clear message that undertakings could be subject to direct involvement of the antitrust agencies in their internal working if they fail to establish effective compliance mechanisms.<sup>1221</sup> This would encourage firms, mainly to avoid external influences by adopting effective compliance programmes that allow the shaping of ethical behaviour in their internal working and ultimately create an ethical culture.

The latter is of utmost importance as empirical research has shown that a significant number of companies and employees within such firms operate a corporate culture that at a minimum does not support lawfulness and good governance.<sup>1222</sup> Indeed, that seems to be the main challenge of the external monitor imposed on *Apple*, although the level of

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<sup>1221</sup> See Editorial Opinion, 'Apple's Antitrust Lord: The outside legal monitor who bills for reading our editorials' *The Wall Street Journal* (New York City, April 26, 2015) <http://www.wsj.com/articles/apples-antitrust-lord-1430085930> (Accessed on July 20, 2015). Mr. Michael Bromwich was appointed for a period of 2 years as an external monitor to Apple and such appointment will expire next October 2015. As of April 2015, Mr. Bromwich and associates have earned almost 3 million USD in fees all paid by Apple and it is interesting to see that level of intrusiveness into the company's business and corporate governance which has not been welcomed and now Apple applied to court to remove Mr. Bromwich as external monitor. Among the issues that have arisen is the fact that the external monitor has stated that the company should remove Deena Said who is the antitrust compliance officer at Apple because in his opinion she "lacks expertise in the matter". Mr. Bromwich has also suggested that there needs to be more independence for compliance officers and has advised that further monitoring must be done thus, he effectively has requested to extend his appointment.

<sup>1222</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 227 adding that perhaps undertakings do not want to know about any unlawful activity because things seem to go well and any internal investigation that uncovers an infringement will have a negative impact on profitability.

intromission and other ancillary effects from such imposition could be debated.<sup>1223</sup>

Nevertheless, *Sokol* suggests a number of functions that an external monitor should have towards helping any undertaking to develop a culture of compliance.<sup>1224</sup>

In his view, the external monitor would work to help the compliance officer to become better integrated into the company, so as to reduce information asymmetries and reduce the costs of compliance.<sup>1225</sup> The monitor would also help the undertaking understand the legal regime and develop a culture, routines and appropriate incentives that support compliance with the laws.<sup>1226</sup> Although it would seem that this work is better done by an external monitor as he would report to the court or antitrust agency, the Apple case sheds light on the shortcomings when there is no support from the top management.

Nevertheless, lack of support for lawfulness and good governance within a company cannot be generalized as there are many factors that influence how each undertaking's culture is shaped including size, nationality, industry among other factors.<sup>1227</sup> For

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<sup>1223</sup> Jeff John Roberts, 'Appeals court scolds Apple monitor, but does not remove him: Apple is outraged about the conduct of Michael Bromwich, who was assigned to investigate its antitrust practices. On Thursday, the iPhone maker got some vindication.' *Fortune* (New York City, May 28, 2015). <http://fortune.com/2015/05/28/appeals-court-scolds-apple-monitor-but-does-not-remove-him/> (Accessed on July 25, 2015). Since the imposition of the external monitor, Apple has sought his removal arguing among many factors, his excessive remuneration despite of his lack of antitrust expertise. Mr. Bromwich charged almost \$140,000 USD for his first 2 weeks on the job and has continuously demanded to interview Apple executives without their lawyers being present. However, on appeal the court decided not to remove the external monitor but it did mention that the latter's behaviour was "opposite of best practice for a court appointed monitor".

<sup>1224</sup> D. Sokol, 'Policing the Firm' [2013] 89 *Notre Dame Law Review* 785 at 840.

<sup>1225</sup> *Ibid* p. 841. However, it must be noted that a level of independence must be maintained so that compliance is not compromised.

<sup>1226</sup> *Ibid*. See also J. E. Murphy, 'A Compliance and Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs' Society of Corporate Compliance and Ethics, August 2010 who argues that a compliance culture would also lower monitoring costs as it allows for early detection. <http://www.corporatecompliance.org/Portals/1/PDF/Resources/CEProgramDollarADay-Murphy.pdf> (Accessed on July 27, 2015).

<sup>1227</sup> For instance, it has been observed that foreign companies doing business in the U.S. lacked optimal understanding of antitrust compliance. On the other hand, Europeans and Asians are more likely to know that they are price-fixing than Americans, but the former are less likely to label price fixing as morally wrong. This is so because it has been part of traditional company cooperation, in places where cooperation is the social norm. In addition, it was pointed out that due to the support to export cartels by

instance, it is clear that in many cases entire industries become recidivists because a younger generation learns from an older generation how to coordinate with competitors, which illustrates the social norm in a specific society and industry. An external monitor could shed light on this issue as well facilitate the conditions to change such business culture.

For this to happen, the external monitor needs to be someone who has substantive antitrust skills and extensive expertise in developing, implementing and monitoring antitrust compliance programmes.<sup>1228</sup> In addition, it is essential for the monitor to have experience with the business world so he can fully understand corporate culture and know how to communicate with firm's different units and levels.<sup>1229</sup>

Once an appropriate monitor is appointed, the latter needs to effectively implement a tailored compliance programme that addresses the identified risks that pertain to a specific company and that company's dynamics.<sup>1230</sup> A central part of this programme is training as it has been shown that a better training and efforts to inform employees of the do's and don'ts in compliance with competition law appear to correspond to fewer situations of cartel behaviour.<sup>1231</sup>

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U.S. government, it is possible that American firms that have a good compliance within the U.S. may not have the same level of compliance abroad. See A. Stephan, 'Cartel Laws Undermined: Corruption, Social Norms, and Collectivists Business Cultures' (2010) 37 (2) *Journal of Law and Society* 345.

<sup>1228</sup> D. Sokol, 'Policing the Firm' [2013] 89 *Notre Dame Law Review* 785 at 841 citing para 63 of the Sentencing Memorandum, *United States v. AU Optronics Corp.*, No. CR-09-0110 SI (N.D. California, September 11, 2012).

<sup>1229</sup> Ibid p. 842 arguing that monitors who have only worked for law firms and government may not know how to ask for information or how to understand an undertaking organizational structure.

<sup>1230</sup> J. Murphy and W. Kolasky, 'The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behaviour' (2012) 26 (2) *Antitrust* 61. <https://www.wilmerhale.de/files/publication/8859279d-3a5a-430d-9757-056feddc6b37/presentation/publicationattachment/9989c14c-32b8-4e5a-ad28-0b0aa3caac6c/spring12-murphythe%20role%20of%20anti-cartel%20compliance%20programs%20in%20preventing%20cartel%20b.pdf> (Accessed August 5, 2015.)

<sup>1231</sup> M. C. Levenstein and V. Y. Suslow, 'Cartel Bargaining and monitoring: The role of Information Sharing' in *The Pros and Cons of Information Sharing*, Swedish Competition Authority, 2006. <http://www-personal.umich.edu/~maggie1/Communication.pdf> (Accessed June 25, 2015)

Such training should focus on senior managers and employees who deal with contracts, pricing, marketing strategies, trade associations, competitor benchmarking and joint ventures.<sup>1232</sup> However, in order for the programme to be effective in changing the culture and relationships within a company, it must alter the incentives and constraints of most of the individuals within such company. Hence, the programme must also include potential witnesses and helpers who may not lead a cartel but who would be aware of anticompetitive activities.<sup>1233</sup>

In this way, liability could be assigned to people who are able to prevent antitrust violations rather than those who actually engage in wrongful commercial behaviour but such liability must be restricted to informal costs as those are the ones to which people are more sensitive about.

Thus, training must involve as many people who are able to prevent as possible so it can generate an active or prospective monitoring scheme.<sup>1234</sup> By simply informing low level employees of the risks and consequences of unlawful commercial practices, it creates an active monitoring network that can incentivise or constraint other individuals' behaviour. This effectively means that educating individuals is the best way to prevent antitrust violations because it gives way to the creation of a culture that can add to the legal constraint on individuals' behaviour on not to take part in cartel infringements.<sup>1235</sup>

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<sup>1232</sup> American Bar Association, Section of Antitrust Law, *Antitrust Compliance: Perspectives and Resources for Corporate Counsellors* (2<sup>nd</sup> Ed. ABA 2010) p. 80.

<sup>1233</sup> A. Dyck *et al*, 'Who Blows the Whistle on Corporate Fraud?' (2010) 65 (6) *The Journal of Finance* 2213.

<sup>1234</sup> J. Tirole, 'Corporate Governance' (2001) 69 (1) *Econometrica* at 9 where he states that passive monitoring is retrospective whereas active monitoring is prospective and forward-looking.

<sup>1235</sup> See C. Aubert *et al*, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels' [2006] 24 *International Journal of Industrial Organization* 1241 where it is stated that cartel prevention should be

Hence, undertakings need to get enough incentives to promote such education that ultimately leads to the creation of a compliance culture. This is the main point, the EU Commission can use legal instruments in order to influence norms that shape behaviour towards compliance by creating incentives.<sup>1236</sup> But incentives to comply should not be exclusive of undertakings, after all, both individuals and companies have strong incentives to fix prices but weak incentives not to do so.<sup>1237</sup>

Thus, we can have soft law instruments constraining firms and individuals' behaviour and increasing both the risk of detection and the severity of sanctions that promote prevention and avoid recidivism. This is how law affects norms as incentives provided by law promote compliance programmes that influence social and cultural norms that create controls on behaviours within society in general and economic organizations no less.<sup>1238</sup>

Although, these controls must be integrated into the company's culture in order for them to work effectively and provide for institutional mechanisms for law-abiding individuals;<sup>1239</sup> the fact that compliance programmes are adopted and provide appropriate means for effective monitoring, is the first step towards integration into the firm's culture. Active monitoring done by law-abiding individuals will effectively single out those who

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directed at the individual rather than the company level because the former is the weak link in corporate law compliance.

<sup>1236</sup> C. R. Sunstein, 'On the Expressive Function of Law' [1996] 144 University of Pennsylvania Law Review 2022.

<sup>1237</sup> C. Parker and V. Nielsen, 'Corporate Compliance Systems: Could they make any difference' [2009] 41 Administration & Society 3. See also M. Motta, 'On cartel deterrence and fines in the European Union' [2008] 29 ECLR 4 p. 216 who mentions that decision makers working within companies are under pressure to meet profit targets to secure employment and accede to rewards while no apparent financial or career benefits result from competition law compliance.

<sup>1238</sup> D. Lange, 'A Multidimensional Conceptualization of Organizational Corruption Control' [2008] 33 Academy of Management Review 712.

<sup>1239</sup> C. Parker, *The Open Cooperation: Effective Self-regulation and Democracy* (CUP, Cambridge 2002).

believe they will never be caught for unlawful activity. However, the scope and limitations of compliance programmes must be adequately defined.

Indeed, according to *Wils*, antitrust compliance programmes can be defined as a set of measures adopted within a company or corporate group to inform, educate and instruct its personnel about the antitrust prohibitions and the company's or group's policy regarding respect for these prohibitions. These measures also include appropriate instrument to control or monitor the respect for these prohibitions or this policy.<sup>1240</sup>

Hence, antitrust compliance programmes are a type of organizational control system aimed at standardizing staff behaviour that originates a culture of compliance in competition law.<sup>1241</sup> This is helpful not only in regards to *ex ante* enforcement but also in regards to *ex post* as risk management would be easier when a compliance programme is in place since failure to mitigate risks in a timely and adequate manner can increase the severity of the consequences after an infringement has been committed.

On the other hand, targeting both individuals and undertakings with a view to enhance the policing function of the EU Commission and thus, increase certainty of punishment which makes general deterrence effective; would also mean that the corporation's strict liability regime must be updated as this would serve as an incentive too.<sup>1242</sup> According to the current regime of strict liability under EU competition law, undertakings are

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<sup>1240</sup> W. Wils, 'Antitrust Compliance Programmes and Optimal Antitrust Enforcement' (2013) 1 (1) Oxford Journal of Antitrust Enforcement 52.

<sup>1241</sup> *Ibid* p. 53.

<sup>1242</sup> J. Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' [1994] 23 The Journal of Legal Studies 833. Here the view is shared that the incentive to adopt compliance programmes may be mitigated by perverse effects of a strict corporate liability. As a company may fear that implementing internal measures to prevent and detect antitrust infringements of their employees increases the probability of detection.

responsible for what happens under their supervision and there is no defence for the actions of the employees acting with the authority of the company.

Indeed, one of the reasons why undertakings do not disclose their involvement in a cartel infringement to antitrust agencies is because they could be exposed to significant risk and thus, the incentive to promote detection is very low if any. This is particularly true in the European Union as only economic units are subject to the application of EU competition law. In the U.S. however, this issue also arises in regards to individuals who can fall under risk of punishment in the application of antitrust law and therefore, are prevented from reporting any violation.<sup>1243</sup>

Despite these formal sanctions available, the immediate risk employees perceive is that of internal punishment and retaliation and the way that will affect their careers and future employability. This risk of informal punishment highlights the importance to focus on the most salient link in the chain of conditional probabilities that influence the likelihood of getting caught.<sup>1244</sup> Thus, the EU Commission should take this fact into account in order to create incentives for an active monitoring network that leads to a cultural change by focusing on informal costs on people able to prevent antitrust violations.

Nevertheless, an essential prerequisite for the above to take place is a high degree of legal certainty within the current legal framework together with procedural transparency.

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<sup>1243</sup> Formal sanctions for individuals can reach 1 million U.S. dollars in fines and up to 10 year imprisonment. See Sherman Act, last modified by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 providing for new limitations that entered into force on 22 June, 2004.

<http://www.law.cornell.edu/uscode/text/15/1> (Accessed on 15 August 2015).

<sup>1244</sup> See above referred John T. Scholz, 'Trust, Taxes and Compliance' in V. Braithwaite and M. Levi (eds), *Trust and Governance* (Russell Sage Foundation, New York 1998) p. 143.

However, the way the General Court has interpreted the concept of added value evidence within the context of the EU Leniency Notice 2006 is not helpful in this regard.

For instance, the EU Leniency Notice 2006 provides an indication of what constitutes evidence of added value.<sup>1245</sup> However, the General Court has given mixed interpretations of this concept that overall create uncertainty and incline the balance for undertakings not to have incentives to detect and report cartel activity. In *Leali* case, the GC held that when an undertaking submits evidence concerning acts for which it could not, in any event have been required to pay a fine; that does not amount to cooperation within the scope of the EU Leniency Notice 2006.<sup>1246</sup>

On the other hand, in *Evonik Degussa* case; the GC considered that the relevance and usefulness of the evidence submitted to establish the existence of another limb of the infringement that the leniency applicant has not taken part in; does not affect the level of the reduction awarded. Thus, the GC effectively went on to state that the evidence does not have to be useful but needs only to direct the EU Commission's attention to such limb of the infringement in order to be considered as added value evidence even if the company did not participate in that part of the infringement.<sup>1247</sup>

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<sup>1245</sup> Numeral 25 of the Commission Notice (EC) of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17. Here it is stated that the concept of added value refers to the extent to which the evidence provided strengthens, by its very nature and / or its level of detail, the EU Commission's ability to prove the alleged cartel.

<sup>1246</sup> Joined cases T-489/09, T-490/09 and T-56/10 *Leali and Acciaierie e Ferriere Leali Luigi v Commission* Judgement of December 09, 2014 not yet published, para 401.

<sup>1247</sup> Case T-391/09 *Evonik Degussa and AlzChem v Commission* Judgement of January 23, 2014 published in the electronic Report of Cases, para. 209 – 211. The applicant was awarded an increase of 8% in the reduction of the fine for which the EU Commission originally granted 20% reduction, thus making it 28%.

Hence, because companies might not themselves know the extent of their involvement in cartel activity, their information might be incomplete or even added information may result in leniency not necessarily being granted for cooperation with the investigation, which is something that generates doubts as to the benefit of detecting and reporting competition law violations.

This in turn, has a negative impact within the internal workings of the undertaking as the judicial and administrative bodies in charge of applying and defining EU competition law are seen with caution due to lack of certainty. Individuals employed in the business unit of the company tend to transfer that mistrust and to see in-house legal counsel with suspicion, as people whose advice might hinder profitability.<sup>1248</sup>

Overall, uncertainty and lack of transparency generated by the discretion of the EU Commission together with the inconsistencies of the EU judicial bodies, in spite of the fact that the General Court has arguably improved the level of judicial review;<sup>1249</sup> have created mistrust from the undertaking vis-à-vis antitrust agencies. This at the same time, creates mistrust from individuals working within the company vis-à-vis legal advisors either in-house or external.

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<sup>1248</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 Antitrust Law Journal 231 and Hon. Paul G. Gardephe, U.S. District Judge in the Southern District of New York, 'Crossroads of Civil and Criminal Law' (Speech at Fordham School of Law, New York City, NY, U.S., January 18, 2015) who points out that the undertaking's lawyers advice employees that, whatever it is they say during the internal investigation, it is not covered by the client-attorney privilege since they are in charge of the legal defence of the undertaking and advise them to seek legal counsel on their own. Thus, companies have their own lawyers and employees are encouraged to have theirs which contributes to the internal mistrust.

<sup>1249</sup> Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085 para 62 and Case T-543/08 *RWE and RWE Dea v Commission* Judgement of July 11, 2014 not yet published, para 162 where the Courts of the EU acknowledged that the EU Commission enjoys a margin of appreciation to apply the EU Leniency Notice 2002 however, such fact cannot be used as a basis for dispensing EU Courts with the conduct of an in depth review of the law and of the facts. See also E. Barbier de La Serre and E. Lagathu, 'The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings' Journal of European Competition Law & Practice, April 1, 2015 p. 15.

Furthermore, the total disregard of the undertakings' dynamics<sup>1250</sup> and the strict liability regime that provides no incentives to comply with EU competition law make the current system based on optimal deterrence actually suboptimal. Although the EU Commission has enhanced its policing function with the adoption of the EU Leniency Notice 2006, the aim to prevent antitrust violations has not been achieved, as informal costs are not taken into account.

To effectively deter, certainty of punishment risk perception needs to be increased and this must be done under a general system that combines the response to the threat of punishment known as general deterrence in criminology and the response to the experience of punishment which is labelled as specific deterrence.<sup>1251</sup> Since resources need to be shifted to increase certainty of punishment but this need to be done in a cost-effective manner then, incentives need to be created to police the undertaking, primarily within the firm.

In order to do this, EU competition law needs to increase the costs of non-compliance and increase the benefits of compliance.<sup>1252</sup> Although the increase should be mainly on informal costs rather than formal ones. It must be acknowledged that sanctions play an important role in this respect as penalties would create incentives for monitoring but such incentives need to be created for both companies and individuals, as has been argued in this section. This is so because deterrence is the behavioural response to the perception

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<sup>1250</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, USA 1992) p. 144 – 145.

<sup>1251</sup> D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) *Crime & Justice* 253.

<sup>1252</sup> D. D. Sokol, 'Cartels, Corporate Compliance, and what Practitioners really think about Enforcement' [2012] 78 *Antitrust Law Journal* 233.

of sanction threats hence, the main focus should be to create incentives within the firm to deter wrongdoing.

Although it is clear that sanctions are indispensable to promote compliance, harsh penalties cannot be justified on deterrent grounds as these do not help to increase certainty but instead increase severity which is only an element of deterrence. It is certainty of punishment that needs to be at a higher level and thus, severe sanctions cannot be justified on deterrent grounds but must be justified on crime prevention through incapacitation or retributive grounds.<sup>1253</sup>

Hence, certainty of punishment carrying informal costs needs to be at the centre of EU competition law enforcement and such efforts need to be backed by penalties for individuals and undertakings as both need to be targeted specially if we consider that policing the firm is better done within the company. *Sokol*'s study has confirmed the common belief that individuals participating in cartel infringements are more concerned with imprisonment than corporate fines.<sup>1254</sup> Yet sentences need not to be draconian or based on a deterrent policy but instead be imposed on retributive grounds and just deserts and ultimately incapacitation in order to prevent recidivism.

Having covered the threat of sanctions as one element of deterrence, incentive to comply must be given through internal instruments. The mere presence of individual sanctions

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<sup>1253</sup> According to Nagin, even theories that conceive sanctions in a singular manner do not provide the conceptual basis for considering the deferential deterrent effect of different types of sanction options. See D. S. Nagin, 'Deterrence in the Twenty-first Century: A Review of the Evidence' (2013) 42 (1) *Crime & Justice* 254.

<sup>1254</sup> D. Sokol, 'Policing the Firm' [2013] 89 *Notre Dame Law Review* 785, See also G. J. Werden, 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime' [2009] 5 *European Competition Journal* 19.

make compliance programmes have potentially a greater outreach on individuals working within the company than when they are not personally liable. But it must be taken into account that, as has been explained before in this work; formal sanctions differ from each other and imprisonment has a far more deterrent effect than fines. However, informal sanctions which are more immediate, can work better as they increase certainty of punishment and internal instruments that provide incentives must increase these informal costs.

In this context, the adoption of antitrust compliance programmes not only help to prevent antitrust violations but they also increase detection rate when an infringement has been committed.<sup>1255</sup> Thus, increasing informal costs helps to increase the effectiveness of formal sanctions too as there is a higher perceived probability that the wrongdoing will be detected. In other words, wrongdoing will be deterred only if detection can be expected and this means that compliance programmes elevate the risk for cartels as detection is enhanced due to an active monitoring network that increases informal costs.

Although detection has been the main focus of the EU Commission since the first EU Leniency Notice was adopted back in 1996, that focus is driven mainly through a policy of deterrence with no consideration of immediate costs of reputation and social standing. Nonetheless, this can be achieved if a culture of compliance is promoted instead. Giving more importance to prevention by promoting a culture of compliance will lead to better detection rates as the extent to which an undertaking is capable of monitoring its employees adequately depends on the quality of internal mechanisms.

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<sup>1255</sup> Effective compliance programmes entail procedures of prevention, detection and response, which may involve sophisticated techniques such as screenings. See R. M. Abrantes-Metz *et al*, 'Enhancing Compliance Programs through Antitrust Screening' (2010) 4 (5) The Antitrust Counselor 4. <http://www.econ.umn.edu/~bajari/otherpub/counselor.pdf> (Accessed on July 19, 2015).

In order to adopt these internal mechanisms, incentives through soft-law instruments have been suggested above. For instance, specific compliance guidance could be published by the EU Commission establishing what are the adequate steps to take in order for compliance programmes to be considered as having effective measures with a view to ensuring compliance and allow companies to receive lower monetary sanctions than those companies that do not integrate those internal programmes.

In this regard, the Consumer and Markets Authority in the United Kingdom has kept the guidance originally published by the now extinct Office of Fair Trading where it provides companies with the benefit of a 10% reduction in their pecuniary sanction for having effective compliance measures.<sup>1256</sup> This benefit applies when the compliance measures are adopted before the infringement or when they were implemented quickly following the business first becoming aware of the potential competition law infringement.<sup>1257</sup>

Credit could also be granted when compliance programmes are adopted as part of measures implemented after the infringement has been detected, typically in response to an investigation.<sup>1258</sup> In addition, companies can be required to implement a compliance

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<sup>1256</sup> For the purpose of evaluating what effective measures are with a view to prevent antitrust violations, the CMA makes an assessment of a four-step process that follows a clear and unambiguous commitment to competition law throughout the organization: Risk identification, risk assessment, risk mitigation and review. See CMA Guidance, 'Four-step process to competition law compliance' April 2014. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/306902/CMA19-staticwheel.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306902/CMA19-staticwheel.pdf) Accessed on 08 July 2015).

<sup>1257</sup> CMA Guidance, 'How your business can achieve compliance with competition law' OFT1341, June 2011, p. 31.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284402/oft1341.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf) (Accessed on June 30, 2015). See also OFT Guidance to SMEs in the UK, 'How small businesses can comply with competition law' OFT1330, April 2014. <https://www.gov.uk/government/publications/how-small-businesses-can-comply-with-competition-law> (Accessed on June 30, 2015).

<sup>1258</sup> See I. Lianos *et al*, 'An Optimal and Just Financial Penalties System for Infringements of Competition Law: A Comparative Analysis' UCL Centre of Laws, Economics and Society, Research Paper Series 3/2014, London, May, 2014, p. 304. <https://www.ucl.ac.uk/cles/research-paper-series/research->

programme in the enforcement stage.<sup>1259</sup> One point to highlight here is the fact that antitrust agencies may choose to give credit to compliance programmes but only in the context of an investigation.<sup>1260</sup>

As to other measures that can be implemented after an infringement is committed, the option of imposing external monitor has already been used in the *Apple* case in the United States as described above. This instrument seems to provide both an incentive in order to avoid such imposition and an appropriate remedy so recidivism is prevented. A system of whistle-blowing rewards might also be helpful in policing and monitoring undertakings.<sup>1261</sup>

South Korea is the most notable example in this regard as a pioneering jurisdiction to offer financial reward to any person who has information concerning cartel infringements.<sup>1262</sup> It must be noted that this measure must work in harmony with leniency programmes and any other internal measures the undertaking implements in order to improve detection and be considered a successful instrument.

The CMA in the United Kingdom has adopted this measure too. According to the guidance published on its website, the CMA will grant up to £100,000 for information

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[papers/cles-3-2014](#) (Accessed on July 19, 2015). Where reference to several jurisdictions can be found like Netherlands, Italy and France.

<sup>1259</sup> Ibid, mentioning Canada, South Africa and Australia as some jurisdictions where this is applied.

<sup>1260</sup> Ibid p. 310 where reference is made to W. Wils, 'Antitrust Compliance Programmes and Optimal Antitrust Enforcement' (2013) 1 (1) Oxford Journal of Antitrust Enforcement 52 who considers an argument against a penalty discount scheme. According to the author, such reward is an implicit subsidy of compliance schemes but one that is contingent to an infringement since companies that have a compliance programme and never commit competition law violations will not get the benefit of such subsidy.

<sup>1261</sup> W. E. Kovacic, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels [2001] 69 George Washington Law Review 766.

<sup>1262</sup> D. Sokol, 'Detection and Compliance in Cartel Policy' CPI Antitrust Chronicle, Vol. 2, September 2011.

about cartel activity.<sup>1263</sup> For that purpose, the antitrust agency provides a hotline and an e-mail that can be used by any person in order to provide information and the amount of the reward will depend on four factors enlisted in the guidance as well as the way this incentive will work with the leniency programme.<sup>1264</sup>

Although not positive incentives, it has been mentioned here that many jurisdictions provide penalties for individuals which should make them act in compliance, in theory at least. In the UK for instance, people directly involved in cartel activity may face imprisonment up to five years, an unlimited amount fine or a ban from acting as director of a company for up to fifteen years.<sup>1265</sup> In the United States too, individuals can face imprisonment as well as economic sanctions.<sup>1266</sup>

However, there is an indication that the U.S. DoJ Antitrust Division is planning to incentivise corporations even further to influence individual's behaviour and create a culture of compliance. According to its current policy, the U.S. DoJ Antitrust Division acknowledges the fact that a culture of compliance starts at the top. The board of directors, and senior officers should set the tone for compliance and ensure that the entire

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<sup>1263</sup> CMA Guidance, 'Rewards for Information about Cartels' March, 2014.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299411/Informant\\_rewards\\_policy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf) (Accessed July 20, 2015).

<sup>1264</sup> Ibid p. 5 where it is stated that even people involved in cartel activity can have access to the reward provided they satisfy certain requirements there enlisted.

<sup>1265</sup> See Section 4.1.3 above discussed.

<sup>1266</sup> 15 U.S. Code § 1 - Trusts, etc., in restraint of trade illegal; penalty.

<https://www.law.cornell.edu/uscode/text/15/1> (Accessed on 15 October 2015). See also the Press Release from the DOJ Antitrust Division, 'Antitrust Division Announces Fiscal Year Total in Criminal Fines Collected' January 22, 2015 confirming a collection of \$1.861 billion USD in corporate criminal fines for the fiscal year that ended on September, 2014 and announcing prison terms for 21 individuals and an average sentence of 26 months in prison. <http://www.justice.gov/opa/pr/antitrust-division-announces-fiscal-year-total-criminal-fines-collected> (Accessed on July 20, 2015).

managerial workforce not only understands the importance of compliance but also has the incentive to actively participate in its enforcement.<sup>1267</sup>

Thus, the U.S. DoJ Antitrust Division recognises that total commitment from the top managerial board is indispensable and yet, it has failed to make such individuals more liable in antitrust enforcement. According to *Smith*, the Antitrust Division not only has imposed short sentences,<sup>1268</sup> but it also is overly prosecuting mid-level employees instead of the wilfully ignorant executives.<sup>1269</sup>

This argument is backed by the fact that many convicted individuals that participated in cartel activity seem to find employment after serving their sentences sometimes at the very same companies where they infringed competition law in the first place.<sup>1270</sup> According to *Connor* and *Lande*, 18 out of 35 people that were sentenced to prison for cartel infringements in the United States, were still working at the same companies or in the same industry.<sup>1271</sup> This is not an isolated fact but is part of a culture. According to some authors there is an awesome level of recidivism from companies who appear as

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<sup>1267</sup> Bill Baer, 'Prosecuting Antitrust Crimes' in remarks as prepared for the 8<sup>th</sup> Annual Conference Georgetown University Law Center Global Antitrust Enforcement Symposium, Washington, 10 September 2014, p. 7. Stating that employees must be encouraged to seek guidance or report potential antitrust offenses without fear of retaliation and disciplinary measures must be available for failing to prevent or detect unlawful conduct. <http://www.justice.gov/atr/file/517741/download> (Accessed July 20, 2015).

<sup>1268</sup> T. W. Smith, 'Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies' 5-9 (November 3, 2005). [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Smith\\_Statement.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Smith_Statement.pdf) (Accessed on 10 October 2015). However, as mentioned before, as of September 2014 the current average sentence stands at 26 months. See Press Release from the DOJ Antitrust Division, 'Antitrust Division Announces Fiscal Year Total in Criminal Fines Collected' January 22, 2015

<sup>1269</sup> See footnote 129 in Z. A. Cronin, 'The Competitor's Dilemma: Tailoring Antitrust Sanctions to White-Collar Priorities in the Fight against cartels' [2013] 36 Fordham International Law Journal 1712.

<sup>1270</sup> J. M. Connor and R. H. Lande, 'Cartels as Rational Business Strategy: Crime Pays' [2010] 34 Cardozo Law Review 441.

<sup>1271</sup> Ibid p. 442 providing statistics.

usual suspects in the world of business cartels, which confirms a culture of business delinquency.<sup>1272</sup>

In view of this situation, the U.S. DoJ Antitrust Division has stated that it would be doubtful whether a company can foster a corporate culture of compliance; even after infringement is discovered and a sanction is imposed, if that same company continues to employ such individuals in positions of substantial authority. Or in positions where they can continue to engage directly or indirectly in collusive conduct; or in positions where they supervise the company's compliance and remediation programs; or in positions where they supervise individuals who would be witnesses against them. These facts are to be considered from now on as they cast serious doubts about that company's commitment to implementing a new compliance program or invigorating an existing one.<sup>1273</sup>

The most recent example of this new focus, on checking whether internal measures are taken that goes beyond the mere imposition of fines and provides further incentives for undertakings to actually invest in compliance,<sup>1274</sup> can be found in the the *AU Optronics* case.<sup>1275</sup> In 2012 it was demonstrated before court that the latter company obtained an illicit gain of at least \$500 million USD to the detriment of American consumers and it

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<sup>1272</sup> C. Harding and A. Gibbs, 'Why Go to Court in Europe? An Analysis of Cartel Appeals 1995-2004' 30 European Law Review 349 at 369. See also J. M. Connor, 'Recidivism Revealed: Private International Cartels 1990-2009' [2010] 6 Competition Policy International 101.

<sup>1273</sup> Bill Baer, 'Prosecuting Antitrust Crimes' in remarks as prepared for the 8<sup>th</sup> Annual Conference Georgetown University Law Center Global Antitrust Enforcement Symposium, Washington, 10 September 2014, p. 8.

<sup>1274</sup> It is assumed that the imposition of corporate fines create an incentive for corporations to monitor, prevent and detect crimes committed by individuals working within such companies. See B. H. Kobayashi, 'Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws against Corporations' [2001] 69 George Washington Law Review 715 at 736.

<sup>1275</sup> *United States v AU Optronics Corp. et al.* delivered 13 March 2012.

was fined accordingly, matching the highest fine ever imposed at that time against *F. Hoffmann-La Roche, Ltd* back in 1999.<sup>1276</sup>

In addition, AU Optronics had its executives convicted of conspiring to fix the prices of liquid crystal displays. On appeal, the \$500 million USD corporate fine was confirmed and AU Optronics's former president and former executive vice president were found guilty of conspiring to fix prices of thin-film transistor-liquid crystal display (TFT-LCD) panels.<sup>1277</sup> However, the company continued to employ these convicted price fixers and indicted fugitives. In view of those circumstances, the Antitrust Division argued that not only was probation necessary, but also a compliance monitor was appropriate and the District Court agreed with it and it sentenced *AU Optronics* and its subsidiary to three years of probation.<sup>1278</sup>

The terms of probation required the companies to develop and implement an effective compliance and ethics programme and the companies were required to accept a compliance monitor whose job it is to supervise the implementation of the program and report back to the District Court and the Antitrust Division.<sup>1279</sup>

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<sup>1276</sup> Antitrust Division of the U.S. Department of Justice, 'F. Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel' Press Release 99-196 of 20 May 1999. <http://www.justice.gov/archive/opa/pr/1999/May/196at.htm> (Accessed July 20, 2015).

<sup>1277</sup> *United States of America v AU Optronics Corporation* Case No. 12-10492 2014 U.S. (9th Cir. July 10, 2014) <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/07/10/12-10492.pdf> (Accessed on November 25, 2016). The two convicted executives, Hsuan Bin Chen and Hui Hsiung, were sentenced to three-year prison terms and each fined \$200,000 USD. See also Jeffrey May, 'Convictions, \$500 Million Fine Upheld in Price Fixing Case Against *AU Optronics*; Foreign Trade Antitrust Improvements Act No Bar' Antitrust Connect Blog, Wolters Kluwer of 14 July 2014 available at: <http://antitrustconnect.com/2014/07/14/convictions-500-million-fine-upheld-in-price-fixing-case-against-au-optronics-foreign-trade-antitrust-improvements-act-no-bar/> (Accessed on 25 November 2016).

<sup>1278</sup> Bill Baer, 'Prosecuting Antitrust Crimes' in remarks as prepared for the 8<sup>th</sup> Annual Conference Georgetown University Law Center Global Antitrust Enforcement Symposium, Washington, 10 September 2014, p. 9.

<sup>1279</sup> Ibid.

Yet, in spite of these further measures imposed, on April 13, 2015, it was reported that the U.S. DoJ Antitrust Division was taking *AU Optronics* back to court. The reason behind this is that there might be probable cause to believe that the latter has violated its probation as it appears that the undertaking “has failed to implement a compliance and ethics programme designed to prevent the illegal activity from happening again”.<sup>1280</sup>

Thus, *AU Optronics* could face a maximum penalty of \$1 billion USD fine and five years of probation for allegedly failing to implement compliance policies previously imposed after the electronics manufacturer and its executives were convicted of violating U.S. antitrust laws.<sup>1281</sup> Although the argument to have prohibitions against individuals from returning to the same companies, where they were found to have infringed competition law, inserted in either plea agreements or court sentences had been provided before.<sup>1282</sup> The fact that an antitrust agency has made such measure part of their policy towards compliance is worth mentioning as an improvement in its enforcement policy. This approach does create informal costs that are immediate to individual’s sensitivity.

On the other hand, targeting individuals involved in cartel activity by pushing companies to take further internal measures in order to signal a drive of the company towards the adoption of effective instruments of compliance and a commitment to effectively implement those tools; is also a way to tackle the strategic use of leniency as has been noted before. According to *Wils*, one out of four leniency applicants in Europe are

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<sup>1280</sup> Beth Winegarner, ‘AUO Could Face \$1B Fine for Alleged Probation Violation’ *Law 360* (San Francisco, April 13, 2015). <http://www.law360.com/articles/642526/auo-could-face-1b-fine-for-alleged-probation-violation> (Accessed July 21, 2015).

<sup>1281</sup> Ibid quoting Anna Pletcher with the U.S. Attorney’s Office. As to the \$1 billion USD maximum fine possible, it must be remembered that 18 U.S.C. § 3571(d) enables the Antitrust Division can make use of the double-the-loss or double-the-gain mechanism when it is able to prove such gain or loss as in the present case.

<sup>1282</sup> A. Stephan, ‘Disqualification Orders for Directors Involved in Cartels’ [2011] 2 Journal of European Competition Law and Practice 535.

recidivist.<sup>1283</sup> This fact confirms the argument that there is a culture of delinquency among business people, as previously mentioned.

Thus, it would seem unfair to grant leniency or even reductions to undertakings that failed to take the appropriate internal measures to prevent recidivism. It must be added that individuals previously involved in cartel infringements for which their companies were fined but they themselves did not receive formal sanctions; they would have the benefit of experience and they would arguably conceal more effectively their activities thus, making it harder and more expensive for the EU Commission to detect their infringements.

Even more, individuals that have infringed competition law before are more likely to have their perception of active monitoring and policing reduced. It has been argued here that increasing the severity of sanctions for cartel participation on individuals is less effective than increasing the odds of enforcement.<sup>1284</sup> However, recidivists would have realized that the initial perception they had regarding the risk of certainty of punishment was overestimated, and they would adjust downwards. This makes them more likely to reoffend than those who have not committed any violation.<sup>1285</sup>

Overall, the measures described above provide incentives for companies and individuals at various levels of such undertakings to comply with competition law and improve

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<sup>1283</sup> W. Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' [2012] 35 *World Competition* 5 at 20.

<sup>1284</sup> See also C. Parker and V. L. Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' [2011] 56 *Antitrust Bulletin* 377 at 412.

<sup>1285</sup> R. Paternoster, 'Estimating Perceptual Stability and Deterrent Effects: The Role of Perceived Legal Punishment in the Inhibition of Criminal Involvement' [1983] 74 *Journal of Criminal Law and Criminology* 210.

compliance. They also provide for a general theory of deterrence that targets both prospective infringers and prospective recidivists by increasing and enhancing, directly or indirectly; the policing function of antitrust agencies as guardians of economic markets.

If adopting these actions, the EU Commission would increase the perception that competition law is actively enforced mainly within a company thus, creating an environment that affects individuals' behaviour and significantly alters company-level decision-making. Although it is true that the corporations' decision to comply or not to comply is based on relative costs or benefits of compliance;<sup>1286</sup> this balance would now be done at the individual's level. In this respect, the benefits of compliance would outweigh the costs of non-compliance and this is done by focusing on promoting compliance primarily while deterring generally and specifically.

In particular, external monitors can help change the corporate culture of a company and kick-start a culture of compliance and lawfulness.<sup>1287</sup> Overall, instruments that generate behaviour constraints such as those proposed here can create an ethical compliance environment that can ultimately result in individuals who have internalized the pro-compliance social norm influencing corporate decision making.<sup>1288</sup>

This must be noted as it is often said that for such compliance mechanisms to work, they must be embedded in the company's culture. However, as *Lessig* has stated, culture can

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<sup>1286</sup> J. Braithwaite and T. Makkai, 'Testing an Expected Utility Model of Corporate Deterrence' [1991] 25 Law and Society Review 7.

<sup>1287</sup> D. Sokol, 'Policing the Firm' [2013] 89 Notre Dame Law Review 785 at 839.

<sup>1288</sup> C. O'Reilly III and J. Chatman, 'Organizational Commitment and Psychological Attachment: The Effects of Compliance, Identification, and Internalization of Prosocial Behaviour' (1986) 71 (3) Journal of Applied Psychology 499. See also D. Lange, 'A Multidimensional Conceptualization of Organizational Corruption Control' (2008) 33 (3) Academy of Management Review 710.

result from a set of constraints that over time will adopt the form of an already given design where constraints will not be perceived as such.<sup>1289</sup> Indeed, behaviour constraints will generate compliance that ultimately will be dependent upon conscience rather than on legal sanctions that seek to provide a focus on reconciling often powerfully conflicting moral values in principled, rational and consistent manner.<sup>1290</sup>

Hence, the EU Commission must adopt those instruments that primarily promote a culture of compliance and achieve deterrence as a secondary goal. First, there must be an acknowledgement from the EU Commission, that corporate compliance is an important, if not the main component of its enforcement system.<sup>1291</sup> Once policy and enforcement instruments are aligned towards compliance, policing and monitoring functions can be enhanced delivering better results than the current so-called “optimal deterrent system”.

This conclusion can be reached by the fact that although both deterrence and compliance approaches recognize that corporate wrongdoing is determined by the acts and omissions of many individuals, subunits and organizations; deterrence in EU competition law focuses on a limited number of regulatory targets subject of liability. To the contrary, the compliance approach focuses on a much larger group of people who have the power to prevent antitrust violations instead.<sup>1292</sup>

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<sup>1289</sup> L. Lessig, ‘The New Chicago School’ [1998] 27 Journal of Legal Studies 661.

<sup>1290</sup> K. Yeung, *Securing Compliance: A Principled Approach* (Hart, Oxford 2004) p. 135 – 136.

<sup>1291</sup> For instance, in Australia the Australian Competition and Consumer Commission (ACCC) regards compliance as an important component of its enforcement tools. See 2015 ACCC Compliance and Enforcement Policy, February 2015.

<https://www.accc.gov.au/system/files/ACCC%20Compliance%20and%20Enforcement%20Policy%202015.pdf> (Accessed July on 20, 2015).

<sup>1292</sup> This effectively means that the compliance approach will not only focus on deterribles and incorrigibles as the only regulatory target groups but also on the conformists which is something deterrence policy fails to take into account. For a limited description of deterrence policy he suggested see D. S. Nagin, ‘Deterrence in the Twenty-first Century: A Review of the Evidence’ (2013) 42 (1) Crime & Justice 252 and G. Pogarsky, ‘Deterrence and Individual Differences among Convicted Offenders’ (2007) 23 (1) Quantitative Criminology 59.

The EU Commission should be able to punish undertaking but more regulatory targets must come into the deterrence frame. Although, it has been suggested that penalties on individuals can provide an effective deterrent, a compliance approach can generate equal informal costs for individuals. Thus, the adoption of compliance programmes and the imposition of external monitors should be encouraged. The role deterrence will play in an enforcement policy framework focused on compliance is discussed below.

## 5.2 Escalation to promote compliance and achieve prevention.

The measures proposed above need to work in harmony. A policy that promotes compliance and advances deterrence too, must be pursued through an enforcement system that can struck the right combination of the two dimensions of a sanction system that considers all the above mentioned instruments. According to *Nagin*, these two dimensions: 1) the legal authority for different types of sanctions and 2) the way that authority is administered, if rightly combined, could optimally determine the certainty, severity and celerity of sanction options available for punishment.<sup>1293</sup>

This is in line with has been advocated by *Braithwaite* in general. According to this author, in order to change behaviour that results in compliance with law statutes, the authority should be responsive to the conduct of those it seeks to regulate in deciding whether a more or less interventionist response is needed.<sup>1294</sup> In particular, law enforcers should be responsive to how effectively individuals or companies are regulating themselves before deciding whether to escalate intervention.<sup>1295</sup>

Responsive regulation is part of the restorative justice ideology that offers an alternative to the current system based on deterrence. Its appeal rests on a less punitive justice system and its strong emphasis on victim empowerment with a parsimonious use of punishment. *Marshall* has defined restorative justice as a process whereby all the parties with a stake

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<sup>1293</sup> D. S. Nagin, 'Deterrence: A Review of Evidence by a Criminologist for Economists' [2013] 5 Annual Review of Economics 101.

<sup>1294</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, USA 1992) p. 120.

<sup>1295</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 29.

in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.<sup>1296</sup>

Within this broad system we can find a subsystem directed to business regulation which is known as corporate restorative justice. According to *Braithwaite*, because of corporate capture combined with the high costs of corporate crime investigations, the authority does not have the incentive to take such white-collar cases and thus, regulation in most countries is rather restorative in this area where dialogue is a main component of the regulatory process as enforcers shift from strict criminal enforcement to restorative justice.<sup>1297</sup>

Indeed, dialogue can be considered to be the most important element of the restorative justice system and it seems to fit perfectly for business regulation as business people are rational. In addition, they are responsible actors who can be persuaded to come into compliance, but who, at the same time, are people who only understand the bottom line and therefore must be consistently punished for their wrongdoing. The question is how to decide when to punish and when to persuade in a corporate restorative justice system.<sup>1298</sup>

To answer this question, *Ayres* and *Braithwaite* provide a regulatory pyramid on which the whole concept of responsive regulation is based.<sup>1299</sup> Taking into account that in both individual and corporate law enforcement and this is especially true in antitrust law; consistent punishment is not possible. Even if it were possible, there are empirical studies

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<sup>1296</sup> T. Marshall, *Restorative Justice: An Overview* (Report by the Home Office Research Development and Statistics Directorate, London 1999), p. 5.

<sup>1297</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 16-18.

<sup>1298</sup> *Ibid* p. 29.

<sup>1299</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, USA 1992) p. 35.

that suggest that increasing or expanding punishment would actually increase reoffending of those punished, as offenders would realize that they had overestimated their perception as to the risk of sanctions.<sup>1300</sup> Hence, dialogue and persuasion would normally be the better way to go if there is a reasonable indication that compliance will be secured through cooperation.

This means that according to the responsive regulation framework, the enforcing authority's first step would be to engage in a dialogic process with the regulatory targets in order to secure compliance from both undertakings and individuals. If persuasion fails, enforcers can move up the pyramid in response to such failure to comply and escalate to punishment including the imposition of civil or criminal penalties and ultimately to incapacitation of any of the regulatory targets.<sup>1301</sup>

Hence, this framework of responsive regulation provides a scheme towards the integration of restorative, deterrent and incapacitative justice, which is what makes it appealing.<sup>1302</sup> There are ancillary benefits in the working of this structure too. For instance, the fact that restorative justice is privileged in first instance through dialogue means that legitimacy can be built for the whole framework and therefore the whole pyramid is perceived as procedurally fair and compliance is more likely.

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<sup>1300</sup> This has been explained in the previous section. See D. Nagin et al, 'Imprisonment and Reoffending in M. Tonry, *Crime and Justice: A Review of Research* (Chicago University Press, Chicago 2009) p. 115. See also R. Paternoster, 'Estimating Perceptual Stability and Deterrent Effects: The Role of Perceived Legal Punishment in the Inhibition of Criminal Involvement' [1983] 74 Journal of Criminal Law and Criminology 210 and Gendreau, Goggin and Cullen, *The Effects of Prison Sentences on Recidivism* (Report to the Solicitor General of Canada, Ottawa: Public Works and Government Services Ottawa.

<sup>1301</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 32.

<sup>1302</sup> Ibid p. 33. According to this scheme, at the bottom of the pyramid lays restorative justice that seeks to engage in dialogue and persuade the regulatory target who is in principle is a virtuous actor, to do right and comply with the law. Going up the pyramid, above restorative justice we can find deterrence as it is directed to the rational actor once the virtuous actor has failed to comply through dialogue. At the top of the scheme, when dialogue and deterrence have failed, the only tool available is incapacitation as it would mean that failure to comply at this point is due to the incompetence or irrationality of the regulatory target.

As has been mentioned in the previous Chapter, the optimal deterrence framework is based on the law and economics assumption that regulatory targets are rational actors and fines or any other sanction must be high and harsh enough until a point is reached where it becomes rational for those regulatory targets to comply. This means that if the level of the amount of a fine is not effective in deterring wrongdoing, then such amount must be increased up to the point where such an amount becomes a cost high enough that makes law violations irrational.

However, since law enforcement is not consistent, it has been demonstrated that the optimal deterrence framework cannot be achieved and even worse, this system makes future enforcement even harder and more expensive, which means that the authority will focus on pursuing easier and less costly cases.<sup>1303</sup> This problem is solved under the responsive regulation framework as it directs the rational actor to the base of the pyramid, which in effect solves the system capacity problem with punishment by making punishment cheap.<sup>1304</sup>

This is facilitated through the preference for cooperative solutions between regulators and regulatory targets at the bottom of the enforcement structure where the most numerous, least costly and most timely instruments to secure compliance can be found. Moving up the pyramid, the sanctions become costlier and increasingly severe in terms of their legal,

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<sup>1303</sup> K. Kinsey and H. Grasmick, 'Did the Tax Reform Act of 1986 Improve Compliance? Three Studies of Pre- and Post-TRA Compliance Attitudes' (1993) 15 (4) Law and Policy 292 where an example is given about tax law enforcement in the U.S. where the use of deterrent instruments ultimately result in hardened tax cheats.

<sup>1304</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 33.

coercive and deterrent effect on the regulatory targets in using those instruments to secure compliance.<sup>1305</sup>

Hence, it is easier and cheaper for undertakings to adopt remedies and sanctions to punish themselves. For instance, they could pay for a new corporate compliance system and individuals to oversee its effective implementation. Or agree to compensation to victims because the responsive regulatory system is designed in a way that companies receive a clear message that unless they punish themselves for law breaches through an agreed action plan near the base of the pyramid, authorities will punish them more severely higher up the scheme. Because the process is certain and transparent, such punishment becomes cheaper.<sup>1306</sup>

Thus, restorative justice offers an alternative to the failing deterrence framework and although its discussion has been focused on criminal law area and criminological studies focused on individual's behaviour, it seems that it is also suited for corporate regulation through the responsive regulatory scheme. In fact, since dialogue is the element that is privileged at the base of this framework, individuals would be a better target and there is a presumption that business people will take this path to avert non-business oriented issues from their commercial activities such as legal proceeding with the authority.

In addition, the responsive regulatory framework may be better suited to deal with corporate issues as the scheme incorporates informal factors that can be taken into account

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<sup>1305</sup> K. Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (2013) 33 (2) Legal Studies 324.

<sup>1306</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, New York 1992) Chapter 2 where it is explained that one of the messages that the pyramid sends to undertakings is that "if you keep breaking the law, it is going to be cheap for us to hurt you because you are going to help us hurt you".

in order to appeal to the virtuous individual so corporate decision making can be affected from within the company as individuals are more sensitive to informal costs. This is possible since, as has been stated before, there is evidence that for individuals without a criminal record such as business people, informal sanction costs make a large contribution to the total costs of offence commission.<sup>1307</sup>

This has been confirmed by *Paternoster* and *Simpson*, who have provided evidence that where MBAs held personal moral codes, which would carry informal sanction costs, these were more important than rational calculations of sanction risks in predicting compliance.<sup>1308</sup> This means that for business people, moral considerations and other non-formal costs outweigh formal costs.<sup>1309</sup> Since the optimal deterrence framework only considers formal costs, the fact that responsive regulation does take informal costs into account make it more likely to influence individual's behaviour working within a company to effectively affect corporate decision making.

One more aspect to take into account is the fact that a system based on deterrence is reliant on increasing the threat of punishment, meaning formal punishment. However, responsive regulation gives preference to dialogue and persuasion calling for the moral considerations and other factors that generate informal costs all of which is backed with the possibility of formal punishment. This is the fundamental difference that allows

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<sup>1307</sup> R. Paternoster, 'Estimating Perceptual Stability and Deterrent Effects: The Role of Perceived Legal Punishment in the Inhibition of Criminal Involvement' [1983] 74 Journal of Criminal Law and Criminology 210.

<sup>1308</sup> R. Paternoster and S. Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' [1996] Law and Society Review 549 - 583.

<sup>1309</sup> Empirical studies offer conclusions in the same line stating that firms and senior executives are vulnerable to activities that have a negative impact on their reputation and self-esteem. See D. Kahan and E. Posner, 'Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines' [1999] 42 Journal of Law & Economics 365 and D. Skeel, 'Shaming in Corporate Law 149 [2001] University of Pennsylvania Law Review 1811.

restorative justice to work better with the threat of punishment in the background rather than in the foreground as reactance is averted, something that deterrence-based systems cannot avoid.<sup>1310</sup>

In essence, responsive regulation becomes an active deterrence system of inexorable escalation, from restorative to punitive justice, which is likely to be more effective than the traditional and passive optimal deterrence framework.<sup>1311</sup> This escalation in the responsiveness of regulation needs to take account of the authority of each deterrent instrument used and how that authority is administered so it is possible to optimally determine the certainty, severity and celerity of deterring options available to achieve compliance through a system that is both efficient and effective.<sup>1312</sup>

Central to this scheme is the fact that the system allows escalation and the level of such escalation depends upon the regulatory target. This is important as empirical research has shown that whenever an individual or company that has violated law, if he or it believes that he or it, is treated as a trustworthy person by those who regulate his behaviour, he is more likely to comply with the law in the future.<sup>1313</sup>

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<sup>1310</sup> S. Brehm and J. Brehm, *Psychological Reactance: A Theory of Freedom and Control* (Academic Press, Michigan 1981). The theory of reactance considers that the level of resistance to persuasion is dependent on how sanction threats increase the perceived difficulty of exercising freedoms. Considering this, it is argued that deterrence can only be achieved without reactance by way of societal inexorability of escalation, which is an accomplishment of the legal system. Responsive regulation is based on dialogue and if that fails, sanctions come inexorably as anyone can see that the system works inexorably. See also J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 45.

<sup>1311</sup> *Ibid* p. 57.

<sup>1312</sup> D. S. Nagin, 'Deterrence: A Review of Evidence by a Criminologist for Economists' [2013] 5 Annual Review of Economics 101.

<sup>1313</sup> J. Black, 'Regulation as Facilitation: Negotiating the Genetic Revolution' (1998) 61 (5) The Modern Law Review 621 and J. Black, 'Talking about Regulation' [1998] 1 Public Law 77.

Thus, a system that puts emphasis on the individual and highlights his importance on the opportunity to comply while letting him know that there is the possibility to escalate to more deterrent and costlier instruments. The latter will inexorably apply if there is still failure to adjust behaviour, means that each missed opportunity will accentuate the individual's liability and legitimacy of any imposition of sanction, which in turn, is easier to levy.<sup>1314</sup> As has been stated earlier, this legitimacy is built from the fact that dialogue creates a sense of procedural fairness by the enforcement agents in use of responsive regulation which increases trust in their authority.<sup>1315</sup>

As a result, individuals are more likely to comply with the law as they see themselves as being treated fairly by the enforcement system.<sup>1316</sup> Overall, the argument is supported with empirical research to conclude that restorative justice can work better if it is designed to enhance the efficacy of deterrence and ultimately prevention. On the other hand, deterrence and prevention strategies can work better if they are embedded in a responsive regulatory pyramid that enhances the effectiveness of restorative justice.<sup>1317</sup>

This would mean that the EU Commission needs to distinguish the situations where commitment decisions are optimal and where others merit to be punished by fines. In both circumstances, the EU Commission will incentivise the regulatory targets to adopt an effective compliance programme and go ahead with the appointment of an external monitor to oversee the implementation of such programme that is able to create a

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<sup>1314</sup> See J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (SUNY Press, Albany 1985) p. 75 who concludes that while persuasion works better than punishment, credible punishment is needed to back up persuasion when it fails.

<sup>1315</sup> T. R. Tyler and Y. J. Huo, *Trust in the Law: Encouraging Public Cooperation With the Police and the Courts* (Russell Sage Foundation, New York 2002).

<sup>1316</sup> T. Tyler, *Why People Obey the Law* (Yale University Press, New Haven 1990) who provides strong evidence that perceived procedural justice improves compliance with law.

<sup>1317</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 69.

compliance culture. The latter should be done by involving all those individuals that can prevent any antitrust wrongdoing. In addition, the EU Commission should incentivize companies to offer compensation when this is possible so a broader active monitoring network is created.

This responsive approach of regulation has been applied in Australia in acknowledgment of the fact that the economic reasoning of the optimal deterrence framework enforcement places too much weight on the deterrent impact of formal sanctions and thus, make it limited and short-sighted.<sup>1318</sup> Another factor considered to undertake a responsive regulatory approach was the evidence from well-developed empirical research that had shown that regulatory enforcement officials were reluctant to resort to a punitive approach that relied upon formal prosecution in response to non-compliance but instead, they seemed to favour a more conciliatory approach involving negotiation and bargaining with the regulatory targets.<sup>1319</sup>

As has been mentioned earlier, a deterrence strategy would often be less effective in securing compliance, as it would generate resistance and reactance from regulatory targets.<sup>1320</sup> This ultimately undermines the importance of generating a culture of shared commitment to regulatory goals between regulators and regulated which is claimed to provide the necessary foundations for compliance.<sup>1321</sup>

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<sup>1318</sup> See K. Yeung, *Securing Compliance: A Principled Approach* (Hart, Oxford 2004), providing a comprehensive discussion of bargaining, negotiation and civil penalty sanctions as central techniques used by the Australian competition regulator in securing compliance with the law.

<sup>1319</sup> B. Hutter, *The Reasonable Arm of the Law?* (OUP, Oxford 1988), R. Kagan, 'Regulatory Enforcement' in R. Schwartz and D. Rosenbloom (eds), *Handbook of Regulation and Administrative Law* (Marcel Dekker, New York 1994).

<sup>1320</sup> S. Brehm and J. Brehm, *Psychological Reactance: A Theory of Freedom and Control* (Academic Press, Michigan 1981).

<sup>1321</sup> K. Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (2013) 33 (2) Legal Studies 317.

According to *Hawkins*, the use of dialogue and negotiation as the base for responsive regulation, is morally compelled because the authority of regulatory officials is not secured on a perceived moral and political consensus. Especially, concerning the ills they seek to control and thus, a strategy of bargaining and negotiation is essential in order to sustain the support of the regulatory targets.<sup>1322</sup> Hence, we can argue that the lack of dialogue and the resistance generated is what prevents a passive deterrence framework to achieve the ultimate goal of regulation, which is compliance thus, making responsive regulation a more effective option.<sup>1323</sup>

Nevertheless, it must be remembered that such dialogue is the first step of an active deterrence system of inexorable escalation. Hence, considering that responsive regulation does take into account the complex sensitivities of firms and individuals who are motivated by concerns to preserve and enhance their perceived social legitimacy, the enforcement agency needs to escalate to a punitive approach in a consistent manner that is not perceived excessive and unfair that renders the whole system ineffective.<sup>1324</sup>

The above is important as enforcement agencies do need to take into account these sensitivities so the interaction with regulatory targets is not compromised.<sup>1325</sup> For

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<sup>1322</sup> See K. Hawkins, *Environment and Enforcement* (Clarendon Press, Oxford 1984) and K. Hawkins, *Law as Last Resort* (OUP, Oxford 2002).

<sup>1323</sup> For a different view see F. Pearce and S. Tombs, 'Ideology, Hegemony and Empiricism' [1990] 30 British Journal of Criminology 423 who argue that a corporate compliance approach based on dialogue only reflects a conservative political ideology that illegitimately perceives corporate illegality as qualitatively and morally different from more traditional crimes. In their view, corporate wrongdoing needs to be addressed with a punitive strategy.

<sup>1324</sup> C. Parker, 'The Compliance Trap: The Moral Message in Responsive Regulatory Enforcement' [2006] 40 Law and Society Review 591 who argues that this could lead to a compliance trap where there is strong enforcement tactics that are perceived as unfair thus, undermining the effectiveness of the legal system.

<sup>1325</sup> K. Yeung, 'Does the Australian Competition and Consumer Commission Engage in Trial by Media?' (2005) 27 (4) Law & Policy 550.

instance, back in 2002 the Australian Competition and Consumer Commission (ACCC) was blamed for using a deterrent approach in its use of media publicity when enforcing competition rules. This generated accusations that the ACCC was using trial-by-media tactics and resorting to reputational blackmail,<sup>1326</sup> which resulted in an official inquiry being undertaken to investigate whether Australian competition rules provided adequate protection for the commercial affairs and reputation of individuals and corporations.<sup>1327</sup>

The inquiry concluded that the ACCC's publicity tactics tend to portray the defendant in an exceptionally negative light, exacerbating the natural an inevitable harm to a defendant's reputation that would ordinarily arise from being the target of enforcement action.<sup>1328</sup> Although publicity is regarded as a useful technique available to regulators in seeking to enhance the deterrent impact of its enforcement activities,<sup>1329</sup> it may also have a disproportionate impact on the regulatory target's reputation.

Although it is clear that enforcement authorities should seek to be transparent and accountable in discharging their regulatory functions, they need to ensure that those affected by their decision are treated with procedural fairness and due process.<sup>1330</sup> According to *Yeung*, it is possible to interpret the constitutional right to due process in a thin and a thick sense. In regards to the former, it may refer to specific doctrine that imposes an obligation on public authorities to ensure that their decision are unbiased and

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<sup>1326</sup> *Ibid* at 551.

<sup>1327</sup> Sir Daryl Dawson, *Report of the Review of the Competition Provisions of the Trade Practices Act 1974* (Commonwealth of Australia, Canberra 2003).

<sup>1328</sup> K. Yeung, 'Does the Australian Competition and Consumer Commission Engage in Trial by Media?' (2005) 27 (4) *Law & Policy* 567 stating that the ACCC's publicity strategy contributes to and accentuates the magnitude of the reputational harm the defendant would otherwise suffer.

<sup>1329</sup> C. Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' [2004] 67 *Modern Law Review* 228.

<sup>1330</sup> *Ibid* 551.

that those affected by such decisions are given an opportunity to participate in the decisions that affect them.<sup>1331</sup>

As to the thick sense of interpretation, the constitutional right to due process refers to the values justifying these legal rules of fair procedure rather than specific rules themselves. This thicker concept of due process is general in nature and can be applied to a range of legal systems as a basis for examining and evaluating the extent to which specific legal doctrine give flesh to its conceptual underpinnings.<sup>1332</sup> The right to due process conceived in this thicker conceptual sense encompasses ethical obligations too that reflect the ethos or shared culture of the community and, although they are not strictly enforceable rules, they are considered binding on enforcement authorities as a matter of professional ethics.<sup>1333</sup>

However, just like many other antitrust agencies in the world such as the ACCC, the EU Commission combines investigative and prosecutorial functions and this may tend to render its objectivity in decision making more difficult, elevating the risk of unfairness in the exercise of its enforcement discretion.<sup>1334</sup> Even more, the EU Commission pursues a broad EU competition policy too and this multiplicity of roles suggest that the nature and the extent of the EU Commission's ethical obligations are likely to be contingent upon the particular task at hand.<sup>1335</sup>

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<sup>1331</sup> K. Yeung, *Securing Compliance: A Principled Approach* (Hart, Oxford 2004) p 41 – 42 making reference to P. Craig, *Administrative Law* (5<sup>th</sup> ed. Sweet and Maxwell, London 2003).

<sup>1332</sup> *Ibid.*

<sup>1333</sup> K. Crispin, 'Prosecutorial Ethics' in S. Parker and C. Sampford (eds), *Legal Ethics and Legal Practice* (Clarendon Press, Oxford 1996).

<sup>1334</sup> See Chapter 3 for a deeper discussion of the EU Commission's enforcement discretion and the respect of fundamental principles of EU Law such as the principle of proportionality, legal certainty, equal treatment, legitimate expectations, equivalence and effectiveness.

<sup>1335</sup> See K. Yeung, 'Does the Australian Competition and Consumer Commission Engage in Trial by Media?' (2005) 27 (4) *Law & Policy* 555 arguing that when the authority carries out investigative and enforcement functions, it should be guided by the ethical responsibilities of a criminal prosecutor. And

This means that if the EU Commission were to adopt an enforcement system that mirrors responsive regulation, each level of escalation in the active deterrence regulatory pyramid, must be effective in striking a balance between the interests of pragmatism and expediency. This should be done in order to achieve compliance with law and the full observance of important values and fundamental principles of EU law such as legality, due process, transparency, accountability, proportionality among others.

This must be kept in mind as dialogue and persuasion are the main components of the responsive regulatory framework, which means that negotiation and bargaining will play a fundamental role in the scheme and these too, need to be protected by due process guarantees.<sup>1336</sup> In this particular instance, negotiation and bargaining may result in injustice arising from inaccuracy or inappropriateness of the enforcement instruments used and the outcomes they produce in order to address the market restriction and prevent future occurrence.

This fear is based on the fact that the enforcement agency could increase its bargaining power from a sanctions-backed position which may diminish the objectivity and fairness of the procedure that ultimately erodes the public confidence in the enforcement process.<sup>1337</sup> As has been discussed in Section 3.1.1 above, Article 6 of the European

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when the administrative authority is acting in capacities other than as an enforcement authority, it may not be constrained by these ethical constraints and has greater freedom to act.

<sup>1336</sup> This is important to address as procedural fairness in negotiation is of fundamental importance as it increases cooperative behaviour by giving people who are treated fairly the message that they are respected which increases their pride in or identity with the group and increases their willingness to cooperate to secure its norms. See T. Tyler and S. Blader, *Cooperation in Groups: Procedural Justice, Social Identity and Behavioural Engagement* (Psychology Press, Philadelphia 2000).

<sup>1337</sup> K. Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (2013) 33 (2) Legal Studies 319. As to the enforcement of EU competition law, there is an inherent institutional imbalance between the bargaining positions of the EU Commission and the undertakings subject to proceedings.

Convention of Human Rights and the case law developed from it by the European Court of Human Rights guarantee the right to due process or procedural fairness in antitrust proceedings in recognition that the latter belong to the criminal law paradigm of liability in the general sense.

However, because EU competition law is not considered within the core of criminal law, its sanctions and proceedings fall within a shadowy middle ground between civil and criminal liability paradigms. This situation generates two divergent views as to how bargaining and negotiation in the responsive regulation framework can be effectively safeguarded on the one hand and how they can deliver effective outcomes that advance compliance on the other.<sup>1338</sup>

Indeed, a balance must be struck so that negotiated enforcement undertaken by the EU Commission under responsive regulation, avoids undermining procedural rights of undertakings while pursuing the adoption of necessary and appropriate instruments that effectively achieve compliance with EU competition law. To this end, the EU Commission must offer guidance on the terms upon which it is willing to engage in sanction negotiations, such as the quality of the evidence supporting the infringement, the scope nature and magnitude of the proposed remedy, including its adherence to the principle of proportionality.<sup>1339</sup>

This can be done by taking into account the social purpose served by the different enforcement tools. It is acknowledged that social goals can be properly pursued by

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<sup>1338</sup> Ibid p. 320 where a deeper discussion is undertaken between civil and criminal paradigms.

<sup>1339</sup> See K. Yeung, *Securing Compliance: A Principled Approach* (Hart, Oxford 2004) p. 135 – 149 for an extensive discussion is offered of potential safeguards that appropriately circumscribe enforcement negotiations.

regulatory sanctions for instance, deterring future non-compliance, changing offender's behaviour, restoring the harm for non-compliance or eliminating the benefit arising from non-compliance.<sup>1340</sup> Thus, in seeking to change offender's behaviour, enforcement instruments might seek to terminate the questioned conduct and prevent specific types of activity, restoration might entail payment of compensation and deterrence might entail punishment.

Negotiated enforcement allows the promotion of these social goals that cannot readily be achieved by adjudication which is a strikingly different form of reaching decisions and adopting remedies. Hence, bargaining and negotiation can overcome or reduce practical problems associated with the inherent limits of rules, mediating the tension between the desire for certainty and flexibility by enabling rules to be applied to particular circumstances in a manner that conforms to the underlying purpose.<sup>1341</sup>

Although, the process of bargaining and negotiation relies upon the consent of its participants consistent with individual autonomy and freedom on an informed basis;<sup>1342</sup> in the application of EU competition law, the EU Commission and undertakings subject to enforcement proceedings are not two equally resourced and well-informed parties as ideal terms of negotiation would require. Even more, they both face significant pressure to settle rather than risk a more severe regulatory response and yet, the social response

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<sup>1340</sup> J. Black and R. Baldwin 'Really Responsive Regulation' [2008] 71 Modern Law Review 59.

<sup>1341</sup> J. Black, 'Talking About Regulation' [1998] 1 Public Law 77. See also C. Parker; 'Restorative Justice in Business Regulation: The Australian Competition and Consumer Commission's use of Enforceable Undertakings' [2004] 67 Modern Law Review 210 explaining that the legal force and flexibility of the of negotiated instruments has been useful in supplementing court-ordered remedies to secure social purposes that cannot be secured by a court order.

<sup>1342</sup> M. Eisenberg, 'Private Ordering Through Negotiation: Dispute Settlement and Rulemaking' [1976] 89 Harvard Law Review 637.

will be of tolerance if both parties willingly consent to obligations that are meant to promote compliance with law and prevent future antitrust infringements.

Undoubtedly, responsive regulation must be carried in a way that is transparent, accountable, proportionate and consistent,<sup>1343</sup> and the degree of protection to guarantee procedural fairness will depend upon the instruments adopted and the level of escalation in the framework were dialogue is the first step to achieve compliance. Nevertheless, as has been mentioned in the previous section, the overall objective of the scheme would be to create an active monitoring network.

The latter should be able to create a compliance culture so companies and individuals will comply even without enforcement action, through internalization and institutionalization of compliance norms, informal pressure and the indirect threat of the benign big gun at the top of the pyramid.<sup>1344</sup>

Indeed, the instruments available within the responsive regulatory scheme will pursue any social goal while also preventing future wrongdoing with minimal or no enforcement at all. This is done by way of conversion or compliance. According to *Taylor*, identification with in-groups delivers conversion to in-group norms without a need for the norm violator to be known.<sup>1345</sup> Alternatively, compliance is conceived as a purely

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<sup>1343</sup> Better Regulation Task Force, *Principles of Good Regulation* (Cabinet Office, London 2003). See also K. Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (2013) 33 (2) Legal Studies 339.

<sup>1344</sup> C. Parker, 'The Compliance Trap: The Moral Message in Responsive Regulatory Enforcement' [2006] 40 Law and Society Review 591.

<sup>1345</sup> For instance, an individual working within a company in charge of a business unit infringing antitrust law without being detected may be converted to the norm against competition law violations by a conference with his in-group in which disapproval is mobilized against a competition law infringement done by someone else.

strategic shift towards a group norm without conversion to ethical identification with the norm because compliance is seen as a way to avoid consequences.<sup>1346</sup>

Thus, enforcement tools belonging to the first dialogic and cooperative stage of the responsive regulation framework can provide for the creation of in-groups where conversion to ethical identification with the norm is facilitated while escalation to deterrence can provide for the creation of out-groups that can secure compliance. Working together, both instances create an active monitoring network that can be more effective in preventing infringements.

Although responsive regulation stands in dynamic relation to the preferred processes of restorative justice and there is no a priori formula for assigning cases of varying degrees of seriousness to different levels of response; it is understood that the first step to be taken will be through dialogue.<sup>1347</sup> However, what is clear is that the best time to persuade a company to invest in a corporate compliance programme is after something goes wrong and someone gets into trouble.<sup>1348</sup>

Indeed, since enforcement agencies have limited resources and promotion of compliance cannot be done by contacting every single company in every single market that is susceptible of infringing competition law; it is clear that the opportunity must be seized for crime prevention. Hence, crime prevention instruments must be adopted when

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<sup>1346</sup> N. Taylor, *Reporting of Crime against Small Retail Businesses* (Australian Institute of Criminology, Canberra 2002) p. 6.

<sup>1347</sup> P. C. Yeager, 'Law Versus Justice: From Adversarialism to Communitarianism' [2004] 29 Law and Societal Inquiry 901.

<sup>1348</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 91.

motivation for implementing demanding preventive measures is at its peak, when any wrongdoing is detected.<sup>1349</sup>

In this respect, the EU Commission does follow a similar pattern as responsive regulation does. Since the adoption of Regulation No. 1/2003 more than ten years ago, the EU Commission can enter into settlements with undertakings suspected of infringements of Article 101 and 102 TFEU and this bargaining practice has allowed it to develop a generalized use of commitment decisions under Article 9 of such regulation in order to restore market competition quickly.<sup>1350</sup>

Thus, an infringement is discovered and negotiation and bargaining are started within the commitment procedure that can lead to the adoption of behavioural or structural remedies so competition can be restored. This can be considered to be the first level of response in the responsive regulatory framework and since this stage encompasses the measures within the restorative justice approach, *Braithwaite* argues that at this same stage, in business regulation; the restorative process works best when victims are at the deliberative table with their corporate victimizers.<sup>1351</sup> Hence, victims of antitrust law

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<sup>1349</sup> Ibid p. 3 mentioning that crime is an opportunity to prevent greater evils. See also C. Bridgeman and L. Hobbs, *Preventing Repeat Victimisation: The Police Officer's Guide* (Home Office Police Research Group, UK 1997) p. 2 and K. Pease, 'Repeat Victimisation: Taking Stock', Crime Detection and Prevention Paper Series Paper, Home Office, London, UK 1998 who states that "victimisation is the best single predictor of victimisation."

<sup>1350</sup> Article 9 of Regulation No. 1/2003 states that commitment decisions are inappropriate where the case deserves fines thus, distribution agreements or joint ventures and other agreements that restrict competition could be settled excluding cartel cases. See H. Schweitzer, 'Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law', EUI Working Papers LAW No. 2008/22, October 2008.

<sup>1351</sup> J. Braithwaite, 'A Future where Punishment is Marginalized: Realistic or Utopian' [1999] UCLA Law Review 1743 and I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, USA 1992) p. 120. Where the author argues that responsive regulation as part of the restorative justice approach envisions crime as a violation of people and relationships and conferences with all parties involved are needed to attend so repair, reconciliation and reassurance can be provided. His argument goes around the belief that this can be done more suitably to repair relationships that were damaged by corporate wrongdoing, as corporations are more likely to offer repair or compensate for the harm done when dialogue is engaged.

infringements can access to conferences with undertakings and enforcement agencies where harm is addressed so compensation can be offered.

However, some authors see reparation of harm as something inappropriate since harm can vary greatly because of factors beyond the offender's foresight or control as in modern global business, the victims are abstractions and their interests are far removed from those of corporate decision makers.<sup>1352</sup> In addition, addressing harm would actually be counterproductive because similar behaviour and culpability will result in quite different degrees of compensation depending on the emotions and skills that victims and wrongdoers bring to the bargaining process thus, resulting in unequal treatment of equally culpable offenders.<sup>1353</sup>

Despite these views, it must be remembered that the EU Commission has used commitment decisions to force undertakings to reimburse customers for the overcharge applied during the infringement thus, effectively compensating for the harm.<sup>1354</sup> On the other hand, the EU Commission has also reduced the amount of fines in cases where undertakings do offer substantial financial compensation to third parties, which suffered material harm.<sup>1355</sup>

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<sup>1352</sup> See P. C. Yeager, 'Law Versus Justice: From Adversarialism to Communitarianism' [2004] 29 Law and Societal Inquiry 910 who states that it is because of this fact that the force of law through punishment is needed in first instance and not as leverage to processes of restorative justice.

<sup>1353</sup> D. Dolinko, 'Restorative Justice and the Justification of Punishment' [2003] 1 Utah Law Review 331.

<sup>1354</sup> *Deutsche Bahn I* (Case COMP/AT.39678) and *Deutsche Bahn II* (Case COMP/AT.39731) Non-confidential version published on 18 December 2013 para 93. Here the EU Commission stresses that the payment granted in the commitments is not a compensation for harm suffered through possible anticompetitive behaviour, as commitment decisions do not contain a finding of an infringement of the EU competition rules. Although, decisions based on Article 9 of Regulation No. 1/2003 do not aim at directly compensating harm suffered from a violation of EU competition law, the payment granted effectively amounts to compensation.

<sup>1355</sup> *Omega - Nintendo* [2003] OJ L255/33 para 440 and 441 where it is confirmed that Nintendo received reduction in the amount of the fine imposed on it for the amount of €300,000.

On the other side of the Atlantic, a U.S. state lawsuit was brought against Apple for damages to address the financial harm caused to American consumers and the company decided to settle and pay \$400 million in compensation. This was done in addition to the original complaint, filed by the U.S. DoJ as discussed above, accusing Apple and five major US publishers of conspiring to set e-books prices and pricing models in order to target Amazon. The individual publishers also part of the restrictive agreement settled earlier for \$166 million.<sup>1356</sup>

Amazon has recently settled too and has started to pay compensation to its U. S. consumers in an E-book antitrust settlement.<sup>1357</sup> Even more, the CMA in the United Kingdom has just published some guidance on a new power to encourage competition law breaking companies to voluntarily pay compensation to victims. This guidance will come into force on October 1<sup>st</sup>, 2015 and provides a procedural framework for determining levels of compensation and how those schemes should operate. In certain circumstances, such schemes will allow the infringing undertaking to receive up to 20% discount on any penalty imposed by the CMA.<sup>1358</sup>

Hence, it would seem that, at least at the national level; EU antitrust law enforcement already allows for compensation as an enforcement tool, which can be covered within the first level of response within the responsive regulation scheme. However, the EU

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<sup>1356</sup> Josh Lowensohn, 'Apple to pay \$450 million in E-books antitrust suit with US states' *The Verge* (New York City, 16 July 2014). <http://www.theverge.com/2014/7/16/5909485/apple-to-pay-450-million-in-ebooks-antitrust-suit-with-us-states> (Accessed August 20, 2014).

<sup>1357</sup> Zack Guzman, 'Amazon refunds users for eBook antitrust settlement' *CNBC* (New York City, 23 July 2015) <http://www.cnbc.com/2015/07/23/amazon-refunds-users-for-ebook-antitrust-settlement.html> (Accessed August 29, 2015).

<sup>1358</sup> Competition and Markets Authority, 'Guidance on the Approval of Voluntary Redress Schemes for Infringements of Competition Law', CMA 40, 14 August 2015. <https://www.gov.uk/government/news/guidance-on-new-compensation-schemes-power-in-competition-cases> (Accessed August 29, 2015).

Commission should follow CMA's lead and offer guidance on minimum and maximum amounts of compensation for particular offenses so that equal treatment is protected.<sup>1359</sup> Thus, commitment decisions could be the instruments to be used when the purpose of EU Commission's enforcement is to terminate the impugned conduct and prevent specific types of activity so competition is restored which might also entail payment of compensation.

At this stage, procedural fairness guarantees can be interpreted in a thick conceptual sense covering ethical obligations to reflect the ethos or shared culture of the community, and rules that are considered binding on enforcement authorities as a matter of professional ethics without these being enforceable.<sup>1360</sup> This is in line with current EU Commission's practice in commitment procedures as it does not need to show that the proposed remedies are proportionate but only that the commitments in question address the concerns the EU Commission expressed to the undertakings concerned and that the latter have not offered less onerous commitments that also address those concerns adequately.<sup>1361</sup>

Overall, bargaining at this stage facilitates what has been called interior justice, which refers to the perception that all parties involved have within this first stage regarding the procedural fairness and substantive rightness of the measures adopted and their adequacy

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<sup>1359</sup> D. Dolinko, 'Restorative Justice and the Justification of Punishment' [2003] 1 Utah Law Review 332.

<sup>1360</sup> K. Crispin, 'Prosecutorial Ethics' in S. Parker and C. Sampford (eds), *Legal Ethics and Legal Practice* (Clarendon Press, Oxford 1996) and K. Yeung, *Securing Compliance: A Principled Approach* (Hart, Oxford 2004) p 41 – 42.

<sup>1361</sup> Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 46 where the CJEU also emphasised that the EU Commission is still obliged to take into account the interests of third parties. Even when adopting commitment decisions but this consideration is not as extensive as Article 7 procedure as commitments do not originate from them, which means that the voluntary nature of the commitments offered cannot be any guarantee that the interest of third parties will be safeguarded. See also Opinion of Advocate General Kokott in Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 55.

relative to the wrong being judged such as compensation and restored compliance.<sup>1362</sup>

This builds on the legitimacy of the procedure but most importantly, it helps to create in-group norms, within the company, which can be internalized by the current undetected infringers or potential infringers within such group without formal enforcement being necessary.<sup>1363</sup>

Although *Braithwaite* argues that this form of restorative justice can remove crime prevention from its marginal status in the criminal justice system, mainstreaming it into the enforcement process;<sup>1364</sup> from a deterrence approach perspective, the fact is that a general deterrence message is not generated makes it ineffective to say the least.

Even though, the compliance approach at the dialogical stage is not broad enough to amount to a policy that aims to prevent EU competition law violations from occurring in the first place because there is no infringing undertaking to punish.<sup>1365</sup> The fact that the EU Commission provides incentives to adopt a compliance programme and thus, create a culture of compliance, which can ultimately lead to be adopted as in-group norms and thus facilitate conversion, is what the compliance approach is all about.

Yet the EU Commission would still be able to escalate the level of response so it can address the need to deter future non-compliance and changing wrongdoer's behaviour. Therefore, the question arises: In what circumstances should the EU Commission escalate

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<sup>1362</sup> See P. C. Yeager, 'Law Versus Justice: From Adversarialism to Communitarianism' [2004] 29 Law and Societal Inquiry 905.

<sup>1363</sup> N. Taylor, *Reporting of Crime against Small Retail Businesses* (Australian Institute of Criminology, Canberra 2002) p. 6.

<sup>1364</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 95.

<sup>1365</sup> D. S. Nagin, 'Deterrence: A Review of Evidence by a Criminologist for Economists' [2013] 5 Annual Review of Economics 87.

from the mere restorative, dialogical process? While responsive regulation does not provide for a priori formula for assigning cases of varying degrees of seriousness to different levels of response, the EU Commission has developed an enforcement practice by which it is possible to assign cases to what it considers an adequate level of response.

According to *Gautier* and *Petit*, the EU Commission can and does follow three types of enforcement policies: A standard enforcement policy, a selective commitments policy and a generalized commitments policy.<sup>1366</sup> First, the standard enforcement policy covers in first instance all those cases dealing with hard-core competition restrictions that will face lengthy proceedings and would normally deserve a fine. Second, the selective commitments policy makes mixed use of Article 7 and Article 9 of Regulation 1/2003 proceedings for cases where the suspected infringement, the relevant markets and the potential remedies are similar.<sup>1367</sup>

Third, the generalized commitments policy is a practice by which the EU Commission makes use of Article 9 of Regulation 1/2003 proceedings to deal with all cases that may involve several sectors, mainly those where markets are in the process of liberalization or fast moving markets such as the IT sector.<sup>1368</sup> Here the EU Commission will accept commitments that are at least equal to the expected sanction of the lowest possible type.<sup>1369</sup>

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<sup>1366</sup> A. Gautier and N. Petit, 'Optimal Enforcement of Competition Policy: The Commitments Procedure under Uncertainty' Liège Competition and Innovation Institute, Working Paper April 24, 2015. <http://orbi.ulg.ac.be/handle/2268/180742> (Accessed on August 3, 2015).

<sup>1367</sup> Ibid p. 4 and p. 25. The selective commitments policy is applied when the EU Commission entertains commitments talks with the parties but maintains an effective threat to return to the infringement procedure.

<sup>1368</sup> Ibid p. 5.

<sup>1369</sup> See Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949 para 46 for the sufficiency and adequacy text.

The enforcement path that the EU Commission takes will depend on the different types of companies that the EU Commission may face. For instance, undertakings subject to enforcement can be responsible for major or minor harm and engaged in lawful or unlawful conduct which generates uncertainty and asymmetric information. Thus, the enforcement type will depend on the level of uncertainty originated from the availability of legal precedent and the factual knowledge of the market.<sup>1370</sup>

Hence, when there is little legal and factual uncertainty, a generalized commitments policy will be appropriate to apply as large uncertainty is against commitments, especially legal uncertainty.<sup>1371</sup> When there is more factual uncertainty with limited legal uncertainty, a selective commitments policy is ideal.<sup>1372</sup> When there is more legal uncertainty, the standard enforcement policy should apply as this too helps to clarify the law and reducing legal uncertainty by taking infringement decisions reduces the costs of using the commitments procedure in the future.<sup>1373</sup>

On the other hand, the level of uncertainty will also determine which category of procedural tools will apply to enforce EU competition law. From a facts intensive investigation in order to precisely establish the infringement as a matter of law and to measure the anticompetitive harm, as a matter of fact that bridges the information gap between the EU Commission and the firm to a less strict set of tools where the procedural guarantees do not apply in their full dimension.<sup>1374</sup>

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<sup>1370</sup> A. Gautier and N. Petit, 'Optimal Enforcement of Competition Policy: The Commitments Procedure under Uncertainty' Liège Competition and Innovation Institute, Working Paper April 24, 2015 p. 6 where the authors expand on the two sources of uncertainty, the first being the legal uncertainty and the second source being the factual uncertainty.

<sup>1371</sup> *Ibid* p. 19.

<sup>1372</sup> *Ibid* p. 25.

<sup>1373</sup> *Ibid* p. 7 and 21.

<sup>1374</sup> *Ibid* p. 10 In the standard enforcement policy, the EU Commission must establish the infringement based on a theory of harm, measure its actual or likely anticompetitive effects and design the appropriate

Overall, *Gautier* and *Petit*'s framework does provide for an effective and efficient way to assign cases to what it can be considered an adequate level of enforcement response depending on the degree of legal and factual uncertainty.<sup>1375</sup> Although their scheme adds to the literature on the economic treatment of the optimal enforcement of EU competition policy, it is limited by approaching the issue with a trade-off between the full but costly restoration of competition and the partial but costless remediation of infringement. Hence, it does not deal with the question of prevention.

Nevertheless, the framework does work within the responsive regulation scheme as it provides for a systematic assignation of cases to the appropriate level of enforcement. If the EU Commission is presented with cases dealing with hard-core competition restrictions that would normally deserve a fine. On cases with a high degree of uncertainty, escalation in the responsive regulation pyramid is suitable and it can provide for the creation of out-groups that can help to secure compliance in addition to in-group norms created through the first regulatory response.

Thus, the need to prevent future non-compliance and changing wrongdoer's behaviour is addressed too, through escalation in the responsive regulation framework enforcing EU competition law. Remedies at this level of response include but are not limited to the compulsory adoption of a compliance programme following previously approved, published and promoted guidelines by the EU Commission. The imposition of an external monitor who can oversee the effective implementation of the above mentioned

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remedy and this procedure carries procedural safeguards which do not apply when negotiation and bargaining is undertaken in the commitments procedure.

<sup>1375</sup> *Ibid* p. 19 – 20.

programme. The setting of a fine which amount is linked to the ill-gotten gains that resulted from the antitrust violation and the blame and shaming of individuals making clear to undertakings that if such individuals remain within their commercial decision making units such fact would be indicative that undertakings are not taking appropriate steps to prevent recidivism.

However, since responsivity means matching the nature of help to the needs and learning styles of the offender,<sup>1376</sup> escalation does not necessarily mean the isolated adoption of instruments that are within the deterrence stage but it is possible to adopt both restorative and deterrent instruments if the appropriate level of response so requires. Thus, in addition to the above mentioned deterrent instruments, a decision finding a competition law infringement could provide for the termination of the anticompetitive behaviour, the obligation or the incentive to offer compensation for the harm caused, as recently adopted by the CMA and the adoption of a negotiated compliance programme following previously published guidelines.

In case of serious competition law infringements, the EU Commission could provide for the appointment of an external monitor so there is a guarantee that an effective compliance programme is in place and it is being followed, mainly in respect of the activities concerning education of the workforce and promotion of compliance with EU antitrust rules within that undertaking.<sup>1377</sup>

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<sup>1376</sup> D. Andrews and J. Bonta, *The Psychology of Criminal Conduct* (5<sup>th</sup> ed. Taylor & Francis 2010) p. 245.

<sup>1377</sup> There is no doubt that a compliance programme would be ineffective if it does not help to prevent the commission of an antitrust violation. Yet, the effectiveness could be measured by the way it helped to detect the antitrust infringement, gather the necessary information and report it to the competent antitrust authority. Hence, an effective compliance programme would result in a successful application for leniency.

To draw an example of how this system could work, it is pertinent to refer to one cartel case dealt by the EU Commission that raises questions as to the real purpose of EU competition law enforcement and makes us doubt whether the EU commission is only putting a price on illegal activity. *Akzo Nobel*, an undertaking that in 2009 was found to have infringed Article 101 TFEU for the fifth time,<sup>1378</sup> received an increase in its basic amount of the penalty of 100% instead of 400% as indicated in the EU Fining Guidelines 2006.

Despite the fact that such company was recidivist, it received full immunity in the use of the EU Leniency Notice 2006.<sup>1379</sup> This case needs to be appreciated in light of the case law of the General Court.<sup>1380</sup> The CJEU has also stated that the fining system is designed to punish the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other operators from infringing the rules of European Union competition law in future.<sup>1381</sup>

Is the fining system really designed to prevent future cartel violations? From the case described above, we can hardly answer in a positive manner. An extension of the current enforcement system put forward here would have allowed the EU Commission to make compulsory the adoption of a compliance programme upon the undertaking. If this was possible from 2002 when the first infringement was discovered and sanctioned, the

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<sup>1378</sup> EU Commission cartel decision Calcium Carbide of 22/07/2009. Akzo Nobel was found to have participated in cartel activity in four previous decisions: Sodium gluconate cartel decision of 19/03/02, Organic peroxide cartel decision of 10/12/03, Choline chloride cartel decision of 09/12/04, MCAA cartel decision of 19/01/05

<sup>1379</sup> EU Commission cartel decision Calcium Carbide of 22/07/2009.

<sup>1380</sup> Case T-214/06 *Imperial Chemical Industries v Commission* published in the electronic reports of cases para 142.

<sup>1381</sup> Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859 para 16.

chances that Akzo would have discovered the subsequent violations in a faster manner would have held the EU Commission.

Even if it had not allowed the company to discover the violation earlier and allow it to come forward to the EU Commission in a promptly manner, it would have allowed the internal structure of the company to be aware of the illegal practices it might be involved in thus, giving way to the possible creation an internal policing network. On the other hand, if such imposition of the compliance programme had taken place, perhaps the need or benefit from the use of leniency would be less permissive.

Since the imposition of a compliance programme would have been accompanied by the incentive of a reduction in the amount of the fine, like it is the case in jurisdictions such as the UK and Brazil,<sup>1382</sup> the need to make use of the leniency would have been limited. It must be clear the since two or more undertaking would be facing the imposition of compliance programmes and it is normally understood that same companies collude over a period of time, the race to benefit from reduction is still in place as it is by making use of leniency.

Because escalation allows the EU Commission to blame and condemn when enforcing competition rules, this works for the benefit of exterior justice which makes the EU competition law enforcement procedure to be perceived with rightness, in moral terms from the society's point of view. Whatever the level of response, the compliance approach is able to create out-groups norms that constrain behaviour towards compliance even if

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<sup>1382</sup> Francisco Todorov, 'Brazil Antitrust: CADE guidance on how to implement a competition compliance program which could lower a penalty' Global Compliance News of 12 May 2016. <http://globalcompliance-news.com/brazil-antitrust-cade-guidance-on-how-to-implement-a-competition-compliance-program-which-could-lower-a-penalty-20160512/> (Accessed on 13 October 2015).

this is seen as a way to avoid consequences but once the active monitoring network is in place, conversion to in-groups norms by way ethical identification is guaranteed.

Thus, escalation in the responsive regulatory framework would allow the EU Commission to terminate the infringing conduct, restore competition, compensate, change anticompetitive behaviour and prevent future non-compliance using an enforcement procedure that increases the interior and exterior justice perception. This too will enable the creation of in-groups and out-groups that make for the most of the active monitoring network that advances the compliance approach by targeting individuals behaviour mainly.<sup>1383</sup>

This escalation would take place after there was an incentive to adopt a compliance programme. Meaning that while there was an obligation to adopt a programme after the first violation, recidivism would prompt the appointment of an external monitor to oversee an effective implementation. A conflict with the operation of leniency might be avoided if consideration is given to the level of compliance undertaken considering whether the same individuals that committed the previous violation are still within the undertaking, in managerial positions.<sup>1384</sup>

Since deterrence offers only a strong external incentive that retards conversion and even compliance, it actually produces a counter deterrent effect. On the other hand, deterrence

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<sup>1383</sup> Undertakings are targeted too but the less salient and powerful the control technique used to secure compliance, the more likely that internalization or conversion will occur. See N. Taylor, *Reporting of Crime against Small Retail Businesses* (Australian Institute of Criminology, Canberra 2002) p. 6 and J. Braithwaite, *Restorative Justice and Responsive Regulation* (OUP New York, 2002) p. 106.

<sup>1384</sup> According to Wils, one out of four leniency applicants in Europe are recidivists. See W. Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' [2012] 35 World Competition 5 at 20

fails as a policy, not because it is irrelevant, but because the gains from the context where it works are cancelled by the losses from the context where it backfires. This has been called the deterrence trap,<sup>1385</sup> which is a situation where in many instances the punishment will be disproportionate when the crime is not as serious but it will fail to deter when crime is at its highest and the punishment is not big enough to deter.<sup>1386</sup>

Indeed, as has been discussed and shown in Chapter 3 above, fines imposed by the EU Commission against small and medium size undertakings are higher and disproportionate than fines imposed against big companies, which most likely fail to even disgorge ill-gotten gains, let alone deter. This sole focus on punishing the undertaking, which is understood to benefit the most from the antitrust violation, is the reason why prevention cannot be achieved through the imposition of fines. Although the EU Commission can resort to remedies and commitment decisions, these are applied within a deterrence policy that renders EU competition law enforcement ineffective.

In contrast, responsive regulation focuses on those subjects who have preventive capabilities meaning that the scheme specifically targets individuals and companies' subunits so compliance is promoted. This too serves to monitor from within the company, replacing narrow and punitive undertaking responsibility with broad and less severe remedies and sanctions making the many of those individuals and subunits part of an active monitoring network that will prevent EU competition law violations in the long term.

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<sup>1385</sup> J. Coffee, 'No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment' [1981] 79 Michigan Law Review 386.

<sup>1386</sup> See C. Parker, 'The Compliance Trap: The Moral Message in Responsive Regulatory Enforcement' [2006] 40 Law and Society Review 602 who expands on this issue of the deterrence trap arguing that the latter is a trap because deterrence assumes that people make decisions about compliance on the basis of cost-benefit calculations which is often likely to be a mistake.

There are signs that this approach will work as shown by *Yeung* and *Parker*'s research that has shed light on the fact that business people and lawyers see a high personal cost and inconvenience in regards to the administrative process of competition law enforcement.<sup>1387</sup> The reputational damage caused by the publicity of the competition law enforcement process done by the ACCC in Australia has proved to deliver a more deterrent effect than the penalty itself.<sup>1388</sup> This is done by spreading the deterrent threat to individuals who are more sensitive to small penalties or even just shame.<sup>1389</sup>

This is in line with effective deterrence doctrine that seeks to elevate the perception of certainty of punishment by increasing the informal costs for individuals and undertakings' subunits who can prevent competition law violations. Nonetheless, the latter is achieved by adopting a compliance approach that seeks to educate and create a monitoring network that can influence social norms to constraints behaviour and ultimately create a design form that allows individual to convert to in-groups norms and eliminate the possibility of non-compliance.

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<sup>1387</sup> See K. Yeung, 'Does the Australian Competition and Consumer Commission Engage in Trial by Media?' (2005) 27 (4) *Law & Policy* 567 and C. Parker, 'The Compliance Trap: The Moral Message in Responsive Regulatory Enforcement' [2006] 40 *Law and Society Review* 591.

<sup>1388</sup> *Ibid* p. 599.

<sup>1389</sup> S. Simpson, 'Assessing Corporate Crime Control Policies: Criminalization versus Cooperation' [1998] 32 *Kobe Law Review* 121.



## **Conclusion.**

In conclusion, the targeting of individuals and companies' subunits will create a corporate conscience with a developed intrinsic commitment to comply.<sup>1390</sup> On the other hand, escalation would allow the EU Commission to create a net of controls that reduce infringement opportunities by embedding compliance norms and practices in the social structure. Thus, making a two-sided monitoring network one internal and the other external that working together constrain individuals. This in turn, results in the indirect constraining of undertaking's behaviour making it more effective in preventing future antitrust law violations than the current system of fines and deterrence policy used by the EU Commission.

As has been shown, the optimal deterrence framework cannot be achieved and more often than not, the EU Commission's enforcement efforts will fall into the deterrence trap, as its focus has shifted to tackle international cartels and abuses of dominance that affect the European market, which are likely to be the most harmful and thus, merit the harshest fines. Yet fines, although they are intended to affect revenue and thus, affect liberty of the market by limiting their consumption; the economic assumptions of their deterrent effect have not materialized.

The Chicago School provided these economic assumptions more than 40 years ago and we can now conclude that this "invisible hand" type of enforcement lacks the foundations that can make the enforcement of EU competition law more effective. New evidence as to the insight of how companies, their business subunits and individuals interact, provide

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<sup>1390</sup> C. Parker, 'Regulator-required Corporate Compliance Program Audits' [2003] 25 Law & Policy 221.

for a more realistic enforcement approach by targeting all. Especially focusing on the weak link to be found in individuals and providing incentives to comply at all levels.

The fact that economic analysis of law treats all regulatory targets as rational is the fundamental flaw. Those to whom the law is directed will not base their decision on whether to comply or not with law on a costs-benefit analysis and thus, new findings on behavioural insights will provide for optimal sanctions and remedies that are consistent with the ultimate aim of EU antitrust law enforcement, which is to prevent future violations.

On the other hand, an enforcement system that seeks to prevent violations by promoting compliance will build legitimization for itself, which will come to facilitate the internalization of compliance constraints to in-groups and out-groups norms. This will enable conversion or even compliance as a strategic behaviour. The above effectively means that promoting compliance will support direct and indirect influence of law into other regulatory constraints such as norms, market and architecture. Something that has not been done by the optimal deterrence framework.

At the same time, a compliance approach will allow the EU Commission to legitimize its use of two different standards of protection of the guarantees emanating from the application of EU principles of law. This will depend on whether it acts as an administrative body applying policy considerations or as an authority in the application of the law. This is important as the deterrence approach makes it hard to evaluate when the EU Commission needs a higher standard, and when it is still within the respect of the guarantee of due process to apply a lower one.

The compliance approach will come into place when the EU Commission decides to give compliance guidance about the do's and don'ts in EU competition law. That guidance should be embraced and offered. It is undeniable that effective compliance programme should enable any undertaking to prevent or at least make early detection of any infringement allowing it to benefit from leniency, reduction or a continued cooperation discount for fine to be imposed, if any.

Nonetheless, after guidance has been provided, whenever a situation arises where the EU Commission needs to impose a fine, the compliance programme should be compulsory following the guidance provided *ex ante*. When the EU Commission decides to approach the case with a commitment decision, it should push undertakings to adopt one. However, in an infringement procedure, whether the EU Commission decides to impose fines or remedies, a compliance programme should be imposed and an external monitor should be appointed to supervise that such programme is effectively implemented.

The EU Commission should encourage undertaking to offer compensation to antitrust violation victims as long as this is possible. However, in this work I have endeavour to provide evidence that in the U.S. and U.K. enforcement systems have considered this measure and the EU Commission should follow as this procedure expands the number of participants so a true restorative process is achieved.

Although full restoration will not be possible, this has a beneficial side effect as the more individuals and undertakings participate, the more likely it is that social norms will be influenced. This has a direct impact on individuals able to prevent antitrust wrongdoing.

All those instruments considered here are adopted with the purpose to create a culture of compliance by making law exert influence on norms, market and architecture.

When escalation is needed, the compliance approach enables the deterrence side to have far reaching effects, with more intrusive measures. Thus, the use of deterrence within a compliance approach makes it be in tune, with current trends of empirical legal research. This is so, as appropriate measures that need to be adopted in order to generate a more responsive approach, take into account all factors that have turned the deterrence approach ineffective.

It is true that total deterrence is not possible, but a compliance approach with more intrusive instrument targeting firms' subunits is more likely to deter those who have been under EU Commission's action. Recidivism in the enforcement of EU antitrust rules is perceived to be high and we can mention several undertakings that have been found to be recidivists in the EU under the current system. Thus, even if general deterrence is not complete, specific deterrence is more feasible under compliance, which is better than what a punishment-focused approach can offer.

Thus, it is pertinent to adopt an EU antitrust enforcement system that considers imposing sanctions at the undertaking level, when the factors under assessment are the nature and extent of the conduct, the size of the company and the damage caused. However, the EU Commission should extend its analysis in order to consider whether the undertaking subject to its action, has a culture of compliance in general for which the level of management at which the conduct originated is a very good proxy, to determine the extent of such culture. In this regard, intrusive remedies are more appropriate.

Hence, the EU Commission can target any company at two different levels, by considering different factors for each level and adopting different remedies for each of them. At the very least, this approach would target recidivism by requiring first time infringers to compulsorily adopt a compliance programme depending on where they stand in regards to their culture of compliance. In consideration to the latter, an identification of the people who participated in the first infringement and found in the second one, which would indicate that, they did not comply with their duty.

A conflict with the optimal operation of the leniency programme can be avoided but most importantly, it would prevent undertakings from making use of such instrument in a strategic manner. Thus, incorporating a factor of compliance culture enables the EU Commission to go beyond the undertaking level, which does not necessarily impose an excessive costs considering that actual prevention is at hand.



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